

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

% *Reserved on: 3rd October, 2012*
Date of Decision: 30th November, 2012

+ **FAO (OS) 484/2012**

RATNAGIRI GAS AND POWER PVT. LTD. Appellant

Through: Mr. A. S. Chandiok, ASG with Ms. Bindu Saxena, Mr. Shailendra Swarup, Ms. Aparajita Swarup, Ms. Neha Khattar and Mr. K. K. Patra, Advocates.

versus

JOINT VENTURE OF WHESOE OIL
AND GAS LTD. (WOGL) AND ORS. Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate with Mr. Dheeraj Nair, Mr. Divyam Agarwal and Ms. Smita Bhargava, Advocates for respondents. Mr. Sanjiv Kakra and Mr. Bharat Arora, Advocates for State Bank of India.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

This is an appeal filed by Ratnagiri Gas and Power Pvt. Ltd., hereinafter referred to as “the appellant” against the judgment and order dated 10-9-2012 passed by the learned single judge in OMP No. 482/2011 in proceedings initiated under section 9 of the Arbitration and Conciliation Act, 1996 (“Act”, for short) by the respondents, viz., the Joint Venture of M/s. Whessoe Oil & Gas Ltd. UK and M/s Punj Lloyd Ltd(R-1) and the joint venture-companies individually. The appeal has been filed under section 37 of the Act.

2. The brief facts giving rise to the appeal may now be noticed. A contract was entered into between the appellant and the respondents for carrying out the work of Phase-H of EPC-I6 package, for completion of the balance work of the top of the jetty facilities for the Ratnagiri LNG Terminal project (“project”, for short). This was on 8-9-2006. The work was to be executed by the joint venture (“JV”). It was divided into three phases: Phase A, Phase B and Phase C. Phase A comprises approximately 80% of the entire work. As required by the contract, the JV furnished two performance bank guarantees (PBGs) to the appellant on 21-9-2006; they were extended till 29-6-2010. The amounts were Rs. 18,44,25,120 and USD 5,203,872 respectively.

3. On 23-6-2010, the appellant by a letter requested the State Bank of India (SBI) which issued the PBGs to extend the validity of the guarantees till 31-3-2013 failing which the letter itself was asked to be treated as notice to enforce the PBGs. The joint-venture companies, who are respondents in the present appeal, approached this court in I.A. Nos. 2948-49/2012 seeking directions to restrain the appellant from enforcing any payment from the SBI under the PBGs and the SBI from making any payment to the appellant under the PBGs.

4. The case put forward by the joint-venture companies before the learned single judge in support of the IAs was that the work in connection with Phases A and B had been completed even as certified by the appellant and that the balance work, which primarily related to the commissioning of the jetty, could not be undertaken by them since the LNG ship was yet to arrive at the jetty and that in these circumstances the appellant cannot ask them to keep the PBGs alive. Basically, what was being urged was that the non-completion of the balance of work relating to the commissioning of the jetty was not attributable to the joint-venture companies.

5. When the joint venture companies had approached the court, the PBGs were about to expire on 30-6-2011, and therefore on 29-6-2011 the court passed an order directing the joint venture to have the PBGs extended till 31-7-2011 and

simultaneously directed the SBI not to make payment to the appellant, if the payment had not already been made. The interim order was continued with the joint venture agreeing to get the PBGs extended from time to time. While so, the appellant informed the joint venture that the LNG vessel was likely to arrive at the jetty between 25-1-2012 and 10-2-2012; on this, the PBGs were continued to be kept alive. Ultimately when the ship arrived at the jetty on 26-3-2012 the fenders at the jetty collapsed, could not be repaired, with the result that the ship had to sail back. The court was informed on 14th May 2012 that another ship was likely to arrive only after the monsoons, i.e., after 15-10-2012.

6. It would appear that there were meetings between the parties on the issues between them from time to time and eventually a letter was written on 19-3-2012 by the JV to the appellant setting out the terms of the agreement arrived at in those meetings in respect of the outstanding issues. The letter recorded that the appellant would reimburse the JV the cost of extending the PBGs for the last 4-and-half years. Two requests were also made to the appellant: (i) to reduce the value of the bond to 2% of the current bond value in proportion to the work remaining to be executed and (ii) to make payment for the invoices raised by the JV in respect of commissioning and remaining related milestones within a week of the invoices being presented.

