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

Date of Decision : 28h January, 2016.

\+ **FAO(OS) 351/2015 and C.M.Nos.11717-11719/2015**

GAIL (INDIA) LIMITED

..... Appellant

Through: Mr.Sanjay Jain, ASG with Ms.Abhisaar Bairagi, Ms.Ruchi Jain and Mr.Shreshth Jain, Advocates.

versus

M/S AMKV-TECPRO

..... Respondent

Through: Mr.Sanjeev Sindhwani, Sr. Advocate with Mr.

AND

\+ **FAO(OS) 353/2015 and C.M.Nos.11727-11729/2015**

GAIL (INDIA) LIMITED

..... Appellant

Through: Mr.Sanjay Jain, ASG with Ms.Abhisaar Bairagi, Ms.Ruchi Jain and Mr.Shreshth Jain, Advocates.

versus

M/S AMKV-TECPRO

..... Respondent

Through: Mr.Sanjeev Sindhwani, Sr. Advocate with Mr.Ankit Sibbal, Mr.Ankur Gupta and Mr.Raunaq Bapra, Advocates with Mr.Jose P.Philip, CEO of the respondent in person.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J (ORAL)

C.M.No.117189/2015 (Exemption)
C.M.No.11728/2015 (Exemption)

Exemption granted, subject to all just exceptions.

Applications stand disposed of.

FAO(OS) 351/2015 and C.M.Nos.11717 (stay) & 11719/2015 (delay)
FAO(OS) 353/2015 and C.M.Nos.11727 (stay) & 11729/2015 (delay)

1. The appellant before us assails the order dated 30th January, 2015 passed in OMP 45/2014 and 151/2015. These were two petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) by the respondent.

2. We note hereunder briefly the admitted facts:

3. Pursuant to an e-Tender dated 20.06.2011 inviting bids (page 49), M/S AMKV-TECPRO, a consortium of TECPRO Systems Ltd., the respondent herein, submitted two bids one for Section-I and another for Section-II which were accepted by the appellant at the contracted price of Rs.89,82,69650/- and Rs.68,97,37,075/- respectively. In terms of clause-37 of the Instructions to Bidders read with clause-11 of the Special Conditions of Contract ('SCC') and Clause-24 of the General Conditions of Contract ('GCC'), the respondent was required to furnish performance bank guarantee being 10% of the contract price within 15 days of the receipt of

the approving the same which was to be valid till expiry of 90 days of after the end of the defect liability period. In terms of Clause-26 of the SCC, the respondent was additionally required to furnish advance bank guarantee being 11% of the contract price which were also to be kept alive for the same period. Thus, it was an integral part of the term of the contract between the parties that the performance bank guarantee and the advance bank guarantee were to be kept alive and valid for the entire duration of the contract till the expiry of the defect liability period.

4. It is undisputed that the respondent furnished the following guarantees:-

ADVANCE BANK GUARANTEE with IDBI BANK LTD CHENNAI

Sl.No.	**BG No.**	**Expiry Date**	**Amt(Rs)**	**Section**
1	1203801BGA00136	13.05.2015	49404721.00	I
2	1203801BGA00137	13.05.2015	49404721.00	I
3	1203801BGA00138	13.05.2015	37935539.00	II
4	1203801BGA00139	13.05.2015	37935539.00	II

PERFORMANCE BANK GUARANTEE with AXIS BANK CHENNAI

Sl.No.	**BG No.**	**Expiry Date**	**Amt(Rs)**	**Section**
1	11650100001747	31.07.2015	89826765.00	I
2	11650100001748	31.07.2015	68973708.00	II

5. It is also admitted position that the appellant released mobilization advance to the respondent on 20th July, 2012 (equivalent to the 5% of the contract price) and 16th October, 2012 (equivalent to the remaining 5% of

the contract). Disputes arose between the parties with regard to the reasons for inability of the respondent herein to complete the contracted work as per the schedule fixed. The respondent has contended that it was unable to do so for the reason that the appellant was unable to acquire the right of user (ROU) over the entire land to which the entire pipeline was to be installed. There is a dispute with regard to the extent of the acquisition and the measurement of the land which was made available to the respondent for executing the contract. The parties are also disputing with regard to the extent of the work actually undertaken by the respondent. The respondent has complained that the land owners assailed the acquisition proceedings initiated by the appellant by way of legal proceedings including a writ petition in the High Court of Kerala, resulting in passing of interim order dated 13th February, 2013 directing maintenance status quo.

6. The respondent has also made a grievance that its workforce was beaten up by mobs and activists claiming to safeguard the interests of the landowners. A direction by the Government of Kerala requiring enhancement of compensation and re-routing of pipeline have also been contended by the respondent leading to alteration of the scope of the contracted work. The respondent had thus pleaded justification for seeking

extension of time for execution of the contracted work.

7. Apprehending the encashment of the performance and advance bank guarantees, the respondent had invoked the arbitration clause between the parties and also filed OMP Nos.145/2014 & 151/2015 under Section 9 of the Arbitration and Conciliation Act, 1996, seeking interim prohibition against the encashment of the bank guarantees by the appellant. By an ex parte ad interim order dated 4th February, 2014, the learned Single Judge directed stay of the encashment of the bank guarantees subject to the respondent keeping the bank guarantees alive.

