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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (L.) NO.1523 OF 2018**

Ideal Energy Projects Limited	..Petitioner
Vs.	
Maharashtra State Power Generation Company Limited	..Respondent

Mr.A.M.Saraogi with Dr.Sujay Kantawalla i/b. Mr.Dhananjay Dubey for
Petitioner.
Mr.Anirudh Joshi with Ms.Gauri Mestha i/b. M/s.L J Law for
Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 19th DECEMBER, 2018

P.C.:

Heard learned Counsel for the petitioner and learned Counsel for
the respondent.

2. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the ACA') by which the petitioner, who is a party to an agreement entered with the respondent titled as "Agreement for Supply of Power - Power Purchase Agreement" termed as "Detail Procedure Agreement (DPA)" dated 14 March 2018 is before the Court seeking interim reliefs pending the arbitral proceedings. The reliefs as prayed are as under:-

"a. that till the dispute between the parties are resolved, as per the provisions of Cl15 of the DPA, the Respondent be

restrained from implementing Final Termination notice dated 28/11/2018.

b. that till the dispute between the parties are resolved, as per the provisions of Cl 15 of the DPA, the Respondent be restrained from invoking the Performance Bank Guarantee.

c. that till the dispute between the parties are resolved, as per the provisions of Cl 15 of the DPA, the Respondent be restrained from raising any demand as per the final termination notice dated 28/11/2018.”

3. Mr.Saraogi, learned Counsel for the petitioner, submits that at this stage, the petitioner is praying for a relief in terms of prayer clause (b), that is for an order restraining the respondent from invoking the performance bank guarantee as furnished by the petitioner to the respondent under the contractual terms which is for an amount of Rs.34.83 Crores.

4. Although a relief as sought is to restrain the respondent from invoking the performance bank guarantee, it is an agreed fact that the bank guarantee is already invoked by the respondent on 26 November 2018 and the bank was called upon to make the payment under the said bank guarantee.

5. Mr.Saraogi, learned Counsel for the petitioner, has drawn my attention to the correspondence annexed to the petition as also compilation of documents as placed on record. The principal contention

of the petitioner in seeking the above reliefs of an injunction on invocation of the bank guarantee is that the termination of the agreement by the respondent vide communication dated 28 November 2018 itself is illegal. It is submitted that there is no default on the part of the petitioner in complying with the terms and conditions of the contract and if at all there is a default, the same cannot be solely attributed to the petitioner, in as much as, the reasons of default were not within the control of the petitioner. It is submitted that the stock of coal could not be lifted for want of proper certification of the coal. Mr.Saraogi in this regard has drawn my attention to the letter of the petitioner dated 23 August 2018 which was addressed to the respondent in reply to the respondent's pre-termination notice dated 10 August 2018.

6. Mr.Saraogi submits that it was wholly unwarranted for the respondent to invoke the performance guarantee. It is submitted that certainly there were financial difficulties suffered by the petitioner and consequently there was a delay in complying with the coal requirement and consequently the power production suffered. It is submitted that however, considering the contractual terms, such delay is required to be taken into account by the respondent and the contract ought not to have been terminated much less invocation of the bank guarantee. It is next

submitted that the respondent has merely invoked the bank guarantee and the payment is not released by the bank. Mr.Saraogi referring to the termination letter dated 28 November 2018 submits that the demand of the respondent is only for an amount of Rs.3.42 crores and for which the respondent is invoking the bank guarantee of Rs.34.83 crores. It is submitted that this would cause grave and irreparable prejudice to the petitioner.

7. Mr.Saraogi referring to a decision of the Division Bench of this Court in case of **K.N. Guruswami Oil Mills Ltd. Vs. Union of India**¹ submits that the Court would also be within its jurisdiction even to restore the payment made under the bank guarantee.

8. On the other hand Mr.Joshi, learned Counsel for the respondent, would submit that the record without any manner of doubt indicates that there is no doubt whatsoever as seen from the correspondence that the petitioner was in breach of the terms and conditions of the contract and being a defaulter, the petitioner now cannot seek a relief of an injunction on invocation of the bank guarantee. It is submitted that the petitioner is not pleading any case of a fraud to the knowledge of the bank or any case of irretrievable injustice in seeking an injunction on encashment of the bank guarantee. It is submitted that considering the

¹ 2000 (120) E.L.T. 57 (Bom.)

settled principles of law in regard to the parameters available for the court to interfere and restrain invocation of the bank guarantee, the present petition needs to fail.

