

\$~19

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

+ O.M.P.(I) (COMM.) 200/2019 & IA 8567/2019

Date of Decision : 3rd July, 2019

LARSEN & TOUBRO LIMITED Petitioner

Through: Mr.Rajiv Nayar, Sr. Adv. and
Mr.Akhil Sibal, Sr. Adv. with
Mr.Kirat Singh Nagra,
Mr.Kartik Yadav, Mr.Pranav
Vyas, Mr.Samir Malik &
Ms.Neha Sarna, Mr.Shantanu
Parashar, Advs.

versus

EXPERION DEVELOPERS PVT. LTD. & ORS.

..... Respondents

Through: Mr.P. Chidambaran, Sr. Adv.
with Mr.Manish Demla,
Mr.Pradyuman Sewar, Advs.
for R-1

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner, *inter alia*, praying for an order of injunction restraining the respondent no.1 from invoking the following Bank Guarantees:

<i>S. No.</i>	<i>Name of the Bank</i>	<i>BG No.</i>	<i>Date of Issuance</i>	<i>Current Amount (In Crores)</i>	<i>Valid upto</i>
(i)	Yes Bank	003GM07140290002	29.01.2014	3.8	30.06.2019
(ii)	IDBI Bank	130380IBGF00113	18.04.2013	13.84	30.11.2020
		140380IBGF00361	08.09.2014	13.84	31.10.2019
		150380IBGF00106	23.03.2015	1.6	30.06.2019
(iii)	IndusInd Bank	0007PR13013736	15.03.2013	31.68	30.06.2019

2. The Bank Guarantee mentioned at Serial No.(i) of the above table is the Advance Money Bank Guarantee. The Bank Guarantees mentioned at Serial No.(ii) are the Retention Money Bank Guarantees and the Bank Guarantee at Serial No.(iii) is the Performance Bank Guarantee.

3. As far as the Bank Guarantee for an amount of Rs.1.6 crores mentioned at Serial No.(ii) hereinabove is concerned, the respondent no.1 has not yet invoked the same and respondent no.1 in its reply states that it does not wish to invoke the same.

4. The petitioner further prays for an interim direction for the respondent no.1 to make a payment of Rs.21.92 crores towards bills which it claims as having been already certified for payment by the respondent no.1 till April, 2019.

5. The disputes between the parties have arisen out of the Design and Built contract dated 07.02.2013 (hereinafter referred to as the 'Agreement') executed between the petitioner and the respondent no.1 for construction of Group Housing Project 'WINDCHANTS', Sector 112, Manesar Urban Complex, Gurgaon, Haryana.

6. The petitioner is the Contractor while the respondent no.1 is the Owner/Employer.

7. I shall at the outset deal with the contention of the learned senior counsel for the petitioner which he urges qua all the three types of Bank Guarantees in question. Learned senior counsel for the petitioner submits that petitions have been filed under the Insolvency and Bankruptcy Code, 2016 against the respondent no.1 before the National Company Law Tribunal, Delhi(NCLT). He submits that there is a likelihood of an Interim Resolution Professional being appointed against the respondent no.1 and incase the Bank Guarantees are allowed to be encashed, the recovery of such amount from respondent no.1 would thereafter become difficult if not impossible. He submits that therefore, the present case would be covered in the limited exception of no injunction in the law of Bank Guarantees inasmuch as the petitioner would suffer an irretrievable injustice incase the encashment of the Bank Guarantees is not restrained by this Court. In this regard, he has placed reliance on the Balance Sheet of respondent no.1 for the financial years 2017-18 to contend that the said Balance Sheet shows a negative cash flow and revenue growth of respondent no.1 from financial years 2015 to 2018.

8. On the other hand, learned senior counsel for the respondent no.1 submits that there are only two petitions filed against respondent no.1 before NCLT. These have been filed by certain home buyers whose allotment had been cancelled by the respondent no.1. The amount claimed by these home buyers is only of Rs.32.61 lacs and Rs.3.86 crores approximately. As against this, the respondent no.1 has a Net Worth of Rs.1,300 crores and capital base of Rs.1,750 crores. The respondent no.1 has various other projects in India and has delivered over 5 million sq. ft of residential and commercial space in the last couple of years. He submits that the negative cash flow is only because of the general down side in the construction market in the country.

