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

\+ O.M.P. (I)(COMM) 427/2016

GLOBAL TRANSNATIONAL TRADING FZE ..... Petitioner

Through: Mr Gopal Jain, Senior Advocate with Mr Ajay Bhargava, Ms Vanita Bhargava and Mr Arvind Kumar Ray, Advocates.

versus

THE STATE TRADING CORPORATION OF INDIA LTD & ANR. ..... Respondents

Through: Mr Ravi Sikri, Senior Advocate with Mr Deepank Yadav, Ms Divyangna Singh and Mr Jasbir Bidhuri, Advocates.
Ms Chetna Bhalla and Mr Rachit, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **27.10.2016**

VIBHU BAKHRU, J

IA No. 13523/2016

1. Exemption is allowed, subject to all just exceptions.

2. The application stands disposed of.

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

> "(a) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including

execution of the order passed therein, an Order be passed staying the effect, operation and implementation of the Notice of Claim bearing reference no. STC/UREA/2/2015-16/GLOBAL/29 dated 29 September 2016 issued by the Respondent No. 1;

(b) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondent No. 1 from recovery of USD 17,196,687.19 or any other amount pursuant to the Notice of Claim bearing reference no. STC/UREA/2/2015-16/GLOBAL/29 dated 29 September 2016.

(c) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondent No. 1 from invoking and encashing the bank guarantee bearing no. 0007BG00085016 dated 7 July 2015 valid till 10 January 2017 issued by the Respondent No. 2 for an amount of USD 10,49,636 (Rs.6,82,26340/-)

(d) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondent No. 2 from making any payment whatsoever to the Respondent No. 1 under the bank guarantee bearing number 0007BG00085016 dated 7 July 2015 valid till 10 January 2017 issued by the Respondent No. 2 for an amount USD 10,49,636 (Rs.6,82,26,340/-)

(e) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondents, their servants and agents and all persons acting on their behalf from invoking / encashing the counter guarantee issued by Mashreqbank PSC for an amount of USD 10,49,636 (Rs.6,82,26,340/-)

(f) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondents, their servants and agents and all persons acting on their behalf from taking any coercive action in furtherance of the Notice of Claim bearing reference no. STC/UREA/2/2015-16/GLOBAL/29 dated 29 September 2016 against the Petitioner, its agents and other related instrumentalities;

(g) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondents, their servants and agents and all persons acting on their behalf from taking any coercive steps pursuant to Notice of Claim bearing reference no. STC/UREA/2/2015-16/GLOBAL/29 dated 29 September 2016;

(h) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed restraining the Respondents from creating any third party rights or interest of any kind with respect to the subject matter of the Contract dated 23 June 2015 pending determination of the disputes between the parties in accordance with the terms of the Contract;

(i) That pending the constitution of the Arbitral Tribunal and final disposal of the arbitration proceedings including execution of the order passed therein, an Order be passed directing the Respondents to maintain status quo pending determination of the disputes between the parties in accordance with the terms of the Agreement dated 23 June 2015."

4. The disputes involved between the parties relate to Urea (Fertilizer grade) supplied by the petitioner (hereafter 'GTT') to respondent no.1 (hereafter 'STC') pursuant to a contract (hereafter 'the Contract') dated 23.06.2015.

5. STC had invited tenders for purchase of prilled /granular urea (bulk) fertilizer grade by a Notice Inviting Tender (NIT) dated 12.06.2015. Annexure I indicated the specification of the goods as under:-

S. NO.	Characteristics	Requirements
1.	Moisture percent by weight maximum	0.50%
2.	Total Nitrogen percent by weight (on dry basis) minimum	46.00%
3.	Biuret percent by weight, maximum	1.50%
4.	PARTICLE SIZE (PRILLED)	The portion of the material passing through 2.8 mm IS SIEVE (Tyler Sieve 7) and retained on 1 mm IS SIEVE (Tyler Sieve 16) shall not be less than 90% by weight, and not more than 5% by weight shall pass through 1.00 mm IS SIEVE.
	OR PARTICLE SIZE (GRANULAR)	90% of the material shall pass through 4mm IS SIEVE and be retained on 2mm IS SIEVE.

6. Pursuant to the NIT, GTT submitted a tender, which was accepted and the Contract for supply and purchase of 105,000 MT (plus/minus 5% at

seller's option) of "Bulk Urea 46% Nitrogen Fertilizer Grade" (hereafter 'the goods') was entered into between GTT and STC.

7. In terms of the NIT, GTT also furnished a bank guarantee bearing no. 0007BG00085016 dated 07.07.2015 (hereafter 'the BG) issued by Respondent No. 2 (ICICI Bank Ltd) for an amount of USD 10,49,636. It is stated that the said bank guarantee was furnished by ICICI Bank Ltd. (ICICI) on the basis of counter guarantee submitted by Mashreqbank PSC.

