

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP NO.8/2011**

Date of Decision : 08.03.2011

Marathon Electric Motors (India) Ltd. Plaintiff

Through: Mr. T. K. Ganju, Sr. Adv
with Ms. Kumkum Sen,
Adv.

Versus

North Eastern Electric Power Corporation Ltd. Defendant

Through: Mr. V. K. Jindal, Sr. Adv.
with Mr. Saurabh Prakash,
Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

- | | |
|--|----|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | NO |
| 2. To be referred to the Reporter or not ? | NO |
| 3. Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J.

1. This order shall dispose of OMP No. 8/2011, a petition under Section 9 of the Arbitration and Conciliation Act, 1996. Though in the petition, the prayer is to pass an order to the effect that the Bank Guarantee No. ILG0903 dated 27.03.2003 issued by Punjab National Bank, Chennai and later on substituted by Bank Guarantee No. BG No. 2007012IBGP0052 issued by IDBI Bank, Kolkata stands released but during the course of arguments, it was urged that the necessity of filing this application has arisen on account of the order dated 11.11.2010 passed by Shri S.N.

Phukan, learned Arbitrator, wherein he has refused to release the balance 50% amount of the aforesaid Bank Guarantee as the same was withheld in pursuance to the order dated 05.02.2003 passed by Hon'ble Mr. Justice J.D. Kapoor in OMP No.241/2001.

2. In order to appreciate the controversy, a brief background of the case which is not disputed by either of the parties, is necessary.
 - (a) The present petitioner (which was previously known as Alstom Limited) had entered into a contract with the respondent for providing consultancy and commissioning of certain electrical projects in the North East. In pursuance to the terms and conditions of the NIT, the present petitioner had furnished a performance guarantee for a sum of Rs. 61 lacs or so to the respondent. The agreement was entered into sometime in 2003 and the bank guarantee was also furnished in the same year, which was later on substituted by another bank guarantee. The case of the petitioner is that it had successfully executed the project but there were certain disputes which had arisen between the parties with regard to the payment, which were referred to the Arbitrator for adjudication. The respondent also has purported to have raised certain disputes regarding the over payment having been drawn allegedly by floating of wrong bills. It is the case

of the respondent that as a matter of fact, a case was registered by the CBI against the present petitioner for having floated wrong and fictitious bills and taken illegal payments by raising such bills.

- (b) The respondent in the year 2003 itself tried to invoke the performance bank guarantee on account of the fact that the petitioner was not able to perform the work according to their satisfaction. This necessitated the filing of a petition being OMP No. 241/2001 by the Alstom Limited, predecessor-in-interest of the present petitioner under Section 9 of the Arbitration and Conciliation Act. The said petition was disposed of by this Court vide order dated 05.02.2003 wherein it was observed that although there are allegations made by the CBI against the present petitioner for having drawn excess and wrongful payments but at the same time, there is no dispute about the fact that the petitioner is purported to have performed and executed successfully the project, for which it was engaged, to the satisfaction of the respondent. In the light of these two competing interests, one with regard to the successful execution of the entire project and the other with regard to an allegation made against the petitioner of having overdrawn the payment wrongfully, the learned single Judge directed that 50% of the performance bank guarantee be released to the petitioner whereas the balance 50% be withheld and may be made subject to the

outcome of the proceedings which the respondent may initiate for recovery of the overdrawn payment towards the alleged extra work.

3. It is this balance 50% of the withheld performance bank guarantee which is sought to be released by the present petitioner.
4. The respondent has filed the reply and contested the claim of the petitioner for the release of this 50% of the balance value of the performance bank guarantee on the ground that the counter claim of the respondent to the tune of ₹90 lacs or so is still pending adjudication and is on a fairly advanced stage before Shri S.N.Phukan, the learned sole arbitrator. Therefore, so long as the said counter claim of the respondent is not finally adjudicated, the balance 50% of the amount may not be released to the petitioner.
5. I have heard Mr. T.K. Ganju, learned senior counsel for the petitioner as well as Mr. V.K. Jindal, learned senior counsel for the respondent and have also perused the record.
6. There is no dispute about the fact that the law regarding performance guarantee is well-settled in the sense that once the performance guarantee is furnished by a contracting party and the opposite side is fully satisfied regarding the performance of the contract, having been successfully executed, the guarantee deserves to be released. It was

contended by Mr. Ganju, learned senior counsel, that since there is no dispute that the withheld 50% amount pertains to performance guarantee and the work has been executed, there is no justification for withholding the balance 50% of the amount. It has been stated that both the period of warranty and latent guarantee or otherwise also according to the terms and conditions of the contract, were valid for a maximum period of six years, which period came to an end in 2009. The learned senior counsel had drawn the attention of the Court to the relevant clause of the agreement in this regard. In addition to this, it was also contended that the CBI has also filed a Closure Report which has been accepted by the competent Court and, therefore, there is no justification for withholding the said amount of performance guarantee any more.