9. Having considered the submissions made by the learned senior counsels for the parties, I do not find any merit in the submission made by the learned senior counsel for the petitioner. As noted hereinabove, the claims made before the NCLT are yet to be admitted. The net worth of the respondent no.1 company, as reflected in the Balance Sheet relied upon by the petitioner, is of more than Rs.1,300 crores in the financial year 2018. Though the question of insolvency of the respondent no.1 is to be considered by NCLT, I at this stage and *prima facie* do not find any case of irretrievable injustice having been made out by the petitioner.

10. Learned senior counsel for the petitioner further submits that Sub-Clause 4.2 of the Agreement restricts the right of respondent no.1 to invoke the Bank Guarantees, especially the Performance Bank

Guarantee and the Retention Money Bank Guarantees only for the circumstances and for the amounts mentioned therein. He submits that before the Bank Guarantees can be invoked, the circumstances mentioned in the said clause have to be fulfilled and the Bank Guarantees can be invoked only for the amounts that have been certified by the Engineer under Sub-Clause 2.5 of the Agreement. He submits that in the present case, neither the circumstances mentioned in Sub-clause 4.2 have arisen nor the amounts have been certified by the Engineer as required under Sub-Clause 2.5 of the Agreement and therefore, the invocation of the Bank Guarantees by the respondent itself is in breach of the terms of the Agreement and the respondent no.1 is liable to be restrained from receiving the proceeds of such invocation.

11. On the other hand, learned senior counsel for the respondent no.1 has placed reliance on the following judgments of the Supreme Court and of this Court:

- (i) ***Vinitec Electronics (P) Ltd. vs. HCL Infosystems Ltd.***, (2008) 1 SCC 544;
- (ii) ***U.P. State Sugar Corporation vs. Sumac International Ltd.***, (1997) 1 SCC 568;
- (iii) ***Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. & Anr.***, (2007) 6 SCC 470;
- (iv) ***General Electric Technical Services Co. Inc. vs. Punj Sons (P) Ltd. And Ors.***, (1991) 4 SCC 230;

(v) ***Consortium of Deepak Cable India Limited & ABIR Infrastructure Private Limited (DCIC-AIPL) Thr Abir vs. Teestavalley Power Transmission Limited*** (Judgment dated 15.09.2014 passed in FAO(OS) No.397/2014).

12. He submits that the law on Bank Guarantee is no longer *res integra* and as the Bank Guarantee in question being unconditional and unequivocal in nature, the disputes between the parties with regard to liabilities under the contract between them cannot in any manner affect the right of the respondent no.1 to invoke such Bank Guarantees. He submits that the encashment of such unconditional Bank Guarantees, only because, *prima facie*, the conditions for enforcing the same in terms of the agreement between the parties have not been fulfilled, cannot be restrained.

13. Without prejudice to the above argument, he submits that in the present case, respondent no.1 was entitled to invoke the Bank Guarantees as the petitioner had failed to extend the validity of the Bank Guarantees at least 28 days prior to the expiry of the validity thereof, as also under Sub-Clause 15.2(c)(i) and (ii) there were circumstances entitling the respondent no.1 to terminate the Agreement.

14. At the outset, certain provisions of the Agreement would require to be noticed. Sub-Clause 4.2 of the Agreement deals with the 'Performance Security', the relevant extract of which is as under:

“The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract in the event of:

(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim the full amount of the Performance Security,

(b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Clause 20 [Claims, Disputes and Arbitration], within 42 days after this agreement or determination,

(c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or

(d) circumstances which entitle the Employer to termination under Sub-Clause 15.2 [Termination by Employer], irrespective of whether notice of termination has been given.”

