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

\+ O.M.P.(I) (COMM.) 179/2017

HINDUSTAN CONSTRUCTION COMPANY LTD. ..... Petitioner

Through Mr. Dayan Krishnan, Sr. Advocate with Ms. Malvika Lal and Ms. Aakashi Lodha, Advocates

versus

IRCON INTERNATIONAL LTD. ..... Respondent

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

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **05.05.2017**

VIBHU BAKHRU, J

Caveat No. 455/2017

1. The learned counsel for the caveator has entered appearance.

2. The caveat stands discharged.

3. The learned counsel for caveator states that although caveator was served with the paper book on 03.05.2017 at 05:00 p.m., he had no intimation that the petition would be listed on 03.05.2017 and, therefore, the order passed on 03.05.2017, insofar as it records that the caveator has been served, ought to be deleted. His submissions are noted.

IA Nos. 5514-5515/2017

4. Exemptions are allowed, subject to just exceptions.

5. The applications are disposed of.

O.M.P.(I) (COMM.) 179/2017

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

> "i. Restrain the Respondent during the pendency and until conclusion of the Arbitral proceedings, by way of a temporary order and injunction, from encashing/invoking or taking any precipitative steps or receiving any monies under the Bank Guarantees of the Petitioner as per Schedule I and Annexure 1(Colly) of the present petition supplied to the Respondent No. 1 for the Project Work as per Letter of Acceptance dated 06.09.2012 along with Agreement dated 26.11.2012 and Appoint a Court Commissioner under provisions analogous to Order 26 Rule 9 of the Code of Civil Procedure to visit the Site and inspect the Site conditions along with verification of the state of affairs existent with regard to the access roads and seepage condition;
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> ii. Restrain the Respondent from terminating the contract dated 26.11.2012 issued to the Petitioner and direct the Respondent to maintain status quo on the Project,
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> iii. Reinstate the Petitioner at the Project and restrain the Respondent from inviting tenders for the balance works at the risk and cost of the Petitioner, and
>
> iv. Pass ad interim and interim ex parte reliefs in terms of prayer (i) to (iii) above."

7. At the outset, Mr Dayan Krishnan, learned Senior Advocate appearing for HCC stated that he was restricting the relief in the present petition to restraining the respondent (hereafter 'IRCON') from taking any steps for

encashing the Bank Guarantees as specified in Schedule I of the petition with liberty to pursue other reliefs at an appropriate stage, if necessary.

8. To begin with it is relevant to mention that HCC has sought an order restraining invocation of 22 bank guarantees as specified in annexure to the petition. These include six bank guarantees which are issued by State Bank of India; four bank guarantees have been issued by Punjab National Bank; six bank guarantees have been issued by Canara Bank; two bank guarantees have been issued by ICICI Bank Ltd.; three bank guarantees have been issued by Oriental Bank of Commerce; and one bank guarantee has been issued by IDBI Bank Ltd. It is further relevant to mention that out of the 22 bank guarantees there is one bank guarantee which is in the nature of the performance bank guarantee; 14 bank guarantees are issued to secure mobilisation advance; two bank guarantees are to secure interest on mobilisation advance, one bank guarantee is for release of liquidated damages; and four bank guarantees are against liquidated damages released to HCC.

9. Thus, the principal controversy to be addressed is whether the invocation/encashment of the bank guarantees are to be interdicted at this stage.

10. The relevant facts necessary to address the controversy involved in the present petition are as under:-

10.1 HCC was awarded the project for 'Construction of the Rail Link Tunnel' pursuant to a Letter of Acceptance (hereafter 'LOA') dated 06.09.2012 issued by IRCON. Thereafter, parties entered into a contract dated 26.11.2012 (hereafter 'the Agreement') for a total contract value of

₹883,89,71,723/-. The completion period of the project was 60 months commencing from the date of the LOA.

10.2 It is stated that the work of the project was considerably delayed for non-availability of approach roads and encumbrance free site, the provision of which formed the primary obligation of IRCON. Moreover, adverse geological conditions and floods in Jammu and Kashmir also proved detrimental to the pace of the project.

10.3 This led HCC to request for extension of time by a letter dated 22.12.2014. This was followed by other letters to similar effect. On 06.02.2015, IRCON informed HCC regarding the shifting of the key dates for completion of the intermediate milestones without extending the final completion date.

10.4 It is stated that on 10.06.2015, an inspection report prepared by the Chief Administrative Officer, Northern Railways specified that the progress of the project was held up due to '*seepage and unpredictable geological conditions faced by the Project as well as on account of the Respondent being unable to provide the access roads / approach roads to the working fronts*'.

10.5 As disputes arose with regard to payment of price variation, reimbursement of excess WCT, etc., HCC referred its claims to the Dispute Resolution Mechanism in 2015 (hereafter 'reference no.1'). Thereafter, certain other disputes arose between the parties which could not be resolved through mutual settlement (hereafter 'reference no.2'). As a result, on 28.06.2016, the disputes were referred for settlement through conciliation; however, the conciliatory proceedings failed.

