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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 302/2016

JITF WATER INFRASTRUCTURE LTD ..... Petitioner

Through: Mr A S Chandhiok, Senior Advocate, Ms Sharmila Upadhyay, Mr Rajesh Chhetri, Mr Rajeev Chhetri, Ms Meenakshi Rawat, & Mr Akash Tyagi, Advs.

versus

NTPC LTD. ..... Respondent

Through: Mr Puneet Taneja and Ms Shaheen, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **19.07.2016**

IA No.8391/2016

Allowed, subject to all just exceptions.

The application is disposed of.

O.M.P.(I) (COMM.) 302/2016

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter as 'the Act') *inter alia* praying as under:-

> "(i) pending proceeding before the Adjudicator/ Arbitrator and final disposal of the Adjudication/Arbitral Proceeding and for a period of four weeks thereafter, to restrain the respondent from invoking the Performance Bank Guarantees and Advance Bank Guarantee, as detailed in para 08 and referred in Annexure 4 of the petition; and/or
> (ii) pending proceeding before Adjudicator/Arbitrator and final disposal of the Adjudication/Arbitral Proceeding and for a period of 4 weeks thereafter,

> restrained (sic) the respondent from its act of terminating the contract and carrying out the work at the risk and cost of the petitioner; and/ or".

2. The Respondent invited tenders on 18.09.2013 for awarding a contract for the following scope of work:-

> "The scope of work includes Design, Engineering, Manufacture/ Fabrication, Application of External Anti-Corrosion Coating of Pipes (as applicable), Testing (at shop and site), Inspection, Packaging, Supply, Transportation to Gadarwara Site, Storage, Transportation to Work Sites, Laying, Erection, all Associated Civil Works, Testing, Commissioning and Annual Maintenance Contract (as applicable) of 3LPEcoated Mild Steel Pipes or Glass Fibre Reinforced Plastics Pipes or Ductile Iron Pipes for Make-up Water Piping Package including supply of Mandatory Spares as per the specifications and scope defined in the Bidding Documents."

3. The Petitioner participated in the bidding process pursuant to the aforesaid invitation to tender and was declared successful; and, consequently, was awarded the contract by two Letters of Award dated 21.01.2014 bearing No. CS-9572-132D-2-FC-NOA-6075 and CS-9572-132D-2-SC-NOA-6076 for a sum of ₹47,35,85,976/- and ₹19,54,71,681/- respectively. The former was for supply of GRP and MS Pipes and latter was for laying the pipelines. Subsequently, two contracts were executed between the parties on 04.02.2014. The first contract related to the design engineering, manufacturing/fabrication, assembly, inspection and testing at manufacturer's works and the second contract was for transportation from manufacturer's work place of dispatch (both in India)

to site, Inland Transit Insurance, Delivery at Site, Receipt, Unloading, Handling, Storage and in-plant Transportation at site, Insurance covers other than Inland Transit Insurance, Installation, Testing and Commissioning, Annual Maintenance Contract for putting the plant in operation. The total cost of the project was ₹66.90 Crores. Out of which, supply cost was ₹ 47.35 Crores and erection cost was ₹19.54 Crores.

4. In terms of the General Conditions of the Contract, the Petitioner submitted two Bank Guarantees which are stated to be in the nature of Performance Bank Guarantees (hereinafter referred to as 'BG'); being BG bearing No.140127IBGP00123 dated 18.02.2014 for ₹4,73,58,598/- and BG bearing No.140127IBGP00122 of even date i.e. 18.02.2014 for ₹1,95,47,168/-. The term of both the BGs extends till 17.03.2018.

5. It is the case of the Petitioner that due to impasse qua the acquisition of Right of Way (ROW) and aggressive nature of farmers, whose lands were being acquired, the contract for laying the pipelines was not immediately feasible and was inordinately delayed. The Petitioner had to complete the project within a period of 28 months but the project could not be completed within time frame fixed. According to the Petitioner, this was so because certain clearances could not be obtained. In the aforesaid circumstances, the Petitioner sought extension of time for completion of the contract and the Respondent by letter dated 08.06.2016 extended the period of performance of the contract upto 20.05.2017. Vide the aforementioned letter, the Respondent also called upon the Petitioner to arrange for the completion of supply, erection work and commissioning activity within the stipulated time.

