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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 09th November, 2017
Pronounced on: 15th November, 2017

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O.M.P.(I) (COMM.) 456/2017

SABARKANTHA ANNUITY PVT. LTD. Petitioner

Through : Mr.Dayan Krishnan, Sr. Adv. with
Mr.Chirag M.Shroff and Ms.Neha
Sangwan, Advs.

versus

NHAI & ORS. Respondents

Through : Mr.Sandeep Sethi, Sr. Adv. with
Ms.Gunjan S.Jain and Mr.Mukesh
Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner has filed this petition under Section 9 of the Arbitration and Conciliation (Amendment) Act, 2015 with a prayer the respondents be restrained from acting upon the letter dated 15.09.2017 or from invoking the Bid securities of the petitioner to the tune of ₹10.93 Crores and also restraining the respondent Nos.2 to 4 from honouring the invocation of said bank guarantees on behalf of respondent No.1 acting in terms of letter dated 03.11.2007.

2. Admittedly, WP(C) No.8327/2017 filed by the petitioner herein was disposed of on 23.10.2017 by the learned Single Judge of this Court whenever the petitioner had prayed as under:-

“a) Issue an appropriate Writ, Order or Direction directing the Respondent NHAI that the Bank guarantee proposed to be furnished by the Petitioner from Punjab Maharashtra Cooperative Bank be accepted by the Respondents or ALTERNATIVELY, direct the Respondents to extend the time for the Petitioners so as to enable the Petitioners to get the Bank Guarantee from Nationalized Bank as demanded;

b) Issue an appropriate Writ, Order or Direction in the facts and under the circumstances of the case stated above directing the Respondent Authority not to take any coercive steps in the matter including termination of the Contract and invocation of Bank Guarantees; (BID SECURITIES)

c) Issue an appropriate Writ, Order or Direction in the facts and under the circumstances stated above directing the Respondent to fulfill its obligations under the Contract.”

3. The said writ petition was though dismissed, but a liberty was granted to the petitioner to invoke the arbitration clause and seek alternative remedy including interim order under Section 9 of the Arbitration and Conciliation Act, 1996. The petitioner did not avail such remedy and rather went in appeal against the order dated 23.10.2017 vide LPA No.684/2017 which too was dismissed by the Division Bench of this Court vide order dated 03.11.2017.

4. Admittedly during the hearing of LPA No. 684/2017 an option was yet again given to the petitioner herein to pursue the alternative remedy under Section 9 of the Act, but the petitioner insisted to argue the

appeal on merits and the Division Bench ultimately dismissed the appeal observing inter alia as follows:-

“19. As noticed above, the appellant was required to submit the performance bank guarantee in the sum of Rs.64.6 crores within a period of 30 days of execution of the concession agreement. The concession agreement was executed on 28.04.2017 and the time for furnishing the performance security was to lapse on 27.05.2017. At the request of the appellant, the respondent extended the period from time to time and finally on 25.08.2017 a last opportunity was granted to the appellant to furnish the balance performance bank guarantee of Rs.50 crores within five days i.e. by 30.08.2017. Admittedly, the appellant did not furnish the performance bank guarantee in accordance with the RFP condition i.e. by 27.05.2017 or within the extended period i.e. till 30.08.2017. It is only on 26.10.2017 that a further effort was made by the appellant to furnish the bank guarantee.

20. The appellant who was to furnish the bank guarantee within a period of 30 days from 28.04.2017 failed to obtain and furnish the bank guarantee for period of over six months.

21. Perusal of the alleged sanction letter of Punjab & Maharashtra Cooperative Bank Ltd. shows that the letter dated 14.09.2017 is in fact not a sanction letter. The letter enlists various terms and conditions, inter-alia, requiring the submission of documents, registration of mortgages and pledge of fixed deposits. It further records that the same is a provisional offer and final sanction would be subject to compliances. The letter records that the offer shall stand revoked or cancelled on the happening of the events stipulated therein. The letter clearly shows that there was no sanction

in favour of the appellant of the balance sum of Rs.50 crores. Even the letter is issued after nearly four months of the last date stipulated by the RFP and LOA.

22. It may further be noticed that the appellant was also required to achieve financial closure by 24.09.2017. Though it is not necessary in these proceedings to examine the clauses or reasons for not obtaining financial closer as the same would be subject matter of consideration in appropriate proceedings if so initiated by the appellant, suffice to say that admittedly the appellant has admittedly not furnished the performance security in terms of the RFP and LOA within the stipulated and the extended time and has till date not achieved financial closure.”

5. The learned senior counsel for the petitioner now in this round of litigation, has relied upon clauses Nos.9.1.1, 9.1.2 and 4.3 of the agreement dated 28.04.2017 entered into between the parties to say the claim for damages since is not a claim for a sum presently due and payable and the respondent would be entitled to damages only on proof of loss, per clause 4.3 of the agreement and hence is not entitle to the entire sum of Bid security.