7. On 22-3-2012, the appellant wrote to the JV stating that the payment of mobilisation and demobilisation charges for which invoices had already been submitted would be made and that the reduction of the value of the bond would be examined once the court decided on the subject-matter. It was further stated in the appellant's letter as under:

“RGPPL agree to reimburse the cost of extending the bond submitted to RGPPL at actual, beyond the contract period (i.e., 31st July 2007 + three months + one year DLP which comes out to 31st October 2008), subject to submission of invoice with supporting documents within seven days.”

8. As regards the weekly milestone payments, the appellant agreed upon condition that the invoices would be submitted and as regards the invoices already submitted by the JV, the appellant agreed for immediate payment. With regard to the additional costs on account of time acceleration and price escalation the appellant stated in the letter as under:

“RGPPL has agreed the request of WPJV for reimbursement of additional cost due to time acceleration and price escalation. Considering the delay RGPPL agrees to pay the escalation and acceleration within seven days of submitting approved invoice limited to the claimed amount of USD 4.38 million.”

9. In the course of the hearing before the court on 14-5-2012, on which day the court was informed of the inability of the ship to dock at the jetty due to collapse of the fenders, counsel for the JV stated that the JV was willing to give a corporate guarantee to the appellant subject to the amount of Rs. 50 crores covered by the PBGs being returned to the JV by the appellant. On 29-5-2012, the court noted the statement of the counsel for the appellant that it would not accept a corporate guarantee against the PBGs.

10. On 7-8-2012, it was claimed by the JV before the court that it had handed over a chart showing the detailed calculations of the bank related charges for both the INR and USD components which were outstanding as on 7-5-2012. These calculations/figures were disputed on behalf of the appellant and eventually it was stated on behalf of the JV that at that stage, they would insist only upon the reimbursement of the actual bank-related charges (INR & USD) for keeping the PBGs alive. The contention on behalf of the appellant at that time was that the JV had not submitted any proof for having actually incurred the charges except showing the invoices raised by the SBI. The JV thereupon agreed to submit the proof for payment of the charges to the SBI. The court accordingly passed an order directing payment of the charges by the appellant to the JV before the next date of hearing. The matter was listed again on 29-8-2012.

11. When the matter was taken up by the court on 10-9-2012, the appellant disputed the liability to reimburse the bank-related charges as well as the liability

to pay such charges relating to the INR component prior to 31-10-2008. With regard to the reimbursement of additional costs due to time acceleration and price escalation, it was claimed that the appellant had not received any original invoice from the JV to facilitate the payment. These contentions were urged before the court in an affidavit by the appellant.

12. In the above backdrop of the dispute between the parties, the court was of opinion that issues could not be resolved. Counsel for the JV at that stage would appear to have stated before the court that they would insist only on the reimbursement of the actual bank-related charges (INR & USD) for keeping the PBGs alive. A copy of the JV's letter dated 28-8-2012 to the appellant showing the calculations of the bank-related charges and the proof for payment of those charges etc. was filed before the court in the form of a chart and it was stated on behalf of the JV that payment of only the bank charges levied by the Arab National Bank for extending the bank guarantee in USD 356,643,94 (S.No.A in the chart) and the charges levied by the SBI in the case of the guarantee in INR 18,710,858 (S.No.D in the chart) was being insisted upon and for the rest of the claims the JV would reserve its rights to claim them in the arbitration proceedings. The appellant's counsel disputed the calculations on the ground that they appeared to be disproportionately high, but agreed to pay them without prejudice to its rights to raise all disputes before the arbitration proceedings.

13. The learned single judge in the impugned order did not consider it necessary or proper to adjudicate upon the disputed claims made by the parties as above and left it open to the parties to raise them in the arbitration proceedings. He however felt the need to pass interim orders till such time the arbitral proceedings are underway.