15. A reading of the above clause would show that the respondent no.1 as an Employer has undertaken not to make a claim against the Performance Security except for the amounts to which the respondent no.1 is entitled under the contract and only in the event of, *inter alia*, the petitioner, as a Contractor, fails to extend the validity of the Performance Security; fails to pay an amount due, which is either agreed upon or determined under Sub-Clause 2.5 or clause 20 within 42 days; fails to remedy a default within 42 days after receiving the

notice from the Employer requiring the default to be remedied; or where circumstances exists entitling the Employer to terminate the agreement under Sub-Clause 15.2.

16. The parties, therefore, by way of the above clause have themselves restricted the right of respondent no.1 to make a claim against the Bank Guarantees. It may be true that a Bank Guarantee is a separate and independent contract between the respondent no.1 and the bank and is to be governed by its own terms. As has been explained by the Supreme Court in the above referred judgments, as far as the bank is concerned, if the Bank Guarantee is unconditional, it cannot refuse to enforce the invocation thereof for an underlining dispute between the two contracting parties as this would not be any of its concern. Invocation of such unconditional Bank Guarantees can be restrained only on the limited exceptions of 'fraud' and 'irretrievable injustice' as explained by the Supreme Court in its various judgments, including the one mentioned hereinabove, or where such invocation is not in terms of the Bank Guarantee.

17. However, having said the above, the two contracting parties in the Contract between them this regard have agreed to restrict the right of respondent no.1 to invoke the Bank Guarantees only in the events mentioned in Sub-Clause 4.2 and for the amounts to which respondent no.1 is entitled to under the Agreement. The petitioner by way of the present petition seeks to enforce this contractual term by way of an injunction.

18. In the present case, the dispute is whether the respondent no.1 in terms of the agreement between the petitioner and respondent no.1 is at all entitled to invoke the Bank Guarantees in question.

19. Though, the Bank Guarantee may be an independent Contract between the bank and the beneficiary, it has been given by the petitioner to respondent no.1 in fulfillment of the contractual terms given in the Agreement. The Agreement then safeguards the petitioner from otherwise unfettered right of the beneficiary/respondent no. 1 to invoke the Bank Guarantees, by circumscribing/restricting the right of respondent no.1 to invoke such Bank Guarantees only on existence of certain circumstances. The respondent no.1 having obtained the Bank Guarantees with such restrictions, cannot then rely upon the general law applicable to such Bank Guarantees and wish away the contractual limitations to its rights. Any other interpretation would make the Sub-Clause 4.2 of the Agreement otiose.

20. To put it differently, as far as the bank is concerned, it cannot refute to honour the invocation on the ground that the conditions set out in Clause 4.2 of the Agreement have not been satisfied; the bank has to honour such invocation if it is otherwise in terms of the Bank Guarantee. However, the petitioner can seek an injunction against respondent no.1 contending that respondent no.1 had undertaken not to invoke the Bank Guarantees except on certain circumstances and as such circumstances have not arisen, the respondent no.1 be restrained from invoking the Bank Guarantees. In such eventuality, what the

petitioner seeks to enforce is the negative covenant in its Agreement with respondent no.1. To that extent, the right of respondent no.1 to invoke the Bank Guarantees has been contractually circumscribed and restricted in the contract itself.

21. Sub-Clause 4.2 reproduced hereinabove amounts to a negative covenant whereby respondent no.1 has agreed not to make a claim against the 'Performance Security' except in the events mentioned in the said Clause. Such negative covenants can be enforced under Section 42 of the Specific Relief Act, 1963 by grant of an injunction.

22. In *Simon Carves Ltd. vs. Ensus UK Ltd.* [2011] EWHC 657 (TCC), the Queen's Bench Division (Technology and Construction Court) has expanded the exceptions for grant of injunction against invocation of Bank Guarantee, holding as under:

"33. In my judgment one can draw from the authorities the following:

(a) Unless material fraud is established at a final trial or there is clear evidence of fraud at the without notice or interim injunction stage, the court will not act to prevent a bank from paying out on an on demand bond provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction.

(b) The same applies in relation to a beneficiary seeking payment under the bond.