6. The relevant clauses read as under:-

“9.1 Performance Security

9.1.1. The Concessionaire shall, for the performance of its obligations hereunder, provide to the Authority no later than 30(thirty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to Rs.64.6 crore (Rupees Sixty Four crore Sixty Lakh Only) in the form set forth in

Schedule-F (the "Performance Security"). Until such time the Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the Authority shall release the Bid Security to the Concessionaire.

9.1.2 *Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 30 (thirty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties."*

"4.3 Damages for delay by the Concessionaire

In the event that (i) the Concessionaire does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.3 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of failure to fulfill the obligations under Clause 4.1.2 or other breach of this Agreement by the Authority, or due to Force Majeure, the Concessionaire shall pay to the Authority Damages in an amount calculated at the rate of 0.3% (zero point three per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent. Provided, however, that the Damages payable hereunder shall be subject to the maximum limit

equal to the amount of the Bid Security and upon reaching such limit, the Authority may, in its sole decision and subject to the provisions of Clause 9.2, terminate the Agreement. Provided further that in the event of delay by the Authority in procuring fulfillment of the Conditions Precedent specified in Clause 4.1.2, no Damages shall be due or payable by the Concessionaire under this Clause 4.3 until the date on which the Authority shall have procured fulfillment of the Conditions Precedent specified in Clause 4.1.2.”

7. The arguments of the learned senior counsel for the petitioner is that though the extent of damages are stated in clause No.4.3 (supra), but such damages depend upon the fulfillment of obligations on the part of the authority and the letter dated 03.10.2017 of the petitioner clearly show the respondent failed in its obligations hence is not entitle to seek benefit of the damages clause.

8. I am not inclined to accept this line of argument. Clause No.9.1.2 (supra) speaks of an exclusive right of the authority to encash the bid security. It opens with a non-obstante clause saying *notwithstanding anything contrary contained in this agreement* if the performance security is not provided within a period of thirty days from the date of the agreement the authority can encash the bid security and appropriate the proceeds thereof as damages and the *rights of the concessionaire under or arising under the agreement shall be deemed to have been waived off and this agreement is deemed to have been terminated by the mutual agreement between the parties.*

9. A bare perusal of clause No.9.1.2 would show the invocation of Bid security and appropriating its proceeds is independent of clause No.4.3. The question if any damages accrue or not shall be a question within the domain of arbitration, if invoked. At this stage the Court need to see whether the petitioner failed to submit performance securities in time per provisions of the agreement.

10. Moreso, the law qua encashment of bank guarantee is well settled. It being an independent contract and lest any fraud or irretrievable loss to the petitioner is alleged no stay can be granted by the Court. The merits and the terms of contract are irrelevant for invoking of the bank guarantees. At this stage one can only go through the terms of the bank guarantee to find if any fraud was committed while entering into such contract and nothing beyond.

11. Learned counsel for the respondent has referred to *NHAI vs. Ganga Enterprises*, (2003) 7 SCC 410, *NHAI vs. Elsamex-TWS-SSNC joint venture*, 150 (2008) DLT 215; *Gujarat Maritime Board vs. L&T Infrastructure development Projects Ltd. and others*, AIR 2016 (Supreme Court 4502); *Era Infra engineering Ltd. Vs. CPWD and others* 242 (2017) DLT 29; *Jhansi Oria Tollway Pvt. Ltd. vs. UOI* (2015) 223 DLT 664, to bring home the point that on the invocation of bank guarantees the merits or the terms of the contract need not be discussed.

12. Admittedly, it is not a case where petitioner has alleged fraud or an irretrievable injustice would be caused to him if Bid Security is encashed, the respondent being National Highways Authority of India, a government company/undertaking.

13. Moreso the petitioner had already availed of remedy of writ jurisdiction and has even gone in appeal on merits before the Division Bench of this Court with prayer(s) that the respondent should not encash the Bid Security. The Division Bench rather dismissed the appeal without grant of any liberty of avail section 9 remedy which the learned Single Judge had initially accorded to the petitioner. In these circumstances allowing this application would be against the spirit of order dated 03.11.2017 of Division Bench of this court.

14. Further in *KV George vs. Secretary of the Government* (1989) 4 SCC 599 and *Vivek Jain vs. UOI* AIR 19898 Delhi 301 it was held the issues decided by writ court would act as a bar from reopening of such questions in the civil court on principles of res-judicata.

15. Further in *Executive Engineer, ZP Engineering Division and another vs Digambara Rao and others* (2004) 8 SCC 262 it was held if the whole claim was not laid before the writ jurisdiction then also the petitioner would be barred from raising it later in civil court per Order 2 Rule 2 CPC.

16. For reasons aforesaid I find no merit in petition and the same is dismissed. No order as to costs.

YOGESH KHANNA, J

NOVEMBER 15, 2017

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