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

+ **ARB. A. (COMM.) 45/2017 & I.A. 13053/2017**

Date of decision: 11th January, 2018

RAIL VIKAS NIGAM LTD. Appellant

Through: Mr. Anil Seth with Mr. Udit
Seth, Advocate

versus

RAILONE-TARMAT-DURGA (JV) Respondent

Through: Mr. Sashidhar Sivakumar with
Ms. Mani Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This is an appeal under Section 37 (2) of the Arbitration and Conciliation Act, 1996 (herein after referred to as the 'Act') filed by the appellant challenging the interim order dated 26th September, 2017 passed by the Arbitral Tribunal directing the appellant to maintain *status quo* with respect to the Bank Guarantees and restraining it from encashing the same.

2. The disputes between the parties have arisen in relation to the award of work of "Package-3-Construction of Roadbed, Major & Minor bridges, Track Linking(excluding supply of rails, ordinary track sleepers and thick web switches), Outdoor Signalling and Electrical

(General) works in connection with Doubling of ARAND (Ex)-Raipur (Ex) section (57.404 kms) part of RAIPUR- TITLAGARH Doubling in SAMBALPUR & RAIPUR Division of East Coast & South East Central Railway in the state of CHATTISGARH, India.”

3. Claiming breach of the agreement by the respondent, the appellant terminated the Contract vide its letter dated 21st June, 2016 and proceeded to invoke the Bank Guarantees submitted by the respondent in terms of the Contract.

4. The respondent filed an application under Section 9 of the Act before the Court and Additional Chief Judge (ACJ), City Civil Court, Hyderabad, seeking an injunction to restrain the encashment of the Bank Guarantees. An order dated 15th June, 2016 was passed by the Court of ACJ restraining the encashment of the Bank Guarantees.

5. In the meantime, the Arbitral Tribunal was constituted and the respondent filed an application under Section 17 of the Act before the Arbitral Tribunal seeking release of the Bank Guarantees in question. The application (in the form of an affidavit) was rather cryptic and as a ground, paragraph 5 of the same submitted as under:

“I submit that attempt to encash the bank guarantee would be illegal and without the authority of law. Therefore the Claimant is entitled an order of Temporary injunction restraining the respondents from encashing the. Bank Guarantee. Otherwise I will be put to irreparable injury and hardship. The, respondents are guilty of breach in not discharging the reciprocal obligation and on account of breach committed by the Respondents, the claimant has lost huge amount. Therefore there is a prima facie case for grant

of order of Temporary injunction under Section 17 of the Arbitration and Conciliation Act restraining the respondents from encashing the Bank Guarantee. If the order of Temporary Injunction is not granted, the claimant will be put to irreparable injury and hardship.”

6. The appellant has contended that even while the application under Section 9 was pending before the Court of ACJ, the Arbitral Tribunal took cognizance of the said application and passed an interim order in favour of the respondent and that this itself is a ground for setting aside the Impugned Order. However, in my opinion, as the interim protection granted earlier has culminated into the Impugned Order after the application under Section 9 of the Act had been withdrawn by the respondent, this Court will confine its scrutiny only to the Impugned Order dated 26th September, 2017 passed by the Arbitral Tribunal.

7. The Impugned Order (passed by the majority of two Arbitrators) after recording submissions made by the parties and the law cited before it, concludes that the allegations of “fraud” by either party is yet to be adjudicated. However, a reading of paragraph 9.11.3 of the Impugned Order would indicate that the “fraud” being discussed by the Arbitral Tribunal is not in relation to the Bank Guarantees but in relation to the conduct of the main Work Order/Contract itself and the allegations of breach thereof. Paragraph 9.11.3 of the Impugned Order is reproduced herein below:-

“9.11.3 The claimant contended a delay of 1400 days while the respondent contended that there was no delay in respect of handling over of the site and hence the

entire extension was granted with Liquidated damages. Similar is the situation as regard to the forest clearance, while the respondent contended that there was no delay, the claimant contended the delay in forest clearance as the big issue. AT feels that such serious allegations against either of the parties can be construed as fraud by any of the party against other party which is yet to be adjudicated.”

8. As far as the allegation of corruption made by the respondent against the appellant, the Arbitral Tribunal records that it has no jurisdiction over the said issue.

9. In relation to the contention that the respondent had performed its obligations under the agreement, the Arbitral Tribunal records that this is an issue to be examined after hearing the parties. It further records that it would be pre-mature to decisively say whether the contract was legally or illegally terminated. A reading of paragraphs 9.11.3 to 9.11.9 of the Impugned Order would show that the Arbitral Tribunal does not even record a prima facie finding on the allegations raised by the parties against each other. The first cardinal principle for grant of interim injunction i.e. a prima facie case in favour of the claimant, therefore, has not been examined by the Arbitral Tribunal.

