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

+ O.M.P.(I) (COMM.) 60/2015

GANGOTRI ENTERPRISES LIMITED

..... Petitioner

Through: Mr Rajshekhar Rao, Mr Subhiksh
Vasudev and Ms Gauri Puri,
Advocates.

versus

NTPC LIMITED

..... Respondent

Through: Mr Puneet Taneja and Ms Shaheen,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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22.12.2016

1. The petitioner (hereafter 'GEL') has filed the present petition under Section 9(1) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“WHEERFORE, in view of the above mentioned facts and circumstances and in the interest of justice, it is most humbly and respectfully prayed that this Hon'ble Court may kindly be pleased to Pass appropriate ad-interim (and *ex-parte*, if necessary) orders/directions as interim protection by restraining the Respondents from encashing and realizing the proceeds of the following Bank Guarantees being (i) BG No.4/08 dated 11.03.2008 issued by Canara Bank, Hazrat Ganj Branch, Lucknow and valid till 10.12.2015, (ii) BG No.26/2008 dated 25.03.2008 issued by Corporation Bank, Kaiser Bagh Branch, Lucknow and valid till 22.12.2015 and (iii) BG No.39/2009 dated 17.12.2009 issued by Corporation Bank, Kaiser Bagh Branch, Lucknow and valid till 14.12.2015, respectively till the adjudication of the arbitration proceedings arising out of Contract Agreement No.CS-6130-319A-9-CS-LOA-5053 dated 21.01.2008 for "Raw Water Reservoir Civil Works

for NTPC, Stage-II (2X490 MW) at Dadri, District Gautam Budh Nagar, State of UP." between the parties.

2. Insofar as the Bank Guarantee No.4/2008 dated 11.03.2008 is concerned, the same has been invoked and encashed. Thus, the relief as prayed for in respect of the said Bank Guarantee has become infructuous. The Bank Guarantee No.26/2008 dated 25.03.2008 is a performance bank guarantee, furnished by the GEL for due performance of the contract in question. The Bank Guarantee No.39/2009 dated 17.12.2009 has been furnished by the GEL to secure the respondent (hereafter 'NTPC') against the free materials supplied by NTPC to GEL.

3. The disputes between the parties arise in connection with the contract dated 12.03.2008 that was entered into between the parties pursuant to NTPC accepting GEL's bid for execution of "Raw Water Reservoir Civil Works for NTPC, Stage-II (2X490 MW) at Dadri, District Gautam Budh Nagar, Uttar Pradesh" on 09.05.2007.

4. Admittedly, the works in question were inordinately delayed and it is GEL's case that the delays were caused for various reasons - all attributable to NTPC - including failure on the part of NTPC to supply the layout plan and construction drawings within time. The same is disputed by NTPC.

5. In view of the disputes as indicated above, GEL made claims to the extent of ₹41.67 crores which were refuted by NTPC.

6. Thereafter, on 09.10.2012, GEL invoked the arbitration clause and Shri Sushant Baliga, Additional Director General (Retired), CPWD was appointed as the Arbitrator by the Chairman and Managing Director of

NTPC. There was an inordinate delay in conclusion of the arbitration proceedings and this led GEL to file a petition under Section 14 of the Act, *inter alia* praying that the mandate of the Arbitrator be terminated. Without going into the merits of the allegations made by GEL, this Court by an order dated 30.11.2016, directed the Chairman and Managing Director of NTPC to appoint an Arbitrator in place of Shri Baliga.

7. The learned counsel for NTPC states that an Arbitrator is likely to be appointed shortly.

8. NTPC alleges that GEL has since abandoned the work. Consequently, NTPC issued a notice dated 17.08.2016 under clause 41 of the General Conditions of Contract calling upon GEL to start the work within seven days failing which NTPC would cancel the contract. It is stated that since GEL failed to restart the works, NTPC has terminated the contract in question by a letter dated 26.11.2016.

9. It is apparent from the above that there are disputes between the parties, however, it is not necessary to examine the disputes between the parties on merits as the relief sought by GEL is limited to seeking injunction against NTPC from invoking the performance bank guarantee (Bank Guarantee No.26/2008) as well as the bank guarantee issued in respect of material provided by the respondent (Bank Guarantee No.39/2009).

10. The law relating to interdiction of the bank guarantees is well settled; invocation of bank guarantees cannot be interdicted except in rare cases where a party seeking injunction can establish a *prima facie* case of fraud of an egregious nature affecting the underlying transaction.

11. In **Svenska Handelsbanken v. Indian Charge Chrome and Others:** (1994) 1 SCC 502, the Supreme Court had clearly held that a BG/irrevocable letter of credit cannot be interfered with unless fraud is established and irretrievable injustice is involved. The aforesaid decision has been consistently followed by the Courts thereafter. In **Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others:** (1995) 6 SCC 68, the Supreme Court referred to the earlier decision in *Svenska Handelsbanken* (*supra*) and held as under:-

“5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v Bank of India* [1981] 3SCR 300, *U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd.* [1988] 1 SCR 1124, *General Electric Technical Services Co. Inc v Punj Sons (P) Ltd.* [1991] 3SCR 412 and the decision of the Court of Appeal in England in *Elia and Rabbath v Matsas and Matsas* [1966] 2 Lloyd’s Report 495 and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* AIR 1994 SC 626, laid down the law thus:

“...in case of confirmed bank guarantee/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...

...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.”

12. In ***U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.***: (1988) 1 SCC 174, the Supreme Court had clarified that:

“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.”

13. In the present case, the disputes between the parties are contractual disputes and this Court is not persuaded to accept that NTPC has committed a fraud in invoking the bank guarantees or a fraud that vitiates the underlying contract.

14. Accordingly, the relief prayed for in the present petition cannot be granted. The same is accordingly, dismissed.

15. It is clarified that nothing contained in this order shall preclude the parties from advancing any contention as may be advised. The observations made herein are only *prima facie* observations and the Arbitrator shall decide the disputes raised un-influenced by any observations made herein.

VIBHU BAKHRU, J

DECEMBER 22, 2016
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