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

\+ **<u>O.M.P.(I) (COMM.) 364/2016</u>**

TECHNOFAB ENGINEERING LTD. ..... Petitioner

Through : Mr S.D. Singh, Mr Rahul Kr Singh, Ms Kamla Prasad, Mr Jitender Singh, Advocates.

versus

BHARAT HEAVY ELECTRICALS LTD(BHEL) & ORS. ..... Respondents

Through : Mr J.C. Seth and Mr Udit Sethi, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **06.10.2016**

<u>VIBHU BAKHRU, J</u>

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that Bharat Heavy Electricals Limited (hereafter 'BHEL') be restrained from taking any action whatsoever in respect of the 4 Performance Bank Guarantees (hereafter PBGs). The said PBGS were furnished by the petitioner to the BHEL in connection with the contracts awarded by BHEL to the petitioner for execution of works, which are described as "Main Supply & Erection, Commissioning, Hydro testing and Handing over of Misc. Tanks (Site Fabricated) for 2 x 270 MW Matrishi Usha Jayaswal TPP, Phase-I, AINL, Latehar, Jharkhand" and "Main supply & Erection, commissioning, hydro testing and handing over of Misc. Tanks

(site fabricated) for 2 x 270 MW Matrishi Usha Jayaswal TPP, Phase II,". These works were to be executed by the petitioner on behalf of BHEL.

2. The Petitioner was awarded four Letter of Awards (LOAs). The details of which are as under:-

(a) Letter of Award (LOA, in short) dated 07.05.2011 for Main Suply of Misc. Tanks (Site Fabricated) for 2x270 MW Matrishi Usha Jayaswal TPP-Phase-I;

(b) LOA dated 07.05.2011 for Erection, Commissioning and Handing over of Misc. Tanks(Site Fabricated) for 2x270 W Matrishi Usha Jayaswal TP-Phase-I;

(c) LOA dated 07.05.2011 for Main Supply of Misc. Tanks (Site Fabricated) for 2x270 MW Matrishi Usha Jayaswal TPP-Phase-II;

(d) LOA dated 07.05.2011 for Erection, Commissioning and Handing over of Misc. Tanks(Site Fabricated) for 2x270 MW Matrishi Usha Jayaswal TPP-Phase-II.

3. The value of the works to be performed under the LOA's for Phase –I were ₹67,59,618.51 and ₹21,81,603.29 respectively and the works to be performed under LOA's for Phase-II were also of similar amounts - ₹67,59,618.51 and ₹21,81,603.29; thus, the contracts in question were to be executed in two phases of equal value.

4. The petitioner successfully completed Phase-I of the contracts and handed over the project to BHEL within the stipulated time. This fact is not disputed by BHEL. The petitioner states that when it was in the final stages of completing of Phase-II of the contracts - in March, 2003 - BHEL advised

the petitioner to stop further work without assigning any reason. There is some controversy as to the works that remained to be executed by the petitioner; the petitioner asserts that only painting work on minor value remained but BHEL states that there were other items of work as well. However there is no dispute that BHEL had asked the petitioner to stop the works.

5. BHEL states that it had directed stoppage of work due to unforeseen circumstances created by Abhijeet Infra Ltd. (hereafter 'the Owner'). It is stated that the works awarded to the petitioner were a part of a contract being executed by BHEL for the Owner. The owner had run into financial difficulty and therefore was unable to make the payments due to BHEL. Consequently, the execution of the work had to be stopped.

6. The petitioner is a sub-contractor of BHEL and was executing the works on the basis of LOA's awarded by BHEL. It is also clear that BHEL has no claim against the petitioner regarding performance of the works. Mr. Abdul Razak, Senior Executive (Law), who was present in court in compliance of the order 27.09.2016, was pointedly asked whether there were any claims or possibility of any claims against the petitioner in respect of their performance and he responded in the negative. He however, stated that the final bill was to be prepared and the amount payable to the petitioner would be finalised only on verifying the same.

7. It is admitted that it is at the instance of BHEL that the petitioner had to stop the work. Over three years have now elapsed since the work was directed to be stopped and yet the petitioner has had to keep the PBGs alive.

Even at this stage, there is no reason provided by BHEL for insisting on keeping the PBGs alive, except to state that the Petitioner has not submitted its final bill for the work done. It is clear that if at all any sum is payable, the same is payable by BHEL to the petitioner and not *vice versa*. There is no allegation that the petitioner has defaulted in any manner. In the circumstances, the demand of BHEL to keep the PBGs alive is wholly unsustainable.

8. Mr. Seth, the learned counsel appearing for BHEL has taken a preliminary objection regarding jurisdiction of this Court to entertain the present petition. He referred to the provisions of Sections 2 (1) (i) of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 (hereafter 'the CCA') and submitted that in terms of the aforesaid provision, suits of a value of less than Rupees one crore could not be entertained by the Commercial Division. He submitted that since commercial value of the present petition was only ₹17,88,244.14, it was below the specified value and therefore the petitioner should be relegated to the court having the pecuniary jurisdiction over the subject matter of the disputes. He also relied upon the decision of this Court in ***Futecht Project (India) Pvt. Ltd. v. Abott Healthcare Pvt. Ltd. & Anr.*** **(2016) 155 DRJ 474** and on the strength of the said decision submitted that a decree passed by a court without jurisdiction would be a nullity.

