

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 31.01.2018

Judgment pronounced on : 01.06.2018

+ **FAO(OS) (C) 227/2017& CM APPL. 47305/2017**

NATIONAL THERMAL POWER CORPORATION LTD.
(NTPC)

.....Appellant

Through Mr. Vikas Singh, Sr. Advocate with
Ms. Kanika Agnihotri, Mr. Preet
Singh Oberoi and Mr. Karan
Minocha, Advs.

versus

NAVAYUGA ENGINEERING COMPANY LTD. (NECL)

.....Respondent

Through Mr. Arvind K. Nigam, Sr. Adv.
with Mr. Milanka Chaudhary,
Mr.Sarojanand Jha and Ms.Naina
Dubey, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. The National Thermal Power Corporation (NTPC hereafter) appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (in short “the Act”), questioning two orders; one, disposing of a Section 9 petition by the respondent- (hereafter “Navayuga”) and

the other, dismissing the application seeking review of the first order, both passed by the Id. Single Judge.

2. This appeal is the outcome of the award of a contract by NTPC to Navayuga for SG Area Civil Works Package for Barh Super Thermal Power Project (3 x 660 MV). The contract was signed amongst the parties on 15.4.2006 and thereunder, as security deposit, Navayuga furnished a bank guarantee to NTPC for an amount of ₹6,83,16,562/- (in short “the bank guarantee”), which was extended from time to time. The bank guarantee was issued by State Bank of India, Hyderabad, Telangana. The disputes, which arose amongst the parties, were referred to arbitration. During the arbitral proceedings, the bank guarantee had subsisted and was kept alive; it was valid till 30.6.2017.

3. The Arbitrator announced its award on 31.5.2017. By its letter dated 3.6.2017, NTPC lodged claim with the bank issuing the bank guarantee, providing however that in the case the bank guarantee was extended by a period of one year, the encashment was not to be acted upon. On 29.6.2017, the bank guarantee was extended till 30.6.2018. NTPC alleges, in this appeal that such intimation came to be received when the final unconditional invocation was already issued and direction issued to its concerned executive to proceed to Hyderabad to invoke said Guarantee. The bank thereafter released the payment under the bank guarantee. Navayuga applied under Section 34 of the Act for setting aside of the arbitral award. It filed a petition under Section 9 of the Act

seeking restitution/refund of ₹6,83,16,562/- against the encashment of the bank guarantee, as an interim measure, inasmuch as, according to Navayuga, the invocation of the bank guarantee was a pre-mature execution of the arbitral award.

4. The learned Single Judge, by the impugned order dated 13.10.2017, taking note of the fact that a petition under Section 34 of the Act had been filed (and notice in which had been issued) and further that the invocation of the bank guarantee by letter dated 3.6.2017 was conditional, directed NTPC to deposit the amount of ₹6,83,16,562/- in a fixed deposit in the name of the Registrar General of this Court, subject to further orders to be passed in the Section 34 petition filed by Navayuga under Section 34. NTPC then sought recall of the said order dated 13.10.2017. It was declined by order dated 15.12.2017. NTPC has preferred the appeal against the said orders.

5. Mr. Vikas Singh, learned senior counsel, for NTPC urged that the invocation of the bank guarantee by it on 30.6.2017 was *de-hors* the arbitral award made on 31.5.2017 because, it was invoked in terms of the General Conditions of Contract, which provided for the refund of security deposit only upon the completion of the work to be certified by the Engineer in-charge and that, the bank guarantee was invoked independently of the award. Consequently, it urged that Section 36 of the Act, which provides for the enforcement of the arbitral award, was not attracted. It was also argued by NTPC that the present proceedings related to the pre-amended Section 36.

Therefore, it could be invoked only in relation to the monies that were intended to be recovered by the successful parties under the directions of the court and had no application to a case, where the monies were already available with the successful parties and were available for appropriation, without resort to execution proceedings. It was therefore argued that any contention of Navayuga for the non-executability of the award for three months contemplated under Sections 34 and 36 of the Act, was unmerited.

6. The impugned order dated 15.12.2017 is also assailed on the premise that it travels beyond the terms of the contract and that, the impugned orders have the effect of restitution of the amounts availed by NTPC on the invocation of unconditional bank guarantee, in the absence of any material to show that any fraud of egregious nature was played or the invocation of the bank guarantee would subject the other party to injustice. In support of such pleas, reliance is placed upon *ONGC vs. Western Geco International Ltd.*, 2014 (9) SCC 263; *Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.*, (2008) 1 SCC 544; and, *Adani Agri Fresh Ltd. vs. Mahaboob Sharif & Ors.*, (2016) 14 SCC 517.

