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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION NO. 57 OF 2020

Litostroj Power D.O.O. ...Petitioner
Versus
IVRCL Limited ...Respondent

Mr Sharan Jagtiani, *with Mr Nitesh Jain, Mr Atul Jain and Ms Avasia Meherzeen, i/b Shardul Amarchand Mangaldas & Co, for the Petitioner.*
Mr Ryan D'Souza, *i/b DSK Legal, for the Respondent.*

CORAM: G.S. PATEL, J.
DATED: 15th January 2020

PC:-

1. The Petition seeks post Award reliefs under Section 9 of the Arbitration and Conciliation Act 1996 in respect of a Foreign Award. The reliefs are these:

> "(a) the Respondent, including, through its Liquidator Mr Sutanu Sinha be directed to deposit the amounts aggregating to INR 23,70,82,761/- (Indian Rupees Twenty Three Crores Seventy Lakhs Eight Hundred and Twenty Seven and Sixty One only) lying in the fixed deposit bearing FDR No. 361866, 38546 with State Bank of India, Hyderabad Branch along with interest from 22nd August 2016 till the date of such transfer with this Hon'ble Court;

(b) the Respondent, its agent, servants, employees and/ or any other person claiming through the Respondent, including the Liquidator Mr Sutanu Sinha, or any other authorised officer be restrained from withdrawing, utilizing, alienating, encumbering or otherwise dealing with or disposing the amount of INR 23,70,82,761/- (Indian Rupees Twenty Three Crores Seventy Lakhs Eight Hundred and Twenty Seven and Sixty One only) lying in the fixed deposit bearing FDR No. 361866, 38546 with State Bank of India, Hyderabad branch;

(c) pending the hearing and final disposal of the present Arbitration Petition, ad-interim relief in terms of prayer clauses (a) and (b);

(d) such further and other reliefs as the nature and circumstances of the case require."

2. A brief background is necessary since I believe this order today is sufficient to dispose of the Section 9 Petition in its entirety.

3. In March 2010, the Maharashtra Water Resources Department accepted a bid placed by IVRCL Limited (now in liquidation) to construct a hydroelectric power station in the State, namely the Koyna Left Bank Power Station. The Respondent contracted or sub-contracted certain civil works under this contract to the Petitioner, a Slovenian limited liability company. They entered into two separate contracts. One was a mechanical contract dated 16th June 2010 and the other was an electrical contract dated 16th December 2010. Both these, though on different dates, have been described as one contract in the Petition.

4. Under the terms of this contract, the Petitioner obtained two performance bank guarantees from Deutsche Bank AG. The first was a Bank Guarantee No. 797BGG1100685 dated 15th September 2011 in the sum of Euro 1,698,980 in respect of the mechanical contract, and the second was Bank Guarantee No.797BGG1100899 dated 29th November 2011 in the sum of Euro 1.8 million in respect of the electrical contract. These are called the DB Guarantees. They were originally valid until 31st December 2014 but were periodically extended by the Petitioner at the request of the Respondent until 30th November 2016. These DB Guarantees were backed by Counter Bank Guarantees from banks in Slovenia.

5. There were some disputes between the Maharashtra Government and the Respondent. The Government of Maharashtra refused to extend the time for completion of the project and the main contract. The Government of Maharashtra encashed the advance Bank Guarantees that had been furnished by the Respondent in favour of the Government. The Respondent requested the Petitioner to refund advance payments. On 11th August 2016 the Respondent partially invoked and encashed the DB Guarantees in the aggregate amount of Euro 3,197,340. The very next day, Deutsche Bank made a claim to its counterpart banks in Slovenia for encashment of parts of the Counter Bank Guarantees.

6. According to the Petitioners, this partial invocation of the DB Guarantees by the Respondent was wrongful and in breach of the terms of DB Guarantees themselves. There was, the Petitioner claimed, a wrongful encashment. The Petitioner therefore filed an Arbitration Petition No. 384 of 2017. By an order dated 22nd

August 2016, a learned Single Judge of this Court (SJ Kathawalla J) made the following order.

