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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 574 OF 2018

Tuticorin Coal Terminal Private Limited

... Petitioner
(Org. Respondent)

vs.

Gelguera Gruas India Private Limited

... Respondent
(Org. Claimant)

Mr. Aspi Chinoy, Senior Advocate a/w. Mr. Mustafa Doctor, Senior Advocate, Mr. Nirman Sharma, Mr. Ranjit Shetty, Ms. Priyanka Shetty, Ms. Vatsala Pant i/b. Argus Partners for the Petitioner.

Mr. Zal Andhyarujina a/w. Mr. Mehul Shah, Mr. Kunal Dwarkadas, Mr. Anirudh G., Mr. Saurabh C. Nagarsheth i/b. Mehul Shah for the Respondent.

CORAM : A.K. MENON, J.

DATE : 20th JUNE, 2018

JUDGMENT

1. By this petition filed under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act) the petitioner challenges an interim order passed by the Arbitral Tribunal dated 27th April, 2018 under Section 17 and as modified on 28th April, 2018 by which the tribunal directed status quo to be maintained as on 27th April and thereafter restrained the petitioner from utilising the amounts if any collected by the petitioner under bank guarantees issued in favour of the petitioner.

A few facts are necessary to be set out :

2. The respondent herein is the claimant in arbitration proceedings which are underway before the Arbitral Tribunal. The petitioner is a private company established under the Companies Act, 1956 which entered into a Concession Agreement with the Board of Trustees for Tuticorin Port on or about 11th September 2010, the intention being to develop North Cargo Berth-II (NCB-II) to handle bulk cargo at Tuticorin Port on a Design, Build, Finance, Operate and transfer basis. The Concession Agreement is valid for 30 years and upon project completion vessels would come alongside to discharge cargo. The NCB-II is stated to be partially operational. The respondent offered services for supply, design, erection and commissioning of stacker-cum-reclaimers and a conveyor system. Three purchase orders dated 23rd August, 2012 came to be placed for design, erection supply and commissioning of stacker-cum-reclaimers. A further set of three purchase orders dated 28th November, 2012 were placed for design, supply, erection and commissioning of the conveyor system. As required under the contract, the respondent issued down payment bank guarantees and performance bank guarantees ("the guarantees") in favour of the petitioner in respect of each of the purchase orders.

3. Disputes arose between parties and at some stage the petitioner invoked these guarantees. The respondent then filed six Arbitration Petitions under Section 9 of the Act seeking injunctions restraining the petitioner from invoking any of the guarantees, the contention of the respondent being that the guarantees were conditional and therefore could not be invoked at will. All the guarantees were

identically worded. Vide an order dated 11th January, 2018 the arbitration petitions under Section 9 came to be dismissed, thereby rejecting the submission of the respondent that it will suffer immensely if the bank guarantees are permitted to be encashed.

4. Being aggrieved by this order six Commercial Appeals were filed. On 23rd February, 2018 these appeals were heard, by consent of parties, finally at the admission stage. By a common order and judgment dated 10th April, 2018 the appeals came to be dismissed. The ad-interim protection granted by the single Judge initially had, by then, been continued for a substantially long period of time. This protection was therefore continued at the request of the respondent for a further period of three weeks.

5. Being aggrieved by the rejection of the appeals the respondent filed a Special Leave Petition in the Supreme Court on or about 20th April, 2018. Vide order dated 27th April, 2018 the SLP came to be dismissed. On the same day i.e. 27th April, 2018 the respondent filed an application under Section 17 of the Act seeking the following prayers :

- (a) Allow the present application and pass necessary directions directing that the amounts under the bank guarantees, which aggregate to Rs.43,98,13,832, be not appropriated / utilized by the Respondent, by keeping it in a separate account / Fixed Deposit, subject to the arbitral award; and*
- (b) Pass such further or other orders as the Hon'ble Tribunal may deem fit and proper.*

The Application was sent by the respondents Advocates to the Tribunal accompanied by an Amendment Application. The forwarding email dated 27th April, 2018 set out as follows :

“Keeping in view the urgency involved and the likely appropriation of the monies that will be released under the Bank guarantees (aggregating to Rs.44 crore approximately) by TCTPL, with no chance of recovery and also keeping in view their precarious financial condition, we request the Hon'ble Tribunal to pass urgent orders in terms of the prayer(s) made in the Section 17 application, if possible, by circulation.”

