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

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Reserved on: 11.09.2019

Pronounced on: 28.01.2020

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O.M.P.(I) (COMM.) 113/2019

M/S MUKTI CREDITS PVT. LTD.

..... Petitioner

Through: Mr. Prashant Mehta, Ms.
Vasundhra Bhardwaj and Mr.
Gaurav Malik, Advocates.

versus

INDRAPRASTHA POWER GENERATION
CO. LTD.

..... Respondent

Through: Dr. Jose P. Verghese & Mr. Dhruv
Jose, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present petition has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act') seeking a direction restraining the respondent or any of its officers, assignees, agents or authorized representatives from encashing the Bank Guarantee (BG) No. 2579IGFIN000713 amounting to Rs. 4 Crores tendered by the petitioner in favour of the respondent, as well as a direction of status quo in respect of the Arbitral Award dated 17.11.2018 till the outcome of the present petition as well as O.M.P.(COMM) 147/2019 pending adjudication before this Court.

2. The respondent through Metal Scrap Trading Corporation Limited ('MSTCL') conducted an e-auction on 27.10.2010 for Dismantling and Disposal of Coal Based Power Plant on "as is where basis" consisting of

3x62.5 MW+1X60 MW units of Indraprastha Power Station situated on Ring Road, near Rajghat, Delhi. MSTCL issued an e-auction tender with respect to the said project. The petitioner in terms of the tender conditions, furnished a Demand Draft through a covering letter dated 26.10.2010 for a sum of Rs. 4 Crores in favour of the respondent as Earnest Money Deposit. Clause 3.0 of the Special Terms and Conditions stipulated that the said EMD will be converted into Security Deposit on issuance of Acceptance Letter, by MSTCL. Clause 3.0 is extracted hereunder:

"3.0 SECURITY DEPOSIT.

The Pre Bid EMD of the successful bidder will be automatically converted into security deposit on issuance of Sale Order/Acceptance Letter by MSTC. The above security deposit will be returned by MSTC only after issuance of a certificate by IPGCL on successful completion of the job (Contract) in all respects including dismantling of foundations to zero level. No interest whatsoever will be paid on the said security deposit. The collection of the above said certificate from the Principal i.e. IPGCL would be the sole responsibility of the bidder/buyer, and therefore, MSTC shall not be, in any case, held responsible by the buyer/bidder for delay in issuance of certificate by IPGCL/Principal. "

3. The bids were opened 'online' on 27.10.2010 and the petitioner was declared as the higher bidder. On furnishing of the Demand Drafts, MSTCL issued a Sale Order/Acceptance Letter on 15.11.2010, in favour of the petitioner for the Project mentioned above. Total sale consideration as per the Contract was Rs. 101,51,11,110.00/-.

4. On 27.11.2010, i.e. within 15 days, petitioner deposited Rs. 20,30,22,222/- towards the first instalment by way of five Demand

Drafts. MSTCL thereafter issued a Delivery Order on behalf of the respondent, on 29.11.2010. However, it is the case of the petitioner that the possession of the site was not handed over to the petitioner by the respondent at the requisite time.

5. The petitioner claims to have written letters to the respondent requesting them to hand over the site so that dismantling work could commence as it had already paid the first tranche of the instalment. After a gap of nearly two months, a Delivery Order was issued by the respondent on 25.01.2011 and the physical possession of the site was handed over to the petitioner. The salient terms and conditions of the Delivery Order were as under:

"1. Payments:-

1.1 Payment towards first installment of sale value of the plant Rs. 20, 30, 22, 222/- only has been acknowledged by our Finance Department vide Document No. 1400000157 to 160 and 1400000164. The entire payment (Rs. 101, 51, 11, 110/only as given in MSTC acceptance letter) for segments as per Annexure-II along with applicable taxes and duties is to be paid by you in five equal instalments in the form of DD/Pay order (sale value plus applicable taxes) drawn in favour of IPGCL in any nationalized banks payable at New Delhi.

