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AP 201 of 2020
IA NO. GA NO. 1 of 2020
(Old No. GA No. 879 of 2020)
IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

HIMADRI SPECIALITY CHEMICAL LTD
VERSUS
NATIONAL ALUMINIUM COMPANY LTD AND ANR

BEFORE:

The Hon'ble JUSTICE SHIVAKANT PRASAD

Date : 14th September, 2020.

APPEARANCE:
For the petitioner:
Mr. Ratnanko Banerji,Sr. Adv.
Mr. Agnish Basu,Adv.
Mr. Piyush Agrawal,Adv.
Mr. Samik Kanti Chakraborty,Adv.

The Court:- I have seen the affidavit of service and the relevant orders passed by the Hon'ble Single Bench dated 13th August, 2020. An ad interim order in terms of prayer (b) of the application under Section 9 of the Arbitration and Conciliation Act, 1996 was granted in favour of the petitioner. In spite of service, effected upon the respondents, none appears on behalf of the respondents. So, the application under Section 9 of the said Act is taken up for consideration.

Heard, learned Advocates for the petitioner in absentia of any respondents from the side of the respondents.

Brief facts relating to this application is that the petitioner is a company dealing with manufacturing of liquid coal tar pitch in which the petitioner was a successful tenderer. The respondent no. 1 carries on business as a boxite and aluminium manufacturer whereas the respondent no. 2 is the banker of the petitioner having its office at Reliance House, 34 Jawaharlal Nehru Road, Kolkata-700071. The petitioner has been regularly supplying liquid coal tar pitch to the respondent no. 1 for more than two decades. As per the purchase order dated 24th January, 2005, the respondent no. 1 had placed an order for supply of 54,400 metric tons of liquid coal tar pitch at a fixed basic price of Rs. 15,250/- per metric ton with the petitioner. In the purchase order dated 24th January, 2005, the respondent no. 1 had mandated that the petitioner was required to furnish a performance guarantee of Rs. 4,14,80,000/-. Accordingly, the petitioner furnished 7 performance bank guarantees for the sum of Rs. 4,14,80,000/- to the respondent no. 1. These performance bank guarantees were given to the respondent no. 1 to secure the performance of the petitioner's obligation under the said purchase order. The dispute arose by and between the parties resulting which the dispute was referred to arbitrator and an award dated 7th May, 2020 has been passed directing the petitioner to pay a sum of Rs. 7,95,62,486/- and interest @ 9 % per annum upon such amount from 23rd March, 2009 till the date of the award, i.e. 7th May, 2020. The respondents were directed to pay an amount of Rs. 7,95,62,486/- and interest @ 9 % per annum from the date of demand till the date of award which comes to Rs. 7,92,24,425/- inclusive of the claimed amount and interest thereon from the date when it fell due till the date of award within three months, failing which it shall carry interest @12% per annum on the aforesaid amount. But the said award has not been complied with.

Mr. Banerji, learned Senior Counsel appearing for the petitioner has invited my attention to relevant submission as made out in the application. It is a fact that the adjudication by the learned arbitral tribunal has reached its finality and the award is accepted in favour of the petitioner. Despite the notice issued to the respondent, none has turned up to address the Court even challenging the award. It is also pointed out that in view of the verdict of the Hon'ble Supreme Court as per the observation made in page no. 52 of the arbitral award that the respondent had never raised any voice by refusing belated supply quantities supplied by the claimant. Rather they had accepted the same and utilised for their benefit. Later on they could not turn round and say that the claimant did not perform its obligations. It is further pointed out that in view of the award, it is apparent that the petitioner had duly and faithfully performed its obligations under the said purchase orders and had faithfully discharged its liabilities and the respondent no. 1 has deliberately failed and/or neglected to discharge its reciprocal duties and obligations under the terms of the said purchase orders as there is no counter claim submitted or raised on behalf of the respondents. The bank guarantees are in the nature of performance guarantees furnished for execution work of the said purchase orders and upon the learned Arbitrator specifically holding that the petitioner had completed work to the satisfaction of the respondent no. 1, the respondent no. 1 has no right to encash the bank guarantees. It is pointed out that the bank guarantee has also been invoked contrary to the terms thereof. The threatened invocation of the bank guarantees is vitiated by egregious fraud, certain particulars whereof are indicated, inter alia that there is no amount due from the petitioner and there are no recoveries due from the petitioner and there is no amount due or payable, despite which the respondent no. 1 is fraudulently attempting to invoke the bank guarantees. It is further pointed out that the said bank guarantees were issued for the performance of the petitioner under the contract. The contract having ended there is no question of any further performance. In the arbitration proceedings, the respondent no. 1 has failed to show any loss caused or to show non-performance of obligations by the petitioner, despite which the respondent no. 1 is attempting to fraudulently invoke the bank guarantees.

Special equities are in favour of the petitioner and against the respondents. There is a specific finding by a competent tribunal that it is the respondent no. 1 which has to pay the petitioner and no sum is due and payable by the petitioner and the petitioner is entitled to recover from the respondent no. 1. The respondents are under an obligation to cancel and return the original bank guarantees mentioned in paragraph 17 to the petition. The petitioner submits that there is a grave urgency in the matter inasmuch as the respondents, if served with a copy of the instant application and/or if a notice of the application is served upon the respondents, the respondent no. 1 would take overnight steps to collect the moneys from the respondent no. 2 in order to render this petition and the petitioner's claim becomes infructuous. Accordingly, the petitioner has prayed that the original bank guarantee particulars whereof are appearing in paragraph 17 thereof be cancelled and be returned to the petitioner.

I have considered the contention made on behalf of the petitioner and considered the arbitral award as well and the dismal conduct on the part of the respondent no. 1. I do not find any hesitation in disposing of this application by allowing the same with the direction that the original bank guarantee as mentioned in paragraph 17 to the petition be cancelled and returned to the petitioner. The respondents are directed to comply with this order within a period of three weeks. Both AP No. 201 of 2020 and GA No. 1 of 2020 are disposed of accordingly.

(SHIVAKANT PRASAD,J.)

s.chandra