IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Commercial Arbitration Petition (L) NO. 412 OF 2017

Wind World (India) Limited ...Petitioner
Versus
Lalpur Wind Energy Private Limited And Anr ...Respondents

Mr.D.D.Madon, Senior Counsel with Dr.Birendra Saraf with Mr.Manish Doshi, Ms.Olga Luone i/b. M/sVimadalal & Co., for the Petitioner.

Mr.Ashish Kamat with Mr.Krishnava Dutt, Mr.Ranjit Shetty and Ms.Vatsala Pant i/b. Argus Partners, for Respondent No.1.

CORAM : G.S.Kulkarni, J.

DATE : 21th September, 2017

P.C. :

1. Heard Mr.Madon, learned Senior Counsel for the petitioner and Mr.Kamat, learned Counsel for respondent no.1.

2. By this petition under Section 9 of the Arbitration and Conciliation Act,1996 (for short 'the Act') the petitioner, pending the arbitral proceedings, has approached this Court seeking the following reliefs:-

> (a) that pending the hearing and final disposal of the proposed Arbitration proceedings, and the making and implementation of the Award therein, a temporary order and injunction be issued restraining respondent no.1, its servants, agents

> and assignees from in any manner invoking, acting in furtherance of invocation, making any demand on or receiving and/or recovering any amount from the Respondent No.2 under the Advance Bank Guarantee bearing Ref.No. No.003GM01121390001 dated 18th May,2012 (which has been extended from time to time until 17th November 2017);
>
> (b) that pending the hearing and final disposal of the proposed Arbitration proceedings, and the making and implementation of the Award therein, a temporary order and injunction be issued restraining the Respondent No.2, its servants, agents and assignees from in any manner making any payment under the Advance Bank Guarantee bearing Ref.No.003GM01121390001 dated 18th May,2012 (which has been extended from time to time until 17th November,2017) to the Respondent No.1 and/or anyone else;"

3. As can be seen from the above reliefs, the petitioner seeks an injunction against the respondents from invocation, encashment and payment under the bank guarantee dated 18 May 2012 as issued by respondent no.2 at the behest of the petitioner in favour of respondent no.1.

4. Respondent no.1 had entered into a contract dated 13 March 2012 with the petitioner for purchase of 63 numbers of E-53, 800 KW Wind Energy Converters, Towers, Transformers and DP structure, who had agreed to supply the same. As also the petitioner was to provide civil works, electrical works and erection and

commissioning of 63 numbers of E-53, 800 KW Wind Energy Converters at project site under the civil works contract as also the transport materials from Daman, Jamnagar/Gadag/Newai and other places to the project side and deal with making payments to Maharashtra Energy Development Agency for infrastructure Development Charges for evacuation of Power and Maharashtra State Electricity Distribution Co.Ltd. And for commissioning of WEC's and transfer development rights for 63 numbers of E-53, 800 KW Wind Energy Converters at Project Side under the transfer contract, to respondent no.1.

5. In the year 2012 there were four contracts which are entered between the parties as set out in paragraph 4(a) of the petition namely (i) contract for supply of materials dated 13 March 2012 (later amended on 21 September 2012), (ii) contract for civil works, electrical works and erection and commissioning of 63 nos. of E-53 800 KW Wind Energy Converters dated 13 March 2012 (later amended on 21 September 2012), (iii) contract for transportation of materials and commissioning of WEC' dated 13 February 2012 (later amended on 21 September 2012) and (iv) contract for transfer of development rights dated 13 February 2012 collectively for setting up of Wind Power. The contract in issue in the present case and in

respect of which the bank guarantee in question was furnished by respondent no.1 is in regard to Khandke Project, District Ahmednagar in Maharashtra (for short 'the Maharashtra contract'). Under the said contract, respondent no.1 furnished a bank guarantee of respondent no.2 – bank of an amount of Rs.68,66,90,000/- dated 18 May 2012. The relevant clauses of the bank guarantee are as under:-

