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

% Judgment delivered on: 25.09.2017

\+ **O.M.P.(I)(COMM.) 393/2017**

WIPRO LIMITED ..... Petitioner

versus

EMPLOYEES STATE INSURANCE CORPORATION & ANOTHER ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sandeep Sethi, Senior Advocate and Mr Dayan Krishnan, Senior Advocate with Mr Dhirendra Negi and Ms Pragya Chauhan.

For the Respondents : Mr Saurabh Chadda for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT
25.09.2017

SANJEEV SACHDEVA, J. (ORAL)

IA No.11261/2017(exemption)

Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 393/2017

1. The petitioner, by this petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the

Act'), seeks a restraint on respondent No.1 from invoking and encashing the bank guarantee dated 26.03.2009 in the sum of Rs.23,63,64,340/- and a direction to respondent No.2 – Bank not to pay any amount to respondent No.1 under the said bank guarantee.

2. As per the petitioner, the express term of the bank guarantee is that it could be invoked by respondent No.1 only in respect of claims arising upto and until midnight of 08.06.2016.

3. It is contended by learned senior counsel for the petitioner that the claims, based on which the bank guarantee is sought to be invoked, are claims which have arisen after 08.06.2016.

4. The contention of the petitioner is disputed by the learned counsel for the respondent.

5. Since respondent No.1 had earlier sought to invoke the bank guarantee, the petitioner had approached this Court by filing a petition under Section 9 being OMP(I)(COMM.) 406/2016.

6. Said petition was disposed of by this Court by relegating the parties to the Arbitral Tribunal and further restraining respondent No.1 from invoking the bank guarantee until the time the Arbitral Tribunal passes an order varying, modifying or vacating the said interim order in accordance with law. The petitioner was directed to keep the bank guarantee alive in the meantime. The bank guarantee is valid upto 08.06.2018.

7. The Arbitral Tribunal, by its order dated 12.08.2017, has noticed the contention of the petitioner that the bank guarantee is limited to claims arising prior to 08.06.2016 and since the cause for invocation occurred only after 08.06.2016, the Bank is not obliged to permit encashment of the bank guarantee.

8. The Tribunal, without expressing any opinion on the merits of the rival contentions, declined to consider the said issue on the ground that the matter was yet to be considered by the Bank, which had issued the bank guarantee.

9. The interim order dated 08.12.2016 passed by this Court in OMP(I)(COMM.) 406/2016 was modified by the Arbitral Tribunal to the extent that it would be open to the respondent to invoke the bank guarantee and the Bank to take a decision in the matter having regard to the relevant facts and its obligations under the bank guarantee.

10. The Bank was left to take an independent decision in the matter, however, the Bank was directed not to give effect to its decision for a period of ten days, in case it took the view in favour of the encashment of the bank guarantee.

11. Learned senior counsel for the petitioner submits that the petitioner neither has been provided with a copy of the invocation letter nor has been furnished, by the Bank, with any decision taken by it on invocation by the respondent No.1.

12. It is, however, contended that an e-mail has been received on 21.09.2017, which reads as under:-

> "*We refer to Bank Guarantee No.PEBBGE090268 (Bank Guarantee) issued by us on behalf of Wipro Ltd favouring Employee's State Insurance Corporation (ESIC) for an amount of INR 23,63,64,340/- (Rupees Twenty Three Crore Sixty Three Lakhs Sixty Four Thousand Three Hundred Forty One Only).*
>
> *We have received an invocation from ESIC demanding payment under this Bank Guarantee.*
>
> *We, therefore, request you to kindly fund your account with us by 28th September, 2017, to enable us to honor the above invocation."*

13. Learned senior counsel for the petitioner contends that the Bank has communicated neither the decision nor the reasons as to why it has decided to honour the invocation.

14. Learned counsel for the respondent has handed over a copy of the invocation letter to the learned senior counsel for the petitioner.

15. Learned counsel for the respondent, *per contra,* contends that the present petition is not maintainable inasmuch as the petitioner had earlier filed a petition under Section 9 seeking identical reliefs.

16. He candidly admits that the decision of the Bank on the invocation letter has also not been communicated to respondent No.1.

17. By order dated 08.12.2016 passed in OMP(I)(COMM.) 406/2016, this Court had relegated the matter to the Tribunal to take a final decision on the objection of the petitioner to the invocation by respondent No.1 of the bank guarantee. The Tribunal was permitted to vary, modify or vacate the said interim order.

18. The Tribunal noticing the fact that invocation had not yet happened and the Bank had yet to take a decision on the plea of the petitioner that the bank guarantee was restricted to claims arising prior to 08.06.2016 and the disputes pertained to a period not covered by the bank guarantee, in the first instance, required the Bank to take a decision and in case the Bank came to the conclusion that the invocation was valid, not to enforce the order for the period of ten days.

19. The purport of order dated 08.12.2016 is that it is the Tribunal, which shall, in the first instance, decide on the objection of the petitioner about the invocation.

20. The Tribunal has directed that in case the Bank concludes that the bank guarantee is to be encashed, a moratorium of ten days is to be granted. The said period, is clearly to enable the petitioner to take recourse in law.

21. Learned senior counsel for the petitioner has contended that the petitioner could not approach the Tribunal as the next date of sitting of

the Tribunal, in the first instance, is 22.11.2017 and as such, has approached this Court by Section 9 of the petition.

22. In my view, since the objection to invocation was relegated to the Tribunal, by this court by order dated 08.12.2016, the matter should be placed before the Tribunal to be considered in terms of the said order dated 08.12.2016 of this Court as well as the direction of the Tribunal contained in order dated 12.08.2017.

23. The objection of the learned counsel for the respondent that the present petition would not be maintainable, in my view, would not be sustainable as there was no final adjudication on the objection raised by the petitioner and it was relegated to be decided by the Tribunal. The Tribunal noticing that there was no invocation and the Bank had yet to take a view on the invocation, declined to consider it. The said issue is still open.

24. In view of the above, the petitioner is permitted to file an application under Section 17 of the Act, with the Tribunal within a period of one week from today.

25. The Tribunal is requested, if possible, to convene a sitting prior to 22.11.2017 to decide the question of the validity of invocation and in case the Tribunal is not in a position to convene a sitting prior to 22.11.2017, then consider the plea of the petitioner on the said date.

26. It is directed that until, the Tribunal takes up the issue, Respondent No. 2 Bank shall not remit the amount of the Bank Guarantee to Respondent No. 1.

27. It is clarified that the Tribunal would be at liberty to, either by way of an ad-interim order or by a final order, vary, modify or vacate the interim protection, without being influenced by anything stated in this order.

28. It is further clarified that in case no application under Section 17 is filed by the petitioner within one week, the interim order shall be deemed to be vacated.

29. The petition is disposed of in the above terms.

30. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

SEPTEMBER 25, 2017

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