7. Mr. Arvind Nigam, learned counsel for Navayuga, submitted that NTPC's contentions were contrary to its pleadings and that, it was not necessary for NTPC to wait for the period to expire as provided under Sections 34 and 36 of the Act. Also, according to Navayuga, the subject contract provided for foreclosure in terms of the conditions of the contract and that on 12.10.2010, NTPC had

accepted Navayuga's request of foreclosure of the contract and while foreclosing the contract, it had also informed Navayuga that the balance works would be executed at the risk and cost of Navayuga.

8. As for the arbitral award, Navayuga argues that on the arbitration clause having been invoked by it, NTPC had also filed a counter claim. A serving employee of NTPC, i.e. a Group General Manager of the project itself, passed the arbitral award and he had partially allowed all the counter claims of NTPC but for one claim of Navayuga. In its submissions, Navayuga also points out that NTPC had filed two affidavits before the Single Judge to the effect that the bank guarantee was encashed as it did not receive the original extended bank guarantee. It is also contended that Section 36 of the Act bars the enforcement of the arbitral award till the time to challenge the award under Section 34 is over or such challenge having been made, has been dismissed.

9. It is further contended by Navayuga that the impugned order, only seeks to protect its interest inasmuch as, in the event, the petition filed by it is allowed and the award is set aside, Navayuga will not be able to recover the monies appropriated by the latter with interest accruing thereon. In support of foregoing submissions, reliance is placed upon *Paramjeet Singh Patheja vs. ICDS Ltd.*, 2006 (13) SCC 322; *Kanpur Jal Sansthan & Anr. vs. Bapu Constructions Ltd.*, 2015 (5) SCC 267; and, *Lakshmi Shankar Mills*

(P) Ltd. & Ors. vs. The Authorized Officer/Chief Manager, Indian Bank & Ors., AIR 2008 Mad 181.

10. Undisputedly, the impugned orders were passed on an application made by Navayuga under Section 9 of the Act. It emerges from the record that on the application made under Section 34 within the stipulated time, NTPC has not proceeded to seek enforcement of the award, as provided for, under Section 36 of the Act. The impugned orders relate to the sums secured by NTPC *as a security deposit* on the award of the subject contract to Navayuga, which was valid till after the announcement of the arbitral award on 31.5.2017. In other words, the bank guarantee continued to remain in force even after the disputes had arisen amongst the parties and the arbitral proceedings continued before the Arbitral Tribunal. Why and under what circumstances, NTPC invoked the bank guarantee on 30.6.2017, is sought to be explained before this court as under :

“16. It is necessary to state that the project in question at Barh was to be executed in two stages. The respondent was to award Stage-I and subsequently, Stage II as well. On 15th March 2010, the respondent intimated to the appellant that it would be ceasing the execution of the work on 31st March 2010. It may be relevant to state at this stage that the work was to be completed in 2009. The respondent caused immense difficulties for the appellant by issuing the said correspondence. Ableit, as per the contract of the bank guarantee which is unconditional in favour of the appellant, the appellant elected to not invoke the bank guarantee at the time on cessation of work.

17. The Appellant did not invoke the said bank guarantee, as the respondent was already in the process of contemporaneously executing Stage -II of the project. Despite the fact that the claimant was well within its rights to invoke the Unconditional

bank guarantee, the appellant had made a conscious call not to invoke the bank guarantee earlier as if the appellant had done so, it would have impinged on the financial liquidity of the respondent. As a consequence of which, the respondent may have taken or may have been constrained to take steps that would have been detrimental to the progress of the project in Stage-II. Having already suffered adversely on account of the actions of the Claimant/Petitioner in Stage-I of the project, the appellant elected not to invoke the bank guarantee in 2010. As the projects were both of national importance, the Appellant took this decision in public interest.

18. The respondent kept the bank guarantee alive till June 2017 and based on the fact that the respondent was in the process of executing the project in Stage-II, the Appellant restrained itself from invoking the bank guarantee. It is submitted that the invocation of bank guarantee was independent of and unrelated to the Arbitral Award dated 31.05.2017.”

11. It thus transpires that the bank guarantee furnished by Navayuga was a composite bank guarantee for the execution of both Stage-I and Stage-II projects and it appears that the Stage-II project is still underway. It follows thereby that the bank guarantee was so kept alive and accepted, even after the passing of the subject arbitral award dated 31.5.2017. The bank guarantee was so sought to be kept alive by the appellant when it issued the letter dated 3.6.2017, which reads, as under :

“Date : 03.06.2017

Ref. No. 4400/BARH/F&A/C&B/BG/17-18/03

To,

*The Branch Manager
State Bank of India
CAG Branch Central Building
PunjaguttaRoa, Durga Nagar,
Somajiguda,*

Hyderabad,
Telengana 500082

Subject : Conditional claim under bank guarantee No. 1303910BG0001940 dated 01.12.2005 for Rs.68,31,65,67/- valid up to 30.06.2017.

