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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION PETITION (L) NO.131 OF 2019

Sri Sai Krishna Constructions	...	Petitioner
V/s.		
Glove Infracom and ors	...	Respondents

- Mr. Ankit Lohia a/w Mr. Bharat Jain, Ms. Anubhuti Gandhi i/by I.C. Legal, for the Petitioner.
- Mr. Himanshu Desai, a/w Zaigam Rizvi, for respondent Nos. 1 & 2.

CORAM : G. S. KULKARNI, J.

DATE : 14th MARCH, 2019.

P.C. :

1] Heard Mr. Ankit Lohia, learned counsel for the petitioner, Mr. Zaigam Rizvi, learned counsel for the respondent Nos. 1 and 2 and Mr. Deep Morabia, learned counsel. Respondent No.3 Karnataka Bank Ltd, though served is not represented.

2] By this petition filed under Section 9 of the Arbitration and Conciliation Act (for short, "ACA"), petitioner has prayed for interim relief pending arbitral proceedings which is essentially an injunction against respondent Nos. 1 & 2. invoking the performance bank guarantee dated 27th September, 2018, for Rs.7,99,20,000/- and for a further direction that respondent No.3 bank be enjoined from paying any amount under the said bank guarantee. There is also prayer that respondent Nos.1 and 2 be directed to return the performance bank guarantee to the petitioner.

3] This Court, by an order dated 7th February, 2019 granted an ad-interim protection in terms of prayer (a) (ii), which reads thus :-

"1. Pending the hearing and final disposal of the present petition and pending the arbitral proceedings and the declaration and execution of the Award that may be passed by the Arbitrators.

(ii) this Hon'ble Court be pleased to restrain the Respondent No.3 by a temporary order and injunction from paying any amounts under the said PBG dated 27th September 2018 for Rs.7,99,20,000/- (Rupees Seven Crores Ninety Nine lacs and twenty Thousand only)".

4] There is some background to this litigation, before this petition was filed. The petitioner, had moved this Court, by filing petition under Section 9 of the ACA (Commercial Arbitration Petition (L) No.1486 of 2018), which came to be disposed of by this Court, by order dated 6th December, 2018. In the said order, disputes between the parties by consent of the parties under Agreement dated 28.9.2018 were referred for adjudication by a sole arbitrator. In regard to the bank guarantee in question in paragraph No.5 of the said order, the court recorded a statement made on behalf of respondent Nos. 1 & 2, that the respondent Nos. 1 & 2 were not immediately inclined to invoke the said bank guarantee and in the event bank guarantee is to be invoked respondent Nos. 1 & 2 would have to give 15 days notice. The said statement came to be accepted. For the purpose of this proceeding, the relevant observations of the Court, in the order dated 6th December are required to be noted which read as follows:-

"3. The case of the petitioner is that despite repeated requests, the respondents did not make available to the petitioner the site. The petitioner had mobilised resources by spending substantial amounts, however no work could be started. The petitioner accordingly entered into correspondence with the respondents. The petitioner recorded its grievances by its letter dated 20.10.2018 (Exhibit B) and by a further letter dated 31.10.2018 addressed to

the respondent. There is another letter dated 16.11.2018 whereby again the petitioner requested the respondent for compliances and also recorded that the respondents should make available the work site. The petitioner recorded that despite odds, the petitioners were still ready and willing to execute the contractual work. It was pointed out that the petitioner had incurred huge expenditure for procuring and mobilising additional machinery and towards labour charges. It was pointed out that the expenditure incurred was to the tune of Rs.50 lacs. As there was no response to any of the grievances and communications, the petitioner has filed the present petition praying for the following reliefs :

“(i) this Hon'ble Court be pleased to restrain the respondent no.1 and its partners claiming through and/or under them by a temporary order and injunction from invoking/encashing the said PBQ dated 27th September 2018 for Rs.7,99,20,000/- (Rupees Seven Crores Ninety Nine Lacs and Twenty Thousand only);

(ii) this Hon'ble Court be pleased to restrain the respondent no.3 by a temporary order and injunction from paying any amounts under the said PBQ dated 27th September 2018 for Rs.7,99,20,000/- (Rupees Seven Crores ninety Nine lacs and Twenty Thousand only);

(iii) this Hon'ble Court be pleased to direct the respondent no.1 to deposit the sum of Rs.75,00,000/- (Rupees Seventy Five Lacs only) paid pursuant to the said Agreement with the Prothonotary and Senior Master, High Court, Bombay;

(iv) In the alternative a prayer 'a (iii) this Hon'ble Court be pleased to restrain the respondent no./1 by an order and injunction from utilizing the sum of Rs.75,00,000/- (Rupees Seventy Five Lacs only) paid pursuant to the said Agreement.

b. Ad-interim reliefs in terms of prayers 'a (i) a (ii) and a (iii) or a (iv) be granted to the petitioner.”

