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

+ **OMP(I)(COMM) 223/2019**

Date of Decision : 22nd July, 2019

ECI-NAYAK (JV)

..... Petitioner

Through: Mr.Sachin Datta, Sr. Adv. with
Mr.Sanjeev Kumar Sharma,
Mr.Deepak Chaudhary, Advs.

versus

IRCON INTERNATIONAL LIMITED & ANR.

..... Respondents

Through: Mr.Abir Phukan, Mr.Gaurav
Jyoti, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') *inter-alia* praying for the following reliefs:

“(i) Set Aside/ Quash the order dated 09.07.2019 inter-alia restraining the respondent no. 1 from taking any coercive action including levying liquidated damages, usurping security deposit and proceeds of interim payment certificates and /or allied action or otherwise giving effect to show cause 7 days' notice dated 18.06.2019 and consequently, pass ex-parte ad-interim order staying the termination of contract dated 25.07.2017 sought to be terminated by Respondent No.1 vide notice dated 09.07.2019;

(ii) *Pass an order restraining the Respondent no. 1, their agents, representatives, servants or any other person claiming through or under them from invoking/ encashment of the Bank Guarantee Nos. 0994517BG0000090 dated 25.05.2017 for an amount of Rs.7,50,00,000/- and BG No.0994517BG0000091 dated 24.05.2017 for an amount of Rs.2,92,95,627/- , both issued by State Bank of India, Khanapara Branch, Guwahati, Assam, valid upto 30.07.2019, till disposal of the disputes in terms of clause 54 of the Special Conditions of contract read with Clause 63/64 of the Standard conditions of contract dated 25.07.2017;*

(iii) *Direct the Respondent No. 1 to release the outstanding payment of Rs.5,48,20,343/- out of which an amount of Rs.4,98,20,343/- is pending payable towards certified RA Bills No.6, 7 and 8 and an amount of Rs.50,00,000/- is pending payable towards price variation clause (PVC) for RA Bills from 5, 6, 7 and 8;*

(iv) *Direct the Respondent No. 1 to release and handover remaining 81% drawings of the project in question to the Petitioner for completion of the project within the time extended by the Respondent vide letter dated 12.06.2019;*

(v) *Appoint a Local Commissioner to measure the work already executed by the Petitioner which has been sought to be awarded by the Respondent No. 1 to third parties without any measurement and bifurcation and Consequently; direct the Respondent No. 1 to declare the reduced contract value as per approved drawings;*

(vi) *Pass an order restraining the Respondent no. 1, their agents, servants or any other person claiming through or under them from implementing and/or enforcing or otherwise giving effect to its letter dated 12.06.2019 to the effect that the respondent no. 1 shall be restrained from imposing liquidated damages on the petitioner, till disposal of the disputes in terms of clause 54 of the Special Conditions of contract read with Clause 64 of the Standard conditions of contract dated 25.07.2017;*

(vii) Pass an order against the Respondent No. 1, their agents, representatives, servants or any other person claiming through or under them that in the event that Respondent no 2 has transmitted the amounts to the Respondent No. 1 against bank guarantee Nos. 0994517BG0000090 dated 25.05.2017 for an amount of Rs.7,50,00,000/- and BG No.0994517BG0000091 dated 24.05.2017 for an amount of Rs.2,92,95,627/- , both issued by State Bank of India, Khanapara Branch, Guwahati, Assam, valid upto 30.07.2019, the Respondent No. 1 be enjoined from appropriating the same and status quo be maintained.”

2. It is the case of the petitioner that the petitioner was awarded the work of carrying out “Earthwork in filling in embankment provision of blanketing material construction of viaduct minor bridge and RUB in the stretch from KM 0.00 (Agartala to Km 5 .1 India Bangladesh border) and construction of service road from trans – shipment yard to NH-44 in connection with new BG railway line from Agartala Akhaura” vide Letter of Acceptance dated 07.02.2017. Thereafter an Agreement dated 25.07.2017 was also executed between the parties.

3. In terms of the Agreement, the petitioner had handed over the Performance Security in form of Bank Guarantee(s) to the respondent no.1.

4. As there was a delay in handing over the possession of the land and drawing on the part of the respondent no.1, the respondent no.1 vide its letter dated 10.08.2018 granted an extension of time for completion of the work till 23.04.2019.