9. Mr.Joshi referring to clause 5.1.15 of the agreement submits that it was an obligation on the petitioner to make regular advance upfront payment to the respondent against the estimated quantum of coal to be transferred and such payments were required to be made by the respondent to the company namely Coal India Limited. It is submitted that an upfront payment was to be made 10 days before the date of commencement of power supply. It is submitted that from 7 July 2018 no payment was made by the petitioner for the price of the coal and eventually the cascading effect was on the production of the electricity which was the principal object under the agreement. This according to Mr.Joshi has severely affected the interest of the ultimate consumers of electricity and public funds. It is submitted that the agreement period was from 1 April 2018 to 29 November 2018 i.e. for a period of 243 days and out of these 243 days, only for 36 days the petitioner had operated the plant and thus, admittedly, there was a default on the part of the petitioner in complying the terms and conditions of the agreement in question. Drawing the attention of the Court to the petitioner's letter dated 19 November 2018 Mr.Joshi submits that the petitioner has

categorically agreed to these defaults and has requested for an extension of the contract period. It is submitted that this letter also clearly indicates that the petitioner was in serious financial difficulties. The petitioner had accordingly recorded in the said letter its discussion with its bankers for a One-Time Settlement. The following contents of the said letter of the petitioner are required to be noted which read thus:-

“The period of supply under the DPA is from 01.04.2018 to 29.11.2018 (i.e. 243 days), however for the most IEPL Plant has operated in this period for 36 days to supply power to MSPGCL due to certain reasons as cited under -

a) Coal quantity computed by MSPGCL to generate contracted capacity is on the basis of declared grade of coal, however due to supply of inferior quality of coal than declared grade & non-availability of third party sampling at loading point, the quantity supplied basis actual quality of coal was not sufficient to generate contracted capacity. IEPL has communicated the same to MSPGCL from time to time.

b. Due to non-permission of 24 hour loading/lifting of coal at WCL mines, alongwith incessant rains in Umrer mines area in the month of Jun-18 & Jul-18, the transportation of cost to IEPL Plant site got severely affected.

IEPL is into active discussion with its banks/lenders for the One-Time Settlement (“OTS”) and has already taken-up with banks for request/proposal for operating the plant under the said DPA with MSPGCL.

IEPL has already reached upon debt resolution/settlement with two of the banks amongst its six lenders and the discussions for debt settlement with Lead Bank along with other three (3) banks are also in advance stage.

In light of above facts presented and IEPL's intent to operate the plant and supply power to MSPGCL, we request you for extension of present DPA for a further period of 12 months from the expiry of the DPA (i.e 29.11.2018) as procuring power under Tolling policy from IEPL would be beneficial/economical for MSPGCL, and in turn the benefits can be passed on to consumers at large.

We sincerely request you for considering our request for extension of DPA positively.”

10. Mr.Joshi, learned Counsel for the respondent, then submits that in view of the petitioner's default/breach of the terms and conditions of the agreement, the respondent has appropriately invoked the performance bank guarantee as clearly set out in the termination notice dated 28 November 2018. It is submitted that the plea of a '*force majeure*' as advanced on behalf of the petitioner is also totally untenable in as much as there is not a single letter in terms of the clause 11.1.2 of the agreement to point out that there was any instance of the nature of a '*force majeure*' as specified in the said clause. It is thus submitted that no case is made out for any relief to be granted in favour of the petitioner.

11. Having heard learned Counsel for the parties and having perused the record, it is quite clear that there were obligations which were required to be discharged by the petitioner under the said agreement. The agreement between the parties was for the sale of electricity for a limited period of 243 days. There is no dispute that the plant was operated by the petitioner only for 36 days out of the total operation of 243 days as agreed in the contract. It is also not in dispute that the petitioner could not comply with the requirement of clause 5.1.15 of the contract of making payment to the respondent for the price of the coal

and there were defaults which resulted into plant remaining idle resulting in non production of electricity within the agreed period of the contract. Clause 5.1.15 is required to be noted which reads thus:-

“5.1.15 Making regular advance upfront payment to MSPGCL against the estimated quantum of coal to be transferred, as communicated by MSPGCL to the Seller, MSPGCL shall then make payment to the Coal Company (CIL Subsidiary). The bidder has to provide an upfront payment of 10 days starting from 10 days before the date of commencement of power supply.”

12. A perusal of the termination letter dated 28 November 2018 issued by the respondent clearly indicates that there are several breaches/defaults which had occurred on the part of the petitioner consequent to which the termination was made. The termination letter was issued following the procedure as contemplated under the agreement namely a pre-termination notice dated 10 August 2018 was issued by the respondent to the petitioner. This notice was responded by the petitioner by its letter dated 23 August 2018. It may be noted above that the termination notice invokes clauses 12.3.4 and 6.3.2 of the agreement for invocation of the performance bank guarantee. The relevant contents of the termination notice read thus:-

“ In the light of above, it is clear that till date, IEPL unit has remained shut down i.e. unavailable for more than one month period in totality after the start of the period of contract., Therefore, it is clear that as per the above mentioned clause 12.2.1 (h) of the DPA, 'Seller's event of default, condition has occurred.

Therefore, MSPGCL is hereby issuing this final termination notice as per clause 12.3 of the DPA vide ref 1.