6. Thus two applications were made. One for amendment which is still pending and the second for urgent relief under Section 17. This sought to prevent appropriation / utilisation of the amount of Rs. 43,98,13,832/- being the proceeds realised by encashing the bank guarantee. After receipt of the application, an order dated 27th April, 2018 came to be passed by the Tribunal which reads as follows :

- (i) Respondent is hereby directed to file its replies to both the applications, within 15 days hereof after serving copies thereof to all.*
- (ii) Until the Application under Section 17 of the Arbitration & Conciliation Act is heard and disposed off, the Parties are hereby directed to maintain status quo as is obtained today.*
- (iii) Tribunal will endeavour to meet at an early date, if convenient to all to consider the said Applications.*

The order was modified the following day. The operative part of the modified order reads as follows :

“ In case, Respondent encashes the Bank Guarantee for a sum of Rs.43,98,13,832/-, then the aforesaid amount shall be kept in Fixed Deposit, bearing maximum interest on it in a Scheduled Bank. Respondent shall not be permitted to utilise the aforesaid amount for any other purpose until further orders to be passed by the Tribunal.”

Thus effectively the petitioner was restrained from utilisation of the amount recovered by it by directing that the same be placed in a fixed deposit. Meanwhile the bank guarantees were encashed and the appellants received the monies thereunder.

7. This petition was filed on 11th May, 2018 challenging the aforesaid impugned orders dated 27th April, 2018 and 28th April, 2018. On 4th June, 2018 this petition came to be mentioned. Circulation was granted and the matter was listed for 5th June, 2018. On 5th June, 2018 the matter came to be adjourned to 11th June, 2018. On 11th June, 2018 the respondent sought time to put in a reply. Time was granted and it was agreed between counsel for the parties that on the next date the petition may be disposed of finally. It was on this basis that the petition was heard on 18th June, 2018. The respondent has filed affidavit of one Mr. Nandan Kumar, Senior Manager (Legal) and Company Secretary of the respondent to oppose this appeal under Section 37 of the Act. An affidavit in rejoinder dated 16th June, 2018 has also been filed.

8. Appearing in support of the petition Mr. Chinoy, learned Senior Counsel submitted that the case of the respondent before the Tribunal was on the basis that the arbitration proceedings are at an advanced stage and for final arguments and the petitioners had admitted liability to the extent of Rs. 32 crores. If the petitioners were allowed to appropriate the amount recovered under the bank guarantees then serious prejudice would be caused to the respondent and that it would be impossible for the claimant to recover the admitted sum especially since, according to the

respondent, the petitioner did not own any assets and was yet to realise any revenue in business. The respondent felt it imperative to serve the ends of justice that the petitioner be prevented from appropriating or utilising the amounts.

9. Mr. Chinoy further submitted that the case with which the respondents had approached to the Tribunal under Section 17 is unsustainable given the finding of this Court while disposing of the petition under Section 9. According to Mr. Chinoy the case pleaded under Section 17 application is the very case that has been urged before the High Court under Section 9. He invited my attention to paragraph 31 of the order dated 11th January, 2018 passed under Section 9 wherein the Court recorded a submission on behalf of the respondent that if the Arbitral Tribunal ultimately decides in favour of the respondent, it would be impossible to recover the amounts under bank guarantees from the petitioner. This argument was dealt with and rejected in the Section 9 order and therefore there is no substance in the contention now taken up in its application under Section 17.

10. Furthermore in the Appeal Court the very same contention had been raised and the division bench had considered all submissions and confirmed the order passed under Section 9. Mr. Chinoy further submitted that the very ground also been taken up in paragraph 5 (H) and (I) of the Special Leave petition and that despite having taken up this ground, the SLP was dismissed by confirming an order passed by the division Bench of this Court under Section 9. The contents of the application under Section 17 contained the very same plea which was unsustainable. Mr. Chinoy also relied upon the affidavit in rejoinder wherein these aspects were highlighted.

11. On behalf of the respondent Mr. Andhyarujina opposed the appeal. He submitted that issue involved does not pertain to the bank guarantees at all. According to the learned counsel for the respondent, utilisation of the funds was the only issue and he submitted that the application made before the Tribunal was in the nature of an application under Order 38 Rule 5 of the Code of Civil Procedure. According to him irretrievable injustice would be caused if the proceeds of the guarantees were allowed to be appropriated, that the petitioner cannot repay this amount if the respondent succeeds in the arbitration. Mr. Andhyarujina further submitted that the application under Section 17 arose out of a fresh cause of action which entitled the respondent to seek reliefs under Section 17. The cause of action it is submitted arose on the rejection of the SLP.

