IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2015

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM

O.S.A.No.149 of 2015

1.M/s.Consul Consolidated Private Limited,
having its registered office at
4/329-A, Old Mahabalipuram Road,
Kottivakkam,
Chennai-600 041.
2.M/s.Megatech Power Equipments Private Ltd.,
having its registered office at
4/329-A, Old Mahabalipuram Road,
Kottivakkam,
Chennai-600 041. ... Appellants/Respondent 1&2

vs

1.Radhakrishnan Raghavan Nair ... 1st Respondent/Applicant

2.M/s.HDFC Bank Limited,
3/4, Mayurpamkh Apartments,
Upp Sheetal, Petrol Pump,
Londhwa Khurd,
Pune-411 048. ... 2nd Respondent/3rd Respondent

Appeal filed under Clause 15 of the Letters Patent read with Order XXXVI, Rule 9 of Original Side Rules against the order of this court made in Original Application No.48 of 2015, dated 27.4.2015. Original Application praying that this Honourable court be pleased to pass an order of interim injuction restraining the first and second Respondents from invoking and encashing the Bank Guarantee for Rs.1,00,00,000/- (Rupees One Crore Only) bearing B.G.No.007GT0113074005 dated 15/03/2013 established in favour of the First Respondent by the Third Respondent a from otherwise appropriating the hold back amount of Rs.1,00,00,000/-(Rupees One Crore only) pending arbitration proceedings.

For Appellants .. Mr.R.Murari
Senior Counsel
for
M/s.TATVA Legal

For Respondents.. Mr.R.Senthilkumar for R1

JUDGMENT

(Judgment of the Court was delivered by The Hon'ble Chief Justice)

The appeal arises out of the impugned order dated 27.04.2015 where the learned Single Judge has passed the order on the application (O.A.No.48 of 2015) filed by the first respondent under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to the said ''Act'') restraining the invocation and encashment of the Bank Guarantee of Rs.1,00,00,000/- bearing B.G.No.007GT0113074005 dated 05.03.2013 (the petitioner, in Section 9 petition and the learned Single Judge in the impugned order mention the date as 15.03.2013) established in favour of the first appellant by the second appellant. At the initial stage, an interim order was granted on 18.01.2015 directing the first respondent to keep the Bank Guarantee alive, which direction was complied with in terms of the impugned order. The learned Single Judge has opined that the Bank Guarantee should not be encashed, but to be kept alive by the first respondent during the pendency of the arbitration proceedings.

2. We may also note that as often happens, the concentration of the appellants seems to be only on the issue of interim relief as it is stated not to have sent the response as yet to the notices issued by the first respondent to the appellants invoking the arbitration Clause and seeking appointment of an Arbitrator, though the learned Senior Counsel for the appellants states that appointment of an Arbitrator would not pose any problem.

3. The facts giving rise to the present application of the said Act are that the first respondent is the former Director and Promoter of the second appellant and engaged in the construction business. The shareholding of the second appellant was sought to be transferred to the first appellant by the first respondent as well the other shareholders of the second appellant. Such shares were transferred in two tranches. 51% of the equity share capital and 100% preference share capital held by the first respondent and his wife was transferred to the first appellant for Rs.15,52,50,000/- in terms of the First Share Purchase Agreement (SPA) executed on 21.12.2012. A certificate of completion and the CP Satisfaction Certificate dated 08.01.2013 were also issued, however, an Indemnity was furnished by the first respondent and the other sellers in respect of the liabilities relating to the period prior to the completion date. On completion, the first appellant is stated to have caused full-fledged audit to be conducted and the financial statements were signed both by the first respondent and the Managing Director of the first appellant and thereafter, no claims were made against the first respondent. The first respondent had provided the Bank Guarantee referred to aforesaid in favour of the first appellant towards security for any legitimate indemnity claim, which was to remain valid for a period of two years from the completion date. In this behalf, it is stated in the petition that as per Clause 6.7 of the

First SPA, the Bank Guarantee had been furnished and as per Clause 15.2 of the First SPA, the Indemnity was to be valid for a period of two years from the completion date.

4. The first respondent pleads that though the Bank Guarantee mentions that it is valid till 19.01.2015, as per the terms of the First SPA and in pursuance whereto the Bank Guarantee was issued, it is to be valid for a period of two years from the completion date. The completion date is stated to have been acknowledged in terms of the completion certificate and CP Satisfaction Certificate dated 08.01.2013 unequivocally certified to the compliance of the obligation by the vendors. In view thereof, the plea raised is that the Bank Guarantee is valid only till 08.01.2015 and till such date, no claim was raised and the Second SPA was entered into on 08.4.2013 for the remaining balance of 49% of the equity share capital of the second appellant.

