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

\+ FAO(OS) (COMM) 58/2020

TECNIMONT PRIVATE LIMITED & ANR. ..... Appellants

Through: Mr.Sandeep Sethi and Mr.Ritin Rai, Sr.Advocates with Mr.Rishi Agarwala, Ms.Shelly Bhasin, Mr.Karan Luthra, Mr.Prateek Gupta and Ms.Madhavi Agarwal, Advocates

versus

ONGC PETRO ADDITIONS LIMITED ..... Respondent

Through: Mr.Nakul Dewan, Sr.Advocate with Mr.K.R.Sasiprabhu, Mr.Aditya Swarup, Mr.Robin and Mr.Aditya Swarup, Advocates

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

O R D E R

% 19.03.2020

CM Nos.10149-51/2020

Allowed subject to just exceptions.

FAO(OS) (COMM) 58/2020 & CM No.10148/2020 (for stay)

1. The appellants are aggrieved by an order dated 13th March, 2020, passed by the learned Single Judge in OMP (I) (Comm.) No.73/2020, a petition filed by them under Section 9 of the Arbitration and Conciliation Act, 1996 (in short "the Act"), praying inter-alia amongst others, to restrain the respondent from invoking and/or encashing the bank guarantees as

detailed in the prayer clause of the application which reads as under:

"(a) Restrain the Respondent from acting upon its communication issued to ING Bank N.V. (communication to the Petitioner vide e-mail dated 10.03.2020) invoking the Performance Bank Guarantee bearing No. DLG211/11 dated 17.06.2011 and consequently restrain the Respondent from encashing and/or receiving any monies pursuant to the said e-mail:

(b) Restrain the Respondent from invoking and/or encashing the following Bank Guarantees furnished by the Petitioners:-

Sl. No.	BG No.	Date of issue	Issuing Bank	Amount	Valid till
Advance Bank Guarantee					
1.	171020560469-LA	21.07.2018	Standard Chartered Bank	Euro 4,36,367/-	31.03.2020
2.	171020560450-LA	21.07.2018	Standard Chartered Bank	Euro 62,36,099/-	31.03.2020
Performance Bank Guarantee					
3.	464840	22.07.2011	BBVA	US$ 8,232,465/- Euro 4,219,234/-	Claim Expiry Date 14.12.2020
4	110126IBGP00064	26.07.2011	IDBI	INR 64,27,00,845/-	Claim Expiry dated 14.12.2020
5	464841	22.07.2011	BBVA Counter guarantee	INR 64,27,00,845	Claim Expiry Date 14.12.2020

2. In a dispute between the appellants and the respondent which was referred to arbitration, the Arbitral Tribunal has passed an Award dated 06.01.2020, as amended on 11.02.2020, for a sum of Rs.162 crores approximately, in favour of the appellants. The Tribunal rejected the counter claims raised by the respondent to the tune of Rs.1000 crores (approximately). The stand of the appellants is that the Section 9 petition had to be filed because the respondent had issued letters to the banks

invoking the bank guarantees offered by them. On the other hand, it is the contention of the respondent that despite communications sent by it to the appellants to extend the validity of the bank guarantees, they did not do so. Therefore, the respondent decided to invoke the bank guarantees by sending communications to the concerned banks. It was also stated that objections under Section 34 of the Act have been filed by the respondent and the petition is likely to be listed in the very near future and if the said bank guarantees lapse, the said petition will be rendered infructuous.

3. With the idea of balancing the equities, the learned Single Judge has disposed of the Section 9 petition filed by the appellants, taking note of the fact that the respondent proposed to file a petition under Section 34 of the Act challenging the Award dated 6th January, 2020 as amended on 11th February, 2020 and directed the appellants to extend the validity of the bank guarantees, with a condition that the expenses incurred for extending the said bank guarantees would be communicated to the respondent who shall deposit the said amount in the court, which would be released subject to the final outcome of the Section 34 petition. Paras 7 and 8 of the impugned order are relevant and read as under:

> *"7. To balance the equities, the petitioner is directed to bear the expenses for extending the validity of the bank guarantees and the expenses so incurred by the petitioners for extending the bank guarantees shall be communicated to the respondent, who shall deposit the amount in this court within three weeks from the date of communication. It is also made clear that the deposit of the charges for extending the bank guarantees shall be subject to the final orders to be passed by the court in the petition to be filed by the respondent under Section 34 of the Arbitration and Conciliation Act.*

8. In take on record the statement made by Mr. Dewan that in so far as the other three bank guarantees being at serial nos. 1, 2 and 5 above are concerned, as the validity of the said bank guarantees expires in the month of December, 2020 as of now respondent shall not invoke the said bank guarantees. I also take on record the statement made by Mr. Dewan that in view of this order passed by the court, communications made by the respondent with the banks invoking the bank guarantees, shall be withdrawn."