5. As there were further delays on part of the respondent no.1 in handing over of the drawing and other delays, the petitioner applied for further extension of time, which was granted by the respondent no.1 by its letter dated 12.06.2019, albeit with imposition of liquidated damages. The petitioner has protested against the imposition of liquidated damages. However, the respondent no.1 by its letter dated 17.06.2019 claimed that the petitioner was not carrying out the work with expedition and called upon the petitioner to complete the work within the extended period of completion.

6. Without even waiting for the response and in fact on the very next date, vide letter dated 18.06.2019, the respondent no.1 issued a notice under Clause 62 of the Standard General Conditions of Contract (GCC) giving 7 days' notice to the petitioner to make good the progress, failing which further action as provided in Clause 62 of GCC was threatened, which is to terminate the Contract and to complete the balance work through another contractor.

7. The petitioner made a detailed representation against this threat by a letter dated 20.06.2019. However, fearing that the respondent would act on its threat, the petitioner filed a petition under Section 9 of the Act, being OMP(I)(COMM) 205/2019, before this Court. The said petition was disposed of by an order dated 26.06.2019, directing the respondent no.1 to consider the representation of the petitioner and pass a speaking order thereon within a period of two weeks from the date of the order. The respondent no.1 was further restrained from

invoking the Bank Guarantee for a period of 7 days of passing of such speaking order.

8. The respondent no.1 by its letter dated 01.07.2019 again made a complaint against the slow progress of work by the petitioner and by another letter dated 09.07.2019 rejected the representation of the petitioner observing that rescinding the contract, encashment of Bank Guarantee and imposition of the liquidated damages are an inevitable consequence of petitioner's poor performance and its failure to execute the work.

9. Faced with this threat, the petitioner has filed the present petition.

10. Learned senior counsel for the petitioner submits that in fact the threat has come true in as much as the respondent no.1 has invoked the Bank Guarantee(s) on 20.07.2019.

11. Learned senior counsel for the petitioner further submits that Clause 7.2 of the Contract requires the petitioner to submit the Performance Guarantee of only 5% of the Contract value. He submits that the respondent no.1 has admittedly reduced the scope of the work of the petitioner and therefore is holding the Performance Security in excess of the amount that is required under the Contract. He submits that even if it is to be held that the respondent no.1 is entitled to invoke the Bank Guarantee, it cannot do so beyond 5% of the Contract value as stipulated in Clause 7.2 (i) of the Contract.

12. On the other hand, the learned counsel for the respondent no.1 submits that the reduction of the scope of the work has occurred due to defaults by the petitioner itself and therefore, the petitioner cannot take advantage of the same. The reduction in the scope of work was forced on the respondent no.1 as the petitioner was failing to comply with the time schedule and carry out the work expeditiously. He further submits that the petitioner has not asked for reduction in the Performance Security on this account earlier.

13. I have considered the submissions of learned counsels for the parties. Clause 7.2 (i) of the Contract states that the successful bidder shall submit Performance Guarantee for an amount of 5% of the contract value. It further states that value of the Performance Guarantee to be submitted by the contractor will not change for variation upto 25% (either increase or decrease). The petitioner in its petition has stated that the reduction in the scope of work was communicated to the petitioner by the letter dated 09.07.2019 and thereafter further reduction was communicated verbally. The letter dated 09.07.2019 of the respondent no.1 records the following with respect to the deletion of the scope of work of the petitioner:

“(VI) On account of your lapses in providing PVD design, earthwork etc. we had to find and allot work to other agencies:

(i) Regarding the PVD design, it is submitted that the PVD Design had to be done by you as per Item no. 7 of Schedule- I of the BoQ of our LOA. However, your contention that you have submitted the PVD design is not correct, as you had submitted the PVD design for part stretch of only 500 meters of the stretch and your consultant had blissfully ignored the remaining 1.5

Km of the stretch and recused himself of any design responsibility. By failing to complete the design for the entire stretch, you have committed a material breach of the contract which has directly contributed to immense delay and losses. In this regard, your attention is also invited to Clause No. 13.2 of SCC- I wherein the design responsibility for the works design by the contractor lies with the contractor.

(ii) Despite being well aware that PVD work is a very critical activity and of utmost importance for timely completion of works in the Nischintpur yard area you did not show any intent to take up this work with sincerity. Accordingly, left with no other alternative and in the best interest of the project, IRCON had to remove this item from your scope and engage another agency in accordance with Clause 32 of SCC-I.

(iii) Similarly, works in the section between Km 4400 to 5100 was also deleted from your scope of the contract because of your inability to show desired progress at site during the best working season (from November to April) again as per Cl. 32 of SCC- I.