1.2 The payments of 2nd, 3rd, 4th and 5th instalments have to be submitted by you within a period of 90, 180, 270 and 360 days respectively from the date of issue of Letter of Acceptance/Sale Order (including date of issue i.e. 15 .11. 2010) by MSTC. It would also be obligatory to deposit the installment as per schedule without any notice/reminder from IPGCL/MSTC since, you have deposited the payment for the first installment' you are allowed to dismantle the contents of first segment only. You will be allowed to lift the material of the first segment after depositing the value of 2nd instalment with MSTC. The dismantling and lifting schedule as per the installment payments is given in the table below:

<i>Sr. No. Instalments</i>	<i>Sr. No. Instalments</i>	<i>Action required to be taken: Segment allowed to be dismantled</i>	<i>Action required to be taken: Segment allowed to be lifted</i>
1.	<i>On deposit of first instalment.</i>	<i>Only first segment</i>	<i>NO LIFTING SHALL BE ALLOWED</i>
2.	<i>On deposit of 2nd instalment.</i>	<i>Only 2nd segment</i>	<i>Only dismissed material of first segment.</i>
3.	<i>On deposit of 3rd instalment.</i>	<i>Only 3rd segment</i>	<i>Only dismantled material of remaining first segment and 2nd segments.</i>
4.	<i>On deposit of 4th instalment.</i>	<i>Only 4th segment</i>	<i>Dismissed material of first three segments</i>
5.	<i>On deposit of 5th instalment and balance if any</i>	<i>Entire listed material as mentioned in Annexure-II.</i>	<i>Entire listed material as mentioned in Annexure-II.</i>

NB: If the purchaser deposits the entire amount in a single installment along with all taxes he will be allowed to dismantle & lift the material from any part of the segments.

1.3 This being a sale of capital goods, no sales tax/D VAT is applicable at present. However any taxes/duties applicable on the transaction at the time of delivery of the goods will be borne by you.

All the taxes, duties, levies, etc., if any is levied/imposed by any Statutory Authority till the final conclusion of the contractual period shall be borne by you including the interstate transactions and IPCL shall not be responsible to pay the same, if any, since the sale is on 'AS IS WHERE IS BASIS' AND 'NO COMPLAINT BASIS EX WORKS OWNER'.

1.4 LATE PAYMENT PENALTY: if the payment is not made within the time of allowed for payment of instalments, MSTCIIPGCL reserve the right to either cancel the contract or

to extend the contract with penalty @ 1% per week for delay up to a maximum period of two weeks from the last date of payment of the respective installment. Acceptance of late payment beyond two weeks and thereafter shall be at the sole discretion of IPGCL, New Delhi.

2. DELIVERY:-

1.1 The delivery period for the listed items of the plant including dismantling cutting, bringing, down the ground level and taking out from J.P. Station premises is 18 months from the date of first delivery order (including the date of issue i.e. 29.11.2010) by MSTC including necessary margin for stopping of movement of his trucks during traffic restriction and VVIP visits in the area of J.P. Station.

1.2 The delivery schedule of the material will be item wise in FIVE SEGMENTS as per the details of the material attached (Annexure-II).

1.3 Vehicles deputed for disposal of the material(s) should report for loading in early hours in such a manner that requisite time is available for loading and vehicles are released before closing of the working hours i.e. at 17:00 Hrs No loading shall be permitted during lunch hours (13:00 hrs. to 14:00) and after 17:00 hrs.

3. REMOVAL OF PLANT MACHINERY/EQUIPMENTS

3.2 In case of any default in lifting the materials, within the time limits specified in the Sale Release order, the outstanding material would be allowed to be lifted within 14 days from the permitted date subject to payment of ground rent @ 2% per week of the value of the entire lot for the period of delay beyond the specified free delivery period. In case of goods sold on 'lot' basis, the ground rent will be payable @ 2% per week, or part thereof, on the value of the entire lot even if lifted in part. However, it will be the sole discretion of IPGCL to allow or not to allow to lift the material with or without the ground rent after the expiry of the stipulated free delivery period or even within the aforesaid additional period of 14 (fourteen) days. In such event the sale of the material not lifted by the buyer(s) will

automatically be cancelled and the Earnest Money/Security Deposit including other payment of installment in full or part made as the case may be will automatically stand forfeited.

