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

**CR No.7885 of 2016(O&M)
Date of Decision:09.12.2016**

M/s Jyoti Build Tech Pvt. Ltd

......Petitioner

Versus

Punjab Water Supply and Sewerage Board and others

.....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Sunil Chadha, Sr. Advocate with
Mr. Dheeraj Mahajan, Advocate and
Mr. Chetan Bansal, Advocate
for the petitioner.

Mr. Vijay Kumar Kaushal, Advocate
for respondents No.1 to 5.

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RAJ MOHAN SINGH, J.

[1]. Petitioner seeks issuance of appropriate directions to the Court of Additional District Judge, Amritsar to decide the application (Annexure P-8) filed by the petitioner for interim measure/order and till then, restraint order was sought to be issued against the respondents from withdrawing the bank guarantees of worth Rs.28,95,00,000/-.

[2]. Earlier a Civil Revision No.7333 of 2016 was filed by the petitioner which was disposed of by this Court by passing an order dated 27.10.2016 in the following manner:-

> *"Learned counsel for the petitioner contends that in a petition under Section 9 of the Arbitration and Conciliation Act, 1996 filed by the petitioner, an application for interim relief was also filed. Additional District Judge, Amritsar (Mrs.Preeti Sawhney) has already heard the arguments on interim relief on 26.10.2016 but order has not been pronounced so far. Respondent, on the other hand, has applied for encashment of the bank guarantee without waiting for the decision.*
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> *This revision petition is disposed of with a direction to the Additional District Judge, Amritsar to pass an appropriate order on the application for interim relief by tomorrow i.e. 28.10.2016. In the event of any adverse order against the petitioner, the Court would be at liberty to consider prayer for interim relief for a specified period in order to enable the petitioner to avail further remedies in accordance with law. Till decision on the interim application, the bank guarantee shall not be encashed.*
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> *A copy of this order be given to the learned counsel for the petitioner under the signatures of the Bench Secretary of this Court."*

[3]. Learned counsel for the petitioner contended that the petitioner is a company duly registered under the Companies Act. The project was allotted to the petitioner-Company on

23.12.2011 and the same was to be completed within stipulated period of 21 months. A regular contract/agreement came to be executed on 26.02.2011. Petitioner-Company deposited five bank guarantees in a sum of Rs.20,95,00,000/- + Rs.8,00,00,000/- = Rs.28,95,00,000/- with the respondent. Petitioner attributed certain reasons for not completing the work within stipulated period and time was extended upto 30.06.2014. Though vide letter dated 06.11.2015, respondent terminated the contract and increased the liquidated damages from 4% to 10%, but later on, time to complete the project was again extended upto 30.09.2016. Petitioner-Company could not complete the work, because of the reasons explained by it to the respondent. The contract was terminated by the respondent vide letter dated 03.08.2016 by invoking Clause 63.1 of the Contract Agreement.

[4]. According to the petitioner, the termination was without giving mandatory notice of 14 days before the completion date i.e. 30.09.2016. On 05.10.2016, a final notice of 14 days was served upon the petitioner acknowledging completion of 65% of work physically and 45% financially. Reference to the meeting with the Minister, Local Government, Punjab was made and targets were fixed considering the dead line of completion of project i.e. 31.03.2017 as prayed by the

petitioner-Company. Later on, petitioner-Company was called upon to clear the previous backlog and to achieve the matching progress within 4 days, failing which the petitioner-Company was threatened to be proceeded against in terms of letter dated 03.08.2016.

[5]. Learned counsel for the petitioner further contended that petitioner-Company kept on executing the work on the project even after 09.10.2016 and also kept on making correspondence with respondent No.4 vide letters dated 14.10.2016, 15.10.2016, 17.10.2016 and 18.10.2016. The respondent without terminating the contract after giving final notice dated 05.10.2016, abruptly issued letter dated 24.10.2016, terminating the contract.