12. In support of this rather novel contention, reliance was placed by Mr. Andhyarujina on the email dated 27th April, 2018 addressed to the arbitrators wherein the respondent sought urgent reliefs in terms the application under Section 17 as also the direction passed by the Tribunal. Mr. Andhyarujina submitted that although the petitioner was directed to file its reply to both the applications, the amendment application as well as the application under Section 17 no reply had been filed till date. Mr. Andhyarujina made reference to the affidavit in reply filed to this petition wherein compliance with the order of the Tribunal is also noted. Exhibit C to the reply is an exchange of emails inter alia notes that the order of the Tribunal has been complied subject to rights and contentions of this pending appeal. The correspondence exchanged between the Advocates reveals that the fixed deposit had been created but particulars of the same had not been

furnished. The correspondence also reveals that the bank guarantee had been encashed on 3rd May, 2018. Mr. Andhyarujina submitted that the petitioner had complied with the order there was no substance in the appeal. Mr. Andhyarujina further submitted that the application made to the Tribunal under Section 17(1)(ii) (b) was to secure the amount in the arbitration, he submitted that the admitted amount of Rs. 32 crores could be secured only in this manner. No other submission was made in support of the orders impugned.

13. Mr. Chinoy in rejoinder submitted that the order only sought was to secure the respondents claim in general. In paragraph 3 of their application, the respondent does not seek protection of the claim allegedly admitted. The only protection is to prevent appropriation or utilisation of the amount and therefore the application under Section 17 cannot be construed as one under Order 38 Rule 5. Moreover the order passed under Section 9 has dealt in particular with the contention that the petitioner had admitted a sum of Rs. 32 crores payable.

14. Having heard the parties I am of the view that order passed by the Tribunal cannot be sustained. The bank guarantees in question have been found to be unconditional, contrary to the case set up by respondents in the six arbitration petitions filed under Section 9 and as canvassed by them in appeal filed by them as also before the Supreme Court.

15. The case of the respondents and as canvassed by Mr. Andhyarujina is that the application under Section 17 is the result of a fresh cause of action namely

rejection of the SLP. In my view rejection of the SLP has resulted in confirmation of the order of the appeal Court in which the order passed under Section 9 has merged. The order of the Supreme Court does not give rise to fresh cause of action to seek relief qua the very subject matter of the application under Section 9. The order under Section 9 makes reference to the Order passed by me as Company Judge in Company Petition No. 780 of 2015 seeking winding up of the petitioner company. The relevant portion of the order under Section 9 wherein the observation was made is reproduced below :

“Again, TCTPL has also filed a counter claim in the sum of Rs. 600 crores before the Arbitral Tribunal. The Court cannot proceed on the basis that the claim of FGIPL will be accepted by the Arbitral Tribunal whereas the counter claim of TCTPL will be dismissed. FGIPL had also filed a Company Petition being Company Petition No. 780 of 2015 before the Company Court seeking winding of Respondent No. 1 on the ground that TCTPL has admitted to pay Rs. 32 crores to FGIPL but has failed to pay the same and is therefore unable to pay its debts. The said Petition has been rejected. It is also pertinent to note that as regards the admission of liability, the Learned Company Judge has recorded in his Order that :

“I find that the admissions of liability were all as a result of negotiations which were in anticipation of continuation of work under the contract and not as a result of the termination of the contract”

16. Thus, the so called admission was not really an unqualified “admission” which could entail an order for payment in the manner in which it is projected. sought. Mr. Andhyarujina was guarded in his submission that the relief sought is in Section 17 application is not based on the bank guarantee or merely an attempt to secure the amount collected by the petitioner pursuant to invocation of the bank guarantees and therefore not subject matter of the first application under Section 9.

17. Furthermore we have to bear in mind that after the amendment of the act and substitution of Section 17 by virtue of Section 17(2) reads as follows :

“(2) Subject to any orders passed in an appeal under Section 37, any order issued by the Arbitral tribunal under this Section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court. “

In view of this amendment what we have here is rather a unique situation whereby despite an order of this Court under Section 9 being confirmed in appeal and in the SLP by virtue of its dismissal, a fresh order affecting rights of the petitioner has been passed. By virtue of the deeming provision of Section 17(2) this order is to be treated as order of the Court “for all purposes and shall be enforceable under the Code of Civil Procedure in the same manner as if it were order of the Court.” This results in a rather incongruous situation which certainly could not have been permitted since the highest Court has already confirmed the order passed by the division Bench of this Court approving the order passed under Section 9. An order under Section 17 which shall be deemed to be an order of court cannot result in setting the clock back to prevent the petitioners from utilising the funds received under the guarantees encashment of which has been permitted. The funds are now at the disposal of the petitioners. In the light of the order under Section 9 attaining finality the impugned orders certainly cannot be expressed as order of the Court. For this reason also the order impugned cannot be enforced in law and hence cannot be sustained.

