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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 23.12.2016

+ FAO(OS) (COMM) 112/2016 & CM No.42025/2016 (for
additional documents)

ENERGO ENGINEERING PROJECTS LTD Appellant

Through: Mr.Rajiv Nayar, Sr. Adv. with
Mr.Dhruv Dewan, Ms.Reena
Choudhary & Mr.Saurabh Seth,
Advs.

versus

TRF LTD Respondent

Through: Mr.Amit Sibal, Sr. Adv. with
Mr.Sumeet Gadodia, Mr. Gautam
Singh and Mr.Kaushik Poddar,
Advs.

+ FAO(OS) (COMM) 113/2016 & CM No.42028/2016(for
additional documents)

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Through: Mr.Amit Sibal, Sr. Adv. with
Mr.Sumeet Gadodia, Mr. Gautam
Singh, Mr.Kaushik Poddar, Advs.

+ FAO(OS) (COMM) 114/2016 & CM No.42031/2016(for
additional documents)

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additional documents)

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Adv.

+ FAO(OS) (COMM) 116/2016 & CM No.42074/2016(for
additional documents)

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Adv.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT

INDIRA BANERJEE, J (ORAL)

1. These appeals are against a common judgment and order dated 16th September, 2016, passed by the learned Single Bench, in applications filed by the respondent under Section 9 of the

Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act), for interim relief.

2. By the impugned judgment and order, the learned Single Judge directed that the applications under Section 9 of the 1996 Act filed by the Respondent, be treated as applications under Section 17 of the 1996 Act and heard by the Arbitral Tribunal as and when the Arbitral Tribunal commenced its first hearing.
3. The appellant is an existing Company within the meaning of the Companies Act 1956, having its principal place of business at Plot No.2496, Phase IV, Udyog Vihar, Gurgaon, in Haryana, outside the jurisdiction of this Court, and its registered office at Flat No.709, Erore Appartment, 56, Nehru Place, New Delhi-110019 within the jurisdiction of this Court.
4. The appellant is engaged in the business of providing engineering procurement, construction and operation and maintenance services.

5. The respondent TRF Limited, is a Company registered under the Companies Act 1956, having its registered office at 11, Station Road, Burma Mines, Jamshedpur-831007 in District East Singhbhum, Jharkhand, outside the jurisdiction of this Court. The respondent is engaged in the business *inter alia* of manufacture erection and commissioning of bulk material handling equipment.
6. The appellant entered into a contract with NTPC Limited, hereinafter referred to as NTPC for supply of certain functional and operational articles which could be integrated into the power plant.
7. After execution of the aforesaid contract and in pursuance thereof, the appellant issued a purchase order No.EEPL/PO1351006 dated 6.5.2014 to the respondent for designing, engineering, manufacturing, supplying, transporting to site, unloading, storing, erecting, testing, commissioning wagon tipplers and side arm chargers.

8. In terms of the aforesaid purchase order, the respondent furnished to the appellant an advance Bank Guarantee No.1403831 BGA00007 dated 30.5.2014 for a sum of Rs. 4,62,92,400/- and a performance Bank Guarantee No.140383 IBGP00026 dated 30.5.2014 for a sum of Rs.5,01,09,200/-. The appeal being FAO(OS) (COMM) 112/2016 relates to the said bank guarantees.
9. The aforesaid bank guarantees were issued by IDBI Bank Limited, Jamshedpur. The advance Bank Guarantee inter alia provided as follows:-

“...We, the BANK hereby undertake to pay without any demur to ENERGO ENGINEERING PROJECTS LTD on the first receipt of demand a sum not exceeding Rs.4,62,92,400/- (Rupees four crores sixty two lacs ninety two thousand four hundred only) against non-fulfillment of obligation under the aforesaid agreement.

We, the BANK further agree that ENERGO ENGINEERING PROJECTS LTD shall be the sole judge whether the SUPPLIER have committed any breach or breaches of any of the terms and conditions of the said agreement and the extent of loss, damage, cost, charges and expenses suffered/incurred or would be suffered or incurred by ENERGO ENGINEERING PROJECTS LTD on account thereof.

Any demand so made on the BANK shall be conclusive as regards the amount due and payable by the BANK

under the Guarantee. The BANK waives in favour of ENERGO ENGINEERING PROJECTS LTD all the rights, defense and pleas to which, we the BANK as guarantors and/or the SUPPLIER may be entitled to. To give effect to this guarantee ENERGO ENGINEERING PROJECTS LTD may act as though we the BANK, were the principal debtors...”