(c) *There is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so.*

(d) *In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the court from making a demand under the bond.*

(e) *The court when considering the case at a final trial will be able to determine finally what the underlying contract provides by way of restriction on the beneficiary party in calling on the bond. The position is necessarily different at the without notice or interim injunction stage because the court can only very rarely form a final view as to what the contract means. However, given the importance of bonds and letters of credit in the commercial world, it would be necessary at this early stage for the court to be satisfied on the arguments and evidence put before it that the party seeking an injunction against the beneficiary had a strong case. It cannot be expected that the court at that stage will make in effect what is a final ruling.*

34. *It is possible to get into an academic debate as to whether the proposition which I raise at paragraph 33(d) reflects a type of fraud in that the beneficiary is seeking to call on the bond when it knows or can be taken to know that the underlying contract forbids it from doing so or whether the proposition reflects another exception to the practice that the courts will only rarely intervene to restrain calls being made or honoured. It is unnecessary to decide this but in my view it represents a second type*

of exception. Once can pose this example: on a commercial contract in which there is a bond in favour of the beneficiary party, the parties reach a full and final settlement which expressly requires the bond to be returned to the other party and no further calls to be made on the bond. If the beneficiary party in those circumstances seeks to call on the bond, in breach of the settlement terms, the court could properly restrain the beneficiary from doing either because it is committing a straight breach of contract or because it is or should be taken to be clear fraud by the beneficiary. ”

23. The above judgment has also been followed in ***Doosan Babcock Limited*** (formerly ***Doosan Babcock Energy Limited vs. Comercializadora de Equipos y Materiales Mabe Limitada*** (previously known as ***Mabe Chile Limitada***) [2013] EWHC 3201 (TCC).

24. In my opinion, the respondent no.1 having agreed not to invoke the Bank Guarantees except in the circumstances mentioned in Sub-Clause 4.2 of the Agreement, cannot then rely upon the general principles of the law on Bank Guarantee to contend that even if such invocation is in clear breach of the terms of the agreement and the express prohibition contained therein, no injunction can be granted to prevent such breach. To accept such submission would be to defeat Section 42 of the Specific Relief Act, 1963 as also make the contractual terms otiose.

25. It is to be remembered that in today's economic condition in the country, encashment of the Bank Guarantee has far reaching

consequences on the parties at whose behest such Bank Guarantee has been given. Not only are such Bank Guarantees given by bank against full or substantial cash security, but encashment thereof also causes damage to the commercial reputation and credit worthiness of such party. Therefore, invocation/encashment of the Bank Guarantee in spite of clear restriction on such right by express terms of the contract, would cause damage to the contracting party at whose behest such Bank Guarantee was given and such damage can have far reaching effect, which cannot be compensated in money thereafter.

26. As far as submission made by the learned senior counsel for respondent no.1 that the invocation would be justified for the failure of the petitioner to extend the validity of the Performance Security, I may only note that pursuant to the order dated 26.06.2019 passed in the present proceedings, the petitioner has extended the validity of the Bank Guarantees in question. Even otherwise, the Bank Guarantees in question were valid till 30.06.2019. However, they have been invoked by respondent no.1 by letter dated 15.06.2019.

27. Learned senior counsel for the petitioner submits that as far as the Retention Money Bank Guarantees are concerned, they had been extended on 30.05.2019 itself, that is even before the invocation. Learned senior counsel for the respondent no.1, however, submits that this fact was not communicated by the petitioner and on the date of invocation of the Bank Guarantees, the respondent no.1 did not have any knowledge of such extension. Be that as it may, once the Bank Guarantees stood extended prior to the invocation, the respondent no.1

cannot still insist on encashment thereof on the ground of their non-renewal.

28. As far as the Performance Bank Guarantee is concerned, the learned senior counsel for the petitioner submits that the respondent no.1, by its letter dated 11.06.2019, had sought renewal of the Bank Guarantee. However, without waiting for the petitioner to act on this demand, the respondent no.1 invoked the Bank Guarantee clearly showing its *mala fide*.

29. As noted above, as far as the Performance Bank Guarantee and the Advance Bank Guarantee is concerned, the same were extended only after the order dated 26.06.2019 of this Court. The only provision of the Agreement pointed out by the learned senior counsels for the parties regarding extension of the Bank Guarantee, is reproduced herein under:

“The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.”

