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

+ **O.M.P.(I) (COMM.) 27/2017**

IVRCL LIMITED

..... Petitioner

Through: Mr Vivek Sibal, Mr Sumesh Dhawan
and Mr Tannya Baranwal, Advocates.

versus

**INDIAN OIL CORPORATION LIMITED
& ANR.**

..... Respondents

Through: Mr Abhinav Vashisht, Senior
Advocate with Ms Tannishtha Singh
and Mr Amit Meharia and Ms Rishita,
Advocates.
Mr Karan Khanna and Ms Asmita
Kumar, Advocate for D-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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30.01.2017

VIBHU BAKHRU, J

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

“a) grant an injunction by restraining the respondent No.1, their agents, servants or any other persons claiming through or under them from invoking or en-cashing the bank guarantee dated 21.12.2011 bearing No. 043271211000431 for Rs 6,57,94,118/- valid till 31.3.2017 (for claim upto 30.9.2017) and bank guarantee dated 08.01.2011 bearing No. 043271111000008 for Rs 2,19,31,500/- valid till 31.3.2017 (for claim upto 30.9.2017) issued by Respondent No.2 bank.

b) restrain the respondent No.2 bank from honoring/en-cashing the schedule bank guarantees.”

2. Briefly stated, the relevant facts are that Indian Oil Corporation Limited (hereafter 'IOCL') had invited bids for the work of Civil and Structural works including supply, foundation, painting and erection of technology structural steel works related to coke drum area of delayed coker unit (030) of Paradip refinery project in Paradip, Orissa (hereafter 'the works'). IVRCL participated in the aforesaid tender and its bid was the lowest. On 07.10.2010, IOCL issued a Fax of Acceptance (FOA) and in terms of the tender condition, called upon IVRCL to deposit the sum of ₹2,19,31,500/- by way of demand draft or furnish a bank guarantee for an equivalent amount towards the initial security deposit computed at the rate of 2.5% of the total contract value.

3. On 25.11.2010, IOCL sent a Letter of Acceptance (LOA) accepting IVRCL's bid and awarding the contract for execution of the works at a total contract price of ₹87,72,56,182/-. In terms of the contract, IVRCL issued two bank guarantees: (i) Bank Guarantee dated 08.01.2011 bearing No. 043271111000008 for ₹2,19,31,500/- valid till 31.3.2017; and (ii) Bank Guarantee dated 21.12.2011 bearing No. 043271211000431 for ₹6,57,94,118/- valid till 31.3.2017.

4. It is not disputed that the works have been completed and a mechanical completion certificate was issued on 07.01.2015.

5. IVRCL claims that it has raised certain invoices for the work done but its invoices have not been paid in the entirety as yet. IVRCL further claims

that apart from unpaid invoices, it also has certain claims against IOCL. IVRCL's grievance is that instead of making the payments due, IOCL is now seeking to fraudulently encash the performance bank guarantees despite accepting the works as having been satisfactorily executed.

6. Although, IOCL admits that a sum of ₹4,55,68,484/- is due and payable to IVRCL on account of the work done, it also claims that a sum of ₹61,43,23,993/- is due on account of price adjustment discount - which is in the nature of liquidated damages - in terms of clause 4.4.0.0 of the contract. In addition, IOCL also claims a sum of ₹2,11,77,325/- as a possible liability towards dues of the sub-contractors of IVRCL. Thus, according to IOCL, it is entitled to encash the bank guarantees for a total sum of ₹4,01,40,912/-. The table of computation, as affirmed by IOCL, in its reply to the petition is reproduced below:

S.No.	Description	Amount (INR)
1.	Total Invoiced amount upto Final Bill	Rs.61,43,23,993.00
2.	Payment already released	Rs. 56,87,55,509.00
3.	Balance	Rs.4,55,68,484.00
4.	Service Tax on Balance payment @ 4.12%	Rs.18,77,422
5.	Miscellaneous Recoveries in Final Bill against water charge, land charge, service tax recovery on PRD, Works Contract Tax (WCT) etc.	(-) Rs.49,77,094
6	PRD amount recovery (10% of total invoiced amount) (10%*1)	(-)Rs.6,14,32,399.00
7	Provision for Petitioner's Subcontractor Payment	(-) Rs.2,11,77,325

8	Total Recovery in Final Bill (5+6+7)	(-)8,75,86,818
9	Shortfall of Recovery after processing the Final Bill (3+4+8)	(-)Rs.4,01,40,912

7. It is seen from the above that even according to IOCL, only a sum of ₹4,01,40,912/- is recoverable from IVRCL and this includes a sum of ₹2,11,77,325/- as provision for payment to IVRCL's sub-contractors.