8. In terms of the Contract, the goods were to be delivered at Mundra Port, India in 2 or 3 lots at the option of GTT on or before 27.07.2015. The price of the goods was agreed at United Arab Emirates Dirhams (AED) 1165.47 PMT CIF FO Mundra.

9. GTT shipped 42,780.00 MTs of the goods vide bill of lading dated 27.07.2015. The said goods were discharged at Mundra Port. According to GTT, the goods conformed to the specifications; however, STC disputes the same. Clause (iii) of Article 9 of the Contract provided for drawing of sample for determining the quality of the goods. The said clause reads as under:

> "Buyer and/or its receivers shall draw samples for determining the quality of the cargo at the port of discharge through an independent reputed Inspection Agency or may opt for the mandatory inspection from Central Fertilizer Quality Control and Training Institute (CFQC&TI), Faridabad (India) or any of its regional laboratory. The quality so determined at discharge port shall be final and binding on the Seller."

10. In terms of the said clause, sample of the goods was drawn and

submitted for analysis at the Central Fertilizer Quality Control and Training Institute. The test report submitted by the said Institute indicated that 7.82% of the goods were below the size of 2 MM. According to STC, the same indicated that the goods in question did not conform to the specifications as stipulated in the Contract.

11. Accordingly, STC issued a debit note dated 12.01.2016 imposing a penalty of AED 421,805.51. The petitioner objected to the levy of penalty and by its e-mail dated 18.01.2016 called upon STC to have the sample checked by a reputed inspection agency in terms of Article 10 of the Contract (Umpire Analysis). In terms of clause (ii) of Article 10, GTT had the right for an independent analysis of the sample, which was referred to as 'umpire analysis' in the Contract. The said clause is quoted below for ready reference:

> "ii. In case of dispute about quality, the Seller has right for umpire analysis. In such circumstances, reference sample will be sent to the umpire laboratory and the result of umpire laboratory will be binding on both Seller and Buyer. The cost of umpire analysis will be borne by the losing party.
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> The umpire analysis will be done by a reputed Inspection Agency nominated by STC and/or its receiver. The umpire agency shall be one of the laboratories notified for the referee analysis in the Fertilizer Control Order 1985 (as amended up to the date of tender closing) and will be the one other than the load port/discharge port Inspection Agency. The seller shall have the right to select atleast 3 (three) eligible laboratories for umpire analysis, out of which STC and/or receivers shall nominate one agency.

> Seller will be ineligible for asking for Umpire analysis in case, he/his representative does not sign the sample slip/relevant documents or is not present at the time of collecting the sample drawn by representative of surveyor/inspection agency nominated by STC or its nominee."

12. By its e-mail dated 08.02.2016, GTT named three independent laboratories (including Fertiliser Control Laboratory, Trichy) and called upon STC to nominate one agency for the Umpire Analysis. In view of GTT's request, the sample of the goods analysed by the Central Fertilizer Quality Control and Training Institute was sent to Fertilizer Control Laboratory, Trichy for 'umpire analysis'.

13. Fertilizer Control Laboratory, Trichy submitted its report on 01.09.2016 confirming that the goods were not as per the specifications.

14. In the given circumstances, STC had issued a Notice of Claim dated 29.09.2016 - which is impugned by GTT in these proceedings - calling upon the petitioner to refund the cost of the goods - USD 17,196,687.19. The said amount also included interest at the rate of 18% per annum up to 31.10.2016.

15. Mr Gopal Jain, learned Senior Advocate appearing for GTT submitted that the although STC had demanded the entire amount paid for the goods along with interest, it had not taken any steps for returning the goods and, therefore, the demand made was patently illegal. He contended that STC could not consume/retain the goods and simultaneously demand refund of the consideration paid along with interest.

16. He earnestly submitted that the goods supplied by the GTT duly conformed to the specifications provided in the Contract. He submitted that the samples had been duly checked in accordance with the Contract by Central Fertilizer Quality Control and Training Institute and drew the attention of this Court to its report dated 02.09.2015. According to him, the said report indicated that the goods were as per specifications. He submitted that since STC has disputed the quality of the goods, GTT had called upon the STC to have the umpire analysis in terms of Article 10 of the Contract. He submitted that the said sample was sent at a much belated stage, that is, more than a year and 15 days after the sample had been taken and, therefore, the analysis report submitted by Fertilizer Control Laboratory, Trichy was clearly not determinative of the quality of goods discharged. He submitted that the goods in question are subject to Hygroscopicity which leads to deterioration of the goods including the size. He submitted that with the passage of time, the moisture in the sample of the goods would decrease and thereby have a material effect on the quality of the sample. He submitted that in the aforesaid circumstances, the analysis report could not be considered. He further contended that since STC had not sent the sample within the reasonable time, GTT could not be penalised for the same.

