

**THE HIGH COURT OF JUDICATURE FOR THE STATE OF
TELANGANA : HYDERABAD**

C.O.M.C.A. NO.62 OF 2019

BVG India Limited, Pune

.. Appellant

Vs.

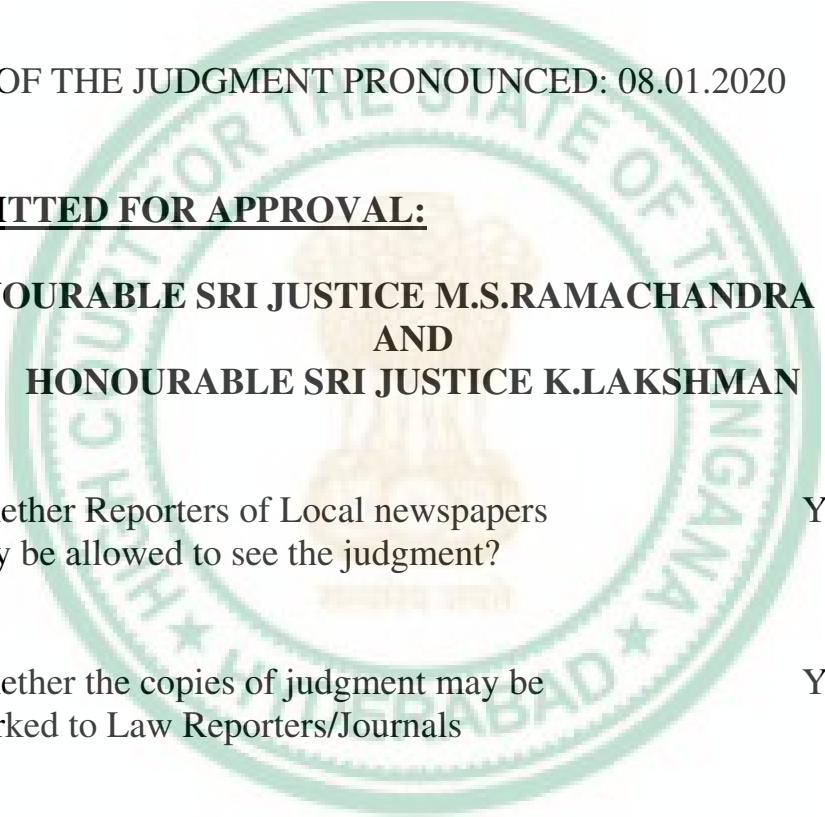
Vijai Electricals Limited,
Hyderabad and another

.. Respondents

DATE OF THE JUDGMENT PRONOUNCED: 08.01.2020

SUBMITTED FOR APPROVAL:

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN**

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

*** HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN**

+ C.O.M.C.A. NO.62 OF 2019

% DATED 8th JANUARY, 2020

BVG India Limited, Pune

.. Appellant

Vs.

\$ Vijai Electricals Limited,
Hyderabad and another

.. Respondents

<Gist:

>Head Note:

! Counsel for the Appellant

: Sri Sandeep S.Ladda and
Sri Yogesh Kumar Heroor

^Counsel for 1st Respondent

: Sri S.Ravi and
Sri C.S.N.Raju

^Counsel for 2nd Respondent

: --

? CASES REFERRED:

1. 1992(59) ELT 505(Bom.)
2. MANU/DE/0242/2016
3. (2008) 2 SCC 302
4. 2019(f) ALT 355(DB) = 2019(6) ALD 248

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN**

COMCA.No. 62 of 2019

JUDGMENT: *(Per the Hon'ble Sri Justice M.S.Ramachandra Rao)*

1. This appeal is preferred under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 1915 r/w. Section 37 of the Arbitration and Conciliation Act, 1996, by the appellant challenging the order dt.26.08.2019 in COP.No.68 of 2018 passed by the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, in an application filed under Section 9 of the Arbitration and Conciliation Act, 1996 filed by the appellant.