10.6 In the meanwhile, on 26.07.2016, HCC sent another letter for extension of time. A letter dated 22.08.2016 was also sent to seek release of certain amounts due to HCC. This was followed by another letter dated 12.09.2016 to similar effect.

10.7 HCC filed a petition under 11 of the Act (Arb P no. 596/2016) before this Court for appointment of an arbitral tribunal for adjudication of reference no.1; and by an order dated 22.11.2016 IRCON was directed to suggest a panel of arbitrators excluding any serving employees of the Northern Railways.

10.8 HCC preferred a Special Leave to Appeal against the aforesaid order as, according to HCC an independent arbitrator having no prior association with IRCON or the Railways was required to be appointed by the court. It is stated that the Supreme Court has stayed the proceedings of the arbitration proceedings by an order passed on 25.04.2017.

10.9 On 01.12.2016, HCC invoked the arbitration clause for reference no. 2. As there was no consensus in regard to the appointment of the arbitral tribunal, HCC filed a petition under Section 11 (Arb. P. 240/2017) which was dismissed by an order dated 10.04.2017 in view of the order passed in Arb P No. 596/2016.

10.10 Prior to the aforesaid dismissal, IRCON issued a letter on 18.02.2017 -followed by similar letters - pointing out the slow pace of works since 11.01.2017. Various meetings also took place to discuss the cash flow situation of the project wherein HCC emphasised the financial crunch faced by it by the imposition of liquidated damages. Thereafter, on 18.04.2017, IRCON issued a notice to HCC to show cause within seven days as to why the

Agreement should not be terminated for non-achievement of the desired progress. On 21.04.2017, HCC also furnished a bank guarantee bearing number 0393BGR0008418 dated 21.04.2017 drawn on ICICI Bank for ₹4 crores seeking release of funds of an equal amount against the same. In response to the same, by letter dated 24.04.2017, HCC reiterated its stand that the work suffered for reasons beyond its control. Despite the above, on 27.04.2017, IRCON sent a 48 hours notice on the expiry of which, the Agreement for the project stood rescinded. Pursuant thereto, HCC sent letters and a meeting was held on 01.05.2017 for settlement of disputes between the parties. As a result of such discussion, HCC sent a letter dated 02.05.2017 specifying a schedule to improve the progress of the project. However, it is stated that IRCON has terminated the Agreement and has issued letters for invocation of the bank guarantees.

11. Mr Dayan Krishnan submitted that there are no access roads to the site in question and there is no dispute that the said access was to be provided by IRCON. He stated that in the circumstances, there could be no dispute that IRCON had failed to provide the necessary site and, therefore, HCC cannot be held accountable for the delays in commencement and performance of the Agreement as per schedule. He also referred to certain communications issued by officers of IRCON to substantiate his contention that there were serious issues as to the site and the delays were for reasons attributed entirely to IRCON and at any rate not attributable to HCC. He submitted that in the circumstances, the invocation of bank guarantees would be harsh, burdensome and would cause irretrievable injury to HCC. He earnestly contended that in the facts of the present case IRCON had failed to provide the site and thus, invocation of bank guarantees could be interdicted on the ground of special equities.

12. He next referred to the language of the bank guarantees and submitted that each of the bank guarantees contained a specific reference to the relevant clause(s) of the Agreement and, therefore, the bank guarantees could only be invoked in terms of the Agreement between the parties. In particular, Mr Krishnan referred to the bank guarantee dated 11.06.2013 issued by the State Bank of India against mobilization advance and drew the attention of this Court to the language of the first paragraph of the said guarantee wherein it was expressly specified that the bank guarantee was issued "*to guarantee his [HCC] proper and faithful performance under the said clause of the contract*". He submitted that in view of the plain language of the bank guarantee, it was incumbent upon IRCON to make an express declaration that HCC had failed to perform its obligations under the Agreement and also specify the relevant clause of the Agreement which it alleged to have been breached by HCC. He referred to an earlier decision of this Court in ***Jyoti Structure Ltd. V. Dakshinanchal Vidyut Vitran Nigam Ltd. And Ors.: 2016 SCC OnLine Del 5035***, in support of his contention that bank guarantee cannot be permitted to be encashed unless the letter of invocation is in terms of the bank guarantee.

13. Lastly, Mr Krishnan submitted that mobilisation advance provided to HCC had been partly recovered by IRCON and, therefore, invocation of bank guarantees to that extent was unsustainable.