> "The Learned Advocate appearing for the Respondent states that the Bank Guarantee is already invoked. The Learned Advocate appearing for the Petitioner tenders draft amendments and seeks to amend the Petition which includes a relief against the Respondent not to utilize the monies received upon invocation. The Learned Advocate appearing for the Respondent opposes the draft amendments on the ground that the Petitioner ought to take out a Chamber Summons and she be given an opportunity to oppose the amendments sought to be carried out by the Petitioner. In view thereof, the following order is passed:
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> (i) The Petitioner is allowed to take out Chamber Summons seeking amendments to the Petition and also seek ad-interim reliefs therein which shall be decided on its own merits.
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> (ii) The Respondent is directed not to utilize the monies received by them from the Bank under the Bank Guarantees until tomorrow at 3.00 p.m. S.O. to 23rd August, 2016 at 3.00 p.m. however, the Learned Advocate appearing for the Respondent seeks time upto 24th August, 2016. In view thereof, the Respondent is directed not to utilize the monies received by them from the Bank under the Bank Guarantees upto 24th August, 2016.
>
> Stand over to 24thAugut, 2016 at 3.00 p.m."

7. On 18th August 2016, the Petitioner initiated legal proceedings against the Respondent and against Deutsche Bank in the District Court in Slovenia. The Slovenian Court granted an interim injunction on 19th August 2016 against the Slovenian banks from disbursing under the Counter Bank Guarantees. It later reversed that decision. An appeal is pending.

8. In the meantime, there was the order of 22nd August 2016 of this Court which I have noted above. That order was periodically extended. By an order of 29th November 2016, this Court said that if the Respondent had been paid any amount under the DB Guarantees, it was to retain this amount in a separate bank account and not to utilise it. A copy of that order is at page 64.

9. Even while the earlier Arbitration Petition under Section 9 was pending in this Court, the Petitioner initiated arbitration in Singapore with the International Chamber of Commerce. By this time, the Respondent's financial condition was deteriorating. The Petitioner filed a Notice of Motion No. 708 of 2017 in its earlier Arbitration Petition. During the hearing of that Petition, the Respondent filed an Affidavit that in partial encashment of the DB Guarantees it had received an amount of INR 23,70,82,761 and that this amount was placed and invested in a fixed deposit bearing FDR Nos. 361866, 38546 with the State Bank of India, Hyderabad branch. What is important to note at this stage is that this fixed deposit stood and to this day stands in the name of the Respondent. This will have some bearing on the submission made in response to the present application by the Respondent and to which I will presently turn.

10. On 22nd November 2017, this Court directed the Respondent to file an Affidavit placing on record copies of this fixed deposit receipt. A copy of that order is at Exhibit "E" at page 74. The Respondent did file that Affidavit, a copy of which is at Exhibit "F" from page 76 onwards.

11. In the meantime the Respondent began to go into insolvency in proceedings before the NCLT, Hyderabad Bench.

12. On 18th September 2018, the arbitral tribunal passed a partial award dealing with the question of jurisdiction and making an award of costs. A copy is at Exhibit "G".

13. On 9th April 2019, to a query from this Court (SC Gupte J) the Respondent confirmed that the fixed deposits continued to be in its name.

14. The arbitration in Singapore concluded on 24th July 2019.

15. Two days later, on 26th July 2019, the NCLT, Hyderabad Bench passed an order of liquidation of the Respondent. In view of this, on 29th July 2019, the Petitioner filed another Notice of Motion in its earlier Arbitration Petition seeking an extension of the previous orders of 22nd August 2016 and 29th November 2016. On 23rd September 2019 this Court made an order on that fresh Notice of Motion permitting the Petitioners to seek a review if thought necessary, of the order of 9th April 2019, on the basis that there was a change of circumstances.

16. On 27th September 2019, the Petitioner filed a Regular Commercial Suit No. 290 of 2019 in the Commercial Civil Court at Bangalore inter alia for a declaration that the partial disbursements by Deutsche Bank were a wrongful encashment and seeking an injunction.

