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

\+ **O.M.P.(I) (COMM.) 167/2017**

BERNARD INGNIEURE ZT GMBH ..... Petitioner

Through Ms. Sindhu Sinha, Advocate.

versus

IRCON INTERNATIONAL LTD. & ANR. ..... Respondents

Through Mr. Dinesh Agnani, Sr. Advocate with Mr. Ishan Chawla and Ms. Leena Tuteja, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **26.05.2017**

VIBHU BAKHRU,J

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

> "a) secure the money under the bank guarantee in dispute in arbitration by directing the respondent No. 1 to return/reverse the amount encashed under the bank guarantee issued by the respondent No. 2 in reciprocation of the bank guarantee issued by the bank Austria for the purposes of the tender/ contract between the petitioner and the respondent No.1; and/or
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> b) direct the Respondent No. 2 and/ or his agents to return/ release to the Petitioners bank guarantee in favour of Respondent No. 2 for amounts of EURO 487,690.68 plus INR 1,91,77,305.04 (Four hundred and eighty

seven thousand, six hundred and ninety Euros and sixty-eight cents plus Nineteen million, one hundred and seventy-seven thousand, three hundred and five Indian Rupees and four paise) issued by Bank Austria; and

c) direct the Respondent No.1 to deposit the money received by Respondent No. 1 under the bank guarantee in favour of Respondent No. 1 for amounts of EURO 487,690.68 plus INR 1,91,77,305.04 (Four hundred and eighty seven thousand, six hundred and ninety Euros and sixty-eight cents plus Nineteen million, one hundred and seventy-seven thousand, three hundred and five Indian Rupees and four paise) into an escrow account; and

d) in the alternative direct the Respondent No. 1 to deposit the entire sum received by encashing the bank guarantee before this Hon'ble Court till the present proceedings and/ or the disputes between the Petitioners and the Respondent No.1 are settled either by way of reconciliation of the accounts or through the adjudication by the Arbitrator; and/ or"

2. The petitioner had participated in a tender floated by respondent no.1 (IRCON) for *Detailed Design Consultancy of all structures including Tunnels, bridges/ viaducts, Station Yards and associated works and Construction Supervision of Tunnels between km 110 & km 125 in connection with Construction of Dharam-Qazigund Section of Udhampur-Srinagar-Baramulla New BG Railway Line Project*. The petitioner's bid was accepted and IRCON issued a letter of acceptance on 31.01.2012.

3. In terms of the tender conditions, the petitioner furnished a bank guarantee issued by respondent no.2 (Bank of Baroda) in the sum of EURO

487,690.68 plus ₹1,91,77,305,04/-. The said bank guarantee was issued by Bank of Baroda based on a counter guarantee issued by the Bank of Austria in favour of Bank of Baroda.

4. The contract was for a period of 48 months commencing January 2012 and expiring on 31.01.2016. According to the petitioner, it had performed its obligations - supervision of works in compliance with the instructions issued by IRCON - in terms of the agreement between the said parties.

5. The petitioner claims that the contract in question was delayed for reasons attributable to IRCON and the sub-contractors that were engaged by IRCON to carry out the construction works. IRCON, on the other hand, asserts that the petitioner has failed to perform its obligations in its entirety and has failed to complete certain activities as contracted for.

6. The petitioner also claims that certain sums have been unjustifiably withheld. In view of the disputes, the petitioner sought for a resolution of the disputes in terms of the agreement. It is stated that several meetings were held for amicable resolution of the disputes (although there are differences between the parties as to the correct recording of minutes of some of those meetings). The petitioner further claims that at a meeting held on 21.12.2016, the parties arrived at a consensus; this was recorded in a letter issued by the petitioner to IRCON on the same date.

7. Thereafter, the petitioner also sent several reminders for getting approval of the Board of Directors of IRCON to the outcome of the mediation - consensus arrived on 21.12.2016.

8. On 10.03.2017, IRCON issued a letter approving the extension of time for continuation of services in respect of the project up to 31.01.2019. According to the petitioner, this was contrary to the consensus arrived at on 21.12.2016.

9. On 11.03.2017, IRCON sent another letter alleging that there was delay in submission of the designs on the part of the petitioner and requesting the petitioner to finalise the design and drawings of a part of work within 15 days failing which IRCON would take steps as per contractual conditions.

