

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Commercial Arbitration Petition (L) NO. 385 OF 2020

Maytas-Rithwik(JV)

...Petitioner

Versus

Konkan Railway Corporation Limited

...Respondent

Mr.Janak Dwarkadas, Senior Advocate with Mr.Ankit Lohia, Mr.Bharat Jai and Mr.Tejas Agarwal i/b. I.C.Legal, for the Petitioner.

Ms.Kiran Bhagalia with Musharaf Shaikh, for the Respondent.

CORAM : G.S. KULKARNI, J.**DATE : 18 March 2020**

P. C.

1. Heard Mr.Dwarkadas, learned Senior Advocate for the petitioner and Ms.Bhagalia, learned Counsel for the respondent.

2. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') praying for the following reliefs:-

“(a) Pending the hearing and final disposal of the present petition, this Hon’ble Court be pleased to pass an order of injunction restraining the Respondent from invoking, encashing and/or receiving any payment under the said Bank Guarantees (more particularly mentioned in Exhibit “C” hereto) or any of them, for a period of 90 days from the date of communication of the Award that may be passed by the Hon’ble Tribunal;

(b) Ad-interim reliefs in terms of prayers “a” be granted to the Petitioner;

(c) The costs of the Petition be provided for; and

(d) This Hon’ble Court be pleased to grant such other and further reliefs, as the nature and circumstances of the case

may require and this Hon'ble Court deems fit and appropriate."

3. Admittedly a Three Member Arbitral Tribunal on 24 October 2018 has closed the arbitral proceedings for pronouncement of an award which is yet to be pronounced. On 13 February 2020 the petitioner moved an application before the Arbitral Tribunal that the parties be re-heard as substantial time has lapsed from the time the proceedings were closed for pronouncing the award. This application of the petitioner was heard by the Arbitral Tribunal on 13 March 2020 and is also closed for orders, which are awaited. In the meantime, the petitioner on an apprehension that the respondent may invoke the mobilization bank guarantees, has moved another interim application before the arbitral tribunal under Section 17 of the Act on 14 March 2020 praying for the following reliefs:-

"(a) In the event the Hon'ble Arbitral Tribunal rejects any part of the claims of the Claimant

(b) Direct the Respondent, its agents, officers, employees etc. not to take any steps towards invoking and/or encashing the BGs furnished by the Claimant for a period of at least 90 days from the receipt of the arbitral award; and

(c) Pass any such other or further orders as may be deemed fit by this Hon'ble Tribunal in the facts and circumstances of the present case."

4. Mr.Dwarkadas, learned Senior Counsel for the petitioner states that the Arbitral Tribunal has not assigned any date to hear the said application. Hence, this application in regard to the bank guarantees is also pending consideration/hearing before the Arbitral Tribunal.

5. It is on the above backdrop the present application under Section 9 of the Act has been moved by the petitioner. Mr.Dwarkadas in support of the prayers as made in the present petition, has drawn my attention to Clause 9 of the Minutes of the Meeting held between the parties at New Delhi on 3 September 2013. He has also drawn my attention to the “Subsidiary Agreement No.3 for Closure of Contract” dated 22 November 2013 and more particularly Clauses 1, 3, 6, 10 and 11, to contend that it may not be appropriate for the respondent to immediately invoke the bank guarantees in case an Award is being pronounced. It is his submission that if the bank guarantees are invoked by the respondents, this would cause a prejudice to the petitioner as also would amount to the respondent acting contrary to the minutes of the meeting and the clauses of the Subsidiary Agreement.

5. On the other hand Ms.Bhagalia, learned Counsel for the respondent would oppose this petition. She would submit that there is no dispute that the mobilization advance was availed by the petitioner and it was expressly agreed by the petitioner that the amounts so advanced would be repaid by the petitioner to the respondent alongwith interest. She would submit that in these circumstances, there cannot be any injunction in regard to the invocation of the mobilization bank guarantees by the respondent as prayed for, also considering the terms of the bank guarantee and the settled principles of law in regard to an injunction on encashment of bank guarantees.

6. Having heard learned Counsel for the parties, in my opinion, in the fact situation it may not be appropriate to consider the prayers as made by the petitioner in the present petition. This for the reason that the application of the petitioner praying for the very relief as made on 14 March 2020 is pending consideration before the Arbitral Tribunal. So far the Arbitral Tribunal has not assigned any date for hearing of the said application. It would be appropriate that the Arbitral Tribunal hears the parties on this application, if the award is not being immediately pronounced and pass appropriate orders in that regard. The petitioner is permitted to bring this order to the notice of the Arbitral Tribunal so that the Arbitral Tribunal can take further appropriate steps to hear the parties on the pending application. All contentions of the parties are expressly kept open.

7. In the meantime, in the event, an Award is pronounced which if enables the respondents to invoke the bank guarantees, the respondents in that case shall give a 24 hours notice of the intended invocation to the petitioner.

8. Disposed of in the above terms.

Parties to act on the authenticated copy of this order.

[G.S. KULKARNI, J.]