IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 19TH DAY OF MARCH 2018

THE HON'BLE DR. JUSTICE ANITA SUMANTH

O.A. No.116 of 2018

In the matter of Arbitration and Conciliation Act 1996
and
In the matter of dispute between M/s.Velohar Infra Private Ltd., and M/s.Purvankara Limited arising under Work Contract No.PPL/PWND/VIPL/Electrical/13-14/368 dated 30.04.2014.

M/s.Velohar Infra Private Limited,
rep. by its Director S.Vijayalakshmi,
No.1F, 7th Cross Street,
Woodcreek Country, Nandambakkam,
Chennai, Pin:600 016. ... Applicant

-Versus-

1. M/s.Purvankara Limited,
   rep. by its Director,
   No.130/1, Ulsoor Road,
   Bengaluru, Karnataka,
   Pin-560 042.

2. Bank of India,
   rep. by its Manager,
   Porur Branch,
   No.69/1, Kundrathur Road,
   Madanandapuram, Porur,
   Chennai-600 125. ... Respondents

Original Application praying that this Hon'ble Court be pleased to pass an interim injunction restraining the respondent from encash by invoking bank guarantee No.8061IFIBG170001 under the guise of recovering mobilization advance morefully described hereunder in the schedule to the Judges Summons pending arbitration proceedings.

This Original Application coming on this day before this court for hearing the court made the following order:

This application is filed by Velohar Infra Private Limited (applicant) under Section 9 of the Arbitration and Conciliation Act 1996 (in short 'Act') seeking an order of interim injunction restraining the first respondent (R1) from invoking and encashing Bank Guarantee dated 09.02.2017 to the extent of Rs.1,06,47.092.83.

2.The applicant is an Electrical Contractor and was engaged by R1 to provide electrical works in its project at Pallikarani, Chennai. The parties entered into a Work Order dated 30.04.2014 that provided for the General terms and conditions (BCC) of the contract and included a clause for settlement of disputes by way of Arbitration at clause 38 thereof.

3. On account of admitted disputes that have arisen between the parties, the applicant has invoked the arbitration agreement by communication dated 06.02.2018 appointing Mr.K.Govi Ganesan, Advocate as its nominee Arbitrator. Mr.Satish Kumar, learned counsel for R1, on behalf of the respondent concurs on the existence of both an arbitration agreement as well as disputes inter se the parties. Though the Arbitration Agreement in clause 38(c) provides for the appointment of an Arbitral Tribunal comprising three members, both

learned counsel, Mr.Satish as well as Mr.K.V.Subramanian Senior Counsel appearing for R.K.Ramaiah, learned counsel for the applicant, jointly request this Court to refer the disputes between the parties to arbitration by a sole Arbitrator. They also concur upon and suggest the appointment of Mr.Justice K.P.Sivasubramaniam as the sole arbitrator.

4. Thus, at the suggestion of both parties through their respective counsel, and recording their consent, I request Mr.Justice. K.P.Sivasubramaniam, Former Judge of this Court, to act as sole arbitrator as per clause 38 of work order dated 30.01.2014. The learned Arbitrator is requested to, after entering reference and issuing notice to the parties, adjudicate upon the disputes inter se the parties. He is at liberty to fix his fee and schedule of expenses that shall be borne by both parties equally.

5. What remains is the adjudication of the prayer in the application. This court was pleased to grant an order of status quo as regards the invocation of the Bank Guarantee for a period of 4 weeks on 08.02.18, extended periodically.

6.A counter has been filed by R1 to which a reply has been filed by the applicant and as such pleadings are complete as between the parties.

7. Mr.Satish seeks the vacation of the order of status quo and refers to communication dated 01.02.2018 from R1 as per which an amount of Rs.1,06,47,092/- is payable by the applicant even after adjustment of mobilization advance and retention money. The aforesaid amount includes unpaid EPF contribution as well as other statutory dues. Thus, R1 proceeded to invoke the bank guarantee furnished for

an amount of Rs.1,58,97,292, to the extent of the amount allegedly due from the applicant, being Rs.1,06,47,092.83.