9. Mr Seth further submitted that the PBGs are required to be kept alive because BHEL is also likely to suffer losses because of the financial distress of the Owner.

10. Mr. Singh, the learned counsel appearing for the petitioner countered the aforesaid submissions and submitted that Section 2(1)(i) of CCA referred to by the learned counsel for the BHEL was only applicable to suits. He further also referred to Section 12(2) of the CCA and submitted that the specified value in matters relating to arbitration would be the aggregate value of the statement of claim and counter claim if any. He also referred to Section 2(1)(e) of the Act, which expressly defines 'court' to be the principal Civil Court of original jurisdiction in a district, including the High Court exercising original jurisdiction, having jurisdiction to decide the questions forming the subject matter of or arbitration if the same had been the subject matter of suit. He submitted that in the present case the aggregate value of works was ₹17,88,244.14. And, the claims of the petitioner in arbitration including damages - which are being calculated - would exceed Rupees one crore. Therefore, the contention advanced that this court does not have jurisdiction is without merit.

11. I have heard learned counsel for the parties.

12. The contention that this court does not have jurisdiction to entertain the present petition is, in my view, without merit. The petitioner has asserted that the value of its claims in arbitration would exceed Rupees one crore and there is no reason to disbelieve the same. Section 9 of the Act only enables a party to approach the courts for interim measures and the value of the PBGs cannot be equated to the value of the dispute in arbitration.

13. Section 12(2) of the CCA reads as under:

> "12(2) The aggregate value of the claim and counter-claim,

> if any, as set out in the statement of claim and the counter-claim, if any, in an arbitration of a commercial dispute shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be."

14. In view of the above, the question whether the "specified value" in relation to a commercial dispute - as defined under Section 2(1)(i) of the CCA – in an arbitration matter has to be ascertained in terms of Section 12(2) of the CCA. And, that includes the value of the claims and counter claims. The contention that only the value of the PBGs (which are subject matter of interim measures) should be taken as the value of the disputes in arbitration is wholly unsustainable.

15. The decision relied upon by the respondent in the case of ***Futecht Project (India) Pvt Lt. v. Abott Health Care Pvt Ltd.***(*supra*) is also wholly inapplicable in the facts of the present case. In that case the objection raised was regarding the territorial jurisdiction of the court. The Court sustained the said objection as it found that the suit pertaining to the subject matter of disputes would have to be filed in Mumbai. In that case, the contract between the parties expressly provided that the courts in "Mumbai Urban District" would have the exclusive jurisdiction. It is in the aforesaid context that the court held that this court would not have any jurisdiction to entertain the petition. There is no dispute in the present case as to the territorial jurisdiction of this court. The objection raised by the respondent only pertains to the pecuniary jurisdiction of this Court, which as stated above is not merited.

16. The second contention that the bank guarantees must be kept alive till the amount payable to the petitioner is finally determined is also without merit. The bank guarantees were furnished for due performance and it is the admitted case that further performance was stopped by BHEL for no fault of the petitioner. It is also not the case of BHEL that it has any claim on account of non-performance of the contract against the petitioner. Thus, there is no possible reason why the BHEL should insist on the petitioner keeping the PBGs alive.

17. Mr Seth's contention that the PBGs must be kept alive because BHEL is likely to suffer losses on account of financial condition of the Owner is also bereft of any merit. The PBGs are for due performance of the contracts by the petitioner and not for indemnifying BHEL against any loss that it may suffer due to insolvency of the Owner. It is nobody's case that the petitioner has stood surety for the Owner. The contract between BHEL and the Owner is a separate contract to which the petitioner is not a party. The petitioner is a sub contractor and BHEL would be liable to pay the consideration for the works performed by the petitioner irrespective of whether it is able to recover its dues from the Owner.

18. The petitioner had approached BHEL several times for release of PBGs, however, the same was not allowed by it. It is clear that the insistence on behalf of BHEL to keep the bank guarantees alive is wholly unjustified.

19. In the circumstances, the present petition is allowed and BHEL is restrained from invoking the bank guarantees or insisting that the same be kept alive. On the insistence of the respondent this court had passed an order

on 27.09.2016 directing the petitioner to extend the bank guarantee for a period of one month at the cost of BHEL. The said order was passed as BHEL had not filed a reply to the present petition on merits and was seeking an adjournment. In terms of the said order the petitioner has extended the PBGs. In the circumstances, it is directed that the petitioner shall submit the details of cost of extending the guarantee to BHEL within one week from today and BHEL shall remit the cost of the same in terms of the order dated 27.09.2016 within one week thereafter, without insisting on the petitioner to visit BHEL's Office.

20. It is further directed that original PBGs shall be returned by BHEL to the petitioner. The petitioner is also at liberty to approach State Bank of Mysore the bank which has furnished the PBGs to cancel the PBGs on the strength of this order without insisting on a copy of the original PBGs.

21. Order *dasti* under signatures of the court master.

VIBHU BAKHRU, J

OCTOBER 06, 2016
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