292

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-4394-2016 (O&M)
Date of decision : 22nd .08.2016

Patel Engineering Limited

... Appellant

Versus

NHPL Limited

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Karan Bharioke, Advocate for
Mr. Vaibhav Narang, Advocate
for the appellant.

Mr. Aman Arora, Advocate
for the respondent.

****

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

AMIT RAWAL, J. (ORAL)

The appellant is aggrieved of the impugned order dated 13.07.2016, whereby its sought indulgence of the Principal Court by invoking the provisions of Section 9 (ii) (b) and (e) of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the 1996 Act') for issuance of the direction to the respondent to deposit the awarded amount of compensation along with interest or release of the same subject to furnishing of the security/bank guarantee to the satisfaction of the Court below while releasing the amount of awarded compensation.

Mr. Karan Bharioke, learned counsel appearing on behalf of the appellant submits that in the month of December 2002, the respondent-

Company invited the bid for civil works (Lot TL-1), Division Works, Barrage and Spillways, Intake, Penstocks, surface Power House, Tail Channel, Plant Head Yard and other associated civil works at Teesta Low Dam H.R. (Project, Stage-III) 132 mw (4x33mw), West Bengal, India. The appellant along with other bidders participated in the tender and ultimately the tender of the appellant was accepted and the agreement dated 29.11.2003 was executed between the parties. The original contractual period was upto 45 months from the date of the notification of the work and two months' time had been stipulated for mobilization and 12 months defect liability period was fixed. Though the agreement also stipulated the extension of time. Clause 38 of the agreement provided for settlement of the dispute. Various reasons had occurred. It has further been submitted that appellant engaged sub-contractor with full concurrence and approval of the respondent. The appellant had executed the work, but there were various differences and disputes. Many meetings were held and ultimately the dispute was not resolved and the matter was referred to the Arbitrator Tribunal. The Arbitrator Tribunal, on the basis of the material placed on record, passed the award on 22.04.2016 in favour of the appellant and supplementary award as per the provisions of Section 3 of the 1996 Act was passed on 13.06.2016. The respondent till date has not chosen to file the objections under Section 34 of the 1996 Act. The appellant-Company is an Expert in construction of dams and there are pre-requisite/conditions for submitting tender works i.e. few of them are “Net Worth” and “List of Completed Projects”. In case awarded amount is not ordered to be released subject to any terms and conditions, the appellant would suffer irreparable loss and balance of convenience lies in their favour. The respondent had been instrumental in delaying the proceedings before the Arbitrator as the reference was sought in July 2007 and Award came to be passed in 2016 amounting to ₹ 1,08,70,73,697/- along with interest @ 12%. In case the amount is not release, it was seriously effect in fetching the future tenders, in essence, would have a serious impact on many other aspects.

He further submits that it would not only hamper the business of the appellant and all concerned employees, but would also be a prejudicial to the interest of the respondent as it is the responsibility of Government Organisation to deposit the amount at the earliest in order to avoid unnecessarily burden of huge interest. The provisions of Section 9 of the 1996 Act envisage three situations i.e. "before", "during", the arbitration proceedings or at any time "after" making of the arbitral award, but before it is enforced in accordance with Section 36 of the 1996 Act. The granting of interest would not be sufficient in mitigating the loss and sufferance rather provided an opportunity to the appellant to bring the work for the company and as well as to the workers, much less, it would facilitate the improvement of the financial condition of the appellant so as to fetch other work/tenders. Since, the act and conduct of the respondent in adopting delaying tactic evident that from entering into reference till the passing of the Award and till date, they have also chosen not to file the objections and as per the stand taken before the Principal Court seeking interim protection, they were audacious enough to come out with the plea that the last date of filing the objections is 03.09.2016.

He submits that the respondents cannot take the benefit of Section 36 of the 1996 Act. In support of his contentions, he relies upon the ratio decidendi culled out by this Court in ***"Fornax Real Estate Limited,***

E29, 1st Floor, Connaught Place, New Delhi V/s M/s Chandigarh Spun Pipe Company, Chandigarh and others" 2015 (4) LAR, 277, to contend that this Court had an occasion while relying upon the judgments rendered by the Hon'ble Supreme Court in ***"National Aluminium Company Ltd. V/s Pressteel & Fabrications (P) Ltd. and another" (2004) 1 SCC 540*** and ***"National Buildings Constriction Corporation Ltd. V/s Lloyds Insulation India Ltd." (2005) 2 SCC 367*** ordered interim relief. He further submits that the provisions of Section 9 deal with the interim measures/reliefs which should be kept in view while granting such relief, thus, urges this Court for appropriate direction to the respondent to release the amount of awarded compensation along with interest as the appellant is willing to furnish the bank guarantee of equal amount i.e. awarded amount along with interest @ 12% valid for a period of one year.