> "In consideration of M/s.Lalpur Wind Energy Private Limited having registered office at the IL&PS Financial Centre, C22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051 (hereinafter referred to as the "Purchaser", which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns) having awarded to M/s.Enercon (India) Limited with its Corporate office at "A-9, Enercon Tower, Veera Industrial Estate, Veera Desai Road, Andheri (West), Mumbai-400053, having a branch at 513 & 514, World Trade Centre, Barakhambha Lane, New Delhi-110001 (hereinafter referred to as "Contractor" which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators and executors), a contract, by issue of Purchaser's Purchase Order dated 13-03-2012 on the terms and conditions stated therein and the same having been unequivocally accepted by the Contractor on valued at Rs.287,91,00,000/- (Rupees Two Hundred Eighty Seven Crores Ninety One Lacs only) for supply, installation and commissioning of Wind Electric Converters (WECs) 63 nos. at Khandke Site in the state of Maharashtra (hereinafter called the "Contract") and the Purchaser having agreed to make an advance payment of 25% value of contract amounting to Rs.71,97,75,000/- (Rupees Seventy One crores Ninety Seven Lacs Seventy Five Thousand only) against bank guarantee to be

furnished by the Contractor valid for a period of 7 months i.e. till 30.11.2012 for the due performance of the Contract i.e. successful commissioning of the WEC's by 30.11.2012.

We, YES Bank Ltd., a company incorporated under the Companies Act 1956 and a banking company within the meaning of Banking Regulation Act,1949 and having its registered office at Nehru Centre, 9th Floor, Discovery of India, Worli, Mumbai-400018 & Branch at Plot No.11/48, Shopping Centre, Diplomatic Enclave, Malcha Market, Chanakyapuri, New Delhi-110021 (hereinafter referred to as the "Bank" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators and executors) do hereby guarantee and undertake to pay the Purchaser, immediately on receipt of written demand any or, all monies payable by the Contractor to the extent of Rs.68,66,90,000/- (Rupees Sixty eight crores sixty six lacs ninety thousand only) as aforesaid at anytime up to 30.11.2012 without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. The Bank further undertakes to pay the interest for the delayed period i.e. from the date of demand till the date of payment at the rate equivalent to its Prime Lending Rate (PLR) existing during that said delayed period, unless the delay to payment is prevented by an order of Court. Any such demand made by the Purchaser on the bank shall be conclusive and binding notwithstanding any difference between the Purchaser and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Purchaser and further agrees that the guarantee herein contained shall be enforceable till 30-11-2012 expiry of its validity."

(emphasis supplied)

6. The case as urged on behalf of the petitioner is that respondent no.1 has invoked the above bank guarantee dated 18 May 2012 not for the Maharashtra Contract but for the other contracts. The contention is that it is a bank guarantee in regard to advance payment of 25% value of the contract as made by respondent no.1. It is the petitioner's contention that the Maharashtra project in regard to which the subject bank guarantee was furnished is 90% completed and therefore, invocation of bank guarantee in that regard is not lawful. It is submitted that infact respondent no.1 is invoking this bank guarantee in respect of the Gujarat, Karnataka and Rajasthan projects. It is submitted that in view of the clear terms of the bank guarantee, respondent no.1 could not have invoked the bank guarantee in regard to the said projects. The attention of the court is drawn to the averments with regard to the status of the subject contract as appearing at pages 12 to 15 of the petition. It is further submitted that admittedly the bank guarantee from 18 May 2012, that is from the date it was issued by respondent no.2 is kept alive till 17 November 2017 as the obligation under the contract would now be completed. It is submitted that thus the Maharashtra project being almost completed, there was no reason for the respondent no.1 to invoke the bank guarantee. It is submitted that in the above circumstances, if the respondents are not restrained from

invoking/encashing the bank guarantee, irreparable injustice would be cause to the petitioner.