4. This petition was heard initially on 27.11.2018. Mr.Ansari appeared for respondent no.1 and made a statement that so far the respondents have not invoked any of the bank guarantees. The said statement was accepted. Thereafter the petition was listed on 3.12.2018. The said statement of the respondents as recorded in the order dated 27.11.2018 has continued to operate till date. The respondents have chosen not to file a reply affidavit.

5. Mr.Ansari learned counsel for the respondents though have opposed the petition, on instructions submits and confirms that the

respondents are not immediately inclined to invoke bank guarantee and in the event the bank guarantee is to be invoked, the respondents shall give 15 days notice to the petitioners. Statement of Mr. Ansari is accepted.

7. During the course of hearing of this petition, on a suggestion made to the parties that disputes and differences, as noted above then needs to be resolved by appointing an arbitrator, the learned counsel for parties on instructions fairly state that their respective clients are agreeable for the appointment of an arbitrator to arbitrate the disputes between the parties. In view of the above consensus, it would be appropriate and in the interest of justice, that an arbitrator is appointed for adjudication of the dispute between the parties.

9. In the above circumstances, in my considered opinion, the present petition needs to be disposed of by the following order :-

O R D E R

(i) By consent of the parties, Mr.Arif Doctor Advocate is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties under the agreement dated 28.9.2018.

(ii) The prospective Arbitrator fifteen days before entering a reference shall make a disclosure as per requirement of section 11 (8) read with section 12 (1) of the Act, and shall forward a copy to the Prothonotary and Senior Master of this Court to be placed on record of this application as also forward the same to the respective parties.

(iii) The respondent is directed to deposit Rs.75 lacs in a separate no lien account. Such deposit shall be subject to further orders which would be passed by the learned arbitrator either under proceedings under section 17 of the Act or the final adjudication in the arbitral proceedings as the learned arbitrator may deem proper and appropriate in the facts and circumstances of the case and the rival contentions.

(iv) All contentions of the parties on merits of the matter are expressly kept open.

(v) The above observations made in this order are *prima facie* and are relevant to the adjudication of the present petition under section 11 of the Arbitration and Conciliation Act and thus is not a reflection on the merits of the disputes between the parties.

5] On the backdrop of the order dated 6th December, 2018, parties are before arbitral tribunal. Learned counsel for the petitioner has drawn my attention to the application filed by the petitioner under Section 17 of the ACA Act, which is stated to be heard by the learned arbitral tribunal and orders on the said application are reserved and would be soon pronounced.

6] Mr. Lohiya, learned counsel for the petitioner while assailing the impugned invocation submits that once as recorded in the order dated 6th December, 2018, passed by this Court, respondent Nos. 1 & 2 had undertaken to issue 15 days notice before invocation of the bank guarantee, contrary to the said order, bank guarantee could not have been invoked by respondent Nos 1 & 2, by their advocate's letter dated 30th January, 2019. Mr. Lohia, learned counsel for petitioner would submit that respondent No.1 ought to have complied with the solemn statement as made before the Court, as the said order passed by this Court was valid and subsisting. It is submitted that the learned Arbitrator has already heard the Section 17 application as filed by the petitioner and the orders on the said application are awaited. He would, thus, submit that interim relief passed by this Court should continue to remain in operation till decision of the Section 17 Application.

7] Respondent Nos. 1 & 2 are represented by learned counsel Mr. Himanshu Desai. Respondent No.2 is stated to be present in the Court. Learned counsel for respondent Nos. 1 & 2 would oppose the present petition principally on two grounds. Firstly, that once reference is already made to the arbitral tribunal and the arbitral tribunal is seized of the matter, a Section 9 petition as filed by the petitioner, is not maintainable and thus, no reliefs can be granted in this petition. The second submission is

that there cannot be an injunction on invocation of the bank guarantee and more particularly considering the terms and conditions of the bank guarantee. It is submitted that the law in this regard is well settled. It is submitted that there should not be any restraint on respondent Nos. 1 and 2 to receive the payments under the bank guarantee in question. There are also submissions which are made by learned counsel for respondent on the nature of agreement and they are not relevant for the purpose of this petition, as the arbitral proceedings are pending.

8] Having heard learned counsel for the petitioner and respondents, and having perused the record, it is quite clear that while disposing of Commercial Arbitration Petition (L) No.1486 of 2018, by an order dated 6th December, 2018, this Court in paragraph No.5 of the said order recorded a categorical statement, as made on behalf of respondent Nos. 1 & 2, that the respondents are not immediately inclined to invoke the bank guarantee and in the event the bank guarantee is to be invoked, respondents shall give 15 days notice to the petitioners. Mr. Lohia, would be correct in his contention that without giving 15 days notice, bank guarantee could not have been invoked by respondent Nos. 1 & 2 by their advocate's letter dated 30th January, 2019 as addressed to the respondent No.3 bank. It was a statement as made on behalf of respondent Nos. 1 & 2 to the Court which came to be recorded. Once such a statement was made on behalf of respondent Nos. 1 and 2 which forms part of the order, then certainly, respondent Nos. 1 & 2 were bound by the statement and respondent Nos. 1 & 2 were obliged to abide by the statement till the said orders passed by the Court subsisted.