6. As per the petitioner, as soon as the site was handed over, it immediately commenced the dismantling activities of Segment No. 1 and mobilized labour and machinery. However, on account of various breaches committed by the respondent, there was delay in completion of the project. The prime grievance of the petitioner was delay in handing over the site. The petitioner has placed reliance on a letter dated 02.06.2012 sent by the respondent where it admits the initial delay of two months in handing over the site. The petitioner also alleges that there was delay on the part of the respondent in granting permission for lifting the material from Segment I. It is further averred that while permission was given on 10.03.2011 to lift the material from Segment I, but no permission was granted to dismantle the second segment despite receiving the second instalment. The petitioner claims to have deposited the third instalment in order to mitigate the losses but while doing so it had requested that no penalty should be imposed on the petitioner. In between the High Court had stayed the lifting of certain items relating to some segments and the stay order dated 20.05.2011 was vacated vide order dated 28.01.2013. After the vacation of the stay order, the petitioner again sought permission for dismantling the material and lifting the same, but the same was not granted. A month later, the respondent granted permission vide letter dated 17.04.2014 and the petitioner avers that it completed the entire work within two months. Some other issues arose between the parties regarding the removal of live wires etc. thereafter,

and on account of the alleged obstructions and breaches by the respondent, the petitioner approached this Court under Section 9 of the Act by filing O.M.P.(I) 757/2012. The said petition was disposed of by a detailed order, relevant paras of which are extracted hereinunder :

"9. Without entering into controversy whether IPGCL has already paid the disputed amount of Sales Tax, the Court considers it appropriate to direct that the petitioner should, within a period of ten days from today; furnish an indemnity to IPGCL that in the event of IPGCL being required to pay sales tax for the sale of the plant and machinery to the Petitioner; then the Petitioner will reimburse IPGCL the sales tax paid by it subject to IPGCL producing the receipt showing the payment of sales tax with reference to the sale by it of the plant and machinery to the Petitioner.

10. As regards the ground rent, the penalty and interest, IPGCL will not insist on the payment of those amounts till the conclusion of the arbitral proceedings.

11. Subject to the Petitioner complying with the above directions, the Respondent is restrained from recovering from the Petitioner at this stage the sales tax, ground rent, penalty and interest in terms of its letter dated 13th July, 2012. The Petitioner will be permitted to remove the plant and machinery, (other than those forming subject matter of the stay order dated 20th May 2011 passed by this Court in OMP No.186 of 2011) forthwith within a mutually agreed time frame but not later than four weeks from today.

12. The above interim order including the permission granted to the Petitioner to remove the remaining plant and machinery other than those covered by the interim order of this Court is without prejudice to the rights and contentions of the parties.

13. The above interim directions can be sought to be modified / varied by either party by filing an appropriate application under Section 17 of the Act before the Learned Arbitrator. The question of liability of the Petitioner to pay the sales tax can also be raised by the Petitioner before the Learned Arbitrator. "

7. The petitioner then vide notice dated 11.09.2012 invoked the Arbitration Clause incorporated in the Delivery Order. Finally, in a petition under Section 11 of the Act being A.A. (No.) 392/2012 this Court vide order dated 22.03.2013 appointed a former Judge of this Court as a Sole Arbitrator to adjudicate the disputes under the aegis of Delhi International Arbitration Centre ('DIAC').

8. Petitioner then filed an application under Section 17 of the Act seeking an interim order to permit the petitioner to have access to the site and complete the remaining work of dismantling the plant and removing the parts.