8. Mr.Satish puts forth the settled proposition that no order is liable to be granted as against the invocation or encashment of a Bank Guarantee except in the case of established fraud or irretrievable injury being made out by the party against whom the guarantee is invoked. He points out that there is not even an allegation of fraud by the applicant. As far as irretrievable injury is considered, it is the financial position of the applicant that is shaky at the least, and the balance of convenience thus calls for the interests of R1 to be protected.

9. He relies on the judgment of the Supreme Court in *Himardri Chemicals Industries Ltd v. Coal Tar Refining Company* (AIR 2007 SCC) and *P & R Infraprojects Ltd vs Bharat Heavy Electricals Ltd* (O.A.No.383 of 2015 dated 08.11.2016) and *Arkay Enery (Rameswarm) Limited Vs. Gail (India) Limited* (O.P.Nos.816 to 818 of 2017 dated 18.12.2017) of this Court.

10. Mr..K.V.Subramanian would, however state that it was R1 who was liable to pay various amounts to the applicant. According to the learned senior counsel, the execution of the project was delayed solely on account of the work site not having been handed over by the respondent in time. This had led to idling of work force and stagnation of material purchased by the applicant that could not be effectively deployed on account of the delay on the part of R1 in handing over the site.

11. Both parties had thus jointly agreed after negotiations, that R1 would take over all usable material in the site, the work

done thus far by the applicant would be certified after joint measurements were taken and the amounts payable would be determined thereafter. The exercise is said to be on-going.

12. The applicant has, according to learned senior counsel, submitted invoices for an amount of Rs.4,67,69,024 as on date that await certification and settlement by R1. Instead of settling the outstanding invoices, R1 is, according to the applicant, making unlawful and premature demands and has invoked the bank guarantee. He would thus urge that the order of status quo against the invocation/encashment of bank guarantee be extended till the conclusion of proceedings for arbitration.

13. Clearly, disputes exist as between the parties that will be the subject of arbitration by the learned Arbitrator to whom a reference has been made. The existence of disputes cannot, however, stand in the way of R1 invoking the bank guarantee.

14. The Supreme Court, in the case of Himadri Chemicals (supra), has this to state in the context of invocation of irrevocable bank guarantee as follows:

> "*14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:*
>
> *(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted,*

the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank http://www.judis.nic.in 16 guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrtrievable harm or injustice to one of the parties concerned.'

15. The rationale of the judgement has been applied and reiterated several times by the Supreme as well as High Courts in the following decisions:

i) Adani Agri Fresh Limited vs Mahaboob Sharif and others ((2016) 14 SCC 517)

ii) In General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd., ((1994) 4 SCC 230)

iii) In Bses Ltd. (Now Reliance Energy Ltd) vs Fenner India Ltd. & Another ((2006) 2 SCC 728)

16. It is a settled position that no injunction would lie as against the invocation of a bank guarantee except if fraud, irretrievable injury or any special equity is made out. The guarantee in this case, as per clause 5 of the GCC annexed to the agreement, is an irrevocable and unconditional guarantee that is liable to be honoured by the bank in fovour of the beneficiary under the guarantee. The pleadings are silent as to either fraud or any special equity that would persuade the court to decide in favour of the applicant. The sole ground made out is that there are disputes that are admittedly pending as between the parties. However as repeatedly confirmed by the Apex Court this cannot, by itself, be a reason to injunct the invocation of an unconditional bank guarantee.

17. The Respondent does not deny that invoices for a total amount of Rs.1,06,47,092/- have been raised by the applicant. However, the dispute as to the claim and counter claim raised by both parties is a matter to be considered and decided by the learned Arbitrator.

18. No pleadings or arguments have been advanced in regard to the poor financial health of R1 and as such and assuming that the claim of the applicant is upheld in Arbitration it will be in a position to recover the amount from R1. On the contrary, the poor

financial status of the applicant cannot be disputed in the light of its own admission in its email dated 05.02.2018 where the applicant confirms that it has been declared as a non-performing asset.

19. In the above circumstances and in the light of the discussion above, the application is dismissed.

Sd./- A.S.M.J.

19.03.2018

//Certified to be true copy//

Dated at Madras this the th day of 2018.

COURT OFFICER (O.S.)

TPY/20.03.2018

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