(sr. no.901)
Tuesday,8.12.2015

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1750 OF 2015

Ansaldo Caldaie Boilers India
Private Limited and anr. .....Petitioners
: V/S :
NAGAI Power Private Limited & Ors. .....Respondents

* * * * *

Mr. Aspi Chinoy, Senior Counsel a/w. Ms. Ankita Singhania i/by. Bachubhai Munim & Co., Advocate for the petitioner.

Mr. D.D. Madon, Senior Counsel a/w. Mr. A. Davar, Mr. S.Y. Mulani, Mr. Jeevan Kumar i/by. Mulani & Co., Advocate for respondents no.1 and 2.

* * * * * *

Coram :- Smt. R.P. SondurBaldota, J.

8th December, 2015.

P.C. :-

1). This petition is filed under Section 9 of the Arbitration and Conciliation Act seeking interim relief pending the parties proceeding for arbitration. The terms in which the interim reliefs are sought read as follows :-

> "(a). That pending the hearing and final disposal of the present petition and the arbitration proceedings between the parties and for a period of six months after the passing of the award, this Hon'ble Court be pleased to issue an order of injunction or a stay, restraining the respondent nos.1 and 2, their agents, assigns, servants, Directors and/or any person/s

> claiming through or under them in any capacity whatsoever from encashing the Bank Guarantees listed at Exhibit "D" to "M".
>
> (b). That this Hon'ble Court be pleased to direct the Respondent Nos.1 and 2 to return the Bank Guarantees to the petitioners;"

2). The petition is opposed by the respondents on the ground of its maintainability in this Court and also on merits. According to the respondent, this Court does not have jurisdiction to entertain and try the present application under Section 9 of the Arbitration Act.

3). Respondents no.3 to 5 are the banks concerning the bank guarantees in respect of which the reliefs have been sought. Needless to say that, there is no relief, as such, sought again these respondents. The relief of injunction at prayer clause (a) and the direction at prayer clause (b) is sought only against respondents no.1 and 2.

4). The undisputed facts of the case are that, respondent no.1 desired to build, own and operate pulverized coal fired power plant at Tamil Nadu. It had initially appointed Nagarjuna Construction Company Limited ("NCCL" for short) as the Contractor for the engineering, procurement and construction of the facilities for setting up the project. Pursuant to the invitation of tenders by NCCL, petitioner no.1 was awarded the contract for supply and installation of the Boiler & Turbine Generator Package (BTG Package) for the project vide Letter of

Award dated 19th May, 2010. A Company by name, Franco Tosi Turbines Private Limited ("FTTPL" for short) was a subsidiary of petitioner no.2, which had entered into Consortium Agreement dated 12th July, 2010 with the petitioner for performance of the BTG Package. Later, the consortium was modified, with petitioner no.2 taking over the rights and obligations of FTTPL and respondent no.1 taking over the rights and obligations of NCCL. For that purpose supplementary agreement dated 27th January, 2014 was executed between the parties. The petitioners allege that, the supplementary agreement was executed and the bank guarantees were renewed by the petitioners because of the representation made and an assurance given by the respondents that they had adequate funds at their disposal to fulfill their obligations.

5). According to the petitioners, under the supplementary agreement, the respondents had (i) acknowledged and confirmed that they had, till then, defaulted in their payment obligations, (ii) agreed to pay the petitioners, in three installments, an amount of Rs.9.78 crores which was then outstanding in respect of the supplies already effected, (iii)agreed to open Letters of Credit of Rs.23 crores by the end of January, 2014 to enable the petitioners to effect supply of, ready for delivery equipment/supplies, and (iv)agreed that further supply would be effected by the petitioners only after the LCs had been established.

On this representation, the petitioners claim, to have been induced, to withdraw their notice of intent to terminate the contract and keep the bank guarantees to the extent of Rs.49 crores alive, which had been furnished to the respondent under the supply agreement. The petitioners allege that, respondents no.1 and 2 paid only a sum of Rs.3 crores against the outstanding of Rs.7.98 crores leaving a balance of Rs.6.28 crores outstanding. Further, the respondents are also alleged to have not complied with their agreement to establish LCs for the purpose of further supply of, ready for delivery goods, worth approximately Rs.30 crores.