(iv) Again, you have failed to commence the important activity of blanketing work at site and the Blanketing Item has not even been considered by you in your work program submitted on 16.04.19. You have also not submitted any samples/ source approvals to any lab for testing and finalization of blanket material. Therefore, IRCON is left with no alternative but to delete the Blanketing Item from your scope and engage another agency as per Clause No. 32 of SCC- I.

(v) IRCON has taken these decisions in the right spirit and in the best interest of the project, which is a highly prestigious project of International importance.

(vi) Interestingly, you are now taking a stand that on account of delay committed by other agencies you are not able to do your work. You seem to be deliberately forgetting or brushing aside the fact that only on account of the continuing unjustifiable delay on your part, the work was allotted to other

agencies. While other agencies are continuing with their work, your work is still frequently stalled on account of non-availability of diesel, inadequate man power, breakdown of machinery.”

14. A reading of the above paragraphs would show that the deletion of work has been ordered on account of failure of the petitioner to carry out the work with expedition. Clause 7.2 would have no applicability in case the scope of work is reduced due to default by the petitioner. I therefore find no merit in the submission made by the learned senior counsel for the petitioner.

15. Learned senior counsel for the petitioner further submits that in terms of Clause 7.4(b) of the Contract, the respondent no.1 can make a claim against the Performance Guarantee only for an amount to which it is entitled under the Contract. He submits that till date there is no demand raised by the respondent no.1 on the petitioner and therefore, the respondent no.1 cannot be allowed to invoke and encash the Bank Guarantee(s).

16. Clause 7.4 (b) of the Contract is reproduced hereinbelow:

“7.4 Release of Performance Security:

(a) xxxxxxxxxxxxxx

(b) Wherever the contract is rescinded, the security deposit shall be forfeited and the Performance Security shall be encashed and the balance work shall be got done independently without risk and cost of the failed contractor. The failed contractor shall be debarred from participating in the tender for executing the balance work.

If the failed contractor is a JV or a partnership firm, then every member/partner of such a firm shall be debarred from participating in the tender for the balance work either in his/her individual capacity or as a partner of any other J.V/partnership firm.

The Engineer shall not make a claim under the Performance Guarantee (P.G.) except for amounts to which Ircon International Limited is entitled under the contract (not withstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:-

- i. Failure by the contractor to extend the validity of the P.G. as described herein above, in which event the Engineer may claim the full amount of the P.G.*
- ii. Failure by the contractor to pay Ircon International Limited any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer.*
- iii. The contract being determined or rescinded under provision of the General Conditions of Contract (GCC) the P.G. shall be forfeited in full and shall be absolutely at the disposal of the Engineer.”*

17. A reading of the above Clause would show that the respondent no.1 is entitled to invoke and encash the Bank Guarantee for the petitioner's failure to extend the validity of the Performance Guarantee as also where the Contract would be determined or rescinded under the provision of the GCC. Performance Guarantee can also be invoked on failure of the petitioner to pay to the respondent no.1 any amount due under the Agreement.

18. In the present case, the petitioner was called upon to extend the validity of the Bank Guarantee(s) till 22.08.2020. The Bank Guarantee(s) as on today are extended only till 30.07.2019. Learned counsel for the respondent no.1 further submits that the respondent no.1 is in the process of terminating the Contract having already rejected the representation of the petitioner in that regard. In my view, therefore, *prima facie* both the conditions for invocation and encashment of the Bank Guarantee have been fulfilled by the respondent no.1.

19. It is further contended by the learned senior counsel for the petitioner that it was respondent no.1 which had delayed handing over of the possession of the land as also various drawings and also committed other defaults which had an adverse effect on the progress of the work being carried out by the petitioner. He submits that on the one hand the respondent no.1 granted the extension of time for completion of work till 23.06.2020, while on the other hand, few days after this letter, threatened the petitioner with termination of the Contract under Clause 62 of the GCC. He submits that the respondent no.1 is therefore not only guilty of breach of the Contract and trying to take advantage of the same but also taking contradictory stands in various correspondences issued to the petitioner.

