

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

% **Judgment reserved on: 26<sup>th</sup> February, 2016**  
**Judgment pronounced on: 9<sup>th</sup> May, 2016**

+ **O.M.P. (I) No.435/2015 & I.A. No.16773/2015**

AQUATECH SYSTEMS (ASIA) PVT LTD ..... Petitioner  
Through Mr.Hiroo Advani, Adv. with  
Mr.Shashank Garg, Ms.Rekha  
Dwivedi & Mr.Tariq Khan, Adv.

versus

SKS POWER GENERATION (CHATTISGARH) LTD, & ANR ..... Respondents  
Through Mr.Rajiv Nayar, Sr. Adv. with  
Mr.Atul Shanker Mathur,  
Mr.Vaibhav Joshi & Mr.Vivek  
Mathur, Adv. for R-1.  
Ms.Chetna Bhalla, Adv.for R-2.

**CORAM:**  
**HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. The petitioner has filed the abovementioned petition under Section 9 of the Arbitration and Conciliation Act, 1996 for seeking certain interim orders.
2. The petition along with the pending application was listed before Court on 18<sup>th</sup> August, 2015 when in the presence of the respondents, the following order was passed:-

**"O.M.P.(I) 435/2015 & I.A. No. 16773/2015**

1. Issue notice. Learned counsel for respondent No.1 accepts notice. Notice be now issued to respondent No.2 by all modes including registered speed post and/or approved courier on filing process fee within one week, returnable on

30<sup>th</sup> October, 2015. *Dasti* in addition. The affidavit of service, enclosing the tracking report of the postal authority and/or courier agency be filed by the petitioner at least one week before the next date of hearing.

2. Learned counsel for petitioner submits that the petitioner entered into an agreement with the respondent for supply of water effluent treatment equipment.

3. The petitioner furnished the bank guarantee No.0005BG00075213 dated 14<sup>th</sup> December, 2012 of Rs.3,01,30,466/- to respondent No.1. It is submitted that the petitioner procured the equipment for being supplied to respondent No.1 by December, 2013. However, the respondent No.1's project was not ready by that time and therefore, they did not take delivery of the same. It is further submitted that petitioner No.1 has kept the said equipment in the warehouse in Pune and the petitioner is incurring warehouse cost of Rs.2,00,000/- per month for storage of the equipment. It is further submitted that respondent No.1 is still not in a position to take the delivery and as such, there is breach on the part of respondent No.1.

4. The respondent No.1 has invoked that bank guarantee vide letter dated 17<sup>th</sup> July, 2015 but the bank guarantee has not been encashed on the ground of stay granted by the District Court, Pune. The District Court, Pune has dismissed the petitioner's petition for want of territorial jurisdiction whereupon the petitioner has approached this Court.

5. Learned counsel for respondent No.1 submits, on instructions, that respondent No.1 is aware that the petitioner had procured the equipment. It is however submitted that petitioner was required to procure the machine only after notice from respondent No.1 and no such notice was issued by respondent No.1. Learned senior counsel further submits that respondent No.1 is still not in a position to take the delivery.

6. This Court is of the *prima facie* view that the invocation of the bank guarantee No.0005BG00075213 dated 14<sup>th</sup> December, 2012 for Rs.3,01,30,466/- by the respondent No.1 is fraudulent and therefore, the invocation of the bank guarantee No.0005BG00075213 dated 14<sup>th</sup> December, 2012 of Rs.3,01,30,466/- is hereby stayed till the next date of hearing subject to the petitioners keeping the bank guarantees alive. Respondent No.2 is restrained from making the payment in respect of the said bank guarantee to respondent No.1.

7. The reply to the petition be filed within four weeks. Rejoinder within four weeks thereafter.

8. Copy of this order be given *dasti* to the counsels for parties under signature of Court Master."

3. It appears from the said order that the same was passed after considering the submissions of the parties. It is a detailed order. When the matter was taken up on 26<sup>th</sup> February, 2016, both the parties again made their submissions and also filed their written synopsis.

4. After reserving the order, it came to the notice of the Court that by order dated 22<sup>nd</sup> December, 2015, passed in Arb.P.No. 574/2015 between the same parties, the earlier Bench had constituted the Arbitral Tribunal appointing Hon'ble Mr. Justice R.V. Easwar, retired Judge of this Court, as the sole Arbitrator to adjudicate the disputes between the parties. The parties have also appeared before the learned Arbitrator. The next date of hearing before the Arbitrator has been fixed for 11<sup>th</sup> May, 2016 for considering the application under Section 17 of the Act.

5. Section 9(3) of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) reads as under:-

“9(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.”

6. It appears from the said provision that once the Arbitral Tribunal has been constituted, the Court shall not entertain an application unless the circumstances exist that the application under Section 17 is not efficacious.

7. In the above said matter, one of the applications under Section 17 of the Act is already listed before the Arbitral Tribunal. Therefore, it would be appropriate if the present petition may also be considered as Section 17 application which may also be decided by the sole Arbitrator and till the time, the said application is decided, the interim order already passed on 18<sup>th</sup> August, 2015 shall be continued, as the said order was passed in the presence of the parties but subject to the condition of keeping the bank guarantee alive till the order is vacated/modified/confirmed and further direction in this regard would be passed by the Arbitral Tribunal. Pleadings in the above said petition would be filed by the petitioner before the Arbitrator on the next date.

8. The present petition is accordingly disposed of, with a direction that till the time the present petition, which has been treated as Section 17, is decided, the interim order already passed on 18<sup>th</sup> August, 2015 shall continue. Pending application also stands disposed of.

**(MANMOHAN SINGH)**  
**JUDGE**

**MAY 09, 2016**