10. In case of Bank Guarantee, the test for restraining invocation thereof is even stricter and it is only in cases of fraud of egregious nature, which would vitiate the entire underlying transaction, or ‘special equities’ in favour of injunction, such as ‘irretrievable injury’ or ‘irretrievable injustice’ being caused with the encashment of Bank Guarantee, that such invocation is liable to be restrained. A reading of

the Impugned Order would show that there is no finding of the Arbitral Tribunal, even prima facie in nature, with respect to the allegation of fraud.

11. As far as irretrievable injury or injustice is concerned, the Arbitral Tribunal has proceeded on the basis that the appellant will not suffer any injury in case the Bank Guarantee is kept alive during the pendency of the Arbitration proceedings which the Arbitral Tribunal would endeavour to dispose of expeditiously.

12. In my opinion this again is not the test of “irretrievable injustice” as propounded by the Supreme Court in its judgments. In *U.P. State Sugar Corporation V. Sumac International Ltd.* (1997) 1 SCC 568, Supreme Court had clarified that since in most cases payment of money under a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under the head of irretrievable harm or injustice must be of such an exceptional and irretrievable nature as would override the terms of the guarantee.

13. In *Dwarikesh Sugar Industrie Ltd. vs. Prem Heavy Engineering Works (P) Ltd.* (1997) 6 SCC 450 the second exception to the rule of granting injunction, i.e. resulting of irretrievable injury, was again explained to mean such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. In *Himadri Chemicals Industries Ltd. vs Coal Tar Refining Company* (2007) 8 SCC 110, Supreme Court summarized

the principle for grant or refusal to grant of injunction in cases of bank guarantee as under:-

“14. ... (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 realize 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 realization of a Bank 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 irretrievable harm or injustice to one of the parties concerned.”

14. 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.”

15. 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.”

16. In the present case as noted above there is no discussion in the Impugned Order with respect to the two exceptions carved out by the Supreme Court.

17. The learned counsel for the respondent submits that the test of Irretrievable injury can be considered to be satisfied as the appellant is intentionally trying to delay the adjudication of the disputes by the Arbitral Tribunal. He contends that even the fee for the Arbitral Tribunal was not paid by the appellant resulting in one of the Arbitrator tendering resignation.

18. In my opinion, apart from the fact that this is not a ground taken by the Arbitral Tribunal in the Impugned Order, in case one of the parties is not cooperating in an expeditious disposal of the Arbitration proceedings, the Arbitral Tribunal is not powerless. It can regulate its own procedure, including imposing costs in exercise of its powers under the second proviso to Section 24 of the Act. However, merely

because a party is not participating or is creating hurdles in expeditious disposal of the arbitral proceedings, it cannot become a ground for restraining encashment of the Bank Guarantees that are unconditional in nature.

19. Apart from the above, the learned counsel for the respondent has not been able to show how the test as laid down by the Supreme Court in the case of *U.P. State Sugar Corporation (Supra)* stood satisfied in the present case. The pleading in the application under Section 17 of the Act have been reproduced above. The same are vague and do not satisfy the test laid down by the Supreme Court.

20. The learned counsel for the respondent has relied upon the Judgment of this Court in *Hindustan Construction Co. Ltd. and Anr. v. Satluj Jal Vidyut Nigam Ltd.* AIR 2006 Delhi 169 to contend that where the party attempts to frustrate results of internal adjudication by recourse to encashment of Bank Guarantee, it would amount to irretrievable injustice. However, in my opinion the said Judgment would not be applicable in the present case. In the said case, the respondents therein were found to be frustrating the findings recorded by the internal determinative adjudicating machinery i.e. CMD'S findings as well as the finding of Dispute Review Board, which were against the respondents. The respondents had earlier agreed not to invoke the bank guarantee in case the same is kept alive. In those circumstances, the Court found that the petitioner therein had been able to make out a case of 'irretrievable injustice' warranting order restraining the respondent from encashing the Bank Guarantee. No

such circumstances exist in the present case and none have even been pleaded.

21. The learned counsel for the respondent has also placed reliance on the judgment *Gammon-OJSC Mosmetrostroy JV and Ors. v. Chennai Metro Rail Limited and Ors.* 2015 (6) ARB LR 340 (Madras) to contend that an injunction had been passed by the Madras High Court against encashment of the Bank Guarantee on the ground that the other party stood fully protected by the Bank Guarantee and by a direction that the same shall be kept alive through the pendency of the arbitral proceedings and even thereafter during pendency of proceedings under Section 34 of the Act. In my opinion, this is not the ratio of the said Judgment and it cannot be said that in every case encashment of a Bank Guarantee is to be restrained merely by directing the Bank Guarantee to be kept alive during the arbitration proceedings.

22. In view of the above, I find merit in the present appeal and the same is allowed. The Order dated 26th September, 2017 passed by the Arbitral Tribunal is set aside, with no order as to costs.

NAVIN CHAWLA, J

JANUARY 11, 2018/Nk