IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.20178 of 2016

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M/s Delco Infrastructure Projects Ltd. having its registered Office at 158, Sector -9, Pocket-1, Dwarka, New Delhi-77 and its corporate Office at 46, Sector- 13, Pocket -1, Phase II, Dwarka, New Delhi- 75 through its authorized Signatory Gaurav kumar S/o Tribhuwan Jha

.... Petitioner/s

Versus

1. Bharat Bhari Udyog Nigam Limited (Government of India Enterprise) through its Chairman and Managing Director having registered office at 26 Raja Santosh Road, Alipore, Kolkata, 700027.
2. The Chairman & Managing Director, Braithwaite Burn and Jessop Construction Company Limited , Reg. Off: 27, Rajendra Nath Mukherjee Road, P.O. Box No. 264, Kolkata -700001, West Bengal India.
3. The Chief Manager, State Bank of Bikaner and Jaipur N-103, Kirtinagar, New Delhi- 110015.
4. The Union of India, through Secretary, Ministry of Heavy Industry , Udyog Bhawan, Delhi.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. P.K. Shahi, Sr. Adv.
Mr. Vikas Kumar, Adv.

For the Resp. No.2 : Mr. Y.V. Giri, Sr. Adv.
Mr. Asish Giri, Adv.

For the Bank : Mr. Girijesh Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 18-03-2017

Heard learned counsel for the petitioner and counsel for the private respondents.

In the present case, the petitioner is challenging the letter no. 331 dated 7.12.2016 issued by the respondent no.2 directing the respondent no.3 to encash the bank guarantee, namely, BG No. 1056812BG0000059 dated 28.12.2012, 11056812B000061 dated

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28.12.2012 and 1056812BG0000064 dated 9.1.2013 issued by State Bank of Bikaner and Jaipur, N-103, Kirtinagar, New Delhi.

The parties have entered into an agreement for construction of building at Samastipur which provides all disputes would be settled by court at Kolkata. In the agreement, jurisdiction of the court has been provided. The Bank guarantee, furnished by the petitioner in favour of respondent, indicates the dispute would be settled by Kolkata Court or Delhi Court. As the petitioner has raised a dispute with the respondent no.1, the matter was referred to the sole Arbitrator, namely, Indrajit Sengupta and he has disposed of the arbitration by passing a final order, paragraph no.46 whereof reads as follows:-

> *"46. In the background of the above, the undersigned as Sole Arbitrator gives the following Order:*
>
> *(a) BBUNL should provide Delco within 15 days from this Order, an updated statement (as on 31.12.2015) of contract wise details of bills, payments and LD deductions, dully reconciled with RAU for the six completed contracts, to settle the matter and pay to Delco, if anything pending.*
>
> *(b) BBUNL should the release BG against mobilization advance of differential of Rs. 855209.05 being the differential of BG held by BBUNL of Rs. 6061215.00 less BG of Rs. 5206005.95 which is required to be continue against the unfinished contracts.*
>
> *(c) Since the contracts are terminated, BBUNL*

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should make final settlement of bills with adjustment for the recoverable advances and dues including penal provisions, if any, for all the eight contracts but ensuring adequate provisions for the risk purchase amount of about Rs. 10499413/-.

(d) BBUNL should hold the BG of Rs. 12125129.67 as performance guarantee. BBUNL, even after release of the BG against mobilization advance as suggested at point (b) under this Para, will be holding a total BG of Rs. 17331135.62 (Rs 12125129.67 as performance guarantee plus BG of Rs. 5206005.95 against mobilization advance). Once the risk purchase amount for the extra cost is ascertained and finalized, BBUNL should release the balance BG after full coverage of the risk purchase amount.

(e) The claim of DELCO, therefore, for a compensation for price escalation of the contracts, in principle, is acceptable. Delco is entitled to claim compensation, the amount of which should be calculated/ascertained by an independent civil engineer based on the delay calculated under column 'd' of table at para 20.

(f) The Claim of Delco that the termination of the two unfinished contracts was is invalid and illegal, cannot be justified and hence rejected.

(g) Waiver of penal (LD) deductions rejected as the same is not tenable.

(h) Claim of Delco for waiver of penal (LD) deductions rejected as the same is not tenable.

(i) Delco's Claim for interest payment @ 18%

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for delayed payment of the running bills and for loss of profit @ 15% on the balance contract value for the two unfinished contracts are not tenable and hence rejected.

(j) The Claim of BBUNL for offsite/on site expenditure incurred by BBUNL, Cost of protection measures at Boys' Hostel Building arising out of abandonment of work by Delco from 1st January 12 to 10th January 2015 and cost of site visits by the BBUNL officials during the time over run period of the project are acceptable in principle but should be recalculated based of the reference dates as mentioned at column (e) of table at Para 42 along with documentary evidence of actual expenditure incurred and submitted to Delco following which the amount could be adjusted/deducted against/from the final settlement. In case the provision under final settlement is not adequate, Delco will be required to pay the amount To BBUNL for compensation.

(k) The claim of BBUNL for cost of balance works for Auditorium Building and Boys' Hostel Building amounting to Rs. 10499413/- has been taken care of under point.

(l) All other claims of BBUNL are not acceptable and hence rejected."

Against certain portion of award, the petitioner has filed an application under Section 34 of the Arbitration and Conciliation Act before City Civil Court, Samastipur. The respondent no.1 is satisfied with the award as it has not filed any application under

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Section 34 of the Arbitration Act and, as such, the arbitration award has attained finality against the respondent no.1. In terms of the award, the petitioner submitted bill but, instead of making payment, the respondent no.1 has invoked the bank guarantee which compelled the petitioner to approach this Court.

The question of territorial jurisdiction has been raised by the respondent no.1 having argued that in terms of the agreement and in terms of bank guarantee, this Court has no territorial jurisdiction as all dispute should be adjudicated by Kolkata Court, whereas, learned counsel for the petitioner submits the term of agreement prescribing particular Court to adjudicate the dispute will not oust the jurisdiction of this Court under Article 226 of the Constitution of India.

Instead of going into the merit of the case as well without considering the issue of territorial jurisdiction, as the parties have agreed that they would raise the dispute before Kolkata High Court, this Court is of the view that let the petitioner is allowed to withdraw this writ application with liberty to file appropriate applicable before the Kolkata High Court, in the meantime for 20 days, the order of stay passed by this Court in favour of petitioner, will remain operative but, after expiry of aforesaid period, the protection granted to the petitioner will be treated to have been withdrawn.

This Court, however, is not giving any opinion on the

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merit of the case.

With the aforementioned observation, this application is disposed of.

(Shivaji Pandey, J)

Rishi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.03.2017
Transmission Date	

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