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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 5.4.2019

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O.M.P.(I) (COMM.) 57/2019

ISHVAKOO (INDIA) PVT. LTD.

..... Petitioner

Through: Mr. Arun Kumar Verma, Sr. Adv.
with Mr. Vishal Nautiyal and Mr.
Abhay Raj Verma, Adv.

versus

NATIONAL PROJECTS CONSTRUCTION
CORPORATION LTD.

..... Respondent

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Rajat Arora and Ms. Vishalakshi
Singh, Adv.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****RAJIV SHAKDHER, J. (ORAL):**

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act").
2. Notice in this petition was issued on 21.2.2019. Reply on behalf of the respondent has been filed therein.
3. The substantive prayers made in the petition are as follows:

*"(a) Allow the present application and further direct the Respondent to immediately refund the amount of Rs.3,50,00,000/- to the Petitioner (in terms of order dated 20.09.2018) being the amount appropriated by it by wrongfully en-cashing the Bank Guarantees in question, along with interest at the rate of 18% per annum from 14.09.2017 till the amount is refunded, and
(b) Award costs of the proceedings in favour of the*

Petitioner and against the Respondents, and/or..."

4. This petition is resisted by the respondent on several grounds, but before I come to the grounds, the following facts with respect to the objections taken qua the reliefs sought in the petition need to be noted.

4.1 The petitioner had previously filed a petition under Section 9 of the 1996 Act at a stage prior to commencement of the arbitration proceedings. This petition was numbered as: OMP No.363/2003. The Section 9 petition came to be disposed of via order dated 15.12.2005.

4.2 It may be relevant to note that when this Court passed the order dated 15.12.2005 in OMP No.363/2003, it issued the following operative directions:

"The Petition is accordingly disposed of recording undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated upon by the arbitrator and even thereafter if petition under section 34 of the Arbitration Act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees. IA also stands disposed of."

(emphasis is mine)

4.3 The aforesaid extract of the order dated 15.12.2005 would show that the petitioner had given an undertaking to the effect that the bank guarantees furnished by it will be kept alive till the matter is adjudicated by the learned Arbitrator and post the adjudication as well, in case a petition under Section 34 of the 1996 Act was filed by the respondent. In other words, the petitioner was directed to keep the bank guarantees alive till the disposal of Section 34 petition. As is plainly evident, the Court also made it clear that if an executable award was passed in favour of the respondent, based on which it was

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entitled to recover the money from the petitioner, the respondent would have liberty to encash the bank guarantees furnished by the petitioner.

4.4 It is not in dispute that for whatever reason, the petitioner was unable to keep the bank guarantees alive, which resulted in the respondent and, to my mind, rightly, approaching the concerned bank for encashment of the bank guarantees. I am informed that this situation obtained in and about September 2017.

4.5 It may also be relevant to note that the petitioner, who was the claimant before the learned Arbitrator, had also raised issues with regard to discharge of bank guarantees furnished by it and in respect thereof, claimed bank charges in the sum of Rs.77,27,225/-, which, supposedly, were incurred by the petitioner to keep the bank guarantees alive.

4.6 Qua these issues, the learned Arbitrator passed certain directions after noting the operative directions contained in the order dated 15.12.2005 passed in OMP No.363/2017, to which I have already made reference hereinabove.

4.7 The learned Arbitrator's view qua the aforementioned aspect is contained in paragraphs 229 to 232 of the award. For the sake of convenience, the same are set forth hereafter:

"229. Issues No. 3 and 4 are whether the Claimant is entitled to discharge of the Bank Guarantee and also whether the Claimant is entitled to the sum of Rs.77,27,225/- towards the bank charges for keeping the Bank Guarantee alive.

230. Without adverting to the submissions made by the Parties, the Tribunal finds that the High Court of Delhi, vide Order dated 15.12.2005, passed in O.M.P. No. 363/2003 had disposed of the Petition in the following terms:

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"The Petition is accordingly disposed of with the (sic) undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated by the arbitrator and even thereafter if petition under section 34 of the arbitration act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees. IA also stands disposed of."