8. The material term of the contract which weighed with the learned Single Judge in passing the impugned order is Clause 28.1 of the SCC whereby the appellant had made a categorical assertion that it had acquired right of use (ROU) free of any encroachments/temporary/permanent structures over the entire land required for execution of the contract under Petroleum & Mineral Pipelines Act in general.

9. After examination of the rival contentions, the learned Single Judge accepted the case of the respondent and concluded that the encashment of the advance bank guarantees would cause irretrievable injustice to the respondent, inasmuch as it had made claims against the appellant with

regard to the work done by it. So far as the performance bank guarantees were concerned, the learned Single Judge was prima facie of the view that inasmuch as the respondent had executed the work and utilized the mobilization advance, injustice would enure to the respondent if the performance guarantees were permitted to be encashed. The appellant was disputing this position. However, the Court was of the prima facie view that delay by the respondent was unreasonable and unfounded, disentitling it from invoking the bank guarantees.

10. After detailed consideration, by a composite order dated 30th January, 2015, the learned Single Judge allowed both the petitions in terms of the interim order dated 4th February, 2014 maintaining the prohibition against the encashment of the guarantees and directing that the same would continue during the pendency of the arbitral proceedings subject to the respondent keeping the performance bank guarantees and advance bank guarantees alive. Aggrieved thereby, as noted above, the appellant has assailed the said order which was passed by the learned Single Judge contending that there were no equities in favour of the respondent and that the basic requirement for grant of interim relief with regard to the issue of bank guarantees, that is, irretrievable injustice which could enure to the person apprehending

encashment of a bank guarantee, must be established before the injunction could be issued. The appellant submitted that this is not established in the present case. It is further contended by Mr.Sanjay Jain, learned senior counsel appearing for the appellant that no case for fraud has either been pleaded or as required by law, has been made out, by the respondent and that it was also not the respondent's case that the invocation of the bank guarantees was not in terms stipulated under the contract.

11. Before we could examine the contentions of the parties on merits, it is submitted by Mr.Sanjeev Sindhwani, learned senior counsel appearing for the respondent on instructions from Mr.Ankur Gupta, Advocate that the learned Single Judge had passed the conditional order of injunction in favour of the respondent and that it was an integral part of the order that the respondent was required to keep the performance bank guarantees and advance bank guarantees alive during the pendency of the arbitral proceedings. It is submitted that the respondent had obtained advance bank guarantees from its banker IDBI Bank, Chennai. However, the respondent's account with this Bank was declared as a non-performing asset (NPA) by the Bank, which had thus refused to extend the advance bank guarantees which had been issued by it. It is submitted by Mr.Sanjeev Sindhwani,

learned senior counsel for the respondent that the respondent made best efforts to obtain extension and renewal of these bank guarantees and had repeatedly written to its banker to do so. He also submits that inasmuch as the IDBI Bank refused to extend the bank guarantees on requests by the respondent, the appellant was called upon to make such request to IDBI Bank. According to learned senior counsel, despite best efforts, the respondent was unable to ensure compliance with the condition of the order dated 30th January, 2015 so far as the advance bank guarantees were concerned. It is submitted by Mr.Sanjeev Sindhwani on instructions from Mr.Ankur Gupta that the performance bank guarantees with the Axis Bank stand renewed and are valid till 31st July, 2016, however, without prejudice to the rights and contentions of the respondent in the arbitral proceedings, the respondent would have no objection to the encashment thereof by the appellant's Bank.

12. We are informed that Mr.Ankur Gupta, counsel for the appellant has been instructed by Mr.Jose P.Philip, CEO of the respondent JV company, who is also present in Court today. This submission is confirmed by Mr. Jose P. Phillip, CEO of the respondent present in Court.

13. Mr.Sanjay Jain, learned Addl. Solicitor General has strongly

contested the submission made on behalf of the respondent with regard to the non-extension of the advance bank guarantees and contends that the request made to the appellant to get the same extended was misconceived and not bona fide. Be that as it may, we accept the statement made by learned senior counsel for the respondent that the advance bank guarantees have not been extended and leave it to the appellant to seek appropriate remedy and relief for the amounts thereof. We also refrain from commenting on the explanation tendered on behalf of the respondent regarding non-extension thereof. So far as the performance bank guarantees are concerned, in view of the statement made on behalf of the respondent, this Court is not called upon to adjudicate upon the merits of the contentions of the appellant so far as order dated 30th January, 2015 is concerned. We accept the statement made by learned senior counsel for the respondent so far as performance bank guarantees are concerned.

14. Mr.Sanjay Jain, learned senior counsel for the appellant submits that the performance bank guarantees issued by the Axis Bank, Chennai were invoked by the appellant by the letter dated 04.02.2014. Accordingly, the impugned order dated 30th January, 2015 is hereby set aside and quashed. The appellant shall be held entitled to invoke the same and shall be at liberty

to take appropriate remedy *qua* the advanced performance guarantee. A direction is issued to the Axis Bank that upon receipt of letter of invocation from the appellant, it shall forthwith transmit the amount of the performance bank guarantees detailed above.

15. The appeals and the applications stand disposed of in the above terms. *Dasti* to the parties.

GITA MITTAL
(JUDGE)

I.S.MEHTA
(JUDGE)

JANUARY 28, 2016
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