9. The Tribunal vide its order dated 10.09.2013 allowed the petitioner to enter the site and restart the work, which eventually started on 08.11.2013. As per the petitioner the work was completed at site on 30.06.2014 and the site was handed over to the respondent.

10. Petitioner filed its amended statement of Claim in December 2014 and claimed Rs. 31,05,13,912/- along with interest at the rate of 18% per annum under different heads. The claims sought were as under:

*Claim A Rs. 51,41,521 Expenses for delay in handing
over the Site to the Claimant by 2
months*

*Claim B Rs. 1,30,57,736 Expenses for the period 28 May
2012 to 13 August 2012 i.e. the
extension period during which
works were being carried by the
Claimant*

<i>Claim C</i>	<i>Rs. 3,21,89,191</i>	<i>Loss suffered by the Claimant due to the arbitrary/illegal act of the Respondent which restrained the Claimant in entering the Site and resulted in closure of the site for the period of 14 August 2012 - 8 November 2013</i>
<i>Claim D</i>	<i>Rs. 1,27,00,000</i>	<i>EXTRA PENALTIES PAID</i>
<i>Claim E</i>	<i>Rs. 2,07,27,699</i>	<i>Costs incurred by the Claimant due to the breaches committed by the Respondent while the Claimant was performing works at the Site during the period of 8 November 2013 till 30 June 2014</i>
<i>Claim F</i>	<i>Rs. 1,42,37,246</i>	<i>Release of bank guarantee of Rs 4 crores and release of the money i.e. 25% of the sale proceeds deposited by the Claimant</i>
<i>Claim G</i>	<i>Rs. 1,48,21,099</i>	<i>Office Overheads</i>
<i>Claim H</i>	<i>Rs. 15,22,66,666</i>	<i>Loss of profit</i>
<i>Claim I</i>	<i>Rs. 1,50,00,000</i>	<i>Non delivery of left over Cables, Coal Bunker, Decantation Pumps</i>
<i>Claim J</i>	<i>Rs. 3,03,72,754</i>	<i>Augmentation of Resources</i>
<i>Claim K</i>		<i>Declaration</i>
<i>Claim L</i>		<i>Costs</i>
<i>Claim M</i>		<i>Interest</i>

11. Respondent filed its Statement of Defence and filed counter claims which are as under:

Claim No.1 Ground Rent for the period beyond 28.05.2012 till 30.06.2015 amounting to s.436,49,77,772.80/-

Claim No.2 Late Penalty levied on the payment of 5th Installments, amounting to Rs.2,19,78,333/-

Claim No.3 Interest on the penalty amount of the 5th Instalment, at the rate of 15% p.a. amounting to Rs.1,10,73,467/-.

Claim No.4 Sales Tax / VAT in the sum of Rs.5,07,55,560/- on the entire sale consideration.

Claim No.5 Forfeiture of Security Deposit amounting to Rs.4 Crores along with interest @ 15% p.a. amounting to Rs.59,83,562/- (Oct. 2013 to 30.06.2015)

Claim No.6 Damages claimed by DTL, due to damage of their installations and live wires etc. amounting to Rs.7,70,173/-

Claim No.7 The respondent furnished fictitious details the sale of the equipment removed by it during November 13 till 30.06.2014 and also not deposited the 25% of the sale proceeds amounting to Rs.4,64,09,137/-

Claim No.8 The respondent is liable to deposit the interest on the late payment of the sale proceeds amounting to Rs.3,61,026.59/-

Claim No.9 Costs of unfinished work amounting to Rs.25,00,000/-

Claim No.10 Interest pre-reference, pendente lite and future @ 15% to be compounded annually

Claim No.11 Costs of Arbitration.”

12. Finally, on 17.11.2018, the Arbitral Tribunal passed the Award and rejected all the claims of the petitioner except Claim ‘D’, which was only partly allowed.

13. Insofar as the Counter Claims of the respondent were concerned, except for Counter Claim No. 4 which was allowed, the remaining Counter Claims were disallowed.

