

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 1407 OF 2015

M/s.Unity Infraprojects Ltd.

..... Petitioner

VERSUS

**Export Credit Guarantee Corporation
of India Ltd.**

..... Respondent

Dr.Birendra Saraf a/w.Ms.Sudeshna Ray, Ms.Deepti Mohan, i/b. Vidhi Partners for the Petitioner.

Mr.Aditya Mehta, a/w.Ms.Vishakha Vaswani, Zeeshan Farooqui, Ms.Kanchan Pillai, i/b. M/s.Gagrats for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 9th JULY, 2015

P.C.

In view of the extreme urgency, papers are allowed to be produced at 3 p.m. since the petitioner seeks to apply for ad-interim stay of the impugned order passed by the learned arbitrator on 7th July, 2015 under section 17 of the Arbitration and Conciliation Act, 1996 rejecting the prayer for injunction sought by the petitioner from encashing the bank guarantee. By consent of parties, matter is heard finally at this stage.

2. A perusal of the bank guarantee clearly indicates that the same is on demand and unconditional bank guarantee. A perusal of the bank guarantee and more particularly clauses 2 and 3 clearly indicates that notwithstanding any dispute or disputes raised by the contractors in any suit or proceedings pending before any court or tribunal relating to their liabilities under the said bank guarantee, the same being absolute and unequivocal, the bank would release the payment in favour of

the beneficiary. In my view the bank guarantee being unconditional bank guarantee, the bank can not refuse to make payment once the beneficiary has invoked the same and having satisfied the condition of the bank guarantee.

3. This court while passing order on 30th April, 2015 in Arbitration Petition (L) No.805 of 2015 alongwith other connected matters has recorded the statement made by the learned counsel for the respondent that the respondent shall not invoke the performance bank guarantee for total amount of Rs.4,40,98,369/- for a period of three weeks from the date of the said order.

4. Dr.Saraf, learned counsel appearing for the petitioner submits that the injunction for encashment of the bank guarantee was sought before the learned arbitrator on the ground that if the respondent was allowed to encash the bank guarantee, there would be irretrievable injustice to the petitioner. He submits that the termination of the contract effected by the respondent is ex-facie illegal and thus the learned arbitrator ought to have considered this aspect while considering the application filed by the petitioner under section 17 for injunction from encashment of bank guarantee. He submits that the learned arbitrator has not considered this crucial aspect merely on the ground that such issue cannot be decided at this stage.

5. A perusal of the order passed by the learned arbitrator clearly indicates that the learned arbitrator has considered this aspect and has after adverting to various judgments referred to and relied upon by the petitioner has held that the plea of irretrievable injustice has to be decisively established and it must be proved to the satisfaction of the court or tribunal that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. It is held

that no such case exists in the present case since the respondent is a public sector undertaking. The learned arbitrator has also construed the terms and conditions of the bank guarantee and has held that the obligations of the bank under the said bank guarantee are absolute. Learned counsel for the petitioner does not dispute that the said bank guarantee is an unconditional bank guarantee. There is no infirmity in the impugned order passed by the learned arbitrator.

6. Insofar as reliance placed by the learned counsel for the petitioner on some of the provisions of the contract entered into between the parties is concerned, I am of the view that the bank guarantee being an independent and separate contract, reliance placed on the other provisions of the contract between the parties need not be considered at this stage.

7. In my view no case is made out for interference with the order passed by the learned arbitrator. The petition is devoid of merits and is accordingly dismissed. In view of the dismissal of the arbitration petition, Notice of Motion (L) No.1804 of 2015 does not survive and is also accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]