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

Date of decision: <u>24th September, 2018</u>

\+ ARB. A. (COMM.) 42/2018 & I.A. No.11373/2018

NHPC LTD ..... Appellant

Through: Ms.Maninder Acharya, ASG with Mr.Piyush Sharma, Mr.Viplav Acharya, Adv.

versus

HCC LTD ..... Respondent

Through: Mr.Dayan Krishnan, Sr. Adv. with Mr.Rishi Agrawal, Mr.P.Lodha, Ms.Shruti Arora, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

<u>NAVIN CHAWLA, J. (Oral)</u>

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the appellant challenging the Interim Order dated 01.08.2018 passed by the Arbitral Tribunal restraining the appellant from invoking and encashing the Bank Guarantee No.20090041 BGP 0050 and/or other Bank Guarantee pursuant to the Letter of Invocation dated 09.06.2018 for the recovery of amount mentioned therein.

2. The disputes in relation to the Contract Agreement No. NHPC/CC/KG-TURNKEY/02 dated 09.03.2009 for Civil

Works of the Kishanganga Hydro-Electric Project (3 x 110 MW) at Bandipora, Jammu & Kashmir have been referred by the parties to the Arbitral Tribunal.

3. The Arbitral Tribunal in paragraph 2 of the Impugned Order itself, records the claims raised by the respondent before it in the following words:

> *"(2) After invoking the arbitration clause, the Claimant has filed the Statement of Claim dt. 19.04.2018 wherein the reliefs sought for are:- (i) to annul the Respondents determination of extension of time (EoT) as set out in its communication dt. 07.07.2015,(ii) hold the Claimant's entitlement to EoT, (iii)award an amount of Rs. 320,23,27,555/- inclusive of interest for costs and loss suffered by the Claimant, (iv) interest on the above amount to the tune of Rs.17,66,36,596/-."*

4. During the execution of the work by the respondent, the respondent by its letter dated 19.05.2016 had requested the appellant to release certain advance for meeting monthly requirement of funds for the material requirement that is Cement, Steel, Diesel, Spares, PRW's etc. The letter gave a schedule of monthly advance required as also stated that the recovery of the same can be made from the IPC on monthly basis as given in the table in the said letter. It was further stated by the respondent that if the recovery could not be affected as per schedule, interest may be charged for such unrecovered amount at the rate as defined in the contract.

5. The appellant by its letter dated 02.08.2017 accepted the request of the respondent and it is not in dispute that certain

advance payments were made by the appellant to the respondent based thereon.

6. The appellant claiming that the recovery of the full advance payment could not be made from IPC raised by the respondent, vide letter dated 16.03.2018 called upon the respondent to make payment of Rs.28,95,10,537/- allegedly due from the respondent to the appellant.

7. The appellant by further letters dated 03.04.2018 and 26.04.2018 called upon the respondent to pay an amount of Rs.32,76,65,649/- allegedly due from the respondent to the appellant against the above advance.

8. Finally, the appellant by its letter dated 09.06.2018 invoked the bank guarantee in question for an amount of Rs.32,98,47,083/-.

9. The respondent filed an application under Section 17 of the Act before the Arbitral Tribunal seeking a stay on the invocation and encashment of the said Bank Guarantee and the Tribunal by its order dated 12.06.2018 stayed such invocation and encashment.

10. The application of the respondent has been finally allowed by way of the Impugned Order.

11. Learned ASG appearing for the appellant submits that the dispute with respect to the advance given by the appellant to the respondent vide its letter dated 02.08.2017 was not a subject matter of the disputes referred to the Arbitral Tribunal and, therefore, the Arbitral Tribunal lacked jurisdiction to

adjudicate on the invocation of the Bank Guarantee which was only on the basis of the amount remaining outstanding against such advance. In this regard, the learned ASG has placed reliance on the judgment of ***Booz Allen and Hamilton INC. vs. SBI Home finance Ltd. & Ors.*** (2011) 5 SCC 532. She further submits that the Bank Guarantee was unconditional and unequivocal in nature and, therefore, the Arbitral Tribunal has erred in restraining the invocation and encashment of the same on the ground that the respondent has raised certain claims in the arbitration proceedings and certain claims of the respondent are pending consideration with the appellant. She submits that as far as the claims raised by the respondent before the Arbitral Tribunal are concerned, the same are pending adjudication and could not have been taken into consideration for restraining the invocation or encashment of the Bank Guarantee. As far as the claims of the respondent pending consideration before the appellant, the same not being the subject matter of the arbitration proceedings, again could not have been taken into consideration for passing the Interim Order in favour of the respondent. She places reliance on the judgments of the Supreme Court in ***BSES Ltd. (Now Reliance Energy Ltd.) vs. Fenner India Ltd. & Anr***. (2006) 2 SCC 728 and ***Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. & Anr***. (1997) 6 SCC 450 and of this Court in ***Rail Vikas Nigam Ltd. vs. Railone-Tarmat-Durga(JV)*** 2018 SCC OnLine Del 6655.