14. Post the Award, the respondent issued an email dated 02.04.2018 invoking the BG amounting to Rs. 4 Crores referred to above. Respondent along with the letter of invocation also sent its sheet of calculation and claimed Rs. 8,54,70,268.29/- as allegedly due to them. It is the invocation of the BG by the respondent which triggered the filing of the present petition seeking the relief mentioned in the earlier part of the judgment.

15. Vide order dated 11.04.2019, this Court restrained the respondent from acting in furtherance of its invocation email dated 02.04.2019 in view of the fact that the Award dated 17.11.2018 was challenged by the petitioner by way of O.M.P.(COMM) 147/2019 and was listed for preliminary hearing on 24.04.2019.

16. On 07.05.2019, when the matter was listed before the Court and the reply had been filed by the respondent, the Court noted the main controversy between the parties being whether the petitioner is liable to pay any amount to the respondent in terms of the Arbitral Award. This order being crucial to the decision of this petition, is extracted hereinafter:

“The learned counsel for the respondent submits that the respondent has filed its reply to the petition. The same is not on record. The counsel for the respondent shall have the same placed on record after removing objection, if any. If the objection is one of delay in filing, the same shall not be insisted upon.

The counsel for the petitioner submits that he does not wish to file any rejoinder to the same.

It is noted that the main controversy between the parties is as to whether the petitioner is liable to pay any amount to the respondent in terms of the Arbitral Award. The petitioner

claims that even if the Award is fully implemented, it would be the respondent who would have to pay certain amounts to the petitioner and therefore, the respondent cannot be allowed to encash the Bank Guarantee submitted by the petitioner. This is denied by the counsel for the respondent.

The Arbitrator by an Interim Order dated 10.09.2013 had passed the following directions:-

"A. The earnest money/security deposit of Rs. 4 crores, as deposited by the Claimant with the Respondent, may be appropriated by the Respondent towards the payment of Sales Tax/VAT and the balance sum of Rs. 1,07,55,560/- be deposited by the Claimant with the Respondent within 2 weeks. Upon deposit thereof the Respondent would permit the Claimant to enter the site and restart its work as per the Contract.

B. With a view to secure and safeguard the interests of the Respondent in regard to the Counter Claims that have been raised against the Claimant, it is ordered that within 2 weeks the Claimant would furnish a Bank Guarantee in the sum of Rs. 4 crores, from a Nationalised Bank, undertaking to pay to the Respondent the amount in terms of the Award that may be passed by the Tribunal. The Bank Guarantee would be kept alive till the date of the passing of the Award.

C. Out of the sale proceeds realised by the Claimant by the sale of the remaining power plant the Claimant shall deposit 25% with the Registrar, Delhi High Court, New Delhi, within a week of the receipt of the amount. A duly verified affidavit shall be filed by the Claimant before this Tribunal giving details of the parts sold, amount of sale proceeds and the date of deposit of 25% with the Registrar General, Delhi High Court, New Delhi. This amount would be kept in Fixed Deposits by the Registrar General so that it attracts some interest for the benefit of the party which is ultimately held entitled to the deposited amount or any part thereof."

In the final Award the Arbitrator has inter alia directed as under:-

"(xx) Counterclaim No. 7 for the release of 25% of the Sale proceeds deposited by the Claimant with DIAC and to make up the deficiency in the deposited amount stands rejected. The amount deposited by the Claimant with DIAC would, however, be accounted for while arriving at the final sum payable to the Claimant or to the Respondent in terms of this Award and DIAC shall release the amount and Bank Guarantee only in favour of the party found entitled to recover some amount under this Award after necessary calculations."

It is directed that without prejudice to the pendency of the present petition, the parties shall approach the Delhi International Arbitration Centre (DIAC) along with their respective calculations of the amounts due and payable in terms of the Arbitral Award. The DIAC shall consider these calculations and after hearing both the parties, give a report on the amount that may be payable by one party to the other in terms of the Award. Such report be filed by the DIAC before this Court within a period of eight weeks from today.