Accordingly, following are steps of termination:

Performance bank guarantee submitted by IEPL is being forfeited by MSPGCL as per the DPA clause no.12.3.4 read with clauses 6.3.2 of DPA.

IEPL have to pay the termination payment Rs.3.42 Cr as per clause 12.3.2. as calculated below,

As the balance period is less than one month therefore the termination payment according to DPA clause 12.3.2 is calculated for one month. In view of above the tentative amount of termination payment will be @ Rs 3.42 Crs”

IEPL will have to pay the termination payment within 15 days from the date of termination notice otherwise the defaulting party i.e. IEPL shall pay interest at 'a rate equal to 3 % (three per cent) above the Bank rate on the amount of Termination Payment remaining unpaid, provided that such delay shall not exceed 90 (ninety) days as per the DPA clause no.12.3.3.

The said Termination payment will be treated as full and final settlement of all claims of Supplier on account of Termination of this Agreement as per clause no.12.3.5.

Accordingly, Without prejudice to all the rights and remedies available to MSPGCL in accordance with the Law, this letter to be termed as Final Notice of Termination and Demand notice (format as per Annexure 1) of Rs.3.42 crs by IEPL and IEPL is required to pay the same within 15 days. With this final notice of termination, it is hereby informed that the Tri-partite agreement & Detail procedure Agreement under Case-4, signed between IEPL, MSPGCVL & MSEDCL on dated 14.03.2018, vide ref. 1 is hereby terminated with immediate effect.

Encl: Annexure 1 – Demand Notice

S/d
Chief Engineer (RCD)
MSPGCL”

(emphasis supplied)

13. It would also be profitable to note the contents of clause 12.3.4 and clause 6.3.2 of the said agreement which would confer an entitlement on the respondent to invoke the bank guarantee which read

thus:-

“12.3.4 Upon termination of this arrangement, the Performance Security of the Seller shall be forfeited. MSPGCL shall inform the Coal Company about termination and subsequently Coal Company shall cease supply of coal to the Seller.

6.3.2 Upon the occurrence of a Supplier default as specified in Article 12.2 MSPGCL shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to forfeit the Performance Security (Bank Guarantee) submitted by the Successful Bidder (s) for non-performing the contractual obligations and may terminate this Agreement in accordance with Article 12.”

14. Thus, it is clear that the invocation of the performance guarantee is in terms of clause 12.3.4 read with clause 6.3.2 as the petitioner was in breach in performing the obligations under the contract.

15. In regard to the contention that the performance bank guarantee of an amount of Rs.34.83 Crores is sought to be invoked for a payment of Rs.3.42 Crores appears to be an incorrect assumption on the part of the petitioner. The payment of Rs.3.42 Crores is in terms of clause 12.3.2 whereby the parties have agreed that upon termination on account of a Seller's (Petitioner's) default, the seller (petitioner) shall deposit with the respondent by way of termination payment, of an amount equal to 10% of the energy that would have been scheduled at the quoted rate for a period of one month or the balance period of contract, whichever is higher. Thus to connect Rs.3.42 Crores to the

invocation of the performance bank guarantee, in my opinion, is wholly untenable.

16. It cannot be overlooked that the performance guarantee which is in question is unconditional and irrevocable bank guarantee which entitles the respondent to its invocation upon occurrence of any failure or default of any of the obligations of the respondent under the agreement in question. It would be necessary to note the relevant clauses of the performance guarantee which reads thus :

“NOW THEREFORE, the Bank hereby, unconditionally and irrevocably guarantees and affirms as follows :

1. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to MSPGCL upon occurrence of any failure or default in due and faithful performance of all or any of the Supplier's obligations, under and in accordance with the provisions of the Agreement, on its mere first written demand, and without any demur, reservation, recourse, contest or protest and without any reference to the Supplier, such sum or sums up to an aggregate sum of the Guarantee Amount as MSPGCL shall claim without MSPGCL, being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.”

17. A bank guarantee is an independent contract between the bank and the person in whose favour the bank guarantee is issued. In the

present case as noted above the terms and conditions of the bank guarantee are crystal clear that the bank guarantee is unconditional and irrevocable and entitles the respondent to invoke the same on default of the contractual obligation on the part of the petitioner. In this situation the only ground which would be available to the petitioner to be entitled to an injunction is of any fraud to the knowledge of the bank in inducing procurement of such a bank guarantee or in a case of irretrievable injustice. A perusal of the grounds and the averments made in the petition, do not show even remotely a case of any fraud or irretrievable injustice or injury caused to the petitioner. The law in this regard is well settled. In absence of any such case being made out, it is not possible for the Court to exercise any discretion and grant a relief to stay the invocation/encashment of the performance bank guarantee in question.

18. For the above reasons, I see no merit in the petition. It is accordingly rejected. No costs.

19. At this stage, Mr.Saraogi, learned Counsel for the petitioner, makes a request that the status-quo as on today be directed to be maintained. Considering the facts of the case, the request is rejected.

[G.S. KULKARNI, J.]