9] It, however, appears that for certain reasons which cannot be

subject matter of adjudication in this proceeding, a letter dated 30th January 2019, was addressed by respondent Nos. 1 & 2 to respondent No.3 bank invoking the bank guarantee, without giving 15 days notice to the petitioner. This course of action on the part of respondent Nos. 1 & 2, therefore, was clearly contrary to the position taken by respondent Nos. 1 & 2 and recorded in the order dated 6th December, 2018, passed by this Court. In the above circumstances it was necessary for this Court to pass an ad-interim order dated 7th February, 2019 as noted above.

10] However, during the intervening period, it is not in dispute that the Arbitral tribunal has proceeded to hear the parties on Section 17 application. Section 17 Application is already heard and the orders on the same are reserved.

11] In view of above factual backdrop, the objection of learned counsel for respondent Nos. 1 & 2 while opposing the reliefs as prayed by the petitioner that a Section 9 petition is not maintainable, cannot be accepted inasmuch as the bank against whom relief is sought, not to make payment, is not a party to the arbitral proceeding. Thus, there was no question of the petitioner seeking such reliefs against bank before the arbitral tribunal. As such a petition under Section 9, against third party, in these circumstances certainly would be maintainable. The law in this regard is well settled.

12] As regards the contention of Mr. Desai, learned counsel for respondent Nos. 1 & 2 that the Court should not injunct invocation of a bank guarantee. Mr. Desai would be correct to so contend, however, in the present facts and circumstances, the Court is only concerned with the

statement as made on behalf of respondent Nos. 1 and 2 and as recorded in paragraph No.5 of the order dated 6th December, 2018, which is not in the nature of injunction, granted by the Court. In the earlier order dated 6th December, 2018, the Court had merely recorded a statement made on behalf of respondent Nos.1 and 2 that 15 days notice would be issued to the petitioner before invocation of the bank guarantee. The concern of the petitioner is limited namely a breach of this statement, as made on behalf of respondent Nos. 1 & 2 in addressing an invocation letter dated 30th January 2019 of the respondent Nos.1's advocate to the bank, invoking the said bank guarantee. On this background, the ad-interim order dated 17.02.2019, was passed by this Court restraining respondent No.3 from paying any amounts under the said bank guarantee, so that respondent Nos. 1 and 2 are held to be bound by the statement as made to the Court and recorded in the order dated 6th December, 2018 to give 15 days notice to the petitioner, before invoking/encashing the bank guarantee.

13] The question was, thus, limited to the solemnity and sanctity of the Court orders dated 6th December, 2018.. It is clear from the record that an action of invocation of the bank guarantee was being taken by respondent Nos. 1 & 2 contrary to the said order of the Court. The only and proper course for the court, in such a situation, was to prevent any breach of the orders passed by the Court at the hands of respondents. There was nothing more. In this situation the contentions as urged on behalf of respondent Nos. 1 & 2 in regard to the law on invocation of the bank guarantee will not have any application.

14] In the above circumstances, the interest of justice would require that the petition is disposed of by the following order:-

Order

i) The invocation of the bank guarantee by letter dated 30th January, 2019 of advocate of respondent Nos. 1 & 2 cannot be sustained as it is contrary to the observations made in paragraph No.5 of the order dated 6th December, 2019 in Arbitration Petition (L) NO.1486 of 2018. Respondent No.3 bank is accordingly directed not to act on the advocate's letter dated 30.01.2019.

ii) The statement as made on behalf of respondent Nos. 1 and 2 and as recorded in paragraph No.5 of the order dated 6th December, 2018 passed in Arbitration Petition (L) No.1486 of 2018 shall continue to operate.

iii) All contentions of the parties on merits are expressly kept open. The observations made in this order are no expression of any opinion on the merits of the disputes between the parties.

iv) The learned sole arbitrator shall endeavour to pronounce orders on the Section 17 Application expeditiously and preferably within 15 days from today.

vi] Petition is accordingly disposed of in the above terms. No costs.

15] At this stage learned counsel Mr. Desai, learned counsel for respondent No.1, on instructions, very fairly states that his clients are not alleging any impropriety on the part of earlier advocate Mr. Zaid S. Ansari, appointed on behalf of respondent Nos. 1 & 2 in Arbitration Petition (L) No.1486 of 2018. .

[G. S. KULKARNI, J]