The parties shall appear before the DIAC on 29th May, 2019 at 2:00 p.m. List before Court on 28th August, 2019.

Interim order to continue."

17. As is evident from the said order, which of course was passed without prejudice to the pendency of the petition, that DIAC was tasked to calculate the amounts due and payable in terms of the Award and file its report. The DIAC heard the parties and submitted its report dated 12.07.2019.

18. On 28.08.2019, when the matter came before this Court, learned counsel for the respondent submitted that certain errors had crept in the report and he would be filing his objections before the DIAC. It was argued that the report particularly does not take into consideration counter Claim Nos. 3 and 10 in their correct perspective and was not in

accordance with the Award. In order to give a fair chance to the parties, this Court gave permission to the respondent to approach the DIAC and point out the errors, though this request was vehemently opposed by the counsel for the petitioner.

19. Thereafter, the parties appeared before the DIAC. Objections and additional objections were filed by the respondent and the petitioner filed its response to the two sets of objections. The parties were heard on 30.08.2019 and the report was sent by the DIAC to this Court.

20. As per the report dated 04.09.2019, the petitioner is entitled to recover a sum of Rs. 61,35,314.34/- from the respondent as on the date of filing of the report. After the report was received, the matter was heard at length and the judgment was reserved.

21. The contention of the counsel for the petitioner is that the entire delay in completion of the Project was on account of the respondent, which failed to hand over the site in time apart from delaying the grant of permissions to dismantle and lift the material from the site. Counsel fairly concedes that the objections against the Award have been filed by the petitioner in O.M.P.(COMM) 147/2019, which is pending before this Court and detailed arguments on the merits could only be made in the said petition. He, however, submits that de hors the outcome of the objections to the Award filed by the petitioner, the petitioner is entitled to money from the respondent and not vice versa. Learned counsel has pitched his case to the extent of saying that even if his petition was dismissed, still it is the petitioner who is entitled to over Rs. 50 Lacs from the respondent and this amount has now been quantified by the report given by the DIAC. Counsel further contends that once the petitioner is

entitled to money from the respondent, there is no reason why the respondent should not pay the said amount to the petitioner immediately. This Court by a detailed order, referred the parties to the DIAC to carry out the exercise of calculating the amounts due to the parties under the Award and once the DIAC has computed the said amount, directions be issued to the respondent to pay the said amount.

22. Learned counsel further contends that the petitioner had given a BG of Rs. 4 Crores to secure the performance of the Contract in the shape of a Security Deposit. Once the Tribunal has rejected the claim of the respondent for forfeiture of the security deposit and has not allowed the counter claims except for the claim towards the Sales Tax payment, there is no reason why the respondent should be permitted to encash the BG.

23. Learned counsel further argues that insofar as the counter claim which has been allowed is concerned, the same was on account of dues payable towards the Sales Tax. Although the petitioner has filed objections against the Award, including objections to the counter claim, but assuming for the sake of arguments that the counter claim is to be allowed, the respondent is not entitled to any amount. The total claim towards the Statutory dues was Rs. 5,07,55,560/- out of which the respondent has already adjusted Rs. 4 Crores paid initially by way of EMD. Balance amount is Rs. 1,07,55,560/-. An amount of Rs. 1.27 crores, is due to the petitioner under Claim 'D' and thus Rs. 1,07,55,560/- has to be set off. Once this is done, it is the respondent who owes money to the petitioner, as clearly brought out in the DIAC report.