[6]. Learned counsel also contended that on coming to know about the aforesaid act of the respondent particularly in terms of proposed encashment of bank guarantees of Rs.28,95,00,000/-, on 25.10.2016, the petitioner-Company filed a petition under Section 9 of the Arbitration and Conciliation Act against the respondents before the Court of District Judge, Amritsar. An application for interim relief was also filed seeking to restrain the respondents from encashing the bank guarantees, from blacklisting the petitioner-Company and from calling fresh tender at its risk and cost. The case was listed

before the Additional District Judge, Amritsar on 26.10.2016 and the arguments were heard on the miscellaneous application, but no order was passed on the application for interim stay. Since the encashment of the bank guarantees was positively threatened, therefore, the petitioner ventured to file aforesaid Civil Revision No.7333 of 2016 in which the order as reproduced in preceding para was passed.

[7]. Learned counsel further contended that the factum of order dated 27.10.2016 passed by this Court was intimated to the banks as well as to the respondents, but the petitioner was informed that the bank guarantees have been released to the account of the respondent on 27.10.2016 itself. When the order dated 27.10.2016 passed by this Court was brought to the notice of the Additional District Judge, Amritsar on 28.10.2016, Additional District Judge, Amritsar passed an order dated 28.10.2016 and issued notices to the respondents before deciding the matter in issue for 15.11.2016 and restrained the respondents till then to get the bank guarantees encashed. But the bank guarantees had already released in the bank account of the respondent.

[8]. Thereafter, petitioner-Company moved an application under Section 151 CPC (Annexure P-8) for issuance of directions to the Executive Engineer-cum-A.P.O, Punjab Water

Supply and Sewerage Board, Amritsar and the concerned banks to transfer the amount of bank guarantees in the account of petitioner-Company in order to preserve the same till passing of the award by the Arbitrator. In alternative, directions were sought against the respondent to keep the amount of bank guarantees intact till the passing of the award by the Arbitrator. On this Application, Additional District Judge, Amritsar passed an order dated 15.11.2016 in the following manner:-

> *"Present:- Sh. Rajiv Sharma, counsel for the petitioner.*
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> *Sh. V.K. Sehgal, Advocate has appeared on behalf of the respondents and filed memo of appearance. The learned counsel for the petitioner has moved an application under Section 151 CPC. Now matter is adjourned to 16.11.2016 in order to ascertain whether the matter in question is triable before this Court or before Commercial Court.*
>
> *(Preeti Sahni),*
> *ADJ 15.11.2016"*

[9]. Thereafter, vide order dated 16.11.2016 passed by Additional District Judge, Amritsar, it was noticed that since the subject matter involves the value more than Rs.1,00,00,000/-, therefore, the case was not to be tried by the Court and the case was sent to the District Judge, Amritsar for further

necessary orders. Parties were directed to appear before the District Judge on 17.11.2016. The case was assigned to different Additional District Judges on transfer.

[10]. Vide order dated 21.11.2016, the Court of Additional District Judge, Amritsar extended the stay granted on 28.10.2016 without adverting to the application (Annexure P-8) filed by the petitioner.

[11]. Now the prayer is to issue directions to the respondent to preserve the amount so transferred in the account of the respondent till disposal of the arbitration proceedings.

[12]. Learned counsel for the petitioner by referring to ***M/s Gangotri Enterprises Ltd. Vs. Union of India and others, 2016(4) Recent Apex Judgements (RAJ) 1, State of Haryana and others Vs. Continental Construction Ltd., 2002(1) SCC 508*** and ***M/s Hindustan Construction Company Limited and another Vs. M/s Satluj Jal Vidyut Nigam Limited, 2006(1) R.A.J. 150*** has pressed for grant of injunction in respect of encashment of bank guarantees.

[13]. The claim of the petitioner has been resisted by the respondents on the ground that petitioner-Company has failed to complete the project within stipulated period despite extension given from time to time. By not completing the project, petitioner-Company has caused huge damages to the

respondent-Board. Liquidated damages to the tune of Rs.160607023/- and recovery of Rs. 12,00,00,000/- towards mobilization advance were claimed to be due as against the bank guarantees furnished by the petitioner-Company.