6). There was extensive correspondence between the parties relating to the failure on the part of respondents no.1 and 2 in making the payment, as also, in opening the LCs. Despite the correspondence and admissions in correspondence, respondents no.1 and 2 terminated the contract with the petitioners. The petitioners claim that the Consortium had duly complied with its contractual obligations under the Supply Agreement and the difficulties arose only on account of non-compliance of the obligations by respondents no.1 and 2. Therefore, the petitioners contend that, continuation of the bank guarantees, having obtained by respondents no.1 and 2 by practicing fraud, the same are not enforceable and directions are required to be given to respondents no.1

and 2 not to encash the same and return the bank guarantees to the petitioner.

7). As regards the jurisdiction of this Court to entertain and try the present petition, the averments in respect thereof are at para-36 of the petition. The same read as follows :-

> "36. Under the terms of the Supply Agreement dated 31st July, 2010 there is no agreement between the parties with respect to the jurisdiction of the Courts. It is submitted that all the ten Bank Guarantees are issued in Mumbai by Respondent nos.3 to 5 whose Registered Offices are in Mumbai. The Registered Office of the Petitioner No.2 is in Mumbai. Hence, this Hon'ble Court has jurisdiction to entertain the present petition."

8). Mr. Madon, the learned Senior Counsel appearing for the respondents draws attention of the Court to Clause-18 of the Supply Agreement, which provides for Dispute Resolution. Sub-Clause 1 thereof is for, "Informal Dispute Resolution" and sub-clause 2 is for "Formal Dispute Resolution". The "Formal Dispute Resolution", which is relevant for the present purposes, is to be by way of arbitration, the procedure wherefor is at 18.2(a) to 18.2(h). The different aspects covered thereunder are, submission of disputes, arbitration rules, place and language of arbitration, finality and enforcement of award, Appointing Authority etc. By Clause-18.2(d), place of arbitration agreed between the parties is Hyderabad, India. Mr. Madon, submits that once the parties agreed upon the place of arbitration, it was necessary for the petitioners to file the present application for interim reliefs in the Court within the jurisdiction of which the arbitration proceedings would lie. Mr. Madon, refers to Section 2(e) of the Arbitration Act for the purpose of the definition of the Court and Section 42 of the Act, which relates to the jurisdiction of the Court. The two provisions read as follows :-

> "**<u>Section 2(e) of the Arbitration Act :</u>**
>
> "[(e) "Court" means -
> (i)in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.
> in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to the High Court.]"
>
> **<u>"Section 42 of the Arbitration Act :-</u>**
>
> "**42. Jurisdiction.**- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement

and the arbitral proceedings shall be made in that Court and in no other Court."

9). Mr. Chinoy, the learned Senior Counsel appearing for the petitioners submits, *per-contra*, by referring to the very definition that this Court being the Principal Civil Court of original jurisdiction having jurisdiction to decide the subject matter of the petition, if the same were to form subject matter of a suit, has jurisdiction to entertain the petition. According to him, the dispute raised by the petitioners is limited to encashment of the bank guarantees on allegations that the same had been obtained by making a false representation to the petitioners. The bank guarantees were executed at Bombay and the enforcement thereof, would take place at Bombay. Therefore, the cause of action to file the petition arose within the jurisdiction of this Court and hence this Court will have jurisdiction to entertain the petition.

10). Mr. Madon, relies upon decision of Andhra Pradesh High Court in **Jyothi Turbopower Services Pvt. Ltd Vs. Shenzhen Shandong Nuclear Power Construction Company Ltd. reported in MANU/AP/0137/2011 (AIR 2011 AP 111)**, by which, under similar circumstances, it was held that the Court had no jurisdiction to entertain a petition filed under Section 9 of the Arbitration Act for interim measures when the parties had designated another State as place of arbitration. In the decision cited, the parties had agreed that the State of Orissa would be the place of arbitration. While hearing the objection to the jurisdiction, the Andhra Pradesh High Court considered the provision of Section 2(1)(e) of the Arbitration Act and Section 42 to hold that, once the parties had agreed upon the place of arbitration, the Court of Hyderabad will have no jurisdiction to entertain the application under Section 9 of the Act. Further, in view of Section 42 of the Act, if his application under Section 9 is entertained by the Court, at which the application is filed, then all subsequent applications arising out of the agreement are required to be made in that Court only. This would render the agreement as regards the place of jurisdiction useless.