2. On 03.10.2008, the Maharashtra State Electricity Distribution Company Limited (MSEDCL) entered into a contract with the 1st respondent for execution of the design, test, supply, transport, construction, erection, testing and commissioning of sub-transmission lines, distribution lines, new sub-stations, augmentation of existing sub-stations, distribution of transformers of varying capacities and other allied works for the works under the Infrastructure Plan Phase-I (project on 'Turnkey' basis under bid package No.CE(Dist)/Infra Plan-I/Mumbai/07-08 for tender No.T-16 for works in Baramati, Kedgaon, and Manchar Divisions under Pune Rural Circle of Pune Zone pursuant to a letter of Award in favour of the 1st respondent granted on 05.09.2008.

3. The total value of the works was Rs.273.53 Crores and the work was to be executed in 48 months. Later the value of the work was enhanced to Rs.300.33 Crores.

4. The 1st respondent then sub-contracted some of these works to the appellant under a sub-contract agreement dt.04.11.2011 and the value of the works under the said agreement was Rs.91.82 Crores. The scope of the work entrusted to the appellant by the 1st respondent as mentioned in the said sub-contract agreement is as under:

“Scope of Work: Subject to approval for sub-contract as also approval to the extension of period for completion by at least about 12 months by the Employer, the Contractor hereby awards the sub-contract to the Sub-Contractor to design, test supply, transport, construct, erect, test and commission sub-transmissions lines, distribution lines, new sub-stations, augmentation of existing sub-stations, distribution transformers of varying capacities and other allied works including provided a two year guarantee (defect liability) period & five years guarantee from the date of commissioning for specified products viz., transformers, Breakers, Conductors etc., for the part of the works as detailed in Annexure-I to this agreement under the Infrastructure Plan Phase-I project on “Turnkey” basis under bid package number CE(Dist)/Infra-plan Phase-I/Mumbai/07-08 for tender No.16 for Works in Bharamati, Kedgoan & Manchar Divisions under Pune Rural Circle Pune.”

5. Under the terms of the said agreement, the appellant was under an obligation to furnish a Performance Bank Guarantee towards 5% of the Value of the sub-contract awarded to it for a period as stipulated by MSEDCL and the said Bank Guarantee was to be issued by a Scheduled Bank having a branch at Hyderabad(*clause f*). It was to be irrevocable and unconditional and a right was reserved to the 1st respondent to invoke the said Bank Guarantee for any default of the contractual obligations by the appellant under the agreement by giving a minimum of 15 days prior notice.

6. The sub-contract also contemplated that the 1st respondent shall open a Special Escrow Account with two signing authorities representing each party- one from the appellant and one from the 1st respondent; and that the amount realized from MSEDCL (employer) after all due deductions

against each invoice was required to be deposited in the same account with Standing Instructions to the Bank to transfer automatically 4% of the received amount to the 1st respondent's account and 96% of the received amount to the appellant's account against an invoice to the 1st respondent by the appellant. It was further stated that any balance due to either by the 1st respondent or the appellant will be paid within 7 working days from the date of receipt of the amount from MSEDCL, after joint reconciliation by both the appellant and the 1st respondent (*clause d*).

7. There was a clause in the sub-contract also dealing with liquidated damages/penalty, which is as under:

“(p) **Liquidated Damages/Penalty:**

1. Sub-Contractor will complete the work as mentioned under this agreement with best efforts on or before the time line as approved by Employer.
2. In case, Sub-Contractor could not complete the work as mentioned under this agreement due to the reasons beyond the control of the Sub-Contractor, no LD will be applicable to Sub-Contractor.
3. In case, Sub-Contractor fails to complete the work in the stipulated time approved by Employer, Contractor may levy LD @ 0.5% per month on the balance amount of work, maximum up to **Rs.2.00 Crores** to Sub-Contractor.”

8. Clause 10 of the sub-contract agreement contained an **arbitration clause** and contemplated reference of any dispute between the parties to a sole arbitrator and such arbitration was to be governed by the Arbitration and Conciliation Act, 1996, and the venue of such arbitration was to be Hyderabad.

9. It is not in dispute that *the 1st respondent did not open the Special Escrow Account as was contemplated in the sub-clause(d) of the sub-contract Agreement at all.*

10. There was a delay on the part of the appellant in providing the Performance Bank Guarantee.

11. A meeting was held on 30.09.2013 and a supplementary agreement was entered into between the appellant and the 1st respondent noting that the scope of the works got reduced from Rs.91.82 Crores to Rs.78.00 Crores and the revised Performance Bank Guarantee amount is also reduced to Rs.3.75 Crores.

