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

% Judgment Delivered on: December 24, 2016

\+ FAO(OS) COMM 149/2016

GANGOTRI ENTERPRISES LTD. ..... Appellant
Through Ms. Chetna Bhalla, Advocate.

versus

NATIONAL THERMAL POWER CORPORATION LTD. ..... Respondent
Through None

CORAM:
HON'BLE MS. JUSTICE INDIRA BANERJEE
HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT

INDIRA BANERJEE, J (ORAL)

1. This appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act 1996, hereinafter referred to as the 1996 Act, is against an order dated 22.12.2016 passed by the learned Single Judge dismissing the application being OMP (1) (COMM) No. 60/2015, filed by the appellant under Section 9 of the 1996 Act.

2. The respondent issued a Notice Inviting Tender (NIT) dated 16.02.2007 for Raw Water Reservoir Civil Works for National Thermal Power Corporation (NTPC), Stage-II at Dadri in Gautam Budh Nagar District in Uttar Pradesh.

3. In response to the said Notice Inviting Tender, the appellant submitted its bid on 09.05.2007. The petitioner was declared successful, after which a Letter of Award No. CS- 6130-319A-9-CS-LOA-5053 dated 21.01.2008 was issued to the petitioner for execution of the project for a total consideration of Rs 46,81,98,550/-.

4. A formal contract was executed between the petitioner and the respondent on 12.03.2008. The Notice Inviting Tender, the General Conditions of Contract of NTPC for civil works along with its amendment, the Special Conditions of Contract and other specified documents were made part of the contract.

5. In terms of the contract executed by and between the appellant and the respondent, and in particular, clause 7 of the Letter of

Award, the project was to be completed within 24 months from the date of receipt of the Letter of Award.

6. Clause 8.1.0 of the Letter of Award required the appellant to make a security deposit Rs. 68,31000 by way of bank guarantee. Accordingly, under cover of a forwarding letter dated 12.03.2008, the Petitioner Furnished a Bank Guarantee being BG No.4/08 dated 11.03.2008 issued by Canara Bank, Hazratganj, Lucknow to the respondent. The Said Bank Guarantee, was from time to time renewed, the last renewal being till 10.12.2015.

7. Clause 14.1.0 of the Special Conditions of Contract required the petitioner to deposit a Performance Guarantee security of Rs. 1,00,00,000/– by way of Bank Guarantee. Accordingly, the petitioner, under cover of a forwarding letter dated 27.03.2008, furnished a bank guarantee being BG No. 26/2008 dated 25.3.2008, issued by a Corporation Bank, Kaiserbagh, Lucknow, to the respondent. The said bank guarantee was, from

time to time renewed. The bank guarantee being BG No.26/2008 is valid till 22.06.2017.

8. As per the Special Conditions of Contract the appellant was also required to deposit a bank guarantee of Rs. 30,00,000/- against material to be issued by the respondent. The appellant accordingly furnished a Bank Guarantee being BG No. 39/2009 dated 17.12.2009 issued by Corporation Bank kaiserbag, Lucknow, which was forwarded to the respondent under cover of a forwarding letter dated 21.12.2009. The bank guarantee was initially valid till 6.12.2010, but later renewed from time to time. The bank guarantee is valid till 14.06.2017.

9. As per clause 13 of the General Conditions of Contract, the execution of the project work was to commence on the 15th day of the date of issuance by the respondent of written orders to commence work. The appellant contends that no such notice or order as contemplated in Clause 13 of the General Conditions of Contract was issued to the appellant.

10. It is alleged by the appellant, that the project work could not be completed due to breaches and lapses on the part of the respondent in performing its obligations under the contract. According to the appellant, the appellant would have completed the project within the stipulated time, but for the breaches and lapses on the part of the respondent.

11. The appellant sought extension of time for completing the work, and the respondent granted such extension. In the meanwhile, by a letter dated 13.03.2010, the appellant penned down its grievances with regard to failure of the respondents to supply layout plan, construction drawings etc.

