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

+ **O.M.P. (I) (COMM.) 394/2016 & IA No.396/2017**

SPML INFRA LIMITED

..... Petitioner

Through: Mr. Prateek Jalan, Mr. Rakesh Sinha, Mr. Samrat Sengupta, Mr. Ankit Yadav & Mr. Rahul Kripalani, Advocates.

versus

NTPC LIMITED

..... Respondent

Through: Mr. Vikas Singh, Senior Advocate with Mr. Bharat Sangal, Ms. Vernika Tomar, Mr. Kapish Seth, Ms. Anindita Deka & Ms. Deepika Kalia, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

12.01.2017

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1. This is a petition under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act'), filed by M/s. SPML Infra Limited (SPML) seeking to restrain the Respondent/National Thermal Power Corporation Limited (NTPC) from invoking and encashing four Bank Guarantees (BGs) – one being a Performance BG, one against mobilisation advance and two against security deposits, all issued by Canara Bank.

2. An interim order was passed by this Court on 4th October, 2016 directing NTPC to maintain *status quo*. That interim order has continued since.

3. The background facts relevant to the present petition are that on 8th September, 2006, a Letter of Award (LOA) was issued by NTPC in favour of SPML for the work of 'Construction of CW System and Offsite Area Civil Works Package for Korba Super Thermal Power Project, State-III (1x500 MW). Pursuant thereto, a Contract Agreement was entered into on 28th February, 2007. As required by the terms and conditions of the said contract, the aforementioned four BGs were furnished by SPML to NTPC.

4. Disputes arose between the parties in the course of execution of the contract. The nature of these disputes need not be discussed in detail. Broadly, the grievance of SPML is that there was delay in handing over the site due to geological conditions and changed methodology; delay due to presence of the underground RCC drain; delay in making available power connection at the site; delay in handing over the sites and encumbrances thereon; delay in issuing drawings and in approval of fabrication drawings submitted by SPML; delay in making payments and deductions made from Running Account (RA) bills; and delay in issue to stipulated materials. There is also a grievance about the site being a violence prone area and there were restrictions imposed on entry of workers, materials and vehicles inside the plant. There is a grievance about grant of the provisional extension of time (EOT), non-payment of compensation and the awarding of additional works, which further delayed the completion of the project.

5. According to SPML, the mobilisation advance and lump sum advance had served their purpose as the advance had already been adjusted from the RA

bills. So far as the performance and security deposit BGs are concerned, despite the plant being operational and working satisfactorily, they were not being released to SPML.

6. Mr. Prateek Jalan, learned counsel appearing for SPML informed the Court that during the pendency of the present petition, SPML has already sent a notice to NTPC invoking the arbitration clause. He submitted at the outset that with the constitution of the Arbitral Tribunal (AT) being imminent, the Court could relegate the parties to the AT as far as further interim reliefs are concerned while directing the interim order already passed to continue.

7. The above plea was opposed by Mr. Vikas Singh, learned Senior Advocate appearing for NTPC, who pointed out that no case was made out by SPML for grant of any interim relief *qua* the four BGs. Mr. Vikas Singh also pointed out that the present petition has been filed at a stage where an Award has already been made pursuant to an arbitration of the disputes arising between the parties out of the very same contract. The arbitration proceedings had culminated in the publication of an Award dated 2nd March, 2016 which is, in fact, the subject matter of a challenge in OMP No. 658/2014 filed by the Petitioner under Section 34 of the Act in this Court.

8. Mr. Jalan responded by pointing out that the present dispute, concerning the attempts by NTPC to invoke and encash the BGs, constitutes a separate cause of action and a consequential claim which obviously did not form the subject matter of the arbitration that culminated in the above Award.

Therefore, according to Mr. Jalan, the present petition would still be maintainable.