14. In that context, the learned single judge directed the appellant herein (RGGPL) to pay the amounts indicated by the JV in S.Nos. A and D in the chart (figures mentioned above – both USD and INR) and further pay, pro rata, the bank charges for keeping the PBGs alive for a further period of two months beyond 30-

9-02-2012, i.e., upto 30-11-2012 (both INR & USD components). On payment being so made, the JV was directed to have the PBGs extended till 30-11-2012. The appellant (RGPPL) was restrained from invoking or encashing the PBGs, both dated 21-9-2006, “till such time the learned Arbitrator appointed in the manner indicated hereinafter passes an order on any application that may be filed by either party under Section 17 of the Act”.

15. Having thus decided on the JV’s application, the learned single judge then proceeded to notice that the appellant had agreed, in its letter dated 22-3-2012 to the JV, for reimbursement of the additional costs and price escalation and had in fact agreed to make payment thereof within seven days of the JV submitting the approved invoices but limited to the claim of USD 4.38 million and recorded the submission made by the counsel for JV on instructions that the invoices had already been submitted to the appellant which may be treated as limited to the above figure; it was directed that *“in view of the said statement, RGPPL will, without prejudice to its rights and contentions, pay the said sum as agreed to the JV within a period of four weeks from today”*.

16. In paragraph 23 of the impugned order, it was clarified by the learned single judge that all payments made pursuant to the directions of the court would be without prejudice to the rights and contentions of either party and would be subject to the final award that may be passed by the learned arbitrator. It was also clarified that the court had not expressed any view on any of the contentions of the parties and they were at liberty to raise all their contentions before the learned arbitrator. The OMP and IAs were disposed in these terms.

17. The contention put forward on behalf of the appellant before us is that the injunction application was filed before the learned single judge on 29-6-2011 and the issue of payment of USD 4.38 million as price escalation and additional costs cropped up for the first time only in the course of the hearing on 19-3-2012 during the pendency of the injunction application, and the learned single judge erred in law in granting the relief in the form of direction for payment of the above USD

4.38 mn by the appellant while dealing with the injunction application for restraining the appellant from encashing the PBGs, which is beyond the scope of Section 9 of the Act. It is pointed out that the prayers in the IAs were limited to reducing the PBGs and considering the scope of the proceedings it was not open to the learned single judge to pass an order directing the appellant to pay USD 4.38 m as price escalation and additional costs which was not the relief sought for by the JV.

18. On the other hand, the contention on behalf of the JV before us is that the payment was directed to be made because the appellant in its letter to the JV had agreed to the same and the order passed by the learned single judge in such circumstances was a consent order, which does not fall outside the scope of section 9. It was submitted that the appellant did not protest before the learned single judge that such a consent order cannot be passed; the order was passed and pronounced in open court and if the appellant had any objection, it could have voiced it at that time. Moreover, it is contended, the direction for payment of the USD 4.38 m is without prejudice and is subject to arbitral proceedings. It is further pointed out that the appellant also implemented the order of the learned single judge by reimbursing the JV the charges for having the PBGs extended till 30-11-2012; it cannot therefore now have a grievance that part of the order is beyond the scope of section 9. It is also contended that the equities are in favour of the JV.

19. The short question which arises before us is whether, given the nature and scope of the proceedings under section 9, could the learned Single Judge have properly directed the appellant to pay the amount of USD 4.38 m to the respondent?

20. The respondent-JV had sought an injunction against the appellant before the learned Single Judge for (a) restraining the appellant from enforcing the PBGs; (b) restraining the SBI from making payment to the appellant under the PBGs and (c) directing the appellant to accept the reduced PBG to the extent of 10% of the balance 2% work remaining to be executed by the JV. It was only in the course of