Dear Sir,

Please refer to your bank guarantee No. 1303910BG0001940 dated 01.12.2005 for Rs.6,83,16,562/- (Rupees Six Crore Eighty Three Lakh Sixteen Thousand Five Hundred Sixty Two only) valid up to 30.06.207 issued by you on behalf of Navaranga Engineering Company Ltd. in our favour towards the Contract No.CW-9552-323-9 LOA-4622 dated 27.10.2005 as Security Deposit.

The captioned bank guarantee is valid up to 30.06.2017. We do hereby lodge our claim in terms of bank guarantee and call upon you to pay the sum of Rs.6,83,16,562/- (Rupees Six Crore Eighty Three Lakh Sixteen Thousand Five Hundred Sixty Two only) being the amount covered under the above bank guarantee forthwith.

In the event this Bank guarantee is extended for a year and such letter of extension duly executed on Stamp Paper of requisite value is received by us, this claim must be treated as withdrawn. We draw your attention to bank guarantee Agreement to limitation clause pursuant to Section 28 of Indian Contract Act (copy enclosed) wherein it is stated that any extension of bank guarantee shall be minimum for a period of one year and the claim period shall also be for one year. Hence, the captioned bank guarantee is extended for a period less than a year please invoke the same.

This is without prejudice to our rights under the guarantee and under the law.

Thanking you,

*Yours faithfully
For and on behalf of
NTPC Limited
Sd/-
Authorized Signatory”*

12. It is not in dispute that pursuant to the above communication, the bank guarantee was extended on 29.6.2017 and a letter to that effect was received by office of NTPC, though, after the office hours as contended on its behalf. The fact remains that the bank guarantee was extended on 29.6.2017 and its intimation was given to NTPC on the same day. The bank guarantee however was encashed on 30.6.2017. One need not get into any further details on this aspect or the correctness or otherwise of the decision of the appellant in invoking of the bank guarantee inasmuch as the impugned orders only relate to the interim measures directed by the Court on the application made under Section 9 of the Act.

13. It is not NTPC's contention that the application filed under Section 9 of the Act was not maintainable or the impugned orders were made without jurisdiction. The genesis of Section 9 is that any party is entitled to interim protection under the said provision, before or during arbitral proceedings or even at any time after the making of the arbitral award, but, before it is enforced in accordance with Section 36, if, the action of the other party is either in breach of the terms of the agreement or is against notions of equity, fair play or natural justice. In that view of the matter, when one adverts to the subject at hand, it would be seen that the bank guarantee, which was kept alive not only during the course of the arbitral proceedings but in terms of the communication dated 3.6.2017 of NTPC itself, was extended further for another one year,

its abrupt invocation, is sought to be explained by the appellant taking contradictory pleas.

14. The averments made in para 18 of the appeal show that NTPC restrained itself earlier and desist from invoking the bank guarantee as Navayuga was in the process of executing the project of Stage-II, whereas in the affidavit filed by it before the Id. Single Judge, the reason given for invoking the bank guarantee is said to be non-receipt of the original extended bank guarantee. These reasons do not appear to be justifiable and plausible. In view of these facts, NTPC's argument that invocation of the bank guarantee was justifiable, cannot be accepted, even if, it is taken that the invocation of the bank guarantee did not suffer from any *per se* illegality.

15. This court is of the opinion that the orders impugned therefore, cannot be said to be unreasonable or unjustified. The impugned orders are passed on an application made under Section 9 of the Act and it does not require any elaboration that the amending Act has not brought any changes in the power of the Court to provide for an interim measure post grant of an arbitral award irrespective of any amendment to Section 36. The power of the Court continues to remain as wide. In the given facts and circumstances of the case, the judgments (*supra*) relied upon by the Id. counsel for NTPC are not of any avail to it. *ONGC's case (supra)* relates to the aspect of public policy of India to be taken into account to set aside an arbitral award on an application made

under Section 34. *Adani's* and *Vinitec's* cases (*supra*) pertain to the principles of grant of injunction in a civil proceeding in relation to invocation of bank guarantee. Such principles are not strictly applicable or attracted on the application made for grant of an interim measure under Section 9. Interim protection under Section 9 is provided by the Court, *inter alia*, when an action of the other party is against equity, fair play or natural justice and in doing so, the Court is not required to go into the claims of either of the parties, but, for what is admitted to by the either side. The *ratio* of the said judgments is therefore of no avail to the appellant.

16. For the foregoing reasons, the appeal is dismissed as being meritless. No order as to costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

JUNE 01, 2018

rc