5. The first appellant is stated to have acquired 100% shares and has assumed complete control of the second appellant. However, subsequently, vide letter dated 08.12.2014, the second appellant issued a letter to the first respondent demanding the Bank Guarantee amount on account of the alleged loss for the period prior to 31.03.2013. Thus, the loss is alleged to have been on account of the inventory shortage, non-recoverable receivables, obsolescence of the Turbo Marshall series UPS, replacement charges of Apollo 1KVA UPS, VAT loss due to disallowance, etc. This demand was replied to by the first respondent on 16.12.2014 denying the claims, whereafter, the application under Section 9 of the said Act was filed. On the other hand, the appellants pleaded that the shareholders had transferred the shares to the first appellant only on 14.01.2013 and received the consideration on 17.01.2013. The invocation was thus stated to have been well within the completion date and in fact, the first respondent is stated to have been managing the second appellant even after the Second SPA till the 30th day of June, 2013 and resigned only on 30.06.2013. It is only on the audit being completed for the period ending March, 2014, several irregularities were stated to have been found.

6. The bedrock of the case of the first respondent as canvassed before the learned Single Judge was that once the completion certificate was executed on 08.1.2013 mentioning the completion date, the Bank Guarantee could have been enforced only before 08.1.2015 as the validity period is two years. The audited balance sheets are stated to have been accepted by the first appellant unconditionally and any loss has been denied. In terms of the First SPA, the Bank Guarantee is stated to be capable of being invoked only after 30 days from the date of the claim. Therefore, the invocation letter dated 10.01.2015 was pleaded to be invalid. The claim notice has been received by the first respondent on 13.12.2014 was also pleaded to be invalid and the act of invoking the Bank Guarantee tainted with mala fide intention and fraud.

7. The stand of the first appellant, on the other hand by reference to various Clauses of the First SPA is that just because the certificate dated 08.1.2015 mentions that date, it is not liable to be considered so. The transfer of shares were stated to have been made only on 14.01.2013 and it was canvassed that the Bank Guarantee could be invoked only on 17.1.2015.

8. The learned counsel for both parties relied upon various judgments of the Apex Court in respect of the circumstances under which the Bank Guarantee could have been stayed for encashment.

9. The learned Single Judge came to the conclusion by referring to the judgment in Hindustan Construction Company Limited v. State of Bihar and others, reported in (1999) 8 SCC 436, that the consideration of Clause 15.3 shows that the Bank Guarantee was conditional on two grounds, viz.,

> (a) it is not for breach of the terms, but only to make good the loss as the bank guarantee is towards indemnity; and
>
> (b) invocation is possible only after the expiry of 30 days from the date of receipt of the claim. In order to invoke the indemnity, the first appellant had to suffer the loss.

It was opined that the invocation was before the expiry of 30 days from the date of the claim and was thus contrary to the terms of the First SPA.

10. The learned Senior Counsel for the appellants did seek to assail this finding on the ground that the Bank Guarantee was unconditional and the terms of the First SPA could not be looked into and the Bank Guarantee alone should be looked into to determine whether it was conditional or unconditional.

11. We are unable to agree with the submission of the learned Senior Counsel for the appellants for the reason that in the given facts of the case, the factum of the First SPA itself is referred to in paragraph-2 of the Deed of Guarantee. No doubt, the issue could not have been raised about the quantification of the amount and the provision was for the first appellant to quantify the amount and then the issue is whether the Bank Guarantee, in fact, is really an unconditional one as contended by the learned Senior Counsel for the appellants or conditional, upon certain occurrences as specified in the First SPA, as opined by the learned Single Judge.

12. In the aforesaid context, Section 9 of the said Act is also to be analysed to come to the conclusion that it empowers the Court to grant such interim measures of protection by use of the words ''Just'' and ''Convenient'' and even orders in the nature against the garnishee are obtainable under the said provision.

13. The learned Single Judge, on a construction of the documents, has unequivocally opined that the Bank Guarantee could have been invoked only after 30 days from the date of the claim and that the completion certificate having been issued on 08.01.2013, the claim was made beyond the stipulated time, the opinion with which, we agree and it is, thus, rightly opined that if there is a question raised about the validity of the completion certificate by the first appellant, then that could be decided only during the arbitral proceedings. It has also come to light that Form-23 on behalf of the first respondent was not submitted by the representative of the first appellant, though the first respondent is stated to have resigned on 30.06.2015.

14. In our view, the learned Single Judge having rightly exercised the jurisdiction vested with him, and such an exercise not being patently erroneous, no case is made out to interfere with the same. Not only that, the learned Single Judge has taken due care not to absolve the first respondent of the obligation to keep the Bank Guarantee alive despite the defence that the period for encashment of the Bank Guarantee was over and has required the first respondent to continue to keep the Bank Guarantee alive during the arbitration proceedings, thus securing the interest of the appellants. This boils down to the only question whether during the arbitral proceedings, the first appellant is in pocket of the guarantee amount or whether the amount is kept secured by the Bank Guarantee to be realised, depending upon the result of the arbitration proceedings.

15. We, thus, are of the view that this is not a fit case for interference.

16. The appeal is dismissed, leaving the parties to bear their own costs.

17. Needless to say that any observation made by us aforesaid is only for the purposes of interim relief and would not influence the arbitral proceedings at any manner. We would expect the appellants to take steps to commence the arbitral proceedings.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrarbbr

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Original Side, Madras High Court,
Chennai.
+1 cc to M/s.R.Senthilkumar, Advocate, Sr.40279
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kra(18/08)