9. In order to persuade the Court to continue the interim order already passed by it in the present petition, Mr. Jalan sought to demonstrate that there were special equities in favour of SPML to restrain NTPC from proceeding to encash the four BGs. Referring to the invocation letters *qua* each of the four BGs, Mr. Jalan submitted that the invocation itself was not consistent with what was required in terms of the BG against mobilisation advance and the two BGs against the security deposit.

10. Mr Jalan referred to the specific clauses in the BGs which required NTPC to specifically state in the invocation letter that there was a breach of the contract by SPML, whereas in each of the invocation letters all that was said was “in terms of the aforesaid guarantee, we invoke the said Guarantee and hereby make a demand on you...”.

11. Referring to the decisions in *M/s. Harprashad and Co. Ltd. v. Sudarshan Steel Mills AIR 1980 Del 174*, *Synthetic Foams Ltd. v. Simplex Concrete Piles (India) Pvt. Ltd. AIR 1988 Del 207* and *EMCO Limited v. Malvika Steel Limited 2012 SCC OnLine Del 5763*, Mr Jalan submitted that in the first place, there had to be a valid invocation of the BG which was absent in the present case. He submitted that merely because in the BGs it is stated that the decision of NTPC that there has been a breach is final and will not be questioned by the bank did not mean that NTPC was precluded from specifically stating in the invocation letter that there had been such a

breach.

12. Mr. Jalan referred to the decision of the Supreme Court in ***Hindustan Construction Co. Ltd. v. State of Bihar (1999) 8 SCC 436*** and submitted that the terms of the BG were material and if the invocation was not in terms thereof, it would be bad in law. He further referred to the statement in the counter affidavit filed by NTPC that a major part of the mobilisation advance had already been recovered, thus, belying any need for the corresponding bank guarantee to be invoked, much less encashed. According to him, barring the performance BG, the other three BGs were not unconditional and, in the present case, the conditions for invocation of the BGs were not fulfilled.

13. Countering the above submissions, Mr. Vikas Singh, learned Senior Advocate appearing for NTPC submitted that neither of the two grounds which were essential to be made out for the grant of interim relief *qua* the BGs viz., the underlying fraud vitiating the transaction and the demonstration of irretrievable injustice being caused to SPML in the case of invocation of the BGs had been made out in the present case. He referred to the decisions in ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Coop. Ltd. (2007) 6 SCC 470***; ***Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd. 2016 SCC OnLine SC 1005*** and a decision dated 15th January, 2015 of this Court in OMP No.322/2013 titled ***Enfield Infrastructure Limited v. NTPC Vidyut Vyapar Ltd.***

14. Mr Singh submitted that the clauses in the BGs in question make it abundantly clear that the decision of NTPC as to what constitutes a breach of a contract could not be enquired into by the bank concerned. He maintained that at this stage, it was not open to the Petitioner to invite a decision on merits as regards the validity of the decision of NTPC to invoke and encash the BGs. That, at best, could form the subject matter of the claim in the arbitral proceedings. The BGs were independent and separate contracts, absolute in nature and the existence of disputes between the parties to the main contract would not be a ground for injuncting or restraining the enforcement of the BGs.

15. In the first instance, it is necessary to look at the precise clauses in the BGs in question in order to understand the conditions, if any, which are required to be met for their invocation and encashment. Under Clause 13.0.0 of the Special Conditions of Contract forming part of the conditions of the Contract, SPML was required to submit an irrevocable BG for the mobilisation advance received by it. Pursuant thereto, the Petitioner got issued through Canara Bank BG No.046GPGE093010001 dated 28th October, 2009 for Rs.1,35,19,400, which incidentally has been kept alive. The operative portion of the said BG reads as under:

“... We, Canara Bank hereby unconditionally and irrevocably undertake to pay to the Owner on demand and without demur to the extent of the said sum of Rs.1,35,19,400/- (Rupees One Crore Thirty Five Lac Nineteen Thousand Four Hundred only) on any claim made by the Owner on us for the loss or damage caused to or suffered by the Owner by reason of the Owner not being able to recover in full the said sum of Rs.1,35,19,400/- (Rupees One Crore Thirty Five Lac Nineteen Thousand Four Hundred only) with interest as aforesaid.”

