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

Date of decision: 30th November, 2018

\+ O.M.P.(I) (COMM.) 443/2018

\+ O.M.P.(I) (COMM.) 444/2018

LARSEN AND TOUBRO LTD ..... Petitioner

Through: Mr.Rajiv Nayar, Sr. Adv. with Mr.Ravi Varma, Mr.S.Kirmani, Mr.Lakshay Khanna, Mr.Ashutosh Ranjan, Advs.

versus

DELHI METRO RAIL CORPORATION LTD & ANR. ..... Respondents

Through: Mr.Manish Srivastava, Mr.Deboshree Mukherjee, Mr.Aditya Gupta, Mr.Ashish Verma, Advs. for R-1.
Ms.Kashish Narang, Ms.Jasleen Budhiraja, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.16307/ 2018 in O.M.P.(I) (COMM.) 443/2018
I.A. No.16308/ 2018 in O.M.P.(I) (COMM.) 444/2018

Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 443/2018
O.M.P.(I) (COMM.) 444/2018

1. These petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the invocation of the Bank Guarantees dated 29.10.2018 for a sum of Rs.11,58,49,347/- in OMP(I)(COMM.) No.443/2018 and Rs.7,18,33,894/- in OMP(I)(COMM) No.444/2018 by the respondent no.1.

2. The facts being referred to hereinbelow have been taken from OMP(I) (Comm.) No.444/2018.

3. The petitioner had been awarded the work of construction of elevated viaduct, 6 elevated stations viz Aluva, Pulinchodu, Companypady, Ambattukavu, Muttom, Kalamassery (from chainage -120.000m to 7055.218m) including architectural finishing works of stations and connecting elevated viaduct and ramp to depot at Muttom on Alwaye Petta line of Kochi Metro Rail Project.

4. The petitioner had submitted the Performance Bank Guarantee(s) in compliance with the terms of the Agreement executed between the parties.

5. The time for completion of the project was 24 months from the commencement date, however, admittedly there was delay in completion of the work, which the petitioner contends was for reasons attributable to the respondent no. 1. The respondent no. 1 had granted extension of time, from time to time, for completion of

the work by various letters, out of which the first extension of time was granted without levy of liquidated damages, while on the other three occasions the respondent no. 1 levied the liquidated damages (in OMP (I) (COMM) 443/2018, the first extension was granted without levy of liquidated damages while the subsequent two were granted reserving the right to levy liquidated damages and the last was with levy of liquidated damages).

6. The respondent no. 1 vide its letter dated 20.06.2018, relying upon Clause 8.5 of the General Conditions of Contract and Appendix-2B of Employer's Requirement, levied liquidated damages of Rs. 14,60,82,088/- on the petitioner. By another letter of 20.06.2018, the respondent no. 1 called upon the petitioner to pay a further amount of Rs. 6,98,99,899.37/- as damages on account of Risk and Cost'.

7. As the respondent no.1 sought to encash the Performance Bank Guarantee(s) submitted by the petitioner for making recoveries of the Liquidated Damages and the damages on account of 'Risk and Cost', the petitioner filed petitions under Section 9 of the Act, being OMP(I)(Comm.) Nos.328/2018 and 329/2018. The same were dismissed by this Court vide its order dated 16.08.2018. The petitioner challenged the above order by filing appeals under Section 37 of the Act, being FAO(OS) (Comm.) 198/2018 and FAO(OS)(Comm.) 199/2018.

8. It is the case of the petitioner that while the above appeals were pending before the Division Bench of this Court, the parties

met and pursuant to the negotiations, the respondent no.1 withdrew the invocation letters vide communication dated 30.08.2018 addressed by the respondent no.1 to the bank. In view of the withdrawal of the invocation, the petitioner withdrew the appeals on 04.09.2018.

9. The learned senior counsel for the petitioner further submits that pursuant to the negotiations between the parties, respondent no.1 vide its letter dated 23.10.2018 called upon the petitioner to submit separate Bank Guarantees for 'Risk and Cost' and for Liquidated Damages under the two Contracts. The petitioner gave its consent to comply with the said requisition vide its letter dated 24.10.2018 and also proposed the values of the Bank Guarantees including interest.

10. In the meantime, the petitioner also invoked the Arbitration Agreement between the parties vide its letter dated 24.10.2018.