17. On 16th October 2019, this Court disposed of the Review Petition that the Petitioner had filed by continuing the previous orders pending the reference to arbitration and for a period of six weeks thereafter. A copy of this order is at Exhibit "O" to the Petition. This order was communicated to the liquidator of the Respondent on 23rd October 2019 (Exhibit "P" and Exhibit "Q").

18. On 22nd November 2019, the arbitral tribunal at Singapore made its final Award. For our present purposes, the important finding returned was that the entire encashment by the Respondent was wrongful and could not have been made, and that the Respondent had wrongfully partially encashed the two DB Guarantees. The arbitral tribunal directed a refund or a return of the amount encashed.

19. Mr Jagtiani for the Petitioners has shown me the relevant portions of the Award and there is indeed a specific finding to this effect.

20. The question now is this. The amount sought to be encashed upon the call made by the Respondent is presently with the State Bank of India, Hyderabad in a FDR that yet stands in the name of the Respondent prior to its liquidation. In view of the Arbitral Award, I have no manner of doubt that the Respondent is not entitled to this amount at all. Its encashment has been held to be wrongful and unlawful and it has been directed to return that amount. Obviously that amount can be returned only if the FDR is encashed and that amount paid over to the Petitioner.

21. The only answer to this from the learned Counsel from the liquidator of the Respondent is that under Section 36 of the Insolvency Bankruptcy Code 2016 and particularly sub-section (3) (a), the FDR with the State Bank of India, Hyderabad is "an asset over which the company has ownership rights". This is also said to be a tangible asset. What the submission however overlooks is that the sub-section (3) of Section 36 is made specifically subject to sub-Section (4). Section 36(4) specifies what is not to be included in the liquidation estate assets and shall not be used for recovery in liquidation. Sub clause (a)(i) specifies that any assets held in trust for any third parties are excluded assets. The general description is of assets owned by a third party which are in possession of the corporate debtor.

22. The fixed deposit is clearly held in trust because that fixed deposit was created pursuant to orders of this Court as noted above. It could not have been created otherwise and it was certainly not created out of any sense of charity or selflessness on the part of the Respondent. If that amount has been so held, it has been held in abeyance, and it is clearly held in trust or in a manner in the nature of a trust, that is to say partaking of a fiduciary relationship, until the determination of who, between the two parties, is entitled to that amount. Let me test this by reversing a possible result in the arbitration. Had the Petitioner failed in that claim in arbitration, and had it been held that the encashment was indeed *not* wrongful, but was lawful, then of course the Respondent company and its liquidator would have been entitled to that amount. But it is impossible to accept the contention that the same result would obtain even if the award was against the Respondent, i.e. that the fixed deposit belongs to the Respondent irrespective of the outcome of the arbitration. Yet that is precisely the nature of the submission that is sought to be made before me today.

23. I do not see the purpose in keeping the Section 9 Petition pending. There is no doubt that this being a Foreign Award it will have to run the gauntlet of Sections 47 and 48 of the Arbitration and Conciliation Act 1996. But I see no reason any longer why the amount should continue to remain in FDR in the name of the Respondent with the State Bank of India, Hyderabad Branch. The company is after all in liquidation. Those funds are secure if brought into this Court and retained here.

24. Therefore the following order is sufficient to dispose of the Petition and will cover both prayers (a) and (b). The Manager of the State Bank of India, Hyderabad Branch is directed to liquidate FDR Nos. 361866, 38546 and to transfer the entire amount including all accrued interest to the name of the Prothonotary and Senior Master of this Court. The Manager of the State Bank of India, Hyderabad Branch will act on production of an authenticated copy of this order.

25. The Prothonotary and Senior Master will on receipt of these funds invest them with the State Bank of India, Mumbai Main Branch in a fixed deposit initially for a period of one year and thereafter for like periods (without awaiting further orders of the Court) until this Court makes an order for the release of that amount. In the meantime, the Respondent is not to apply to the State Bank of India, Hyderabad Branch, for encashment or withdrawal of fixed deposit.

26. The Arbitration Petition is disposed of in these terms. In the facts and circumstances of the case and since the Respondent is in liquidation there will be no order as to costs.

27. Liberty to the Advocates for the Petitioner to furnish a copy of this order to Deutsche Bank.

(G. S. PATEL, J)