24. Per contra, learned counsel for the respondent argues that the present petition deserves to be dismissed as it was the petitioner who had

initially failed to take charge of the Project and discharge its financial liabilities. There was no delay on the part of the respondent. The petitioner defaulted in payment of Sales Tax/DVAT, Ground rent, penalty for late payment for instalments and interest and thus a Demand Notice dated 13.07.2012 for Rs. 11,48,36,221.40/- was served on the petitioner. The liability of the petitioner to pay 5% of the material purchased by way of Sales Tax/DVAT amounts to Rs. 5,07,55,560/-. The respondent has deposited the said amount with the Sales Tax Department on 03.09.2011 on a clear undertaking with the petitioner that the liability would be discharged eventually by the petitioner. The Arbitrator vide order dated 10.09.2013, had clearly recorded that the respondent would pay the said amount by adjusting the security deposit of Rs. 4 Crores and pay the balance itself. The petitioner had given an indemnity bond to reimburse the amount later, if paid by the respondent.

25. Learned counsel also argues that the petitioner was permitted to complete the remaining project on the condition that 25% of the sale proceeds shall be deposited with the Registry of this Court and the amount would be kept in Fixed Deposit for the benefit of the successful party.

26. Learned counsel next argues that for an amount of Rs. 5,07,55,560/-, Rs. 4 Crores have been adjusted by the Security Deposit initially made and the balance out of Rs.11,48,36,221.40/- is still due and payable to the respondent. He contends that the report of the DIAC suffers from serious errors of misinterpreting the Award and the calculations are erroneous. While it is accepted that the claim of the petitioner as regards Claim 'D' for refund of penalty amount is payable,

but this comes to Rs. 93,89,243.32/- and is subject to the final decision on the objections filed by the respondent against the Award, being O.M.P. (COMM) 318/2019, which is pending adjudication before this Court. It is contended that the DIAC has not taken into consideration the calculations with respect to Counter Claims No. 3 and 10. It is the admitted case of the petitioner that they had not paid interest on the delayed payment of fifth instalment, which along with interest @ 15% comes to Rs. 68,04,483.90/-. Thus, the total amount payable to the respondents is Rs. 1,28,34,191.65/-. If the amount payable to the petitioner, subject to the objections to the Award by the respondent is set off, the respondent is still entitled to Rs. 34,44,948.33/- and nothing is due to the petitioner.

27. In rejoinder, learned counsel for the petitioner submits that the additional objections were filed by the respondent without the permission of the Court and being on merits of the Award, cannot be looked into. On the main objections to the report by the respondent, it is contended that the matter was referred to the DIAC by this Court for a limited purpose to check the correctness of the calculations of the amounts claimed by the parties. The respondent did not challenge the order dated 07.05.2019, referring the matter to DIAC and rather participated in the proceedings. It cannot now seek to object to the report or enlarge the scope of reference. Counsel relies on the detailed reply filed to the objections before the DIAC for the purpose of pointing out that there are no calculation errors in the report and thus the amount held due and payable by the DIAC must be released to the petitioner.

28. I have heard the learned counsels for the parties and examined the respective submissions.

29. It is an undisputed fact between the parties that the Arbitral Tribunal vide its Award dated 17.11.2018 has partly allowed Claim 'D' of the petitioner and the rest of the claims have been rejected. Insofar as the Counter Claims of the respondent are concerned, only counter claim No. 4 has been allowed and the remaining have been disallowed. It is also undisputed that both parties have filed their respective objections against the Award under Section 34 of the Act, as referred to above and the petitions are pending adjudication before this Court. In the present petition under Section 9 of the Act, it is not for this Court to enter into the merits of the objections of the parties with respect to the Award between them, which will be decided once those petitions are heard.

30. This Court vide order dated 11.04.2019 had restrained the respondent from invoking the BG, as the objections filed by the petitioner were coming up for admission on 24.04.2019. Subsequently, vide order dated 07.05.2019, reference was made to the DIAC to calculate the amounts due to the respective parties under the Arbitral Award. Respondent filed objections to the first report given by the DIAC and after hearing the parties the DIAC rendered a second report. After examining the contentions of both the parties and the effect of the claim and the counter claim allowed under the Arbitral Award, DIAC came to a conclusion that Rs. 31,69,471.56/- is due to the petitioner. The respondent raised no challenge to the order dated 07.05.2019 referring the matter to the DIAC and in fact participated in the proceedings leading to the final report given by the DIAC. In this background, it is certainly not open to the respondent to contend that the DIAC could not have entered into the arena of calculating the amount due to the petitioner under the Award

though it is pertinent to note here that the reference to the DIAC was without prejudice to the pendency of the present petition.

