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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 23.06.2020

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O.M.P(EFA)(COMM)8/2019 & E.A. 481/2019, E.A. 492/2020, E.A. 493/2020

M/S ANGELIQUE INTERNATIONAL LIMITED

....Decree Holder.

Through: Mr.Tarun Singhla, Adv with
Mr.Praveen Singhai, A.R.

Versus

PUBLIC ELECTRICITY CORPORATION & ORS.

.....Judgment debtors.

Through: Mr.Rajiv Kapur with Mr.Akshit
Kapur, Advs for R-5.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J(ORAL)

1. The present enforcement petition filed under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') filed by M/S Angelique International Limited/company having its registered office in Delhi, seeks enforcement of a unanimous foreign award dated 25.07.2019 rendered by a three-member Arbitral tribunal, pursuant to arbitration conducted under the UNCITRAL Arbitration Rules. The decree holder (DH) seeks enforcement of only one of the reliefs granted under the award, but has reserved its right to file a separate petition for enforcement of the remaining reliefs.

2. At the outset, learned counsel for the DH submits that the enforcement of the award is primarily sought against judgment debtor

(JD)nos.1 to 3, who were respondents before the Tribunal. He submits that while the JD no. 4/ National Bank of Yemen and JD no.5/State Bank of India, who had issued the original bank guarantees and counter bank guarantees respectively, have been arrayed as JDs in the present petition, they are necessary parties for enforcement of the relief sought herein but may not be treated as JDs while disposing the present petition. He further submits that prior to the pronouncement of the award, the DH had sought interim stay on invocation of the subject bank guarantees by filing a petition under Section 9 of the Act being OMP (I)(COMM)235/2019, wherein this Court, on 26.07.2019, had directed the JDs to keep these bank guarantees alive. However, now that enforcement of the award itself is being sought, the DH undertakes to forthwith withdraw this Section 9 petition by moving an appropriate application, so that the matter of withdrawal can be taken up before 30.06.2020, i.e., the date on which the bank guarantees expire, in order to circumvent the necessity of extending them any further.

3. After notice was issued in the present petition on 03.09.2019, the JD nos.1 to 3, situated in the Republic of Yemen, were served through the Ambassador of Yemen in India, as also at their e-mail addresses as reflected in the award. An affidavit of service in this regard was filed by the DH, however since none appeared on their behalf or that of JD no.4, which is also located in Yemen, on 19.06.2020 this Court again directed the DH to serve them through email. The DH has, after serving them through e-mail, filed another affidavit of service along with an affidavit under Section 65B of the Indian Evidence Act, 1872, from which it transpires that JD nos.1 to 4 have been served through

email. Today, as none appears on their behalf despite the matter being passed over, the present petition has been taken for final hearing.

4. This petition arises out of a contract dated 28.12.2010, which was awarded by JD nos.1 & 2 to the DH for design, supply and installation of 132 KV Transmission Overhead Line from Dhamar Substation to Hizyaz substation in Sana'a, Yemen and re-routing of the existing 132 KV Overhead Line Double Circuit Dhamar/Taiz in & out of the new substation at Yarim, Yemen. When the contract was being awarded, the DH was required to issue bank guarantees for a sum of USD 1,701,553/- in favour of JD no.1. The DH, therefore, requested State Bank of India (arrayed as JD no.5) to issue counter bank guarantees for the aforesaid sum of USD 1,701,553/-. The State Bank of India also issued four counter bank guarantees, viz. bank guarantee no. 0480310FG0015185 dated 12.11.2010 and bank guarantee nos. 0480310FG0015267, 0480310FG0015268 and 0480310FG0015266 all dated 03.12.2010, based on which the National Bank of Yemen issued four bank guarantees bearing no. L/G NB33/94/2010 dated 25.12.2010 and L/G NB33/95/2010, L/G NB33/96/2010 and L/G NB33/97/2010 all dated 08.12.2010, in favour of the JD no.1. In September, 2014 when the DH had completed about 60% of the work, a Civil War arose in Yemen leading to extensive loss of life and property in the country. Consequently, the DH, vide its letter dated 04.06.2015, terminated the contract. The DH then invoked arbitration for recovery of the balance amount payable for the work already done. The JD nos.1 to 3 duly participated in the arbitration proceedings, which were held in Cairo, Egypt and also filed a statement of defence which led to an award

being passed in favour of the DH on 25.07.2019 in the following terms:

“1. The Arbitral Tribunal hereby declares that Claimant has validly terminated the Contract and is therefore released from any obligation(s) to perform any work(s) under the Contract.

2. The Arbitral Tribunal hereby declares that Respondents were and are not entitled under the Contract to draw down on the bank guarantees provided by Claimant and issued in their favour by the National Bank of Yemen, namely Performance Security No L/G NB/33/94/2010 dated 25 December 2010 for an amount of USD 1,701,553.00; Advance Payment Security No L/G NB33/95/2010 dated 8 December 2010 for an amount of USD 1,167,311.00; Advance Payment Security No LIG NB33/96/2010 dated 8 December 2010 for an amount of USD 7,610.00; Advance Payment Security No LIG NB33/97/2010 dated 8 December 2010 for an amount of USD 526,632.00.