4. The above order shows that Mr.Dewan, learned Senior Advocate appearing for the respondent had made a statement to the effect that since the bank guarantees at serial Nos.1, 2 and 5 of the tabulated statement reproduced above were to expire in December, 2020, the respondent will not invoke the said bank guarantees and shall communicate the same to its bankers so that the letters of invocation can be withdrawn.

5. Thereafter, an application was moved by the appellants (IA No.3620/2020) praying inter-alia that the respondent be directed to withdraw its communication made with IDBI Bank, seeking invocation and/or extension of the bank guarantee mentioned at serial No.4 and the counter bank guarantee at serial No.5 above. It was stated in the said application that para 8 of the order dated 13.03.2020, clearly records the statement of the Senior Advocate appearing on behalf of the respondent that since the bank guarantee at serial No.5 is expiring in the month of December, 2020, as of now the respondent shall not invoke the said bank guarantee. The appellants clarified that both the bank guarantees mentioned at serials No.4 and 5 had a claim period up to 14th December, 2020 and the validity period of the bank guarantee at serial No.4 being up to 14th

December, 2020, the same did not require any extension.

6. However, vide order dated 17th March, 2020, the learned Single Judge dismissed the said application without issuing any clarification, as prayed for by the appellants. Aggrieved thereby, the present appeal has been filed.

7. Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the appellants, submits that the direction issued by the learned Single Judge in para 5 of the order dated 13th February, 2020, calling upon the appellants to extend the bank guarantee mentioned at serial No.4 above, is erroneous as the claim period will expire only on 14th December, 2020, even though the bank guarantee itself had expired on 14th December, 2019. He submits that the whole purpose of the impugned order was to secure the interest of the respondent for a reasonable time, till the Section 34 petition proposed to be filed by it, is taken up by the concerned court. It is submitted that once the claim period of the bank guarantee at serial No.4 is valid till 14th December, 2020, the respondent's interest is amply protected since it can invoke the said bank guarantee up to 14th December, 2020.

8. The aforesaid submission is however disputed by Mr.Nakul Dewan, learned Senior Advocate appearing for the respondent who states that there is a difference between *"expiry of the bank guarantee"* and the *"expiry of the claim period"* and in the instant case, even though the claim expiry date of the bank guarantee at serial No.4 is 14th December, 2020, the bank guarantee having already expired on 14th December, 2019, the respondent has a genuine apprehension that in the event it ultimately succeeds in the Section 34 petition proposed to be filed, it would be left high and dry, in so far as recoveries against the bank guarantee at serial No.4 is concerned.

9. To our mind, since the sum of Rs.64,27,00,845/- has been secured by the appellants in view of the fact that the claim expiry date in respect of the Bank Guarantee at serial no. 4 is 14th December, 2020, there is no justification for the respondent to insist on invoking the said bank guarantee, particularly when its Section 34 petition has yet to be listed before the concerned Court. On the statement made by learned counsel for the appellants that the claim period of the bank guarantee at serial No.4 of the tabulated statement, extracted above, shall remain valid up to 14th December, 2020 thereby entitling the respondent to claim the amount mentioned thereon, i.e. Rs.64,27,00,845/-, we are of the opinion that the interest of the respondent has been adequately secured.

10. In view of the statement of learned counsel for the appellants recorded above, the respondent shall not invoke the bank guarantee at serial No.4 of the tabulated statement above, being a part of the order dated 13th March, 2020. For the present, the appellants need not take any steps to extend the said bank guarantee till 14th December, 2020, as directed in the impugned order.

11. The present appeal and the application are disposed of on the above terms while leaving the parties to bear their own costs.

HIMA KOHLI, J.

SUBRAMONIUM PRASAD, J.

MARCH 19, 2020
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