16. However, what is also important is the immediate following clause of the same BG, which reads as under:

“2. We, Canara Bank, further agree that the Owner shall be the sole judge of and as to whether the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and the extent of loss or damage caused to or suffered by the Owner on account of the said advance together with interest not being recovered in full and the decision of the Owner that the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and as to the amount or amounts of loss or damage caused to or suffered by the Owner shall be final and binding on use.”

17. It was submitted by Mr Jalan that the essential condition as far as mobilisation advance was concerned was the reason of the “Owner not being able to recover in full the said sum of Rs.1,35,19,400/- (Rupees One Crore Thirty Five Lac Nineteen Thousand Four Hundred only) with interest”, whereas in the present case, there is an admission by NTPC in its reply that a major portion of the mobilisation advance had already been recovered. This according to him made it particularly necessary for NTPC to state precisely in its invocation letter the reason for invoking the said BG.

18. As regards security deposit BGs which were identically worded, a reference has been made to one of them, viz., BG No.2007089 SPML dated 2nd March, 2007 for Rs.61,76,000. Here again, in the operative portion, the issuing bank i.e., Canara Bank, has undertaken to indemnify and keep indemnified NTPC to the above extent of money “against any loss or damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Corporation by reason of any breach or breaches

by the said Contractor of any of the terms and conditions contained in the said Contract and to unconditionally pay the amount claimed by the Corporation on demand and without demur to the extent aforesaid.”

19. Here again, the immediate following clause is identical to para 2 of the BG for mobilisation advance. Therefore, in three of the BGs i.e., one BG pertaining to mobilisation advance and the other two pertaining to security deposits, there is an identical clause to the effect that NTPC would be the sole judge as to whether SPML had committed any breach of the contract and the extent of loss, damage caused, etc. suffered by it.

20. In the considered view of the Court that although at first blush it might seem that the aforementioned three BGs are conditional, Clause 2 of each of these BGs virtually make them unconditional. It requires to be noticed at this stage that there was no dispute between the parties that the fourth BG, which is the performance BG is, in fact, unconditional.

21. In *Hindustan Construction Co. Ltd. v. State of Bihar* (*supra*), the Court emphasised that the invocation of the BG would have to be validly made in accordance with the terms and conditions of the BG. However, the Court in that case was looking at the specific terms of the BG where the requirement of the bank for making payment on a demand was not unconditional and irrevocable. It was qualified, as noted in the judgment as under:

“13. The Bank, in the above Guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by

following :-

".....in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.""

22. Interestingly, in the BG in that case, there was no clause similar to clause 2 of the three BGs with which we are concerned in the present case. No doubt that the BG requires the bank to make payment "without whatsoever right to objection on our part." Clause 2 of the BG in the present case is far more specific in underscoring that the decision of NTPC on whether the Petitioner has committed breaches would be final. The wordings of the BGs in the present case are, therefore, not similar to the one in ***Hindustan Construction Co. Ltd. v. State of Bihar*** (*supra*).

23. For the same reason, the decisions in ***M/s. Harprashad and Co. Ltd. v. Sudarshan Steel Mills*** (*supra*), ***Synthetic Foams Ltd. v. Simplex Concrete Piles (India) Pvt. Ltd.*** (*supra*) and ***EMCO Limited v. Malvika Steel Limited & Ors.*** (*supra*) are distinguishable on facts. In ***M/s. Harprashad and Co. Ltd. v. Sudarshan Steel Mills and Ors.*** (*supra*), the Division Bench (DB) went as far as to state that the notice sent by the Appellant in that case to the bank had to be strictly in compliance with the BG failing which "the liability of the bank to pay the amount to the Appellant did not arise." The DB further observed that it was not sufficient for the Appellant "merely to reiterate parrot-like words of the bank guarantee."