6. On the other hand Mr.Kamat, learned Counsel for respondent no.1 at the outset submits that the bank guarantee has been invoked by letter dated 15 September 2017 a copy of which is tendered by Mr.Kamat which records that the bank guarantee is invoked for the petitioner having failed to fulfill its obligation under the contract. It is submitted that the petitioner cannot have a quarrel even if the bank guarantee has been invoked in respect of the other project inasmuch as the petitioner by its letter dated 18 July 2013 had informed respondent no.1 interalia that the bank guarantee submitted by the petitioner under various purchase orders namely Maharashtra, Gujarat and Karnataka, or for any other projects and not necessarily limited to the Advance Bank Guarantees pertaining to the respective project. It is necessary to note the contents of the said letter:-

> "WWIL/LWEL/2013-14/02
> 18th July,2013.
>
> Mr.Anand Nair
> Lalpur Wind Energy Limited
> The IL&FS Financial Centre
> Plot No.C 22, G Block,
> Bandra-Kurla Complex
> Bandra (East),
> Mumbai-400051.

Sub: Advance Bank Guarantees (ABGs) submitted under the Pos referred

Ref:
1.Purchase Orders dated 21.09.2012 for 50.4 MW Project at Khandke Site in Maharashtra.
2.Purchase Orders dated 30.06.2012 for 54.4 MW Project at Lallpur Site in Gujarat
3. Purchase Orders dated 21.09.2012 for 44 MW Project at Tadas Site in Karnataka.
4. Purchase orders dated 30.06.2012 for 25.6 MW Project at Khandke Site in Maharashtra.

Dear Anand,

We hereby confirm and agree to Lallpur Wind Energy Limited (LWEL) exercising its rights under Purchase Orders for a Project (any of the POs referred above) to call upon any of the ABGs submitted by us under Purchase Orders for any of the other Projects (listed above), and not necessarily limited to the ABGs pertaining to the respective Project.

For example, LWEL can take recourse to the ABGs issued for Khandke I project for any requirements of such recourse in accordance with the Purchase Order for Khandke II project.

Thanking you,

Yours faithfully,
For Wind World (India) Limited

D.G.Kamath
Vice President-Sales & Marketing." (emphasis supplied)

7. Mr.Kamat submits that the above letter has not been revoked and the same subsist between the parties. Mr.Kamat pointing out to various averments in the petition submits that there was delay in completing the work under the contract and that admittedly the Maharashtra project has also not completed, and therefore respondent no.1 was entitled to invoke the bank guarantee in question. It is submitted that the apprehension of the petitioner as

set out in the petition is totally erroneous and unfounded. It is submitted that the petitioner has not made out any case as the law would require for an injunction to be granted by the Court against invocation of the bank guarantee.

8. Having heard the learned Counsel for the parties and having perused the averments as made in the petition, the clauses of the bank guarantee, and the other documents as referred above and more particularly the letter dated 15 September 2017 of respondent no.1 invoking the bank guarantee, it can surely be observed that there is much substance in the contention of Mr.Kamat, learned Counsel for respondent no.1. From a perusal of the averments as made in the petition, it is clear that the petitioner has not completed the works under the Maharashtra contract. The petitioner in paragraph 4(s) at page 12 of the petition has admitted that there are several delays in performance of the contract. Further a perusal of the chart indicating completion status of the contract also indicates that there are pending works not only in respect of Maharashtra contract but also the other contracts. A reading of the bank guarantee at page 58 to the petition, also indicates that it was not only a bank guarantee for advance received by the petitioner but also for "*due performance of the contract that is successful*

commissioning of the WEC's by 30 November 2012" as paragraph one of the bank guarantee would recite. Admittedly, the petitioner has kept alive the bank guarantee till 17 November 2017. If this is the contractual position entered between the parties, then it cannot be said that action of respondent no.1 in invoking the bank guarantee is in any manner illegal so as to injunct respondent no.1 against invocation or encashment of the bank guarantee.

9. The petitioner has failed to make out any case of any fraud, irreparable prejudice or injustice or of any special equities for this Court to grant the reliefs of injunction as prayed for.

10. Resultantly, the petition fails. It is accordingly dismissed. No costs.

[G.S.Kulkarni, J.]