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

\+ O.M.P. (I) (COMM) 224/2017

KASUKURTHI SUJATHA CONSTRUCTIONS PVT. LTD. ..... Petitioner

Through: Mr Abhinav Ramkrishna and Mr Divyesh Pratap Singh, Advocates.

versus

TELECOMMUNICATIONS CONSULTANTS INDIA LTD. & ANR. ..... Respondents

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% 30.05.2017

<u>IA No.6978/2017</u>

1. Allowed, subject to all just exceptions.

<u>O.M.P. (I) (COMM) 224/2017</u>

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

> "(a) Direct the Respondent No.1 preserve and maintain the records of correspondence exchange, details/data complied/reports prepared/submitted/uploaded in its correct form and not to tamper, manipulate, alter or concoct records of the executed work/services rendered in connection with purchase orders/tender under the General (Commercial) Conditions of the Contract executed between the Petitioner and the Respondent No.1; and/or

(b) Direct the Respondent No.1 & 2 as an interim measure of protection in respect of invoking of bank guarantee No.019516IPG00018 amounting Rs.67,67,042/- not to invoke the same till the pendency of the present petition by this Hon'ble Court; and/or

(c) Direct the Respondent No.1 & 2 as an interim measure of protection in respect of invoking of bank guarantee No.0195616IPG00019 amounting Rs.66,75,923/- not to invoke the same till the pendency of the present petition by this Hon'ble Court: and/or

(d) Direct the Respondent No.1 & 2 as an interim measure of protection in respect of invoking of bank guarantee No.0195616IPG00020 amounting Rs.69,80,000/- not to invoke the same till the pendency of the present petition by this Hon'ble Court; and/or

(e) Direct the Respondent No.1 & 2 as an interim measure of protection in respect of invoking of bank guarantee No.0195616IPG00021 amounting Rs.48,80,000/- not to invoke the same till the pendency of the present petition by this Hon'ble Court."

3. The aforesaid bank guarantees were furnished by the petitioner pursuant to the Purchase Orders - four in number - issued by the respondent (hereafter 'the TCIL') for optical fibre cable construction work as detailed in the Purchase Orders. The said Purchase orders were issued in the month of April 2016 (two Purchase Orders were issued on 11.04.2016 and the other two were issued on 27.04.2016) and the works were to be completed within a period of 90 days from the date of the respective Purchase Orders

4. The aforesaid Purchase Orders were terminated by TCIL with effect from 12.05.2017 on the allegation that the petitioner has been unable to perform the work.

5. The learned counsel for the petitioner earnestly submits that the termination of the Purchase Orders is illegal and the works had been delayed solely on account of TCIL not obtaining ROW permission which could not have been obtained by the petitioner. It is seen from the record that there are certain letters issued by TCIL alleging that the progress of the work is slow on account of the petitioner not deploying adequate resources in terms of the manpower and machinery.

6. At this stage, this Court has not been called upon to decide the merits of the rival claims. However, it is apparent that there are contractual disputes between the parties. The bank guarantees in question are unconditional performance bank guarantees and the TCIL was entitled to invoke the same on an assertion that the petitioner had failed to perform the agreement.

7. A perusal of the letters invoking the bank guarantees also clearly indicate that TCIL has made an unequivocal assertion that the petitioner has failed to perform the contractual obligation and, therefore, the amount of the bank guarantee be paid to TCIL.

8. The law relating to interdiction of the bank guarantee is now well settled. In the case of ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Others***: **(1994) 1 SCC 502**, the Supreme Court had further held as under :

> "...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...
> …irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms…

...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

9. In the case of ***U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.: (1988) 1 SCC 174,*** the Supreme Court has observed as under:-

> "The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

10. In the facts of the present case it is apparent that there are contractual disputes and there may be some merit in the petitioner's contention that the works were delayed also on account of non-availability of the requisite permissions, however, the bank guarantees cannot be interdicted as this is not the case of egregious fraud. Further, the letter of invocation of the bank guarantees is also in terms of the bank guarantees. Thus, notwithstanding the contractual disputes between the parties, this Court is not persuaded to interdict the invocation of the bank guarantees in question.

11. The petition is disposed of.

VIBHU BAKHRU, J

MAY 30, 2017
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