12. It is not in dispute that a security deposit Bank Guarantee was given by the appellant though the 2nd respondent-Bank on 01.02.2014 for Rs.3.81 Crores.

Contentions of appellant

13. According to the appellant, it commenced execution of the works as agreed in the sub-contract and completed more than 75% of the contract work within the 12 months time period; the delay in performance of the contract was not attributable to it; extensions were sought by the 1st respondent from MSEDCL, and the appellant completed 99% of the work entrusted to it within the period of two years; and the other 1% of the work entrusted to it over a period of time was cancelled for various reasons which were not attributable to it.

14. It claimed that it completed works to the value of Rs.71.38 Crores which excludes the taxes, but on account of the non-opening of the Escrow Account despite repeated requests of the appellant, payments were withheld by the 1st respondent for the works executed by the appellant.

15. It was contended that the 1st respondent never insisted upon furnishing of Bank Guarantee by the appellant at the time of execution of

the works and the appellant brought it to the notice of the 1st respondent through *e-mail* dt.24.02.2012 that its internal audit took an objection to the furnishing of Bank Guarantee to the 1st respondent in the absence of an Escrow Account. It alleged that the 1st respondent however insisted on the submission of the Performance Bank Guarantee and under pressure from the 1st respondent, the appellant furnished the Performance Bank Guarantee to the 1st respondent on 01.02.2014 for Rs.3.81 Crores and the said Bank Guarantee was issued by the 2nd respondent-Bank.

16. It is contended that only Rs.55,59,88,509/- was paid to the appellant for the works executed by the appellant but the remaining outstanding amounts were not paid by the 1st respondent though the 1st respondent had received payments for the said work also from MSEDCL.

17. According to the appellant, meetings were held with the 1st respondent's representatives; in a meeting held on 20.04.2016 there was an attempt to reconcile the accounts; and an *e-mail* was addressed on 12.05.2016 by the appellant to the 1st respondent stating that the appellant's claim is Rs.32,63,52,635/-. It was contended that subsequently on the request of the 1st respondent, the Bank Guarantee amount was reduced to Rs.2.08 Crores and the said Bank Guarantee was also given by the appellant.

18. It is contended that the 1st respondent and the appellant had several meetings and correspondence was exchanged through *e-mails*, but the 1st respondent in a clandestine manner, illegally and unlawfully addressed a letter on 12.04.2017 to the 2nd respondent threatening that if the appellant did not extend the Bank Guarantee which was due to expire on 30.04.2017, then the said letter shall be treated as letter for invocation of the Bank Guarantee and the Bank must remit the amount to it. Appellant contended

that the said letters were also addressed later on 29.04.2017 and 07.07.2017.

19. It is stated that there was a meeting held on 31.08.2017 between the parties where reconciliation of accounts took place and the 1st respondent agreed that Rs.13,55,84,531/- was due and liable to be paid to the appellant and the same was referred to in the *e-mail* dt.01.09.2017 sent by the appellant to the 1st respondent which was signed by both parties. It is contended that both parties have also drawn another statement regarding other disputed amounts, which were not agreed between the parties.

20. Appellant contended that it issued legal notice on 05.12.2017 calling upon the 1st respondent to pay Rs.13,55,84,531/- without prejudice to the other claims of the appellant within 7 days along with interest @ 15% per annum; that the 1st respondent gave a reply on 05.01.2018 denying its contents; that the 1st respondent is in financial distress and the 1st respondent was not in a position to execute the contract awarded by the MSEDCL by itself and so it awarded part of its work to the appellant; and the financial distress of the 1st respondent is evident in the manner in which the 1st respondent, even after accepting that an amount of Rs.13,55,84,531/- is due and liable to be paid to the appellant on 31.08.2017, had not paid it to the appellant.