(emphasis is mine)

231. Therefore, it can be seen that by its own undertaking, the Claimant was bound to keep the bank guarantees alive in terms of the above order.

232. In any event, due to the fraudulent and collusive conduct of the Claimant, the Respondent cannot be fastened with any liability and as such, the Tribunal is not inclined to grant any relief in this regard. The Respondent is accordingly, not liable to pay any bank charges."

(emphasis is mine)

4.8 It may be pertinent to point out, at this juncture, that while the matter was still pending adjudication before the learned Arbitrator, the petitioner had filed yet another petition under Section 9 of the 1996 Act. This petition was numbered as OMP(I)(COMM.) 382/2017. I am informed that this petition was filed before the encashment of the bank guarantees by the respondent. However, before this petition could be finally adjudicated upon, the respondent had already encashed the bank guarantees. Therefore, the Court, after noting this fact and having regard to the aspect that the petitioner had failed to keep the bank guarantees alive, found no fault with the conduct of the respondent in encashing the bank guarantees. Accordingly, the petition i.e. OMP(I)(Comm.) No. 382/2017, was dismissed by a learned Single Judge of this Court.

4.9 It would be important to note that the learned Arbitrator had reserved the matter for rendering the Award on 12.12.2016, which was, ultimately, pronounced on 5.12.2017. The observations made in paragraphs 229 to 232 of the Award, which have been extracted in paragraph 4.7 above, were obviously made by learned Arbitrator without knowledge of the fact that in the interregnum i.e. in September 2017, the bank guarantees had already been encashed. It appears that neither party made any effort of informing the learned Arbitrator about this development.

5. Be that as it may, the petitioner being aggrieved by the Award, has filed a Section 34 petition, in which, I had passed two orders. These are orders: dated 20.9.2018 and 30.10.2018. The Section 34 filed by the petitioner is numbered as: OMP(COMM.) No.171/2018.

5.1 This petition came up for hearing before me, on 20.9.2018, when, four weeks were granted to the respondent to file a reply to the Section 34 petition. Since, brief arguments were heard on the aspect concerning the encashment of bank guarantees, I had, after hearing the counsel for both the parties, made the following observations on 20.9.2018:

"4. Mr. Bhambhani, who, appears for the respondent, affirms the fact that the respondent did not file any counter claim in the matter.

5. However, Mr. Verma says that a bank guarantee which was furnished by the petitioner to the respondent and had been kept alive all this while has been encashed by the respondent.

6. The fact that the petitioner was directed to keep the bank guarantee alive is, according to the counsel for the parties, discernible from a perusal of the order dated 15.12.2005, passed in OMP No. 363/2003.

7. In these circumstances, the respondent is directed to return the amount, equivalent to the bank guarantee, to the petitioner within three weeks from today.

8. In case, there is any difficulty or impediment qua the same, the respondent will have liberty to move this Court in that behalf."

5.2 In effect, for the reasons recorded in the order dated 20.9.2018, I had directed the respondent to return the amount equivalent to the bank guarantees to the petitioner within three weeks from that date, primarily, based on the fact that the respondent had not filed any counter claims. Since, the respondent had failed to comply with the directions, the petitioner proceeded to file an interlocutory application, that is, I.A. No.14903/2018.

5.3 This application came up for hearing on 30.10.2018. The application was disposed of after noticing the observations made, by the learned Arbitrator in paragraphs 229 to 232 of the award. The directions issued on that date are contained in paragraphs 4 to 8 which are extracted hereafter for the sake of convenience:

"4. A careful perusal of the aforementioned paragraphs of the award would show that the learned Arbitrator, having regard to the order passed by this Court on 15.12.2005 in OMP No.363/2003 rejected the petitioner's contentions qua Issue No.3 and 4. In sum, the Arbitral Tribunal was of the view that since, the petitioner itself had given an undertaking to this Court that the bank guarantees would be kept alive, Issue No.3 which related to discharge of the subject bank guarantees could not be ordered in favour of the petitioner. Consequently, Issue No.4, which, dealt with bank charges for keeping the bank guarantees alive was also rejected.