8. In so far as the recovery of ₹49,77,094/- is concerned, the same would be a matter of reconciliation and the learned counsel for IVRCL has no objection if the same is taken into account for the purposes of encashment of the bank guarantee.

9. In so far as the claim for price adjustment at the rate of 10% of the invoices is concerned, there are serious disputes between the parties. IVRCL claims that the delays in execution of the works are attributable to IOCL and therefore, IVRCL cannot be penalized for the same. At this stage, it is not necessary for this Court to examine the merits of the dispute between the parties. The only question to be examined is whether the invocation of the bank guarantees is fraudulent as alleged or is otherwise unsustainable. At this stage, it cannot be determined whether IOCL would be entitled to claim the price adjustment. Thus, notwithstanding, the issues that IVRCL may have with regard to levy of price adjustment, IOCL would be entitled to invoke the bank guarantees as it is claiming the aforesaid amount.

10. In so far as the recovery of a sum of ₹2,11,77,325 by invoking the bank guarantees is concerned, it is seen that the said amount is claimed as a provision for payment to IVRCL's sub-contractors. Mr Vashisht, the learned

senior counsel appearing for IOCL was pointedly asked whether IOCL is liable to pay any amounts to the sub-contractors engaged by IVRCL; he responded in the negative. IOCL has not produced any material which would even remotely indicate that it would be liable towards any claims that IVRCL's sub-contractors may have against IVRCL.

11. In the circumstances, it is difficult to accept that IOCL would be entitled to invoke the bank guarantees furnished by IVRCL merely because some of its sub-contractors have written letters to IOCL. In absence of any material claim required to be settled by IOCL, there is no justification for invoking IVRCL's bank guarantee for the aforesaid sum. In addition, IVRCL has also committed to provide an indemnity to IOCL in the prescribed form indemnifying IOCL against any claim that may be made against IOCL for non-compliance of the terms of the contract.

12. It is also relevant to observe that the bank guarantees in question are performance bank guarantees. There is no dispute that the works in question have been satisfactorily executed by IVRCL and IOCL had also issued a certificate dated 07.01.2015, *inter alia*, certifying as under:-

“THEY HAVE COMPLETED THEIR SCOPE OF WORK COVERED UNDER THE SAID CONTRACT ON JANUARY 28, 2014 IN ACCORDANCE WITH THE SPECIFICATION, DRAWINGS ETC., LAID DOWN IN THE CONTRACT SATISFACTORILY.”

13. It is clear from the above that the works in question were completed as early as on 28.01.2014 and the reply filed by IOCL to this petition does not indicate that IOCL has any claims regarding performance of the works

except as indicated in the table reproduced herein before.

14. In the circumstances, there would be no justification for permitting the IOCL to invoke the bank guarantees to the full extent.

15. In view of the above, IOCL cannot be restrained from invoking the bank guarantees to the extent of ₹1,89,63,587/- (₹4,01,40,912/- less ₹2,11,77,325/-). Respondent no. 2, Indian Overseas Bank Ltd, is accordingly directed to honour the bank guarantees invoked by IOCL but limited to extent of ₹1,89,63,587/-. Bank guarantees for the balance amount shall remain outstanding and IVRCL shall ensure that the bank guarantees for the balance sum are kept alive till the resolution of the disputes or subject to further orders that may be passed by the Arbitral Tribunal.

16. IVRCL and IOCL will also take necessary steps for referring the disputes to arbitration in accordance with the arbitration clause as expeditiously as possible and in any event, not later than three months from today.

17. Needless to state that nothing stated herein would be read as an expression of opinion on the merits of the disputes between the parties and their all contentions are reserved.

18. The petition is disposed of.

VIBHU BAKHRU, J

JANUARY 30, 2017

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