the proceedings before the learned Single Judge that the issue of payment of USD 4.38 m had cropped up, when the letter dated 22-3-2012 written by the appellant in reply to the letter dated 19-3-2012 written by the JV had come up for consideration; in that letter the appellant had undisputedly agreed to the request of the JV for reimbursement of additional costs due to time acceleration and price escalation amounting to USD 4.38 m, and had even bound itself to pay the amount within seven days of submission of the approved invoice by the JV. Later, the only objection raised by the appellant in the course of the proceedings was that it had not received the original invoice from the JV so that payment could be made under the 'alleged settlement' dated 22-3-2012. It is only considering this objection that the learned Single Judge had directed the payment of USD 4.38 m to be made by the appellant to the JV, at the same time also noting that the foremost concern at that stage was the keeping alive of the PBGs. It was in this context that the learned Single Judge directed the payment of the actual bank-related charges in respect of the PBGs (both INR & USD) as an interim measure, upon condition that if the payment is made the JV will keep the PBGs alive till 30-11-2012. The direction was to remain in effect till an order is passed on any application that may be filed by either party before the learned arbitrator (once he is appointed) under section 17 of the Act.

21. It will be seen from the above that the payment of the actual bank-related charges was linked to the extension of the PBGs. The injunction application filed by the JV under section 9 had thus worked itself out once the learned Single Judge issued the above directions vide paragraph 21 of the impugned order.

22. What followed in paragraph 22 of the impugned order is the direction for payment of the USD 4.38 m which is under challenge before us as being without jurisdiction and outside the provisions of section 9. The point that weighs in favour of the respondent-JV is that the appellant had agreed before the learned Single Judge for the above payment and thus in equity it cannot resile from it. But the precise point that arises for consideration is whether that can enlarge the scope and content of the nature of the proceedings under the section.

23. The object of section 9 which enables the court to pass interim orders for the protection of the parties is to support the arbitration proceedings and to render “more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute” (Lord Mustill in *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* (1993) All ER 664 HL), provided that “this and no more is what such measures aim to do” and there is nothing in the orders contrary to the spirit of arbitration. The contention of the appellant that there was no dispute regarding the payment of the price escalation and acceleration charges/costs – there was nothing arbitrable – and therefore section 9 would not apply seems to us to be not without force, if we are to hold that section 9 can be set in motion only when there is a dispute. Even granting that the section can be invoked before the arbitral proceedings, it seems to us that the existence of a dispute between the parties before the filing of an injunction application under section 9 on the point for which interim relief is sought is essential. Sub-clause (b) of clause (ii) of the section permits a party to approach the court for interim relief for “securing the amount in dispute in the arbitration”. Admittedly there is no pre-existing dispute between the parties in the present case with reference to the price escalation and additional costs for acceleration; as rightly pointed out on behalf of the appellant, there is no mention of any such dispute in the affidavit filed by the JV before the learned Single Judge nor did the JV make any such prayer in the interim application. The powers of the court under the said sub-clause could not have therefore been invoked. It would actually amount to recovering sums in advance of the hearing before the arbitrator. The power can be exercised only when an identified fund is in dispute. There was no such identification by the JV of any fund that was in dispute when it approached the court under section 9. The affidavit and the prayers made therein bear this out.

24. The position with regard to bank guarantees may now be noticed as the whole purport of the proceedings before the learned Single Judge was the protection sought by the JV against the enforcement of the PBGs. A contract relating to bank guarantee is independent of, and altogether different from, the

contract out of which the requirement for giving the guarantee arose. It was apparently on this basis that the appellant sought to encash the PBGs against which the JV had sought protection under section 9. The court undoubtedly had the power to grant the injunction subject to fulfilment of the usual criteria, such as existence of genuine hardship, balance of convenience, existence of special equities between the parties, prevention of injustice, existence of a prima facie case and so on and so forth. But the power to intervene and pass orders granting interim protection does not, with respect, extend to the contract between the parties which existed independently of the contract relating to the bank guarantee.