12. On the other hand, learned senior counsel for the respondent submits that the Arbitral Tribunal has rightly exercised its jurisdiction under Section 17 of the Act as with the amendment to Section 17 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015, the jurisdiction of the Arbitral Tribunal to pass an interim order has been expanded by the legislature and an interim measure of protection as may appear to the Arbitral Tribunal to be just and convenient can be passed by the Arbitral Tribunal. He further submits that the Arbitral Tribunal has rightly considered the amounts that are due and payable by the appellant to the respondent and found that as the same are far in excess of the amount that is sought to be recovered from the invocation and encashment of the bank guarantee, such invocation and encashment of the bank guarantee cannot be permitted. He submits that in any case, the invocation letter dated 09.06.2018 issued by the appellant is not in terms of the Bank Guarantee and therefore, the bank cannot make payment on basis of such invocation. In this regard, he places reliance on the judgment of this Court in ***Jyoti Structure Ltd. vs. Dakshinanchal Vidyut Vitran Nigam Ltd***. 2016 SCC OnLine Del 5035.

13. I have considered the submissions made by the counsels for the parties. I may first note that as mentioned by the Arbitral Tribunal in paragraph 2 of the Impugned Order, the dispute that is pending adjudication before the Arbitral Tribunal is confined only to the issue whether the respondent

is entitled to seek extension of time and consequently award of 'amount towards cost and loss suffered by it.' Therefore, the dispute whether the appellant is entitled to seek recovery of the advance granted by it pursuant to the request of the respondent vide its letter dated 19.08.2016 and acceptance thereof by the appellant on 02.08.2017 is not a subject matter of reference before the Arbitral Tribunal. Therefore, the Arbitral Tribunal cannot and could not have gone into the validity of the demand raised by the appellant.

14. I am unable to agree with the submission made by the learned senior counsel for the respondent that with the amendment in Section 17 of the Act, the jurisdiction of the Arbitral Tribunal has been widened to such a great extent that it can pass interim orders of protection even where the dispute is not a subject matter of reference before it. A reading of the amended Section 17 of the Act also shows that the interim measure of protection has to be confined to the subject matter of the dispute which is being adjudicated by the Arbitral Tribunal. The Arbitral Tribunal cannot travel beyond its own terms of reference.

15. As noted hereinabove, the dispute whether the appellant was entitled to seek recovery of the advance amount in spite of certain claims of the respondent being pending before it for consideration, was not a dispute referred to or being adjudicated by the Arbitral Tribunal. Equally, the validity of all those clams which are pending consideration before the

appellant is also not the subject matter of the reference or pending adjudication before the Arbitral Tribunal. Therefore, the validity of the demand raised by the appellant not being a subject matter of dispute before the Arbitral Tribunal, the invocation and encashment of the Bank Guarantee for recovery of such demand could not have been restrained.

16. Even otherwise, the Bank Guarantee in question is unconditional and unequivocal in nature. The relevant terms of the same are quoted hereinbelow:

> *"......do hereby guarantee and undertake to pay the Owner, on demand any and all monies payable by the Contractor to the extent of Rs.96,29,19,500/- (Rupees Ninety Six Crores Twenty Nine Lakhs Nineteen Thousand Five Hundred only) as aforesaid at any time up to 06.05.2018 (days/month/year) without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any such demand made by the Owner on the Bank shall be conclusive and binding notwithstanding any difference between the owner and the Contractor or any dispute pending before any Court, tribunal, Arbitrator or any other authority."*

17. The law in relation to the Bank Guarantee is no longer *res integra* and infact has been reiterated by the Supreme Court in a number of decisions. In ***Dwarikesh Sugar Industries Ltd.*** (supra), the Supreme Court has held as under:-

> *"**21.** Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it*

necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome, Larsen & Toubro Ltd. v. Maharashtra SEB, Hindustan Steel Workers Construction Ltd. v. G.S.Atwal & Co. (Engineers) (P) Ltd. and U.P. State Sugar Corpn. v. Sumac International Ltd. The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. as follows:

> *"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the*

> *harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."*

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank are apposite:

> *".... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. <u>It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer</u>, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged." (emphasis supplied)*

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.

***22**. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of* *the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."*

18. The Supreme Court further held that the principle of unjust enrichment would have no application incase of encashment of the Bank Guarantee.

19. In ***BSES Ltd.*** (supra), the Supreme Court held that the ground of irretrievable injustice cannot be said to have been made out only because the arbitral proceedings were pending.