5. In my opinion, what this Court had in mind was that the subject bank guarantees will be kept alive by the petitioner during the period of adjudication and thereafter if the respondent were to succeed before the Arbitral Tribunal. It is clear that at that stage, the Court was perhaps factoring in the circumstance that the respondent may also file a counter claim, however, as it transpires, concededly, the respondent did not lodge any counter claims. Therefore, what the Arbitral Tribunal was required to deal with was only the claims, which, the petitioner had lodged before it. The claims lodged by the petitioner were admittedly rejected by the Arbitral Tribunal.

5.1. Therefore, the directions issued by this Court that the bank guarantees would be kept alive in anticipation that the

award may accord moneys in favour of the respondent worked itself out with the conclusion of the arbitration proceedings.

5.2. As indicated above, the respondent did not lodge any counter claim and therefore, the purpose for which directions were issued by this Court stood upon pronouncement of the award.

6. Mr. Rajat Arora, who, appears for the respondent says that the subject bank guarantees were furnished by the petitioner towards mobilization advance.

6.1. Furthermore, counsel for the respondent says that the unutilized mobilization advance is still outstanding in the books of respondent.

6.2 On being queried, learned counsel for the respondent admitted that there was no such finding recorded in the award.

7. In these circumstances, in my view, there is no tenable ground based on which the respondent can retain the money, which it obtained after encashing the subject bank guarantees.

8. Accordingly, since, no other aspect has been articulated before me, the respondent is directed to remit the amount equivalent to the subject bank guarantees to the petitioner within ten (10) days from today, failing which the concerned officer of the respondent will remain present in the Court on the next date of hearing as already fixed, i.e. 21.02.2019."

5.4 Evidently, the respondent was aggrieved by the orders dated 20.9.2018 and 30.10.2018. The respondent's appeal against these orders, which was numbered as FAO(OS) (COMM) No.271/2018, came up for hearing on 29.11.2018. The Division Bench, based on the agreement arrived at between the counsel for the parties, set aside the orders dated 20.9.2018 and 30.10.2018. While doing so, the Division Bench issued the following directions:

"After some hearing in the matter, it is agreed that without prejudice to the rights and contentions of the parties which have been raised by them in petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the impugned orders may be set aside and the questions raised may be left open to be decided along with objections filed under Section 34 of the Arbitration and Conciliation Act, 1996, by the

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respondent.

This order will not come in the way of the respondent, in case the respondent chooses to file a fresh petition under Section 9 of the Arbitration and Conciliation Act, 1996.

Legal objections of the appellant herein are kept open.

The present appeal is accordingly disposed of, in the above terms."

(emphasis is mine)

6. It is in this background that the petitioner has approached this Court for the third time, *albeit*, after the award has been rendered by way of petition filed under Section 9 of the 1996 Act.

7. In support of the petition, arguments have been advanced by Mr. Arun Kumar Verma, Sr. Advocate, instructed by Mr. Abhay Raj Verma, Advocate, while submissions on behalf of the respondent have been advanced by Mr. Sudhir Nandrajog, Sr. Advocate, instructed by Mr. Rajat Arora, Advocate.

8. Mr. Verma has briefly submitted that since no counter claims were preferred by the respondent, the monies that the respondents obtained via encashment of the subject bank guarantees would have to be returned to the petitioner or in the very least, the monies received should be deposited with this Court. It is Mr. Verma's submission that there is no good reason as to why the respondent should be allowed to retain the money as the respondent did not think it fit to lodge any counterclaim(s) to justify the encashment of the subject bank guarantees. In support of his plea, Mr. Verma relied upon Order XXXIX Rule 10 of the Code of Civil Procedure, 1908 (in short "CPC") and the judgment dated 14.1.2011, passed by a Division Bench of this Court, in FAO(OS) No.200/2010, titled: *Simplex Infrastructures Ltd. vs. National Highways Authority of India*. Furthermore, Mr. Verma also placed

reliance on the provisions of Section 9(1)(e) to emphasize the fact that this Court has the requisite power to pass the kind of direction sought for by the petitioner.

9. On the other hand, Mr. Nandrajog has made the following submissions:

(i) That this Court ought not to hear and adjudicate upon the captioned petition at this stage. This petition should be heard and decided at the stage when Section 34 petition is adjudicated upon by the Court.