7. In the present case, there is no dispute about the fact, as has been observed by the learned single Judge in its order dated 05.02.2003 that so far as the question of the performance of the project by the petitioner is concerned, that has actually been completed to the satisfaction of the respondent and consequently in normal circumstances, the bank guarantee which was in the nature of the performance guarantee furnished by the petitioner ought to have been discharged or released. But with the performance guarantee having been invoked, the petitioner was constrained to approach the Court

(by filing OMP No.241/2001) for a restraint order whereupon the Court also took into consideration the fact that there were serious allegations against the present petitioner itself for having raised false, frivolous and wrongful bills and consequently over drawn the payment. On account of the said allegations against the petitioner, the CBI registered an FIR. It was on account of these serious allegations levelled against the petitioner by the CBI that the learned single Judge, while balancing the equities, directed release of only 50% of the performance guarantee amount whereas the balance 50% was made subject to the decision in the counter claim which may be filed by the respondent against the present petitioner.

8. It is the case of the petitioner that so far as the CBI case against the present petitioner is concerned, a Closure Report had already been filed by the CBI, which has been accepted by the competent court. The learned senior counsel has in this regard placed on record a copy of the Closure Report and drawn the attention of the Court to the relevant averments made in the Closure Report. This fact has also not been disputed by the learned senior counsel for the respondent. If that be so, the main ground on the basis of which the balance 50% of the performance guarantee amount was withheld, goes.

9. It has also been contended by the learned senior counsel for the petitioner that according to the terms and conditions of the contract, the equipment which was installed by the present petitioner was to have warranty and the latent guarantee ranging from a period of 15 months to maximum of 6 years, and even this period of six years has elapsed and there has been no defect pointed out in the equipment provided by the petitioner to the respondent, therefore, that could also not be a ground for withholding the balance 50% of the amount of performance guarantee.
10. This argument could not be successfully countered by the learned senior counsel for the respondent.
11. I fully agree with the contention of the learned senior counsel for the petitioner that according to the terms and conditions, it is neither in dispute that the work has been successfully executed in 2003 nor that the period of six years, which is the maximum period provided for the warranty and latent guarantee with regard to the equipment provided by the petitioner, has also come to an end. Therefore, it could not be a valid justification for depriving the petitioner of his legitimate claim by withholding the balance 50% of the amount of performance guarantee. The CBI case has also been closed, so that could also not be a ground for withholding the amount from the petitioner.

12. Now, the only ground on which the balance 50% of the performance guarantee amount has been withheld is the counter claim, which is under adjudication before the learned sole arbitrator. The petitioner had admittedly filed an application for release of that balance 50% amount with the learned sole arbitrator who refused to pass any order on the ground that this was a condition which was imposed by the Court and, therefore, the petitioner must approach the Court for modification of the said order. It is because of this reason that the restraint was issued. The present petition is as a sequel to the direction given by the learned arbitrator. Since the learned single Judge vide order dated 05.02.2003 has specifically directed that the balance 50% shall be released to the petitioner subject to the decision in the proceedings initiated by the respondent, therefore, in order to balance the equities, I am of the view that no useful purpose would be served by keeping the balance 50% amount of the performance guarantee if the interest of the respondent to the extent of this balance 50% is fully secured. This can be done by directing the petitioner to either furnish an undertaking or to give a bank guarantee with regard to this balance 50% till the time the matter is not finally adjudicated by the learned arbitrator.

13. I am of the considered opinion that the amount which has been withheld by the Court is essentially forming a part of the

performance guarantee and not as a security to the counter claim. The petitioner admittedly has successfully performed the contract to the satisfaction of the respondent and, therefore, there is absolutely and prima facie no valid justification for depriving the petitioner of the said balance 50%. I feel that the application of the petitioner for the release of the balance amount of 50% of the performance bank guarantee deserves to be allowed on petitioner's furnishing an undertaking to the satisfaction of the learned Registrar (Original) of this Court stating that in the event of the learned arbitrator deciding against the petitioner and granting any claim of the respondent which is of any amount up to the 50% of the bank guarantee, the said amount shall either be deposited by the petitioner with the Registrar General or alternatively he shall furnish necessary bank guarantee in this regard. Needless to say that this will be subject to such legitimate challenge which the petitioner may like to lay to such an award, which if at all is ultimately passed against them. Once these conditions are met, I am of the view that the interest of the respondent will also be sufficiently protected and accordingly, I direct the petitioner to furnish the said undertaking to the satisfaction of the learned Registrar within a period of two weeks from today. On that undertaking having been furnished and accepted, the aforesaid 50% of the balance amount of the performance

bank guarantee along with interest accrued thereupon, shall be released to the petitioner.

14. With these observations, the application of the petitioner stands disposed of.

MARCH 08, 2011
MA

V.K. SHALI, J.