20. In ***Vinitec Electronics Private Ltd v HCL Infosystems Ltd***. (2008) 1 SCC 544 it was reiterated that:-

> *"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes."*

21. On pendency of arbitration proceedings it was held that:-

> *"29. There is no dispute that arbitral proceedings are pending. The appellant can always get the relief provided he makes his case before the Arbitral Tribunal. There is no allegation that it would be difficult to realize the amounts from the respondent in case the appellant succeeds before the Arbitral Tribunal."*

22. In ***Rail Vikas Nigam Ltd.*** (supra), this Court has held that merely because the Arbitral Tribunal considers that it

would be able to adjudicate on the disputes pending before it expeditiously, is no ground for injuncting the invocation/encashment of the Bank Guarantee. It was held that the harm or injustice contemplated under the head of irretrievable injury or injustice must be of such an exceptional and irretrievable nature as would override the terms of the guarantee.

23. In the present case, the Arbitral Tribunal, as noted above, has merely considered the claims that are pending before it as also pending before the appellant as a ground for restraining the invocation/encashment of the Bank Guarantee. The Arbitral Tribunal has held as under:-

> *"(23) The table shows that substantial bills, more than the amount sought to be recovered by way of encashing the bank guarantee are already pending with the Respondent and are being processed. The bills have been pending for more than 4- 6 weeks. During the course of hearing, we asked the Ld. Counsel for the Respondent as to within how much time the bills have to be processed? We were told that the contract provides for a period of 56 days (8 weeks) for processing the bills. If only, the bills would have been processed, possibly the balance amount of unsecured advance would have been recovered by the Respondent from out of the amount of Bills found due and payable to the Claimant. This is in addition to the submission of Mr. Puri, the Ld. Sr. Counsel that there are huge claims of the Claimant against the Respondent which are subject matter of this arbitration and there is no counter claim.*
>
> *(24) Attention of the Tribunal has also been invited to the tables available at pages 13 to 21 with the*

Claimant's reply to the Respondent's IA-1A which go to show that apart from the present dispute there have been other arbitration disputes between these very parties and awarded amount of more than 490 crores is pending for payment by the Respondent in favour of the Claimant.

(25) In the above circumstances, Mr. Puri submitted that not only the invocation is not in terms of the contract and the bank guarantee but it is also highly inequitable to permit the bank guarantee being encashed and keeping the claims of the Claimant pending without determination/finalization."

24. The Arbitral Tribunal does not give even a *prima facie* view on the claims raised by the respondent and pending adjudication before it. It does not state that *prima facie,* it has found any merit in those claims that are pending before it. As far as the claims of the respondent that are pending consideration before the appellant, the same were not subject matter of dispute before the Arbitral Tribunal and in any case, once it is held that the Bank Guarantee in question is unconditional and unequivocal in nature, the dispute whether the respondent is entitled to such claims at all, cannot be a ground for restraining such invocation/encashment of the Bank Guarantee. As far as the amounts which have been awarded in favour of the respondent in other arbitration proceedings, I am informed that the same are pending enforcement/challenge before different Courts. The same therefore, again could not have been made a basis for restraining the

invocation/encashment of an unconditional and unequivocal Bank Guarantee.

25. As far as the issue of invocation letter not being in terms of the Bank Guarantee is concerned, I have already quoted the relevant terms of the Bank Guarantee above. The invocation letter, after making the reference to the Bank Guarantee reads as under:-

> *"2. Accordingly, we hereby enforce this bank guarantee and request you to deposit an amount of Rs.32,98,47,083/- (Rs. Thirty Two crores Ninety Eight Lakhs Forty Seven Thousand and Eighty Three only) in our bank account as detailed hereunder:-*

i)	*Beneficiary*	*NHPC Limited*
ii)	*Account No.*	*00000010813608692*
iii)	*Type of Account*	*Cash credit*
iv)	*Name of Bank*	*State Bank of India*
v)	*Branch of Bank*	*Corporate Accounts Group Branch, Jawahar Vyapar Bhawan, 1, Tolstoy Marg, New Delhi-110001*
vi)	*IFSC Code*	*SBIN0009996*

26. The Arbitral Tribunal in its Impugned Order has held as under:-

> *"(19) Above letter does not mention that the amount was due and payable by the Contractor; that a demand was made from the Contractor for payment; and, that the specified amount was due and payable by the Contractor to the Owner."*

27. As the invocation is not in terms of the Bank Guarantee,

the same cannot clearly be given effect to. However, it is made clear that the order of injunction granted by the Arbitral Tribunal would not preclude the appellant from invoking the bank guarantee in terms thereof, if so advised.

28. In view of the above, the Impugned Order is modified to the limited extent that while restraining the respondent from encashing the Bank Guarantee No.20090041 BGP 0050 pursuant to the Letter of Invocation dated 09.06.2018, the appellant shall be free to invoke /encash the Bank Guarantee by issuing a Letter of Invocation in terms of the Bank Guarantee.

29. The appeal is disposed of with the above directions, with no order as to cost.

Dasti.

NAVIN CHAWLA, J

SEPTEMBER 24, 2018
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