12. On 03.02.2011, the appellant again wrote to the respondents explaining why the project work could not even be started. Breaches and lapses were attributed to the respondents. The respondents also raised claims to the tune of Rs. 41.67 crores upon the respondent on account of alleged breaches and lapses committed by the respondents.

13. On 09.10.2012, the appellant invoked Clause 56 of the General Conditions of Contract, that is, the arbitration clause, and sought appointment of an independent arbitrator. The Chairman and Managing Director of the respondent appointed an arbitrator. The arbitrator entered into the reference.

14. By a letter dated 11.05.2015, the respondent alleged that the project work had been stalled since 20.6.2014 and had not been resumed by the appellant despite repeated requests informed that after some investigation, it had been found that Rs. 139.50 lakhs was recoverable from the bills of the appellant. Thereafter communication ensued between the parties

15. On 04.11.2015, the respondent served final notice to the appellant in terms of Clause 41 of the General Conditions of Contract, to resume the project work within 7 days, failing which, the respondent would get the same executed at the risk and cost of the appellant.

16. The appellant has alleged that that the respondent all of a sudden invoked the Bank Guarantees being BG Nos. 04/08, 26/2008 and 39/2009 by three letters issued on 07.12.2015 and 09.12.2015 respectively. The bankers of the appellant put the appellant to notice of the demand and requested the appellant to arrange funds to liquidate the bank guarantee amount

17. In the aforesaid circumstances, the petitioner filed an application being OMP (1) (Comm) No. 60/2015 under Section 9 (1) of the 1996 Act, seeking an interim order restraining the respondent from encashing the Bank Guarantees, or realising the proceeds thereof. However, while the application was pending, counsel for the respondent informed the Court that the bank guarantee being BG No. 04/08 Rs. 4,68,31,000/- had already been encashed.

18. On 14/12/2015, Counsel for the respondent submitted that the Bank Guarantee being BG No. 26/2008 had not till then been invoked. Insofar as BG No. 39/2009 was concerned the learned

Judge granted stay and directed that the amount of Rs. 30,00,000/- should not be remitted to the respondent till the next date of hearing

19. On 26.11.2016, the respondent terminated the contract in question, as per Clause 41 of the General Conditions of Contract. On 30 08/11/2016 an application of the appellant being OMP (1) (Comm.) 10/2016 under Section 14(2) 0f the 1996 Act, questioning the authority of the sole arbitrator to proceed with the reference, as also the application under Section 9 of the 1996 Act being OMP (1) (Comm.) No. 60/2015 were heard by the learned Single Bench. The application under Section 9 was directed to be listed on 22.12.2016 and the interim orders were directed to continue till the next date of hearing. On 22.12.2016, the learned Single Judge passed the order under appeal, dismissing the application of the appellant under Section 9 of the 1996 Act. It is not in dispute that the Bank Guarantees in question were unconditional bank guarantees invocable on demand

20. It is well settled that 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 egregious fraud or irretrievable injustice and/or special equity that an injunction restraining the invocation of a Bank Guarantee might be granted.

21. It is also well settled that if the bank cannot be restrained from honouring a Bank Guarantee, the beneficiary of the Bank Guarantee cannot also be restrained from invoking the Bank Guarantee, for one cannot do indirectly, what one is not free to do directly. This proposition is settled by the judgement of the Supreme Court in ***UP Cooperative Federation Ltd. Vs. Singh Consultants and Engineers Private Limited*** reported in (1988) 1 SCC 174.

22. The bank was/is bound to honour its commitment under the Bank Guarantees, irrespective of the merits of the disputes between the appellant and the respondent. It is reiterated that the Bank Guarantee is unconditional. It is not the case of the appellant that the invocation was/is not in terms of the Bank Guarantee. No case of fraud or special equity has been made out.

23. The learned Single Judge rightly dismissed the application under Section 9 of the 1996 Act. The appeal is without merit and the same is dismissed. The appellant may proceed to press its claim if any against the respondents in the arbitral proceedings.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

December 24, 2016/ n