21. Appellant contends that it would be difficult for the appellant to get back the amounts if the Bank Guarantees were allowed to be invoked, when there are special equities in its favour. It also referred to the arbitration clause mentioned in the sub-contract agreement dt.04.11.2011 and filed the OP under Section 9 of the Arbitration and Conciliation Act, 1996 for the following reliefs:

- “i) restrain 1st respondent by way of injunction from invoking the Schedule Bank Guarantee issued by the 2nd respondent on behalf of the appellant;
- ii) restrain 2nd respondent from honoring/releasing/transferring /encashment of the Schedule Bank Guarantee issued by the 2nd respondent to the 1st respondent on behalf of the appellant either at the request of the 1st respondent or otherwise;
- iii) direct the 1st respondent to forthwith deposit an amount of Rs.13,55,84,531/- or furnish an equivalent security for the said amount;
- iv) pass such other further order/orders as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

The stand of the 1st respondent

22. Counter affidavit was filed by the 1st respondent in the OP admitting in para 10 that though the appellant did not complete the works as per the specifications of MSEDCL and the appellant had obtained work completion report by managing the Field Officer of MSEDCL to raise claims in the name of the 1st respondent, after repeated and alarming follow-ups of the 1st respondent *all the works in full shape were completed by the appellant in November, 2014.*

23. It also admitted that though appellant raised total contract value of Rs.78.08 Crores, Rs.56.06 Crores was already paid.

24. It stated that only Rs.81 lakhs is payable to the appellant by it. It denied that it was not prompt in making payments to the appellant. It contended that the appellant is making false claims and there was a delay in completion of the project by the appellant.

25. It categorically stated that *it had no intention to invoke the Bank Guarantee given by the appellant* and as per the sub-contract agreement

dt.04.11.2011 it was only requesting the appellant to continue the Bank Guarantee till November, 2019.

26. It also denied that the 1st respondent had accepted that the appellant is due to be paid Rs.13,55,84,531/- as was being claimed by the appellant and contended that there is no necessity to direct the 1st respondent to deposit or furnish security for the said amount.

The events in the Court below

27. Before the Court below, e-mails and other correspondence were marked in evidence as exhibits.

28. The Court below framed the following two points:

- “A. Whether the Court can injunct the 1st respondent from invoking the Bank Guarantee?*
- B. Whether the court can direct the 1st respondent to deposit an amount of Rs.13,55,84,531/-(Rupees Thirteen Crores fifty five lakhs eighty four thousand five hundred and thirty one only) or to furnish the security equal to the said amount?”*

29. It then passed the order on 26.08.2019 dismissing the COP.No.68 of 2018 in *toto* with costs.

30. Assailing the same, this Appeal is filed.

31. Heard Sri Sandeep S.Ladda, for Sri Yogesh Kumar Heroor, counsel for the appellant and Sri S.Ravi, Senior Counsel for Sri C.S.N.Raju, counsel for the 1st respondent.

The order of the Court below:

32. In its order passed on 26.08.2019 dismissing the COP, the Court below observed that the appellant did not plead harm or injustice and it had

also not pleaded any fraud. It also stated that there was no consensus on the amount due and the reasons for the delay and so the appellant cannot claim that it has a *prima facie* case and balance of convenience.

33. It also observed that the appellant did not place any material to draw inference that the appellant would not be able to recover any amount due, if any. According to it the injury if any sustained by the appellant can be compensated.

34. It observed that the completion of the work did not make the appellant entitled for any special equities and the dispute regarding the delay and the reasons for the delay in execution of the work are questions to be decided by the arbitral tribunal. It held that since the appellant did not furnish the Bank Guarantee within the time stipulated in the sub-contract agreement, it is disentitled to claim special equities.

The consideration by this Court

35. We find it difficult to accept this view of the Court below.

36. As we have pointed out above, under the sub-contract agreement dt.04.11.2011, while the appellant was obligated to provide and performance Bank Guarantee in clause (f), the 1st respondent was also obligated to open a special Escrow Account vide clause(d).

37. It is unfortunate that the failure of the 1st respondent to open the Special Escrow Account totally missed the attention of the Court below and it only focused on the delay on the part of the appellant in furnishing the Performance Bank Guarantee.