[14]. Learned counsel for the respondents placed reliance upon sub Clause-47.1 of the Contract in respect of liquidated damages for delay. Respondents were entitled to release liquidated damages by encashing the bank guarantee furnished by the Contractor for performance security. Learned counsel submitted that the petitioner has concealed the material facts from the Court. Work of construction of interceptor sewers, trunk sewers, lateral sewers and house connection from North Zone Sewers, Amritsar was allotted to the petitioner. The date for commencement of work was 12.03.2012. The time limit for completion of work was 21 months i.e. upto 11.12.2013. The work could not be completed by the petitioner-Company within stipulated period and the Company sought extension in time, which was granted upto 30.06.2014.

[15]. Petitioner-Company was repeatedly asked to speed up the work and achieve the target as committed by it in PERT charts in consonance with the terms of the agreement. Respondents asserted that petitioner-Company did not keep its

commitments. Respondents were left with no alternative, but to levy liquidated damages as per contract agreement i.e. Volume 1, Section 2 of General Conditions of Contract and Section 3 of sub Clause 47.1 related to liquidated damages for delay. Liquidated damages were imposed on the petitioner from time to time.

[16]. Even after levying of 4% liquidated damages, the petitioner did not show any progress for completing the work. 56 days notice for termination of agreement and imposition of liquidated damages to the extent of 10% was issued. After expiry of the period, 10% liquidated damages were imposed as per terms of the agreement. The contract was terminated on 03.08.2016. Petitioner-Company submitted letter dated 09.11.2015 with a promise to complete the work by 30.09.2016. Petitioner-Company could not complete the work.

[17]. According to the respondents, loss of Rs.1.07 crore (Approximately) was caused for re-construction of road of Verka crossing. Learned counsel further contended that due to delay in completion of work, PMC contract has to be extended, for which additional expenses were borne by the respondent. JICA loan agreements of IDP-186 has to be extended for further two years and for this, additional interest of 0.2% has to be borne by the respondent. Thereafter, on the request of the

petitioner, a meeting was called and it was decided that the petitioner-Company will adhere to the target, but still nothing was done by the petitioner even after giving a written assurance to the respondent.

[18]. Both the parties have tried to dispel the impressions against each other. Learned counsel for the petitioner submitted that the orders passed by the respondent from time to time in the context of imposing liquidated damages were stayed by the competent authority. According to learned counsel for the petitioner, an attempt has been made by the respondent to forge the documents. Reference has been made to Annexure P-3 which was issued vide endorsement No.1753 dated 24.10.2016 to the Bank Manager. No such diary/reference number was found in the dispatch register maintained by the respondents wherein endorsements from 1751 to 1758 were found in the context of communication issued to CEO.

[19]. After hearing learned counsel for both the parties, this Court does not feel like to appreciate the controversy on merits at this stage. On the one hand, learned counsel for the petitioner made stress upon encashment of bank guarantees to the tune of Rs.29,00,00,000/- by the respondents. On the other hand, learned counsel for the respondents vehemently

submitted that the petitioner-Company is liable to pay liquidated damages to the tune of Rs.160607023/- and mobilization advance to the tune of Rs.12,00,00,000/-. Allegations and counter allegations have been made against each other, which according to this Court cannot be a subject matter and scope of present revision petition. Without expressing anything on merits, I am of the considered view that since the matter is pending before the Additional District Judge, Amritsar for 22.12.2016, therefore, it would be appropriate to direct the Additional District Judge, Amritsar to decide the application (Annexure P-8) filed by the petitioner in accordance with law. Nothing expressed hereinabove shall be construed to be any opinion on merits of the case. Court of Additional District Judge, Amritsar shall appreciate the controversy without being influenced by any statement of fact given by either side hereinabove. Since both the parties have strongly projected their claims, therefore, matter is relegated to the Courts below where the same is already pending. However, the trial Court would be at liberty to pass an appropriate order at appropriate stage after assessing the evidence led by both the parties in accordance with law.

[20]. In view of aforesaid, this revision petition is disposed of with a direction to Additional District Judge, Amritsar to

decide the pending application Annexure P-8 (attached with the present revision petition) in accordance with law.

09.12.2016 **(RAJ MOHAN SINGH)**

Prince **JUDGE**

Whether Reasoned/Speaking **Yes/No**

Whether Reportable **Yes/No**