31. The contention of the petitioner is simple. It is submitted that the DIAC has after detailed calculations held that Rs. 61,35,314.34/- is due to the petitioner and therefore, the said amount should be paid to the petitioner. Secondly, the connotation of such a conclusion is also that as of today pending the objections of the respondent, no amount is due and payable to the respondent. The contention also is that if no amount is due to the respondent today, there is no reason why it should be permitted to invoke/encash the BG furnished by the petitioner to the tune of Rs. 4 Crore. In these circumstances, there is no reason why the petitioner should keep the BG alive and the same should not be returned to the petitioner.

32. I find merit in the contention of the learned counsel for the petitioner. The learned Arbitrator has allowed Claim 'D' of the petitioner, which was seeking a refund of the penalty paid, while on the other hand, counter claim No. 4 of the respondent has been allowed entitling the respondent to recover an amount of Rs.1,07,55,560/- deposited by the respondent towards DVAT with interest, in addition to Rs. 4 crores adjusted from the EMD. As the chronology goes, certain statutory dues towards Sales Tax and VAT were allegedly payable by the petitioner. On account of certain financial crisis of the petitioner, an interim arrangement was worked out as per which the respondent undertook to pay the sum of Rs. 5,07,55,560/- towards the said dues. The respondent adjusted Rs. 4 Crore deposited by the petitioner at the initial stages towards the Security Deposit and paid the balance amount of Rs.

1,07,55,560/- from its own account. The petitioner had undertaken to indemnify the said amount at a later stage. Thus, the Arbitrator awarded recovery of the amount of Rs. 1,07,55,560/- in favour of the respondent along with interest.

33. Since the objections of both the parties are pending adjudication, it is not open for this Court in the present petition to even enter into the controversy of the correctness or otherwise of the Award, relating to the claims and the counter claims. However, what emerges in the facts as they stand today, is that an amount of Rs. 61,35,314.34/- is due to the petitioner as per the report of the DIAC and nothing is due to the respondent. The claim of the respondent to any amount would arise once he succeeds in the petition filed by it against the Award.

34. The respondent has not made out any case in the present petition for invocation of the BG of Rs. 4 Crores. Insofar as the counter claim No. 4 which has been allowed is concerned, the sum of Rs. 4 Crores payable towards the Sales Tax has already been adjusted by the security deposit made by the petitioner. The remaining amount of Rs. 1,07,55,560/- would be set off by the amount payable to the petitioner presently, under the Award, which is more than the amount to be recovered by the respondent. This Court is unable to fathom any good reason why the respondent should be held entitled to invoke and encash a BG of Rs. 4 Crore today and incur Bank Charges.

35. Thus, in my view, the petition deserves to be allowed. The respondent is directed to return the BG bearing No. 2579IGFIN000713 for an amount of Rs. 4 crores to the petitioner within a period of two weeks from today. Needless to state that if the respondent succeeds in the

challenge to the Award, it may take recourse to the remedies available to it for recovery, in accordance with law.

36. In so far as the amount of Rs.61,34,314.34/- which is held to be payable to the petitioner as per the report of the DIAC dated 04.09.2019, is concerned the same cannot be directed to be released in the present petition under Section 9 of the Act. The petitioner is at liberty to take recourse to legal remedies available to it for release of the said amount in accordance with law, and subject to the outcome of O.M.P. (COMM) 147/2019 and O.M.P. (COMM) 318/2019, which are pending adjudication before this Court.

37. Petition is accordingly allowed, with no orders as to costs.

JANUARY 28th, 2020
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JYOTI SINGH, J

भारतमेव जयते