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

+ **OMP (I) (COMM) 410/2016**

PCM STRESCON OVERSEAS VENTURES LTD. Petitioner

Through: Mr. Parag P. Tripathi, Senior Advocate with
Mr. A. Sridhar, Ms. Mahima Gupta & Ms.
Mishika Bajpai, Advocates.

versus

ALSTOM TRANSPORT INDIA LTD. & ANR. Respondents

Through: Mr. Arvind Nigam, Senior Advocate with
Mr. Atul Sharma, Mr. Milanka Chaudhury,
Mr. Dinesh Pardarsani & Ms. Satakshi
Sood, Advocates for R-1.

CORAM: JUSTICE S.MURALIDHAR

ORDER
19.10.2016

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Caveat No.911/2016

1. Since learned counsel for the Respondents have entered appearance, the caveat is discharged.

IA No.12972/2016 (Exemption)

2. Allowed subject to just exceptions.

OMP (I) (COMM.) No.410/2016

3. The Petitioner, PCM Strescon Overseas Ventures Ltd. (PCM) has filed this petition under Section 9 of the Arbitration & Conciliation Act, 1996

(‘the Act’) against Alstom Transport India Ltd. (Alstom)/Respondent No.1 seeking to restrain Alstom from invoking Bank Guarantee Nos. 0780IGPER001315 & 0780IGPER001515, both dated 7th August 2015, issued by Respondent No.2 Bank on behalf of the Petitioner in its favour.

4. Alstom was awarded a contract by the Delhi Metro Rail Corporation (DMRC) for the work related to supply, installation, testing and commissioning of Ballastless, Track of standard Gauge, Part-1 Corridor of Sections of Lajpat Nagar-Shiv Vihar (Line 7) by a contract dated 23rd January, 2015. In turn Alstom sub-contracted the work to the Petitioner by a sub-contract dated 16th April, 2015. *Inter alia* in terms of the said contract three Bank Guarantees (BGs) were submitted by the Petitioner as under:

S.No.	BG No. & Date	Amount (Rs.)	Purpose	Validity
1.	0780IGPER001515 dated 07.08.2015	81510000	Performance Bank Guarantee	30.04.2017
2.	0780IGPER001315 dated 07.08.2015	20377500	To secure release of mobilization	31.10.2016
3.	0780IGPER001415 dated 07.08.2015	20377500	To secure release of mobilization	31.10.2016

5. Disputes having arisen between the parties in the execution of the sub-contract, the parties sought to resolve the said disputes. At one stage the Petitioner filed OMP(I)(Comm.) No.89/2016 under Section 9 of the Act. However, the said petition was dismissed as withdrawn by the Court on 22nd March, 2016 with liberty to file a fresh petition if the need arises. This was in view of the fact that the parties were trying to resolve the disputes.

6. However, according to the Petitioner, the parties were unable to resolve their disputes. The immediate provocation for the present petition is that by the letters dated 13th October, 2016, addressed to Respondent No.2-Bank, Alstom has sought the invocation and encashment of the Performance Security Bank Guarantee (PBG) dated 7th August, 2015 in the sum of Rs.8,15,10,000 as well as Advance Bank Guarantee (ABG) dated 7th August, 2015 in the sum of Rs.2,03,77,500.

7. The main ground on which the Petitioner seeks the interim relief, as prayed for, is that Alstom has not invoked the BGs in accordance with the terms thereof. Reliance is placed on the decision of this Court in *Ansal Properties & Industries Ltd. v. Union of India & Ors. 1994 (29) DRJ 66*.

8. Mr. Parag Tripathi, learned Senior Advocate appearing for the Petitioner referred to the relevant clause of the PBG dated 7th August, 2015 and submitted that the amount thereunder would become payable by the Bank only if the contractor issued a written order asking to be indemnified for “any liability or damage resulting from any defects or shortcomings of the sub-contractor or the debts he may have incurred to any parties involved in the works under the sub-contract agreement.....” It is pointed out that the invocation letter dated 13th October, 2016 merely states that Alstom has terminated the sub-contract “due to breach of contract (non-performance) by M/s. PCM Strescon Ventures Limited (PSOVL).” It is submitted that this is not in accordance with the requirement of PBG and therefore the Court should restrain Alstom from encashing the said PGB.

9. Mr. Arvind Nigam, learned Senior Advocate appearing for Alstom, on the other hand, points out that in terms of PBG the determination of Alstom as to whether the Petitioner was liable as a result of such breach of the contract could not be questioned by the Bank. He submitted that even assuming that the invocation was erroneous as alleged, the only remedy available to the Petitioner would be to seek to recover damages consequent thereto in the arbitration proceedings.

10. The relevant clause of the PGB reads as under:

“5. The bank is engaged to pay the contractor, any amount up to and inclusive of the aforementioned full amount, i.e., not-more than Rs.8,15,10,000 (Rupees Eight Crore Fifteen Lakh and Ten Thousand Only) and the time mentioned in para 6 upon written order from the contractor to indemnify the contractor for any liability or damage resulting from any defects or shortcomings of the subcontractor or the debts he may have incurred to any parties involved in the works under the subcontract agreement mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The bank will deliver the money required by the contractor immediately on demand without delay and demur and without reference to the subcontractor or without the necessity of a previous notice or of judicial or administrative procedures and without it being necessary to prove to the bank the liability or damages resulting from any defects or shortcomings or debts of the subcontractor. The bank shall pay to the contractor money (as mentioned above within the time mentioned in para 6) so demanded notwithstanding any dispute/disputes raised by the subcontractor in any suit or proceedings pending before any court, tribunal or arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal.”

11. In order to invoke the PBG in accordance with the above clause Alstom has to seek in writing indemnification for “any liability or damage resulting

from any defects or shortcomings of the subcontractor.....” The last few lines of clause 5 makes it clear that the Bank should deliver the money as required by Alstom “immediately on demand without delay and demur and without reference to the subcontractor and without the necessity of a previous notice or of judicial or administrative procedures....” In other words once Alstom informs the Bank that a liability has arisen as a result of the breach of the contract by the Petitioner, the amount under the BG becomes straightaway payable by Respondent No.2-Bank. The clause involved in the decision in *Ansal Properties & Industries Ltd.* (*supra*) was not identical to the clause involved in the present PBG. The said decision is therefore distinguishable on facts.

12. In the present case the Court considers the invocation letter to be sufficient compliance with the requirement of the relevant clause of the PBG. This Court is also not satisfied that any egregious fraud has been played on the Bank or that any special equities exist in favour of the Petitioner. The Court is therefore not inclined to grant the relief prayed for.

13. The Petition is accordingly dismissed but in the circumstances with no orders as to costs.

S. MURALIDHAR, J

OCTOBER 19, 2016

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