Per contra, Mr. Aman Arora, learned counsel appearing on behalf of the respondent submits that the appellant has not able to point any circumstances which are *sine qua* for intervention by invoking the provisions of Section 9 of the 1996 Act as sought to be demonstrated. The respondent-Corporation is a coveted Corporation which is one of the prime Corporations of the country and has sufficient funds at its disposal. The ordering for a bank guarantee would tantamount to taking a loan from the Corporation. In case, such order is passed, it will open the doors for all the Contractors. There are notable points in the so-called contemplated objections and there are every chances of objections being accepted. In support of his contentions, he relies upon the judgment of Hon'ble High Court in ***"M/s Global Company V/s M/s National Fertilizers Ltd." 1998 (3) RCR (Civil) 559***, to contend that there has to be certain circumstances enabling the Court to form an opinion that the respondent is attempting to defeat/delay or obstruct the execution of the Award. Until and unless those ingredients are not made out, the interim relief as sought to be invoked under Section 9 (ii) (b) cannot be granted and prays for dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and substance in the submission of Mr. Karan Bharioke. For the sake of brevity, the provisions of Sections 9 and 36 of the 1996 Act reads thus:-

> ***"9. Interim measures, etc. by Court****.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*
>
> *(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or*
>
> *(ii) for an interim measure of protection in respect of any of the following matters, namely:—*
>
> *(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
>
> *(b) securing the amount in dispute in the arbitration;*
>
> *(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
>
> *(d) interim injunction or the appointment of a receiver;*
>
> *(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall*

> *have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*
>
> ***36. Enforcement***.*—Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.*

On juxtaposition of the aforementioned provisions, it is crystal clear that the provisions of Section 9 are *pari materia* to the provisions under Order 39 Rule 1 & 2 CPC as it envisages the situation even after passing of the award and in fact sub-Section 1 of Section 37 of the Specific Relief Act also provides for grant of temporary injunction which is regulated by the Court. The ratio decidendi culled out in the judgments of the Hon'ble Supreme Court in ***National Aluminium Company Ltd.'s case*** (supra) and ***National Buildings Constriction Corporation Ltd.'s case*** (supra) did not envisage the provisions as contemplated by the legislature under Section 9 (ii) (b) and (e) of the 1996 Act and in fact it only dealt with the enforcement and execution of the Award, during the pendency of the objections under Section 34 of the 1996 Act i.e. provisions of Section 36. In the instant case, the respondent has has not chosen to file the objections. The Section 36 of the 1996 Act cannot be pressed at this stage and the Award would remain unenforceable till the objections under Section 34 of the 1996 Act are with humility, there is no reference or discussion viz-a-viz the power of the Court while invoking the provisions of Section 9 of the 1996 Act in the judgments i.e. ***National Aluminium Company Ltd.'s case*** (supra) and ***National Buildings Constriction Corporation Ltd.'s case*** (supra).

The aforementioned view of mine is fortified from the judgment rendered by this Court in ***Fornax Real Estate Limited's case*** (supra), which was based on the basis of the ratio decidendi culled out by the Division Bench judgment of Hon'ble Andhra Pradesh High Court rendered in ***"I. Sudershan Rao and others V/s Evershine Builders Private Ltd. Mumbai and another" 2013 (2) Arbi LR 52***.

The aforementioned findings of Hon'ble Andhra Pradesh High Court were challenged in the Hon'ble Supreme Court of India vide SLP(C) No.31464 of 2012 and vide order dated 14.07.2014, the same was dismissed as withdrawn.

I do not subscribe to the view of Mr. Aman Arora that the appellant has not been able to point out any intention which is *sine qua non* for ordering of the bank guarantee for the reasons that for procuring a contract of a building a dam, certain amount of qualifications as noticed above are required for which financial worth of company is pre-requisite for the purpose of awarding the contract. Dehors of fact that the respondent has sufficient means to discharge the liability.

Since, the appellant-Company has an Expertise in construction of dams and there are pre-requisite and requirements/qualifications for submitting the tender i.e. net worth and etc. as noticed above, in my view, in case the aforementioned awarded amount is ordered to be released to the appellant, it would not be adverse to the interest of the respondent as it would help them in saving the element of interest incurring day-to-day, when the appellant has offered to furnish the bank guarantee to the equal amount (awarded). Furnishing of bank guarantee is equal to the liquid cash.

The aforesaid observation of mine is being kept in view, in case the objections are dismissed, the respondent would be saved of the element of interest as the Court consumes a lot of time in deciding the objections and also envisaged as other situation that in case the respondent succeed in the objections, they will be entitled to encash their amount along with interest and further in case, the objections are not decided within a period of operation of the bank guarantee, an order can be obtained for extension of the same. All these factors have not been noticed by the Court below while declining the grant of the relief as sought.

For the foregoing reasons, the impugned order under challenge is set aside. The application at the instance of the appellant seeking interim relief by invoking the provisions of Section 9 (ii) (b) and (e) of the 1996 Act is hereby allowed. The respondent-Company is directed to release the amount along with interest till its realization subject to furnishing of bank guarantee by the appellant equal to the awarded amount for a period of one year. In case the objections purported or intended to be filed by the respondent are not decided during the duration of bank guarantee, the appellant are directed to extend the bank guarantee till the decision of the objections.

With the aforesaid observations, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

22nd .08.2016
yogesh

Whether speaking/reasoned **Yes/ No** ✓

Whether Reportable **Yes/ No**