30. A reading of the above clause would show that incase the Contractor has not become entitled to receive the ‘Performance

Certificate’ at least 28 days prior to the expiry date of the Bank Guarantees, the same shall be extended by the Contractor. This clause does not, however, state within what period such Bank Guarantees have to be extended. Necessarily, they have to be extended any time prior to their expiry. At least at this *prima facie* stage, therefore, I do not find the circumstance mentioned in Sub-Clause 4.2 (a) reproduced hereinabove, having been made out as on 15.06.2019 for the respondent no.1 to have invoked the Bank Guarantees in question. It is not the case of the respondent no.1 that it had even warned the petitioner of such invocation incase the Bank Guarantees were not extended and the petitioner had even thereafter, either unreasonably delayed the extension of the Bank Guarantees or refused such extension.

31. As far as reliance on Sub-Clause 4.2(d) is concerned, it authorizes the Employer to make a claim against the ‘Performance Security’ where circumstances exist entitling the Employer to terminate the Agreement under Sub-Clause 15.2 of the Agreement. Sub-Clause 15.2 of the Agreement entitles the Employer to terminate the contract, *inter alia*, where the Contractor fails to proceed with the work in accordance with Clause 8 or comply with a notice issued under Sub-Clause 7.5 or Sub-Clause 7.6 within 28 days of receiving such notice without reasonable excuse.

32. Sub-Clause 8 of the Agreement deals with the ‘Commencement, Delays and Suspension’ of work. The question of extension of time for completion has to be considered by the Engineer under Sub-Clause

8.4 read with Sub-Clause 20.1 of the Agreement. Sub-Clause 8.7 of the Agreement further provides for delay damages to be paid by the Contractor in case it fails to comply with the time for completion. Such damages are to be again made subject to Sub Clause 2.5, that is, determination of Employer's claims by the Engineer.

33. Sub-Clause 7.5 of the Agreement provides for rejection of the Plant, materials, design or workmanship, if found defective by the Engineer. While Sub-Clause 7.6 empowers the Engineer to instruct the Contractor to remove or replace any plant or material which is not in accordance with the contract or re-execute the work which is not in accordance with the contract. It is not the case of the respondent no.1 that the Engineer has made any determination of delay damages in terms of Sub-Clause 8.7 of the contract and/or the Engineer has made any determination under Sub-Clause 7.5 or 7.6 of the Agreement. On the other hand, it is the case of the petitioner (and not denied by the respondent no.1) that for the first time, the defects in the work have been alleged by the respondent no.1 only by its letter dated 28.06.2019, that is, after the invocation of the Bank Guarantees. Learned senior counsel for the respondent no.1 has not been able to refute the said submission of the petitioner. Therefore, at least *prima facie*, stage of invoking Sub-Clause 4.2(d) of the Agreement has also not arisen as on the date of the invocation of the Bank Guarantees.

34. In any case, the Bank Guarantees have to be invoked for the "amounts to which the Employer is entitled under the contract". This

amount has to be determined by the Engineer under Sub-Clause 2.5 of the Agreement, which is reproduced hereinbelow:

“2.5 Employer’s Claims

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employers Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an

amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.”

35. A reading of the above Sub-Clause would show that the determination of the Engineer has to be preceded by a notice giving relevant particulars to the Contractor. Though the learned senior counsel for the respondent no.1 submits that in the Agreement the respondent no.1 itself has been named as the “Engineer” however, it is not the case of the respondent no.1 that the respondent no.1 has given any prior notice to the petitioner of its claims against which the Bank Guarantees are sought to be invoked or any amount as having been so determined by the respondent no.1 in its capacity as Engineer. Even to a query from the Court, learned senior counsel for the respondent no.1 submits that no such determination of the amount is to be made by the respondent no.1/Engineer before invocation of the Bank Guarantees. In my opinion, this argument cannot be accepted in view of the specific provisions in Sub-Clause 4.2 of the Agreement.