25. The only other provision which can be pressed into service is sub-clause (e) which empowers the court to pass “such other interim measure of protection as may appear to the court to be just and convenient”. It is true that in granting interim protection the well-settled principles which normally direct and guide the court are to be applied and as rightly pointed out on behalf of the respondent, the Supreme Court in *Adhunik Steels Ltd. V Orissa Manganese And Minerals (P) Ltd.* (2007) 7 SCC 125 have opined so. But the ruling will have no application where the court has no power to grant injunction or interim protection for the reason that it has not been prayed for or that it does not relate to the matter that is raised in the application for interim protection. The question here is not whether the learned Single Judge had kept in view those principles which the court is normally expected or bound to apply while passing orders granting interim relief, for, in granting such relief to the JV restraining the appellant herein from encashing the PBGs these principles were undisputedly applied; the question is when there is no dispute about or prayer for any interim relief on the aspect of payment of USD 4.38 m, can the court direct payment as a matter of interim relief. It is a question of the jurisdiction of the court; it can rule only in respect of what is brought before it under section 9. The phrase “just and convenient” in the sub-clause cannot be stretched to interpret it in such a wide manner as to impinge on the power of the arbitrator, if and when appointed, to decide the disputes that may be referred to him. That the learned Single Judge expressly stated that the payment of the amount

of USD 4.38 m would be without prejudice and subject to the orders of the arbitral Tribunal, if and when appointed, does not help matters where the question is whether such a direction can be issued at all in the first place. In this context, it is relevant to note the judgment of the Supreme Court in Sundaram Finance Ltd. vs NEPC India Ltd. (1999) 2 SCC 479. It was observed that it is implicit when a party applies under section 9 that (a) it accepts that there is a final and binding arbitration agreement in existence and (b) that a dispute has arisen which is referable to the arbitral Tribunal, and c) there has to be a “manifest intention” on the part of the person invoking section 9 to take recourse to the arbitral Tribunal. In the case before us, no such intention of either party was manifest, to have recourse to arbitral proceedings in respect of the payment of the USD 4.38 m.

26. In *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Ors.*, (1983) 4 SCC 625, the Court while discussing *The State of Orissa v. Madan Gopal Rungta*, (1952) 1 SCR 28 observed that: -

“a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank seeks in its suit. The prayer is that the Corporation be restrained by an injunction of the Court from presenting a winding-up petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding-up of the Bank. There is a clear bar in Section 14(b) against granting this relief. The Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms.

The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings.”

In *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, (2007) 7

SCC 125 the Court observed: -

*“The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In *The Siskin* [1979] AC 210, Lord Diplock explained the position:*

A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

He concluded:

To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction.

Recently, in *Fourie v. Le Roux*, (2007) 1 W.L.R. 320, the House of Lords speaking through Lord Scott of Foscote stated:

*An interlocutory injunction, like any other interim order, is intended to be of temporary duration, **dependent on the institution and progress of some proceedings for substantive relief.***

and concluded:

Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in Section 37(1) of the 1981 Act, "just and convenient", must be applied having regard to the interests not only of the claimant but also of the defendant."

27. During the hearing, counsel for the respondent had argued that the ratio of *Adhunik Steel (supra)* enables the Court, while applying principles governing grant of interim injunctions, to incorporate the principles that govern Order XXXIX Rule 10, CPC. He had urged that the Court can, acting within jurisdiction issue mandatory orders; for this proposition, he relied on the ruling in *Dorab Cawasji Warden v. Coomi Sorab Warden*, 1990 (2) SCC 117. The Court is unpersuaded by these submissions. Order XXXIX Rule 10 specifically clothes the Court with power to direct a litigant to deposit amounts. No such power is conferred upon the Court under Section 9 of the Arbitration and Conciliation Act, 1996. This Court also notices that Section 19 of the Act contains the only reference to the Code of Civil Procedure, to clarify that its provisions do not apply to arbitration proceedings, or bind the Arbitral Tribunal. As regards *Warden (supra)* and the power to make a mandatory order, the circumstances for invoking such power must be exceptionally compelling, and the primary subject matter of the dispute must necessarily take within its fold the subject matter of such relief. Both conditions do not exist in this case.

28. Consent cannot confer jurisdiction on a court or tribunal where none exists. That is a well-settled position which does not require the citing of any authority. Therefore, that the parties consented to pay the amount cannot confer jurisdiction upon the court to pass the impugned direction. The court needs to be satisfied that there exists a dispute between the parties which would justify interim protection to them.

29. In view of the foregoing discussion, we allow the appeal and set aside the direction of the learned Single Judge to the appellant to pay the amount of USD 4.38 m to the respondent-JV. There will be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

NOVEMBER 30, 2012
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