(ii) Section 9 petition is not adjudicatory in nature but only an application, whereby, interim measures are put in place by the Court.

(iii) This Court at this stage cannot come to the conclusion, one way or another, as to whether or not invocation or encashment of the bank guarantees was valid.

(iv) The respondent being a public sector entity is good for the money obtained by it upon encashment of the bank guarantees. In other words, there is no need to direct the respondent to deposit the money obtained through encashment of the bank guarantees.

10. I have heard learned counsel for the parties at some length.

11. This matter falls in a narrow compass. The facts narrated above would demonstrate that the petitioner had moved Section 9 petitions at three stages. At the first stage, the Section 9 petition was filed prior to the commencement of arbitration proceedings. The second time around, the petitioner filed a Section 9 petition during the arbitration proceedings, *albeit*, prior to the award being rendered and the instant petition, which is the third Section 9 petition, has been filed after the award has been rendered.

11.1 The facts set out above, qua which there is no dispute, this Court, disposed of the first Section 9 petition with a direction that the bank

guarantees furnished by the petitioner would be kept alive during the subsistence of arbitration proceedings and thereafter, till the Section 34 petition is disposed of. As a matter of fact this Court further directed, that in case the award rendered by the Arbitral Tribunal was in favour of the respondent, the respondent would have the right to recover the amount via encashment of the bank guarantees.

11.2 As indicated above, these directions are contained in the order dated 15.12.2005. These directions were not assailed by either party. Hence, to my mind, the entire aspect concerning the bank guarantees is covered by the directions which this Court issued on 15.12.2005. The only catch in the present case is that the petitioner was unable, for whatever reasons, to keep the bank guarantees alive. As noted hereinabove, a right was given to the respondent to seek encashment of the bank guarantees; in such circumstance, which it did in September 2017.

11.3 Before I proceed further, I must note that during the course of the arguments, Mr. Nandrajog submitted that the bank guarantees had been issued against mobilization advance which was not utilized. This submission was made before me on 30.10.2018 as well. I had, in that proceeding, put a pointed question to the learned counsel for the respondent as to whether there was any finding in the award that the petitioner had failed to utilize the mobilization advance. I had received a candid answer, on that date, from Mr. Rajat Arora, the Advocate instructing Mr. Nandrajog, that there was no such finding.

11.4 Upon a perusal of the award, I noticed that there is no such finding recorded by the Arbitral Tribunal. Therefore, this query again was put by me at the hearing held today, lest I missed something. While Mr. Nandrajog was not able to show anything which would answer this query, he did refer to paragraphs 158 to 160 of the Award.

11.5 I have examined the observations made by the learned Arbitrator in those paragraphs. None of the observations, however prejudicial they may be, indicate that the petitioner had contended that the bank guarantees furnished by the petitioner against mobilization advance was not utilized by the petitioner. The observations made in the paragraphs referred to by Mr. Nandrajog do not answer the query that I posed to the learned Senior Counsel.

12. Therefore, the question before me is: whether without a claim, can the respondent, by any stretch of imagination, hope to keep the money with it. Mr. Nandrajog points out that Issue No.3 was related to discharge of bank guarantee while Issue No.4 was related to the petitioner's claim for bank charges. According to the learned Senior Counsel, both the issues were decided by the learned Arbitrator against the petitioner.

12.1 I tend to disagree with Mr. Nandrajog that Issue No. 3 was, at all, decided by the learned Arbitrator. A careful perusal of paragraphs 229 to 232 of the award dated 5.12.2017 would show that the learned Arbitrator did not decide Issue No. 3 which pertained to discharge of bank guarantees. The learned Arbitrator after quoting the order dated 15.12.2005 passed by this Court, had only stated the following:

"231. Therefore, it can be seen that by its own undertaking, the Claimant was bound to keep the bank guarantees alive in terms of the above order.

232. In any event, due to the fraudulent and collusive conduct of the Claimant, the Respondent cannot be fastened with any liability and as such, the Tribunal is not inclined to grant any relief in this regard. The respondent is accordingly, not liable to pay any bank charges."