18. Apropos the contention that the application seeks to secure an admitted sum of money, I enquired of Mr. Andhyarujina whether in the light of such alleged admission, the respondent had sought any interim award to which Mr. Andhyarujina fairly stated that no such application for interim award had been made. It transpires that the so called admission was not in any pleading in the arbitration proceedings but refers to the very same amount which formed the subject matter of the Statutory notice under Section 434 of the Companies Act and a Company petition based on that notice to which reference was made in the Section 9 order. As stated above the Company Court had observed that admission of liability was in anticipation of the work under the contract and not as the result of termination of the contract. Different sets of circumstances arose on termination of the contract and this aspect has been dealt with by the Court while disposing of the Section 9 Applications.

19. It is also not possible to accept Mr. Andhyarujina's contention that the application under Section 17 is by way of an application to furnish security as contemplated under Order 38 Rule 5. In my view none of the elements of the said Order or Rule have been satisfied and on that ground alone this contention of the respondent is liable to be rejected. The Arbitral Tribunal has not passed the order after having come to any satisfaction that the petitioner was about to dispose of the property or remove property from the jurisdiction with intention to delay or execution of any award that has to be passed. Paragraph 30 of the order passed under Section 9 deals with the submission on behalf of the respondents in support of the plea of irretrievable injustice and special equities in their favour. The

respondents contention has been recorded thus in paragraph 31 (iv):

“That if the Arbitral Tribunal ultimately decides in favour of the FGIPL, it would be impossible to recover the amounts under the Bank guarantees from TCTPL causing great irretrievable injury / injustice to FGPI. TCTPL being a Special Purpose Vehicle has no other assets or businesses apart from its Concession Agreement with V.O.Chidambaranar Port Trust and the assets created therein. FGIPL verily believes that all the loans given by the lenders to TCTPL are secured by exclusive first charge on all the assets provided under the Concession Agreement. FGPI verily believes that lenders were also furnished the Corporate Guarantee by ALBA Aisa Pvt. Ltd (Holding Company of TCTPL) TCTPL is not making much revenue or operating cash inflow since the project has not been commissioned, on account of issues between TTCTPL and V.O. Chidambaranar Port Trust.

20. This submission was dealt with by the Court in its order under Section 9. The contention on behalf of the respondent that the petitioner does not have any assets and the respondent is left high and dry and thus it will be unable to execute an award has been rejected. The Court found that the promoters of the petitioner had already invested about 170 crores in the project and the Concession Agreement between the parties was for a period of 30 years during which users of the facilities would be required to pay appropriate handling charges. The estimated revenue during the balance of the Concession period was Rs.10,067.14 crores to be appropriated in the manner set out in the contract. The petitioner also had a counter claim of Rs.600 crores and the Court held that the adjudication of the proceeding on the basis that the claim of the respondent would be upheld by the Arbitral Tribunal and the counter claim could be dismissed, cannot be accepted. In this view of the matter the so called admission of liability is not significant.

21. Furthermore the application now made proceeds on the basis that an adjudication of disputes is at advanced stage and a clear admission of debt had been made and further it is imperative to serve the ends of justice, that the petitioner be directed not to appropriate the amount recovered under the guarantees. These are the very grounds which were taken up by the single Judge under Section 9 applications which was called into question before the appeal Court. The Order of the single Judge under Section 9 also dealt with the aspect of special equities now sought to be claimed. Bank guarantees have always been treated as the life blood of commerce. The facts in the present case did not give rise to any situation under which the guarantees could not be encashed. The very purpose of the guarantees was to enable the beneficiary to recover the amounts on demand. Once monies under the bank guarantees had been paid to the beneficiary there would be no occasion for any Court or Tribunal to restrict usage of this funds unless a serious fraud was established. Needless to mention the Tribunal probably had no occasion to consider reasoning of the learned single judge while dismissing application under Section 9 or the confirmation of that order by the appeal Court. In that context the Arbitral Tribunal's order under Section 17 may have been well meaning but even assuming the amendment seeks to make out fresh cause of action to prevent utilisation of the funds, in my view there was no occasion for the respondent to prevent utilisation of funds once the bank guarantee is allowed to be encashed and without conditions. The utilisation of the money so recovered cannot in the facts of this case be a matter for Courts or Tribunals to monitor. It is part of the commercial bargain struck by the parties as otherwise such order would

amount to altering terms of the contract. This is not permissible. For all the aforesaid reasons I am of the view that the appeal is liable to be allowed. I therefore pass the following order :

- (i) The petition is made absolute in terms of prayer clause (a).
- (ii) Orders dated 27th April, 2018 and 28th April, 2018 are set aside and the respondent will be at liberty to appropriate the amounts.
- (iii) After this Order was pronounced Mr. Dwarkadas seeks stay of the order. Stay declined.

(A.K. MENON, J.)