10. On 27.03.2017, IRCON sent a letter to the petitioner requesting the petitioner to extend the bank guarantee in question upto 31.10.2017. However, IRCON also stated that it would submit its claim for encashment of the bank guarantee if the same was not extended on or before 30.04.2017 (the date of expiry of the bank guarantee).

11. On 29.03.2017, IRCON once again requested the petitioner to convey its acceptance to the extension of the contract on the terms and conditions as recorded in the earlier letter dated 10.03.2017 within a period of two days failing which it would be presumed that petitioner was not willing to continue with the works.

12. The petitioner informed IRCON on 30.03.2017 that it had applied for extension of the validity of the performance bank guarantee in question and would respond to IRCON's letter dated 29.03.2017 within a period of 14 calendar days.

13. On 12.04.2017, the petitioner requested for initiation of the arbitration proceedings under Part 6 of the General Conditions of the Contract and unequivocally rejected IRCON's proposal for continuation of services. Thereafter, IRCON by an email dated 20.04.2017, requested the bank for encashment of the performance bank guarantee.

14. Ms Sindhu Sinha, learned counsel appearing for the petitioner earnestly contended that the invocation of the bank guarantees was fraudulent. He submitted that IRCON had called upon the petitioner to extend the bank guarantee and the petitioner had complied with the same. In the circumstances, there was no occasion for the respondents to proceed to encash the bank guarantee. He submitted that this was clearly fraudulent as the petitioner had been induced to extend the bank guarantees/counter guarantees on a representation that the same would not be encashed till the resolution of the disputes. He submitted that the Bank of Austria had already extended the counter guarantee to Bank of Baroda and encashment of the same would severally prejudice the petitioner's relations with its bankers and have an adverse effect on its business.

15. He further submitted that the encashment of the bank guarantee was also fraudulent as the contract had expired by efflux of time and the petitioner had duly performed the services as required. He stated that the works were not completed due to the delay on the part of IRCON and other sub-contractors and the petitioner could not be called upon to continue rendering services beyond the contractual period.

16. Mr Dinesh Agnani, learned senior counsel appearing for IRCON

countered the aforesaid submissions. He referred to the short affidavit filed by IRCON and submitted that the petitioner's performance was wanting. He referred to paragraph seven of the short reply filed by IRCON, wherein it had indicated the service/activities that, according to IRCON, remained to be completed by the petitioner.

17. It is apparent from the above that there are serious disputes between the parties. Whilst the petitioner claims that it has duly performed the agreement, IRCON disputes the same. The efforts made by the parties to resolve the disputes have not fructified.

18. At this stage, this Court is not called upon to adjudicate the rival contentions/claims. The law relating to bank guarantees is well settled and unless the party seeking interdiction of bank guarantee is able to establish a *prima facie* case of egregious fraud affecting the underlying transaction, a bank guarantee cannot be interdicted. (See: ***U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.*: *(1988) 1 SCC 174, Svenska Handelsbanken v. M/s Indian Charge Chrome and Others*: *(1994) 1 SCC 502*** and ***Larsen & Toubro Limited v Maharashtra State Electricity Board and Others*: *(1995) 6 SCC 68***).

19. In the present case, it is apparent that there are disputes between the parties and in view of IRCON's claims that the petitioner has not performed the contract, the invocation of bank guarantee by IRCON could not be interdicted. Thus, at this stage, IRCON cannot be called upon to deposit the funds received from Bank of Baroda either.

20. The petitioner's prayer that Bank of Baroda be directed to release the

petitioner's counter guarantees also cannot be accepted. Bank of Baroda has already remitted funds against the bank guarantee issued on the basis of counter guarantees and, therefore, it would be fully entitled to be reimbursed for the same.

21. This Court is not persuaded to accept that there is any requirement to secure the petitioner against the sum recovered by way of a bank guarantee as there is no allegation/apprehension that the petitioner would be unable to recover the said sum in the event it prevails in the arbitral proceedings.

22. The petition is, accordingly, dismissed.

23. However, it is clarified that nothing stated in this order should be construed as an expression of opinion on the maintainability or the merits of the disputes raised by the petitioner.

24. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 26, 2017
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