11. The respondent no.1 by its letter dated 25.10.2018 accepted the proposal of the petitioner to submit separate Bank Guarantees Contract wise for 'Risk and Cost' and for the Liquidated Damages and also specified the corrected amounts including interest for Bank Guarantees pertaining to 'Risk and Cost'.

12. The petitioner, complied with the direction of the respondent no.1 and submitted separate Bank Guarantees for the two contracts towards 'Risk and Cost' and Liquidated Damages under cover of its letter dated 30.10.2018.

13. Learned senior counsel for the petitioner submits that in spite of complying with the said condition, the respondent no.1 first threatened to invoke the Bank Guarantee(s) vide its letter dated 09.11.2018 and has thereafter, proceeded to invoke the bank Guarantees by a communication addressed on 29.11.2018. He submits that such invocation of the Bank Guarantees is against the terms settled between the parties pursuant to which the petitioner had submitted fresh Bank Guarantees.

14. On the other hand, the counsel for the respondent has brought to my attention the letter dated 31.08.2018 addressed by the respondent no.1 to the petitioner. He submits that the terms of the settlement were that the petitioner shall make payment of the 'Risk and Cost' amount to the respondent no.1 by 15.10.2018. This period was thereafter extended from time to time, however, as the petitioner failed to pay the said amount, the respondent no1 had no option but to proceed to invoke the Bank Guarantees.

15. I have considered the submissions made by the learned counsels for the parties. Letter dated 31.08.2018 addressed by the respondent no.1 to the petitioner reads as under:-

> *"As requested vide your letter cited above based on the discussion you had with Principal Advisor/DMRC, the encashment of Bank Guarantees under reference 1 and 2 for the projects KC02 and KC03 is being withdrawn, duly advising the Bank.*
>
> *Arrangements may please be made to extend the Bank Guarantees as per the conditions of the contract for both*

KC02 and KC03. <u>As per the discussion we had today and as committed by you to the Principal Advisor arrangements may please be made to pay the risk amount of Rs.6,98,99,899.37 and Rs.11,27,30,318.00 respectively for the contracts KC02 and KC03 on or before 15/10/2018."</u>

(Emphasis added)

16. The said letter clearly records the demand made by the respondent no.1 regarding the payment of the 'Risk and Cost' amount to be paid by the petitioner to the respondent no.1 on or before 15.10.2018.

17. Letter dated 23.10.2018 relied upon by the petitioner also states that incase the payment of 'Risk and Cost' amount is not made before 01.11.2018, the Bank Guarantees covering such amount shall be encashed by the respondent no.1. By the subsequent letter dated 09.11.2018, respondent no.1 again advised the petitioner to make payment against the 'Risk and Cost'amount by 30.11.2018.

18. The demand made by respondent no.1 in the abovementioned letters has never been contested by the petitioner. There is no correspondence placed on record by the petitioner stating that the offer to make such payment was never made by the petitioner.

19. In view of the above, it must be held that the Bank Guarantees are being invoked by the respondent no.1 in terms of the settlement arrived at between the parties.

20. Be that as it may, the Bank Guarantees in question are unconditional and unequivocal in nature. There is no allegation of fraud or irrevitable injustice being caused to the petitioner due to such invocation of the Bank Guarantees by respondent no.1. The law in relation to the Bank Guarantees is no longer *res integra* and has been settled and reiterated by the Supreme Court in a large number of judgments. I made reference to them in my previous order dated 16.08.2018 passed in OMP(I)(Comm.) 328/2018 and 329/2018.

21. Curiously, this order has not even been filed on record along with present petitions. Neither is the order passed by the Division Bench, by which the appeals had been withdrawn, filed on record along with the present petitions. This is most important because the appeals were withdrawn after the letter dated 31.08.2018 addressed by respondent no.1 to the petitioner which clearly stated that the petitioner had undertaken to make the payment of 'Risk and Cost' amount on or before 15.10.2018. If this was not the understanding between the parties, the petitioner would not have proceeded to withdraw its appeals pending before the Division Bench.

22. In view of the above, I find no merit in the present petitions and the same are dismissed, with no order as to costs.

NAVIN CHAWLA, J

NOVEMBER 30, 2018
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