(emphasis supplied)

10. The Performance Bank Guarantee had identical terms and conditions as the Advance Performance Guarantee. Both the Advance Bank Guarantee and the Performance Bank Guarantees were unconditional bank guarantees invocable by the beneficiary on demand.
11. Other similar purchase orders were issued by the appellant to the respondent, pursuant to which Advance Bank Guarantees and/or Performance Bank Guarantees which relate to the other appeals were furnished by the respondent to the appellant.
12. According to the appellant, the respondent defaulted in its contractual obligations to supply the contracted goods within the stipulated time. The appellant contends that even though the respondent was in breach of its own contractual obligations, for

which the bank guarantees were liable to be invoked, the respondent filed petitions under Section 9 of the 1996 Act, before the learned Single Judge, seeking ad interim relief of an order of injunction, restraining the respondents from encashing the Bank Guarantees, on the purported ground that encashment of the Bank Guarantees would amount to fraud, as the appellant had, on the one hand, not been paying the dues of the petitioner, but on the other hand, threatening to unjustly enrich themselves by encashing the Bank Guarantees.

13. The respondent may have a good case on the merits of its claims against the appellant in arbitration. However, a bank guarantee constitutes an independent contract between the bank which issues the bank guarantee and the beneficiary of the bank guarantee. In the matter of invocation of a bank guarantee the merits of the underlying disputes between the party at whose instance the bank guarantee was furnished and the beneficiary of the bank guarantee are of no relevance. It is only in exceptional cases of fraud,

irretrievable injustice and/or special equity, that an injunction restraining the invocation of a bank guarantee might be granted.

14. It is also well settled that if the bank cannot be restrained from honoring a bank guarantee, the beneficiary of the bank guarantee cannot be restrained from invoking the bank guarantee, for one cannot do indirectly, what one is not free to do indirectly. Reference may be made to the judgment of the Supreme Court in ***U.P. Cooperative Federation Ltd. Vs. Sengh Consultants and Engineers Pvt. Ltd.*** reported in (1988) 1 SCC 174.
15. Notices were issued, after which the appellant entered appearance through its counsel, and affidavits were directed to be filed. The learned Single Judge recorded the statement of the appellant's counsel that the appellant would, without prejudice to its rights and contentions, withhold invocation of the Bank Guarantee till the next date of hearing.
16. After exchange of affidavits, the matter came up for hearing before the learned Single Judge on 4th January, 2016. The learned Single

Judge directed the competent officers of the respective parties to have a meeting to make an endeavour to resolve their differences. The Single Bench recorded that the undertaking of the respondent not to invoke the Bank Guarantee, would continue till the next date of hearing.

17. It appears that the appellant and the respondent could not settle their differences. Accordingly, further affidavits were filed, as directed by the learned Single Bench, by the order dated January 4, 2016.
18. It is pleaded that the applications were, thereafter, heard together, approximately 30 times over a period of about 9 months, and the parties filed detailed written submissions. After extensive hearing, the applications were reserved for judgment on 05/09/ 2016. According to the petitioner, after every hearing, the statement of the appellant's counsel, made at the 1st hearing, not to invoke the bank guarantees till the next date of hearing was directed to continue.

19. In the meanwhile, the respondent invoked the arbitration clause in the Purchase Order and sought reference of the disputes that had arisen between the parties, to arbitration.
20. An Arbitral Tribunal was constituted. By an order dated 05/02/2016, the Arbitral Tribunal directed the parties to appear before it on 24/02/2016 for the 1st meeting. However, on the same day, that is, 05/02/2016, the respondent filed an application being Arbitration Petition No. 87/2016 under Section 11 (5) read with 11 (6) of the 1996 Act before the Learned Single Judge, questioning the authority of a nominee of the General Manager of the appellant to arbitrate, after amendment of the 1996 Act by the Arbitration and Conciliation Amendment Act 2015, hereinafter referred to as the 2015 Amendment Act, with effect from 23rd October 2015 and incorporation of Section 12(5).
21. The respondent prayed for appointment of a retired judge of the Supreme Court as arbitrator, after declaring that the nominee of the Managing Director of the appellant was no longer eligible for

appointment as arbitrator, in view of Section 12 (5) of the 1996 Act as incorporated by the 2015 Amendment Act.

22. By a judgment and order dated 19/04/2016, the Learned Single Judge dismissed Arbitration Petition No. 87/2016 filed by the respondent, under Sections 11 (5) and (6) of the 1996 Act. On or about 11/05/2016, the respondent filed a Special Leave Petition in the Supreme Court being SLP No (Civil) 14331 of 2016.
23. By an order dated 30/09/2016, the Supreme Court directed that the Special Leave Petition be listed for final disposal in the 2nd week of November 2016, and stayed further proceedings before the Arbitral Tribunal. In the meanwhile, on 16 September 2016, the Learned Single Bench passed the judgment and order under appeal.
24. The Learned Single Bench observed and held:-

“18. Admittedly, the Arbitral Tribunal has already been constituted. In case, the Court goes into the details of the matters, the case of one of the parties would be prejudiced. The present nine petitions which are filed by the petitioner after 23rd October, 2015, i.e. under the amended Act, Section 9(3) of the

Act has been amended which is mandatory in nature.

