

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO No.1667 of 2014 (O&M)

Date of decision : 21.12.2015

M/s Niraj J M Mahatre Niraj House

...Appellant

Versus

Haryana State Roads and Bridges Development Corporation

...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Manoj Chauhan, Advocate for the appellant.

Mr. Gagandeep Singh Wasu, Advocate for the respondent.

AMIT RAWAL, J. (Oral)

The appellant-Contractor is aggrieved of the order dismissing the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking restraint order against the state for not encashing the performance bank guarantee as well as retention guarantee.

Mr. Manoj Chauhan, learned counsel appearing on behalf of Contractor submits, that an agreement dated 15.04.2009, for completion of the project was entered into. The period of project was 15 months. In lieu thereof, the petitioner furnished two additional bank guarantee in lieu of the retention money as per the following details:-

“That to the pursuant to the fulfillment of the condition of the aforesaid Tender/Package, the petitioner No.1 furnish the bank guarantee for an amount equivalent to 5% of the Contract Price i.e. Rs.135,20,54,286/- Bank Guarantee No.0960112BG0000856 dated 28.12.2012 of Rs.6,76,02,714.00/- (Rupees six crore seventy six lakh two thousand seven hundred fourteen only) State Bank of India Industrial Finance Branch, New Delhi.

That the petitioner No.1 also furnish the two additional bank guarantee in lieu of the retention money Additional Bank Guarantee No.00070100006393 dated 30.06.2014 of Rs.1,68,00,000/- (Rupees one crore sixty eight lakhs only) and Additional Bank Guarantee No.00070100006394 dated 30.06.2014 of Rs.1,70,00,000/- (one crore seventy Lakhs only)”

The original milestone as per the agreement was 15.09.2009, 15.01.2010, 15.05.2010 and 15.08.2010. 3rd and 4th milestone were delayed owing to the delay in providing the design and removal of the trees, law and order, slow working of Mining Department for providing crusher facility for the raw materials and shortage of stone material as there was ban on the mining of the stone in Haryana.

He submits that appellant had completed the work on 30.06.2012 and Department had also extended the defect liability period upto 31.05.2015 though defect liability period was completed on 10.04.2015 yet the Department did not pay balance amount and was in the process of encashing bank guarantee. Prior to that, respondent did not respond to the request of the appellant for payment of the balance money which necessitated the appellant to file the petition by invoking the

jurisdiction under Section 9 of 1996 Act on 26.02.2014. However, after the decision of the petition, letter notice dated 15.04.2014 seeking appointment of the Arbitrator has been sent but the respondent did not appoint any Arbitrator. In case cause of action arose as respondent-defendant has raised the demand vis-a-vis liquidated damages.

This Court vide order dated 26.03.2014, while noticing the contention of the appellant, issued notice of motion and also granted status quo with regard to the bank guarantee. The order reads thus:-

“Present:- Mr.Manoj Chauhan, Advocate for the appellant.

Learned counsel has produced before me a letter dated 11.09.2013 of an Engineering Consultant and addressed to the petitioner certifying from the material placed before him that substantial completion of project is to be considered w.e.f. 30.06.2012. Learned counsel submits that though this document has not been placed on the record of this case, but it is part of record of the trial Court.

Learned counsel may place it on record.

Learned counsel then points out to Annexure A5 being a memo from the respondent to its Executive Director in which anxiety has been expressed that some sites are under litigation and inspite of best efforts as explained from time to time to the Corporation, the same have not been cleared to hand over to the agency and the matter is being delayed in infinite directions. Delay is not attributable to the petitioner and substantial construction has been carried out in the road work in the Mewat area, then the learned Additional District Judge ought to have

exercised discretion in favour of the petitioner while considering an application under Section 9 of the Arbitration and Conciliation Act, 1996 and ought to have granted status quo with respect to the encashment of two bank guarantees i.e retention bank guarantee and performance guarantee to indemnify the employer against damage to road during the construction period and before giving site and performance bank guarantee.

The issue is arguable.

Notice of motion returnable on 12.05.2014

Process dasti, as well.

In the meantime, status quo be maintained with respect to both kind of guarantees and they be not encashed till further orders.

26.03.2014

*Sd/- (Rajiv Narain Raina)
Judge”*

He submits that respondent after having been served the notice seeking appointment of the Arbitrator has not appointed the Arbitrator and even petition under Section 11 (6) has been filed which is under scrutiny. In support of his contention, he has relied upon judgment of the Delhi High Court in case titled as *Continental Construction Ltd. and another Vs. Satluj Jal Vidyut Nigam Ltd. 2006(1) Arbitration Law Reporter 321 (Delhi)*.

Mr. Gagandeep Singh Wasu, learned counsel appearing on behalf of respondent submits, that petition under Section 9 was wanting pleadings vis-a-vis intention of their Contractor to get the matter resolved through the arbitrator, thus, Principle Court while relying upon principles culled out in *M/s Sundaram Finance Ltd. Vs. M/s NEPC India Ltd., 1999(1) RCR (Civil) 580* rejected application on this ground. There is no illegality

and perversity, in essence, there was no cause of action in favour of the Contractor to file petition under Section 9 in February, 2014.

I have heard learned counsel for the parties and appraised the paper book.

The fact aforementioned would reveals that dispute has been raised by the respondent vis-a-vis the nature of the work having not been completed as per the terms and conditions of the agreement. Once the dispute has arisen, the matter has to be resolved through appointment of the Arbitrator. It is intriguing that despite appellant having sent notice, seeking appointment of the Arbitrator, the respondent has not chosen to appoint Arbitrator which has necessitated him to file petition under Section 11(6). Since both the parties are making allegation/cross allegation vis-a-vis non-completion or completion of the work, I am of the view that till the Arbitrator enters into reference, the bank guarantee noticed above should not be encashed by the respondent. Accordingly, encashed bank guarantee as noticed above shall remain stayed till the Arbitrator enters into reference, thereafter appellant shall be at liberty to seek interim protection by invoking provision of Section 17 of the 1996 Act i.e. by moving appropriate application before the Arbitrator. This aforementioned aspect has not been noticed by the Court below while dismissing the petition.

No doubt Hon'ble Supreme Court in M/s Sundaram Finance Ltd. case (Supra) has laid down the criteria of entertaining an application under Section 9 but the subsequent event which has been brought to the notice of this Court leads to an irresistible conclusion that respondent has not taken any steps for appointment of the Arbitrator despite having been

requested in writing.

In view of what has been observed above, impugned order is set aside. Appeal is allowed.

It is made clear that bank guarantee noticed above shall not be encashed by the respondent till the Arbitrator enters into reference, thereafter applicant shall be at liberty to seek interim protection by moving appropriate application under Section 17 of 1996 Act.

21.12.2015

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**(AMIT RAWAL)
JUDGE**