17. In addition, Mr Gopal relied on the provisions of Section 30 of the Fertilizer (Control) Order 1957 in support of his contention that the sample of the fertilizer has to be analysed within a strict time frame of 90 days; the sample has to be sent to laboratory within a period of 7 days and the laboratory is to forward its report within a period of 60 days of the receipt of the sample and the authority analysing the report has to communicate the

result of the analysis within a period of 30 days thereafter. He submitted that the rationale for providing the said time frame was to ensure that the sample is representative of the quality of the fertilizer that is sought to be ascertained. He submitted that since, the sample could not be relied upon, STC could not impose any penalty or could not make any claim on account of quality of the goods.

18. Mr Sikri, learned Senior Advocate appearing for STC on advance notice, submitted that the sample drawn in terms of the Contract indicated that the goods in question were not as per the specification and the contention that the report of Central Fertilizer Quality Control and Training Institute indicted that the goods were as per specifications, was erroneous. He contended that GTT had disputed the said report and not STC. He further submitted that the disputes as to the quality of the goods could not be agitated by way of the petition under Section 9 of the Act as those disputes would be subject matter of arbitration between the parties in the event, the arbitration clause was invoked by the petitioner.

19. I have heard the learned counsel for the parties.

20. In my view, the first two prayers made by the petitioners - that is, to stay the Notice of Claim issued by STC - cannot be granted. Clearly, STC would be entitled to raise such claims as it may be advised and it cannot be interdicted from raising the same. The question whether the claims made by STC are merited or not would be considered by the forum called upon to adjudicate such claims. The scope of proceedings under Section 9(1)(ii) of the Act is limited to granting interim measure of protection.

21. Although Mr Jain submitted that prayers (a) and (b) seeking the stay on the effect, operation and implementation of the Notice of Claim and its enforcement were independent of other prayers seeking interdiction of invocation of the BG, the same is plainly not so. What GTT effectively seeks is to prevent STC from recovering any amount by encasing the BG. Mr Jain is unable to indicate any other coercive steps that can be taken by STC for recovering the amount claimed by it without recourse to courts or the arbitral tribunal.

22. The legitimacy of STC's claims would be considered in the proceedings adopted by the STC for recovering the amounts claimed by it. Plainly, STC cannot be interdicted from taking recourse to proceedings for recovery of amounts that it believes is due to it. A blanket order as sought for by GTT cannot be granted.

23. As far as the encashment of the BG is concerned, it is trite law that invocation of the bank guarantees cannot be interdicted at the instance of a party merely urging contractual disputes.

24. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others*****: (1994) 1 SCC 502,** the Supreme Court had held as under:-

> "...in case of confirmed bank guarantees/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...
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> …irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms…

> ...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."

25. The aforesaid view was reiterated by the Supreme Court in ***Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others:*** **(1995) 6 SCC 68**.

26. In ***U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.***: 1988 (1) SCC 174, the Supreme Court had held as under:

> "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."

27. In ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.***: **AIR 1996 SC 2268** the Supreme Court held as under:

> "We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as

> to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

28. In the present context, the petitioner has not been able to establish a *prima facie* case of fraud. It is well settled that a party pleading fraud must specify the particulars and details in support of its plea of fraud. Merely making a bald statement that a bank guarantee is being invoked fraudulently or that the conduct of a party is fraudulent would not be sufficient to establish a *prima facie* case of fraud.

29. The contention that the report dated 02.09.2015 submitted by Central Fertilizer Quality Control and Training Institute is in favour of GTT is, *prima facie*, erroneous. The report clearly indicates that the quality of the sample was in variance with the specification as stipulated in the Contract. Further, if the said report was in favour of the petitioner, there was no reason for GTT to insist on recourse to Article 10 of the Contract, that is, refer the sample for analysis of another laboratory. However, it is not necessary to examine the rival contentions in this regard as it is clear that there is no ingredient of fraud involved.

30. In the present case, at best, GTT can contend that the claims made by the STC are wrongful and/or beyond the terms of the Contract and/or contrary to law. But, those are not sufficient grounds for interdicting

invocation of bank guarantees. As stated above, the invocation of bank guarantees cannot be interdicted simply because a party has raised contractual disputes. In the aforesaid circumstances, the prayers for interdicting invocation or encashment of the BG cannot be granted.

31. In addition, GTT has also prayed that the subject matter of goods supplied be preserved. In view of the fact that STC has made a claim for entire consideration paid for the goods along with interest, it would also be expedient that orders be issued for preservation of the goods supplied by GTT.

32. Accordingly, it is directed that if STC is still in control and possession of goods, it shall preserve the goods and duly inform the petitioner as to the status of the goods within a period of two weeks from today. However, in the event the goods are no longer in the control of STC, it will be open for GTT to urge the effect of the same before the arbitral tribunal as and when constituted.

33. The petition is disposed of with the aforesaid directions.

VIBHU BAKHRU, J

OCTOBER 27, 2016
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