38. The reason why the Special Escrow Account was contemplated was that payments for the execution of the works, which would be made by the MSEDCL(Employer) would not be totally appropriated by the 1st respondent and there would be timely payment to the appellant also. But this could not materialize because of the failure of the 1st respondent in opening the Special Escrow Account.

39. While there may be delay in execution of the works and the question who is responsible for it would be subject matter of the arbitration proceedings, the admission of the 1st respondent in it's counter in the COP that the appellant completed all the works in November, 2014 and if its further admission that Rs.81 lakhs is payable to the appellant is also taken into account, in our opinion, the appellant had made out a *prima facie* case for interim relief. But unfortunately, these two facts were ignored by the Court below.

40. Admittedly, the amount covered by the Bank Guarantee was paid by the 2nd respondent to the 1st respondent on 03.10.2019, *after* the OP was dismissed by the Court below, in spite of the fact that the appellant had extended the validity of the Bank Guarantee till 30.11.2019, which is not disputed.

41. The Bank Guarantee could be invoked by the 1st respondent if there is a default in performance of the contractual obligations under sub-contract agreement *by giving minimum of 15 days prior notice*. Admittedly, no 15 days prior notice was given by the 1st respondent to the appellant before invoking the Bank Guarantee. It straightaway wrote to the 2nd respondent and encashed the Bank Guarantee.

42. More importantly, when the 1st respondent stated in its counter at para 20 that it had *no intention to invoke the Bank Guarantee of the appellant* and it was only requesting the appellant to continue the Bank Guarantee till November, 2019, there was no occasion for the Court below to even consider whether there is fraud in invocation of the Bank Guarantee or whether there is possibility of irreparable injury in favour of the appellant for grant of injunction in its favour restraining the invocation of the Bank Guarantee. There was in fact no necessity for the Court below to go into these aspects and record any finding thereon. Yet it did. This approach of the Court below is erroneous.

43. Moreover, the appellant had an interim injunction through out the pendency of the OP and before the appeal time expired to avail the remedy under Section 37 of the Arbitration and Conciliation Act, 1996, the Bank Guarantee was invoked by the 1st respondent. We find this conduct of the 1st respondent not *bonafide*.

44. In *Mahindra & Mahindra Ltd. v. Union of India*¹, the Bombay High Court held that where there is an improper encashment of Bank Guarantee by a party, such party can be directed to pay the entire amount recovered by encashment of Bank Guarantee to the person who had given such Bank Guarantee.

45. Following the said decision, we hold that, interests of justice would require that a direction has to be given to the 1st respondent to pay to the appellant a sum of Rs.2.08 Crores which the 1st respondent had received from the 2nd respondent on account of invocation of the Bank Guarantee on 03.10.2019 with interest @ 9% per annum from the date of invocation till

¹ 1992(59) ELT 505(Bom.)

repayment within 4 weeks. This Court is entitled to mould the relief in the interest of justice to give the above direction.

46. We shall next consider the other relief sought by the appellant :

‘whether it is entitled to a direction from the Court that the 1st respondent should deposit Rs.13,55,84,531/- or to furnish security equal to the said amount is concerned?’

47. The Delhi High Court in **Huawei Technologies Co. Ltd. Vs. Sterlite Technologies Limited**² has accepted the plea of a petitioner in a Sec.9 (1) (ii) (b) application that though in a normal case, the requirement of all conditions of Order XXXVIII Rule 5 CPC are to be satisfied before Court while considering the prayer of securing the amount and the Court should exercise its discretion very carefully in order to secure the amount, but *if the petitioner has been able to make out a strong case against the respondent, particularly, when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising flimsy reasons, and when it appears to the Court to be just and convenient, the Court has ample power to exercise its discretion to secure the amount even when the condition of the company is solvent, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996.* It held that the amount, under these circumstances, should be secured, once the dispute is of commercial in nature and that the case of the petitioner in that case falls within the range of exceptional ones where the amount is liable to be protected.

² MANU/DE/0242/2016

48. In **Raman Tech. & Process Engg. Co. v. Solanki Traders**³ the Supreme court no doubt stated as under:

“5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment.”