14. Mr Agnani, learned Senior Advocate appearing for IRCON countered the aforesaid submissions. He submitted that the law relating to bank guarantees was well settled and bank guarantees could not be injuncted unless HCC was able to establish a case of egregious fraud. He also referred to the language of the bank guarantees and submitted that the same were

unconditional. He handed over copies of the letter invoking the bank guarantees issued by Punjab National Bank and submitted that the said letter was in terms of the bank guarantee. However, Mr Agnani did not contradict the submission that part of the mobilisation advance furnished to HCC against bank guarantees had been recovered. He submitted that the same can be accounted for after the concerned bank had remitted the funds against invocation of the bank guarantees in question.

15. I have heard the learned counsel for the parties.

16. It is apparent from the above that although there is no dispute that execution of the works has been delayed, there is serious disputes as to which party is responsible for the same. According to HCC, the delays are attributable to IRCON and IRCON had breached the Agreement as it has not provided accessible sites to HCC. Mr Krishnan submitted that in absence of an access road, the question of deployment of machinery and construction was virtually impossible.

17. There may be some merit in the claims as set up by HCC. However, this is not the stage to evaluate the rival contention of the parties regarding the contractual disputes nor can the same be done in these proceedings. It is well settled that a bank guarantee is an independent contract and the law relating to invocation of the bank guarantee has been authoritatively settled by the Supreme Court in various decisions.

18. 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 fraud that is referred to as a ground for interdiction of invocation of a bank guarantees is a "*fraud of egregious nature as to vitiate the entire*

underlying transaction". In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and others: (1994) 1 SCC 502,*** the Court again noted that there should be a *prima facie* case of fraud and special equities and merely irretrievable injustice without *prima facie* case of established fraud is of no consequence. A similar view was taken in ***Larsen & Toubro Limited v Maharashtra State Electricity Board and Others: (1995) 6 SCC 68***.

19. It is not necessary to refer to various decisions rendered by the courts and suffice it to say that it has been consistently held that mere existence of contractual disputes is not a ground for interdiction of bank guarantees. In the given circumstances, notwithstanding that there may be merit in the contentions advanced on behalf of HCC that IRCON has failed to provide access to the sites, the bank guarantees in question cannot be interdicted.

20. The contention that the letters of invocation are not in terms of the bank guarantees is also unmerited. Undoubtedly, the guarantees specifically state that they have been issued pursuant to the relevant clauses of the contract, however, there is no stipulation that the letters invoking the bank guarantees must indicate a reason. On the contrary, the bank guarantees specifically provided that the banks '*unconditionally and irrevocably'* guarantee payment to IRCON '*on their first demand without whatsoever right of objection*'. The guarantees further expressly provide that the banks would be liable to pay the guaranteed amount or their part thereof *'only if you serve upon us a written claim or demand'*. Thus, there is no requirement that the letters invoking the bank guarantees state anything other than an unequivocal demand for payment of the specified sum or part thereof. The decision in the case of ***Jyoti Structure Ltd.*** (*supra*) is inapplicable to the facts of the present case as in that case the bank guarantees in question expressly required a declaration that the

contractor was in default under the contract. Undoubtedly, the letter of invocation must be strictly in terms of the bank guarantee and, therefore, where a bank guarantee requires the letter of invocation to make a certain assertion, the same cannot be encashed/ invoked without the party invoking the bank guarantee expressly making such assertion. As stated above, in the present case, the bank guarantees do not require any specific assertion that the contractor has failed to perform the Agreement and, therefore, IRCON was not obliged to state any reason for invoking the bank guarantees.

21. In view of the above, this Court is unable to accept the contention that the bank guarantees furnished by the HCC are required to be interdicted. However, it is seen that some of the bank guarantees have been issued against mobilization advances. It is also not disputed that a part of the said advances have already been recovered from the running account bills furnished by HCC. In the given circumstances, there would be no justification for IRCON to invoke bank guarantees for recovery of amounts which have already been recovered from the running account bills.

22. Mr. Agnani stated that IRCON shall provide correct computation / calculation to the banks with the correct amounts to be recovered. He further states that since the bank guarantees have already been invoked, IRCON would not furnish fresh letter for invocation to the concerned banks.

23. In view of the above, IRCON is directed to furnish the correct computation of the amounts due against mobilisation advance to the banks with a request to pay only the amounts due and not the full extent of the sums guaranteed. Needless to mention, the concerned banks shall release only such amounts as indicated by IRCON afresh and not the amounts specified in the

bank guarantees. It is clarified that this direction is only limited to the bank guarantees furnished to secure the mobilization advances.

24. Since HCC has limited its relief in the present petition only to interdicting the invocation/encashment of the bank guarantees, it is not necessary to examine other reliefs. HCC is not precluded to claim such other relief as may be advised in any other proceedings. Needless to state that any such relief, if sought, will be considered only in accordance with law.

25. The petition is disposed of with the aforesaid observations and directions.

26. Order *dasti* under signature of Court Master.

VIBHU BAKHRU, J

MAY 05, 2017
***sm*/RK**