19. *Section 9(3) of the Act reads as under:*

“9. Interim measures etc. by Court:-

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

20. *Thus, I am of the view that as soon as the Special Leave Petition filed by the petitioner is disposed of, the prayer made in the nine petitions can be considered by the Arbitral Tribunal. There is no impediment or a situation where the remedy provided under Section 17 of the Act is not efficacious. Thus, let these petitions be treated as applications under Section 17 of the Act which may be decided by the Arbitral Tribunal at an early date once the Arbitral Tribunal shall commence the first hearing. Till the said petitions are decided, the interim directions which are issued by way of statement not to take any steps for invocation shall continue, subject to the condition that the petitioner shall keep the bank guarantee alive till the decision of application under Section 17 of the Act. The Arbitral Tribunal at the time of deciding the said application would pass the appropriate orders in this regard. All pleadings of these petitions shall be filed by the petitioner once the Arbitral Tribunal will commence the proceedings.*

21. The above mentioned petitions are accordingly disposed of.”

25. Upon amendment of Section 9 of the 1996 Act, by the 2015 Amendment Act, Section 9 of the 1996 Act, as it stood prior to its amendment by the 2015 Amendment Act, has been renumbered. Section 9(1) and Sub sections (2) and (3) have been incorporated. Section 9 of the 1996 Act as amended by the 2015 Amendment Act is set out herein below for convenience:-

“9(1) A party may before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36 apply to a Court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters namely :-

(a) the preservation interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention preservation or inspection of any property or thing which is the subject-matter of the

dispute in arbitration or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient and the court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

26. Even after enforcement of the 2015 Amendment Act, an application for interim relief may be filed in Court under Section 9

of the 1996 Act, before the commencement of arbitration proceedings, during arbitration proceedings or at any time after an award is made, but before such award is enforced in accordance with Section 36 of the 1996 Act.

27. A harmonious reading of Section 9 (1) with Section 9 (3) of the 1996 Act, as amended by the 2015 Amendment Act, makes it amply clear that, even after the amendment of the 1996 Act by incorporation of Section 9 (3), the Court is not denuded of power to grant interim relief, once an Arbitral Tribunal is constituted.
28. When there is an application for interim relief under Section 9, the Court is required to examine if the applicant has an efficacious remedy under Section 17 of getting immediate interim relief from the Arbitral Tribunal. Once the court finds that circumstances exist, which may not render the remedy provided under Section 17 of the 1996 Act efficacious, the Court has the discretion to entertain an application for interim relief. Even if an Arbitral Tribunal is non functional for a brief period of time, an application

for urgent interim relief has to be entertained by the Court under Section 9 of the 1996 Act.

29. It is a well settled proposition that if the facts and circumstances of a case warrant exercise of discretion to act in a particular manner, discretion should be so exercised. An application for interim relief under Section 9 of the 1996 Act, must be entertained and examined on merits, once the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the said Act efficacious.
30. In our view, the Learned Single Bench patently erred in holding “there is no impediment or situation where the remedy under Section 17 of the Act is not efficacious”. The Learned Single Bench failed to appreciate that the pendency of a Special Leave Petition in which the constitution of the Arbitral Tribunal was under challenge, was in itself, a circumstance which rendered the remedy of the parties under Section 17 uncertain and not efficacious.

31. In fact, the Learned Single Bench itself observed that the prayer in the nine applications could be considered by the Arbitral Tribunal as soon as the Special Leave Petition filed by the Respondent was disposed of. This observation itself shows that the Court had doubts about the efficacy of the remedy under Section 17, as long as the Special Leave Petition was pending.
32. Moreover, the Single Bench itself directed that the petitions filed under Section 9 of the 1996 Act be treated as applications under Section 17 of the 1996 Act, which might be decided by the Arbitral Tribunal at an early date, once the Arbitral Tribunal commenced the first hearing.
33. In our view, the Learned Single Bench erred in law in holding that the 9 applications filed before the single bench could be disposed of by the arbitral tribunal after the Special Leave Petition was disposed of by the Hon'ble Supreme Court. The Learned Single Judge had in effect, by continuing an undertaking given at the first hearing, injuncted the appellant from invoking the bank guarantees, without even considering whether the appellant could

in law be restrained from invoking the bank guarantees, and then left the appellant without the remedy of getting the interim order of injunction vacated on urgent basis. A party, seeking the vacating of an ad interim order on urgent basis cannot be left without remedy.

34. An application for interim relief should ordinarily be decided by the Arbitral Tribunal, once an arbitral tribunal is constituted. However, if circumstances exist which may not render the remedy under Section 17 of the 1996 act efficacious, the Court has to consider the prayer for interim relief on merits, and pass such order, as the Court may deem appropriate.
35. The Learned Single Bench has not at all considered whether any interim protection was at all necessary in this case. The bank guarantee was apparently unconditional. In effect, the appellants have been restrained from invoking an unconditional guarantee. The application cannot be heard out until the special leave petition is disposed of.

36. The appeals are allowed. The judgment and order under appeal is set aside. The Single Bench shall hear and dispose of the 9 applications filed by the respondent in accordance with law, preferably within 4 weeks.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

DECEMBER 23, 2016

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