24. It must be remembered that the said decision was rendered at a time when the Supreme Court had not categorically pronounced on the limited scope of interference in the case of BGs. For instance, in *Himadri Chemicals Industries Limited v. Coal Tar Refining Company (2007) 8 SCC 110*, the law relating to grant of injunction was explained as under:

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit:

- (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
- (iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.
- (iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.
- (v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.
- (vi) Allowing encashment of an unconditional bank guarantee

or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

25. The above decision itself follows a long line of decisions subsequent to the decision in *M/s. Harprashad and Co. Ltd. v. Sudarshan Steel Mills* (*supra*). The above law has been emphatically reiterated by the Supreme Court in *Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd.* (*supra*). In *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Coop. Ltd.* (*supra*), the DB referred to the earlier decision in *U.P. State Sugar Corporation v. Sumac International Ltd.* (1997) 1 SCC 568 and observed as under:

“The law relating to invocation of such Bank Guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee in terms is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.”

26. Recently, in *Enfield Infrastructure Limited v. NTPC Vidyut Vyapar Ltd.* (*supra*), the Court referred to *Vinitec Electronics Private Limited v. HCL Infosystems Limited* (2008) 1 SCC 544 and observed as under:

“12... It was explained that with the bank guarantees being unconditional and irrevocable, the bank was bound to honour it and pay the amounts “at once upon receipt of written demand of the Respondent.”

27. The Court rejected the plea of fraud in that case as being vague and indefinite and not satisfying the requirement of law. Even the plea of irretrievable injustice was “again vague and not supported by any evidence.”

28. Turning to the present case, the question is whether the Petitioner had to repeat the very words of Clause 1 of the BG in the invocation letter or whether it was sufficient to state “in terms of the aforesaid guarantee we invoke the said guarantee...”? In the considered view of the Court, the expression used by NTPC in stating that it was invoking the BG “in terms thereof” should constitute sufficient compliance of the conditions spelt out in the BGs. It is unnecessary for NTPC to repeat Clause 1. The issuing bank would certainly understand what NTPC is saying when it uses the expression “in terms thereof.” The submission of Mr. Jalan that it is mandatory for NTPC to spell out in the invocation letter the precise terminology set out in Clause 1 of the BGs would render Clause 2 in each of the BGs meaningless.

29. In other words, notwithstanding that NTPC would be the sole judge whether there was a breach by the Petitioner, a bank can decline to honour the BG only because the precise reason for NTPC to conclude that there was a breach is not spelt out in the manner indicated in Clause 1. Apart from such a requirement not flowing from the wording of the BGs, it would make

the entire exercise impractical and defeat the very purpose of issuance of BGs in commercial transactions. There should be no unnecessary burden cast on the bank to take on the task of ascertaining if a breach was committed, particularly in light of Clause 2 of the BGs. The Bank is not expected to undertake an enquiry at the stage of invocation to ascertain if the invocation is for genuine reasons. Consequently, the Court is unable to agree with the submission of Mr. Jalan that the invocation letters in the present case are not in accordance with the terms of the BGs in question.

30. Although it is stated by NTPC in its reply that a substantial part of mobilisation advance has been recovered, that by no means disentitles it from invoking the mobilisation advance if it is of the view that the conditions spelt out therein exist. Even assuming that NTPC has wrongly invoked the BG, the remedy of the Petitioner would lie in raising a claim in that behalf in the arbitral proceedings and not invite a judgment in advance on the correctness of the decision of NTPC to invoke the mobilisation advance BG.

31. The SPML is not able to make out any case of special equities or demonstrate irretrievable injustice in the event of the BGs in question being encashed.

32. For all the aforementioned reasons, the Court is satisfied that SPML has failed to make out a case for continuation of the interim order. Accordingly, the interim order dated 4th October, 2016 is hereby vacated.

33. The petition is dismissed but, in the circumstances, with no orders as to costs. The pending applications also stand dismissed.

S. MURALIDHAR, J

JANUARY 12, 2017

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