20. On the other hand, learned counsel for the respondent no.1 submits that the project in question is of national importance in as much as it relates to railway connecting India with Bangladesh. He submits that all correspondences of respondent no.1 were intended to

persuade the petitioner to understand the importance of the project and work expeditiously. However, it is only on the failure of the petitioner, that left with no alternative, respondent no.1 was forced to take the decision to reduce the scope of the work of the petitioner and thereafter to terminate the Contract. He further submits that even the letters of extension filed by the petitioner with respondent no.1 show that the petitioner was not in a position to complete the Contract within the stipulated period. Though the contractual period of completion of the work was only 18 months, the petitioner sought extension of time by 24 months by its letters dated 06.04.2019 and 27.06.2019. Even otherwise, the petitioner was in no position to complete the work within the stipulated time. The last extension of time was granted by the respondent no.1 with imposition of liquidated damages, however, even that did not persuade the petitioner to carry out the work with any expedition.

21. Before considering the submissions made by the learned counsels for the parties, it would be relevant to remind oneself of the limited scope of the jurisdiction of the Court in matters of injuncting encashment of Bank Guarantee. As repeatedly held by the Supreme Court, the Bank Guarantee being an independent contract between the bank and the beneficiary, injunction on encashment thereof can be granted only on the ground of egregious fraud and irretrievable injury being established by the petitioner. In the present case, even as per the allegations of the petitioner, no case of fraud or irretrievable injury has been made out by the petitioner.

22. As far as the submission of the petitioner that it was the respondent no.1 who was guilty of not handing over the possession of the land and/or drawings and for other defaults which had an adverse impact on completion of work within the time stipulated, the same can be considered only by the Arbitral Tribunal upon parties leading evidence before it. However, the same would not be a relevant consideration for restraining the respondent no.1 from exercising its rights under the Bank Guarantee(s) which is separate contract between the respondent no. 1 and the bank. The Bank Guarantees are unconditional in nature. Therefore, the invocation and encashment thereof cannot be restrained on account of any dispute relating to the Agreement between the petitioner and respondent no. 1.

23. As far as the prayer for restraining the respondent no.1 from terminating the Contract or levying the liquidated damages is concerned, this would again be a matter for adjudication before the Arbitral Tribunal. This Court in exercise of its power under Section 9 of the Act and on the basis of the pleadings of the parties cannot restrain the respondent no.1 from exercising its contractual right. In my opinion, the petitioner has not been able to make out a *prima facie* case for exercise of such jurisdiction. In this regard I may only note that the respondent no.1 has in various letters explained in detail the slow progress of work carried out by the petitioner, even in casting of piles for which the drawings had been handed over to the petitioner. I am also persuaded with the submission of the counsel for the

respondent no.1 that this is a project of national importance in as much as it involves bilateral understanding between two countries.

24. As far as the prayer of the petitioner for release of certain amounts claimed by it, the learned counsel for the respondent no. 1 submits that these have been adjusted against the liquidated damages. Be that as it may, this would be an issue to be considered by the Arbitral Tribunal as it involves a disputed question of facts and determination of the right of respondent no. 1 to impose such liquidated damages and/or basis of amount payable to the petitioner. Keeping in view the facts and circumstances of the present case, the petitioner has not been able to make out a case of grant of mandatory injunction at this stage.

25. As far as the prayer for appointment of a Local Commissioner to measure the work already executed by the petitioner is concerned, the learned counsel for respondent no. 1 submits that such work would be duly measured in accordance with the terms of the Contract before the same is handed over to a third party. For the work which has already been handed over, he submits that such measurement must have been taken. The learned counsel for the petitioner submits that such measurements have not been provided to the petitioner.

26. I find that the pleadings of the petitioner in this regard are highly vague. Whereas, learned counsel for respondent no. 1 has handed over certain correspondence which would show that certain portion of the work was withdrawn on 25.02.2019, the pleadings of the petitioner in regard to withdrawal of scope of work and its request

for measurement are completely vague in the petition. I may only observe that respondent no. 1 would fully comply with the terms of the Agreement in respect of the measurement of the work.

27. I may also note that the learned senior counsel for the petitioner submits that the petitioner has already nominated its Arbitrator and the respondent be directed to ensure appointment of an Arbitral Tribunal expeditiously.

28. The learned counsel for respondent no. 1 submits that the invocation is not in terms of the Arbitration Agreement and infact, even the petition under Section 11 filed by the petitioner has been dismissed by this Court.

29. Be that as it may, this prayer is beyond the scope of the petition.

30. In view of the above I find no merit in the present petition and, the same is dismissed, with no order as to cost. It is however clarified that any observation made in the present order would not prejudice either party from agitating its claims or counter claims before the Arbitral Tribunal as and when constituted.

NAVIN CHAWLA, J

JULY 22, 2019/vp