36. The above discussion, however, is applicable only to the Retention Money Bank Guarantees and the Performance Bank Guarantee which are mentioned in Serial no.(ii) and (iii) of the table mentioned hereinabove. The same would not be applicable to the Advance Money Bank Guarantee which is mentioned in Serial no. (i) of the table mentioned hereinabove, as admittedly, the same was not a “Performance Security” and does not fall within the ambit of Clause 4.2 of the Agreement.

37. Learned senior counsel for the petitioner submits that the invocation of even this Bank Guarantee is in breach of the Agreement inasmuch as only an amount of Rs.86.20 lacs remains to be recovered from the petitioner against the mobilization advance. He submits that in accordance with the last certified bill of the respondent no.1, the respondent no.1 has also admitted that only an amount of Rs.2,89,44,656/- remains to be recovered as mobilization advance from the petitioner. He submits that as the Bank Guarantee in question is for an amount of Rs.3.80 crores, the respondent no.1 could not have invoked the same for the full amount, but could have invoked only for an amount of Rs.86.20 lacs or at worst for an amount of Rs.2,89,44,656/-.

38. On the other hand, learned senior counsel for the respondent no.1 has again placed reliance on the judgments of the Supreme Court mentioned hereinabove to contend that this would be a dispute to be adjudicated by the Arbitral Tribunal, however, cannot be a ground for restraining the invocation of the Bank Guarantee at this stage. He submits that even otherwise, the last certified bill relied upon by the petitioner required the petitioner to submit an invoice alongwith supporting documents. However, the petitioner has not yet submitted its invoice or supporting documents and therefore, cannot place any reliance on the last certified bill.

39. Learned senior counsel for the petitioner submits that without prejudice to his contention that the invocation of this Bank Guarantee is also in breach of the contract and could not have been permitted, the

petitioner shall deposit the amount of the Bank Guarantee, that is, Rs.3.80 crores with the respondent no.1 within a period of two weeks from today. Such deposit, however, will not prejudice the case of the petitioner to seek a refund of the said amount in the arbitration proceedings.

40. In view of the statement so made, this issue need not detain this Court any further. On the petitioner depositing the amount of Rs.3.80 crores with the respondent no.1, the respondent no.1 shall release the Advance Money Bank Guarantee and return the same to the petitioner.

41. In view of the above and as far as the Performance Bank Guarantee and the Retention Money Bank Guarantees are concerned, the petitioner has been able to make out a good *prima facie* case and balance of convenience in its favour. This Court, by an order dated 19.06.2019 had directed the Banks/ respondent nos.2 to 4 not to transfer the fund pursuant to the encashment of the Bank Guarantees by the respondent no.1. The order dated 19.06.2019 shall continue to operate in so far as the Performance Bank Guarantee and the Retention Money Bank Guarantees are concerned, leaving it open to either party to seek modification/variation of the said order before the Arbitral Tribunal to be appointed in accordance with the contract between them and subject to the condition that the petitioner shall keep the Bank Guarantees alive.

42. I may only note that the petitioner claims that the petitioner has already nominated its Arbitrator and it is for the respondent no.1 to

nominate its Arbitrator in accordance with the terms of the Agreement.

43. As the encashment of the Bank Guarantees except for the Advance Money Bank Guarantee, for which separate directions have been passed in the present order, has been restrained only on the ground that the respondent no.1 has, *prima facie*, not established the pre-conditions mentioned in Sub-Clause 4.2 of the Agreement, this order shall not prejudice the respondent no.1 from invoking the Bank Guarantees in accordance with Sub-Clause 4.2 of the Agreement. Such invocation or any challenge thereto, as also the arbitration proceedings, shall in no manner be prejudiced by any observation made in the present order.

44. As far as the prayer 'c' of the petition is concerned, learned senior counsel for the petitioner prays for leave to withdraw the said prayer with liberty to agitate the same before the Arbitral Tribunal. The petitioner is granted such liberty.

45. The petition is disposed of in the above terms, with no order as to costs.

NAVIN CHAWLA, J

JULY 03, 2019
RN