6. It is also the case of the Petitioner that the delay in acquisition of ROW by the Respondent and the consequent delay in commencement of the contract rendered the prices offered by the Petitioner for supply of the pipes "unviable". It is also averred that the Petitioner had tendered for supply of the pipes in question based on the original schedule and the prices of the pipes had subsequently increased. It is also stated that first lot of pipes procured by the Petitioner were of much higher price than that which was envisaged at the time of bidding for the Contract. After exchanging certain correspondence, the Petitioner sought for reference of the disputes to the adjudicator for the resolution in terms of the clause 6.1.1 of the General Conditions of the Contract, which is stated to be pending.

7. Mr Chandhiok, learned senior counsel appearing for the Petitioner referred to Clause 10.2 of the General Conditions of the Contract and on its strength contended that the Respondent was responsible for acquiring and providing legal and physical possession of the site and access thereto and also for providing possession of and access to all other areas reasonably required for proper execution of the Contract. He submitted that the Respondent was unable to provide the required access for the reasons stated in the petition.

8. He further referred to the letter dated 18.03.2016 wherein the Respondent had informed the Petitioner that they had received the permission for laying of the pipeline on government land from District Collector, Narsinghpur vide letter dated 14.03.2016. He submitted that in the aforesaid circumstances, the invocation of the BGs by the Respondent would be wholly unjustified and unwarranted. According to him, the delay

in providing clearances and ROW coupled with unprecedented increase in prices of Pipes, gave rise to special equities in favour of the Petitioner and, therefore, this is a fit case for restraining the Respondent from encashment of the said BGs.

9. Mr Puneet Taneja, learned counsel for the Respondent appearing on advance notice has countered the arguments advanced by Mr. Chandhiok. He submitted that it is well established that BG is an independent contract and encashment thereof cannot be restrained on account of any dispute or controversy in relation to the underlying contract.

10. Next, he referred to the letter dated 14.06.2016 issued by the Respondent which indicates that although there may have been some delay in acquiring the land on the part of the Respondent, the same did not impede the Petitioner from completing the supply contract. The Respondent further claimed that it had completed all obligations in respect of the settled contract and the demand of the Petitioner for additional price was wholly unjustified.

11. He further submitted that the Respondent had extended all assistance in carrying out the survey and the delays on that count were on the part of the Petitioner.

12. I have heard learned counsels for the parties.

13. The law relating to injuncting encashment of BGs is well established. In ***Svenska Handelsbanken v. Indian Charge Chrome and Others***: **(1994) 1 SCC 502**, the Supreme Court had clearly held that a BG/irrevocable letter of credit cannot be interfered with unless fraud is established and

irretrievable injustice is involved. The aforesaid decision has been consistently followed by the Courts thereafter. In ***<u>Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others</u>***: **(1995) 6 SCC 68**, the Supreme Court referred to the earlier decision in ***Svenska Handelsbanken*** (*supra*) and held as under:-

> "5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in United Commercial Bank v Bank of India [1981] 3SCR 300, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd. [1988] 1 SCR 1124, General Electric Technical Services Co. Inc v Punj Sons (P) Ltd. [1991] 3SCR 412 and the decision of the Court of Appeal in England in Elian and Rabbath v Matsas and Matsas [1966] 2 Lloyd's Report 495 and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome AIR 1994 SC 626, laid down the law thus:
>
> "...in case of confirmed bank guarantee/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...
>
> ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

14. In ***U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.***: **(1988) 1 SCC 174**, the Supreme Court had clarified that:

> "The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

15. In view of the above principles and on a bare perusal of the averments made in the petition, I am unable to accept that any of the grounds for restraining encashment of the bank guarantees/letters of credit has been made out. The Petitioner has not made out a case of fraud affecting the underlying contract between the parties and as held in ***Larsen & Toubro*** (*supra*), mere special equities in the form of irretrievable injustice would be of no consequence in absence of a *prima facie* case of established fraud.

16. Accordingly, the petition is dismissed.

VIBHU BAKHRU, J

JULY 19, 2016
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