49. While these considerations are no doubt to be kept in mind, as held in **Huawei Technologies Co. Ltd** (2 Supra), the refinement of the above principle is also worthy of acceptance i.e if the petitioner has been able to make out a strong case against the respondent, particularly, when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising the flimsy reasons, and when it appears to the Court to be just and convenient, the Court has ample power to

³ (2008) 2 SCC 302

exercise its discretion *to secure the amount* even when the condition of the company is solvent, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996.

50. We are in agreement with the said view in **Huawei Technologies Co. Ltd** (2 Supra) and hold that the appellant has made out a strong case against the 1st respondent.

51. The Court below also relied upon the decision of the Division Bench of this Court in **Everest Industries Ltd. v. MW High Tech Projects India Pvt., Ltd.**⁴ where a request to secure amounts was granted by the trial Court but it was set aside by the High Court. In para 25 of the said judgment it was observed that:

“25. Coming to the second issue, given its own finding that there could be no inference that the first respondent had become insolvent and would not be in a position to pay, we are perplexed as to why the Commercial Court thought it fit to direct the first respondent to furnish third party security. As per the settled legal norm, more than a mere apprehension is required in this regard and allusion by the appellant to some news reports in support of its contention that the first respondent was facing financial difficulties was wholly insufficient to sustain such a direction. The reasoning that if the first respondent encashed the Bank Guarantee and if the appellant thereafter succeeded in the arbitration proceedings it would have to recover the amount, to justify imposition of this condition, is without logic or basis as a similar situation would arise in every case of encashment of a Bank Guarantee. When the Commercial Court found no evidence of the first respondent facing any financial crisis, there was no cause made out to impose such a condition.”

52. In that case the appellant had also sought for an injunction restraining encashment of bank guarantee and was found to be disentitled to such relief. Maybe that factor influenced the Bench to take the above view.

⁴ 2019(f) ALT 355(DB) = 2019(6) ALD 248

53. We are of the view that mere fact that the 1st respondent is solvent by itself cannot be a ground to deny to the appellant the relief under Sec. 9(1) (ii) (b) of the Act and the said decision in *Everest Industries Ltd.* (4 *supra*) has to be confined to it's facts.

54. Having admitted *prima facie* in the annexure to the e-mail dt.31.08.2017 that after reconciliation of accounts, a sum of Rs.13,55,84,531/- was payable by the 1st respondent to the appellant, the 1st respondent disputed the said quantum in the counter in the O.P. and admitted that only Rs.81 lakhs is payable to the appellant. This conduct of the 1st respondent does not appear to be *bonafide*, more so, when it failed to open the Special Escrow Account having agreed to do so in the sub-contract agreement entered into by it with the appellant on 04.11.2011.

55. When the 1st respondent had received the amount from the Employer(MSEDCL) and is avoiding to clear the due amounts of the appellant by raising flimsy reasons, this Court can exercise its power under Section 9(1)(ii)(b) and (e) of the Act even when the financial condition of the 1st respondent is good as held in *Huawei Technologies Co. Ltd* (2 *Supra*) .

56. Therefore, we are of the opinion that the Court below erred in rejecting the prayer of the appellant to secure payment of Rs.13,55,84,531/-

57. Accordingly, this Appeal is allowed; order dt.26.08.2019 in COP.No.68 of 2018 of the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, is set aside; and the said COP is allowed in the following terms:

- a) the 1st respondent shall repay the appellant the amount of Rs.2.08 Crores received by the 1st respondent on the encashment of the Bank Guarantee of Rs.2.08 Crores invoked on 03.10.2019 with interest @ 9% per annum from 03.10.2019 till the date of payment within 4 weeks;
- b) the 1st respondent shall also provide immovable property security which is unencumbered at Hyderabad, for a sum of Rs.13,55,84,531/-, to the satisfaction of the Court below within four weeks;
- c) The 1st respondent shall also pay costs of Rs.50,000/- to the appellant.

58. It is made clear that the observations made in this order are made only for the purpose of deciding this appeal and the Arbitrator as and when arbitration takes place shall decide the matter uninfluenced by any observations made herein.

59. Consequently, miscellaneous petitions pending if any shall stand dismissed.

M.S. RAMACHANDRA RAO, J

K.LAKSHMAN, J

8th January, 2020

Note: L.R. copies to be marked: Yes
(B/o) *gra*