(emphasis is mine)

12.2 What is plainly evident, when one reads the award, is that, the learned Arbitrator was unaware of the fact that the bank guarantees had already been

encashed. As a result, the learned Arbitrator held the view that the bank guarantees continued to remain in operation on account of an undertaking to that effect, given by the petitioner, by which it was bound. In this regard, the obvious reference of the Arbitral Tribunal was to the order dated 15.12.2005 passed by this Court. More importantly, this observation was made in the context of Issue No. 4, which required the Arbitral Tribunal to determine as to who would bear the financial burden of keeping the bank guarantees alive.

12.3 The Arbitral Tribunal, clearly, failed to deal with the direction contained in order dated 15.12.2015 which required the petitioner to keep the bank guarantees alive only to enable the respondent to encash the bank guarantees against an executable award, if any, passed in its favour. In view of the fact that there was no counterclaim lodged by the respondent, the Arbitral Tribunal, in my view, had to decide, in the changed circumstances, whether or not the condition put in place by this Court via order dated 15.12.2015 would continue to operate. The Arbitral Tribunal, clearly, did not decide this aspect of the matter and, thus, Issue No. 3 remain unaddressed.

12.4 The Arbitral Tribunal, though, for whatever it is worth, did decide Issue No. 4 which related to "liability", purportedly borne by the petitioner on account of bank charges for keeping the bank guarantees alive.

13. Therefore, I am confronted with two undeniable facts. First, no counterclaims were filed. Second, however irrelevant it may be, there is no finding that the bank guarantees were encashed on account of non-utilization of mobilisation advance.

14. Given this position, in my view, if I were to permit the respondent to continue to hold on the money, it would not only result in the respondent unjustly enriching itself but would also be contrary to the purpose and object

with which order dated 15.12.2015 was passed by this Court when arbitration had not commenced. Thus, the argument that the respondent is good for its money, given the facts obtaining in this case, is untenable and hence is rejected.

15. However, before I issue any direction, I must locate the power vested in the Court. To my mind, the power is contained in following provision of Section 9 of 1996 Act:-

“9. Interim measures etc. by Court.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court—

(i) xxx

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) xxx

(b) xxx

(c) xxx

(d) xxx

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it...”

15.1 The operative words are “just” and “convenient” followed by the words (and if I were to paraphrase it) - that the Court could exercise the same powers, if it were a proceeding pending before it.

15.2 Thus, in view of the fact that I have still not adjudicated upon the Section 34 petition, equities, to my mind, would be balanced if an appropriate direction is issued to the respondent to deposit the money in Court, which is also the alternative relief that Mr. Verma has prayed for. This direction appears to be wholesome as deposit of money in Court will enable accrual of interest which will ultimately benefit the party which

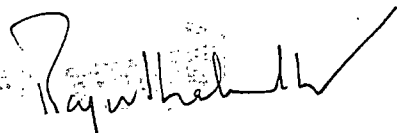
succeeds in the main matter.

16. In this context, I must also indicate that the submission of Mr. Nandrajog that Section 9 petition should await the adjudication of the Section 34 petition, is a submission, which does not impress me. In my opinion, neither the Division Bench has made any such observation nor is the methodology expedient. Once a litigant, in this case the petitioner, has moved a Section 9 petition, it has the right to have the same adjudicated upon unless for good reasons the Court defers a decision on such a petition. I see no reason to defer adjudication in the petition.

17. Thus, for the foregoing reasons, I am inclined, for the moment, insofar as this petition is concerned, to direct the respondent to deposit the monies, which, I am told, is an amount equivalent to a sum of Rs.3.5 Crores with the registry of this Court. The said amount will be deposited within two weeks from today. Upon such amount being deposited with the Registry of this Court, the same shall be invested in an interest-bearing fixed deposit, maintained with a nationalized bank.

18. The petition is disposed of in the aforementioned terms.

19. Needless to say, the observations made hereinabove have been made for the purposes of disposal of the captioned petition and would not impact the main petition.


RAJIV SHAKDHER, J.

APRIL 05, 2019/pmc