11). I am in respectful agreement with the decision of the Andhra Pradesh High Court cited above. The jurisdiction available under the definition of Court under Section 2(e) of the Arbitration Act, would be a general provision for jurisdiction, which would operate in the absence of any specific agreement between the parties on the place of arbitration. The concept of the arbitration is, hearing and determination of a dispute between parties by a person or persons chosen or agreed to be chosen by the parties. Since the very basis of the concept of arbitration is agreement of the parties, due recognition and importance must be given to the agreement on the place of arbitration, which can be other than that, indicated by Section 2(e) of the Arbitration Act. In that circumstance, this Court will have no jurisdiction to entertain the petition.

12). It has also been rightly submitted by Mr. Madon, that the dispute raised in the petition, is infact part of the larger dispute between the parties about the performance of the contract and termination of the contract by respondents no.1 and 2. Therefore, the argument that contract of Bank Guarantee is an independent contract, cannot be available to the petitioner. Therefore, in my opinion, the argument that the place of jurisdiction of the Court would be decided by the place where the bank guarantees were executed, cannot be excepted. In any case, as has been pointed out by Mr. Madon, the petitioners are not parties to the bank guarantees. It is a contract, *inter-se*, the respondents i.e. respondents no.1 and 2 and the banks. There is no clause for arbitration in that contract. Consequently, any dispute as regards the agreement of bank guarantee cannot be taken by the petitioners to an arbitrator. In that case, there cannot be an application for interim reliefs by resorting to the Arbitration Act. For that reason also, the present petition is not maintainable.

13). The documents of bank guarantees show that the performance bank guarantees thereunder are unconditional and irrevocable. Therefore, the petitioners can have no say as far as the encashment of the bank guarantee is concerned. Mr. Madon, relies upon the decision of the Apex Court in the case of **U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. reported in MANU/SC/0021/1987 ((1988) 1 SCC 174)** in support of his submission that, the Court can interfere with the machinery of irrevocable obligations assumed by banks only in exceptional cases i.e. demands made therein being fraudulent or other special circumstances. He argues that, the petitioners have not made out any such circumstance and therefore not entitled to the reliefs at all. The observations of the Apex Court relied upon by Mr. Madon, at para-17 of the decision, read as follows :-

> "17. This question was again considered by the Queen's Bench Division by Mr. Justice Kerr in R.D. Harbottle (Mercantile) Ltd. And Anr. V. National Westminister Bank Ltd. and Ors. [1977] 2 All EL 62. In this case injunction was sought on a question in respect of a performance bond. The learned Single Judge Kerr, J. gave the following views :
>
> > (i)Only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Accordingly, since demands for payment had been made by the buyers under the

> guarantees and the plaintiffs had not established that the demands were fraudulent or other special circumstances, there were no grounds for continuing the injunctions."

The Apex Court, further observes as follows, at para-37 of the decision.

> "37. On the basis of these principles, I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere."

The other decision, on this aspect, of the Apex Court, relied upon by Mr. Madon, is in **Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company reported in MANU/SC/3256/2007 ((2007) 8 SCC 110)** wherein the Apex Court has reiterated the principles for grant or refusal to grant injunction to restrain enforcement of bank guarantee. The same enumerated at para-14 read as follows :-

> "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-
>
> (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank

Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

14). Keeping the above principles in mind and applying the same to the facts of the present case, in my opinion, the interim relief as sought by the petitioners cannot be granted to them. Hence, the petition is dismissed.

(SMT. R.P. SONDURBALDOTA, J)