3. Respondents are ordered not to draw down on the bank guarantees referred to in point 2. of this dispositive section, and to cancel such bank guarantees by either (i) presenting them to the National Bank of Yemen and/or to the State Bank of India, or (ii) sending a written statement of release from liability under such bank guarantees to the National Bank of Yemen and to the State Bank of India; and to send a copy of such letter to Claimant.

4. The Arbitral Tribunal hereby declares that Respondents are not entitled to an extension of the bank guarantees referred to in in point 2. of this dispositive section.

5. The Arbitral Tribunal hereby declares that Claimant's set-off of USD 637,616 against the remaining Advance Payment of USD 637,616 was valid.

6. Respondents are ordered to pay to Claimant USD 2,662,577.60.

7. The Arbitral Tribunal hereby declares that Respondents are obligated to pay to Claimant all costs incurred by Claimant for any extensions of the bank guarantees referred to in point 2. of this dispositive section after the date of this award until the date when any legal proceedings challenging this award have been finally terminated (upholding the award) or the statutory deadline for filing a challenge of the award has expired.

8. Respondents are ordered to pay interest on USD 2,662,577.60 at the rate of 5% per year running from the date of this arbitral award until final payment of this sum.

9. The decision on Claimant's claim for the un-invoiced items is reserved.

10. The decision on Claimant's claims

"to order Respondents to pay to Claimant any damages, costs and expenses (including but not limited to legal fees and expenses) incurred by Claimant should Respondents draw on the bank guarantees referred to in paragraph (c) during the course of this arbitration"

And

"to order Respondents to pay to Claimant [. . .] all additional costs incurred by Claimant for the extensions of the bank guarantees from the date of Claimant's termination of the Contract (4 June 2015) until the date of the final award"

is reserved.

11. The decision on costs is reserved.

12. All other Claimant's claims, i.e. "to declare that the award will be provisionally enforceable; And "to grant Claimant such other and further relief as the Tribunal deems appropriate under the circumstances" are dismissed.

13. The Arbitral Tribunal will issue in due course a Procedural Order for the further proceedings related to those Claimant's claims that are reserved as above and Respondents' counterclaims.

5. Thus under the award, the Arbitral Tribunal, besides directing the JD nos.1 to 3 to pay a sum of USD 2,662,577.60 and USD 637,616/- along with interest @ 5% per annum after declaring that they were not entitled to invoke any of the four bank guarantees, also directed them not to encash the bank guarantees in their possession. In fact, a specific direction was given to the JD nos.1 to 3 to cancel the bank guarantees by presenting them to the National Bank of Yemen and/or to the State Bank of India and to give a written intimation to these banks, along with a copy to the DH, regarding their release from liability under the said bank guarantees.

6. In support of the present petition, learned counsel for the DH submits, by drawing my attention to the statement of defence filed by the JD nos.1 to 3 before the Tribunal, that as per their own stand these bank guarantees did not need to be extended and it is on this very ground that they refused to return the bank guarantees - that these bank guarantees were no longer enforceable as they had already expired. He submits that although the JD nos.1 to 3 do not have any assets within the jurisdiction of this Court, the subject bank guarantees were issued by the National Bank of Yemen on the basis of four counter bank guarantees issued by the State Bank of India, which is situated in Delhi within the jurisdiction of this court. He submits that, therefore, the DH has approached this Court only for enforcement of the relief qua the

bank guarantees, and reserves its right to seek enforcement of the other reliefs under the award dated 25.06.2019 before the appropriate Court.

7. In accordance with Section 47 of the Act, the DH has filed a duly authenticated copy of the award as also of the contract dated 28.12.2010 which contains the arbitral clause in para 46.5 thereof. As noted hereinabove, the award dated 25.07.2019 was rendered in an ad-hoc arbitration conducted in Cairo, Egypt under the revised UNCITRAL Rules of Arbitration by a three-member Arbitral tribunal comprising of Dr. Anke C. Sessler, Ms. Rabab Yasseen and Hon. Prof. Dr. Andreas Reiner. In the light of the facts noted hereinabove, it is evident that the award sought to be enforced is a foreign award. In terms of the scheme under the Act, once a petition seeking enforcement of the foreign award is filed, it is open for a party opposing the enforcement to file objections in terms of Section 48 of the Act. As noted hereinabove, the JD nos.1 to 3 despite having been repeatedly served, have neither appeared before this Court nor filed any objections under Section 48 of the Act. In these circumstances, when the judgment debtors have not filed any objections to the present petition and the DH fulfils the requirement under Section 47 of the Act, there is no reason to decline enforcement of the award with respect to the reliefs sought in this enforcement petition.

8. At this stage, it may be noted that the State Bank of India is duly represented through counsel and has confirmed the fact that the National Bank of Yemen has till date not called upon them for encashment of any of the four counter bank guarantees

9. Accordingly, the enforcement petition is allowed and it is declared that in accordance with the award, the counter bank guarantees issued by the State Bank of India being Nos. 0480310FG0015185 dated 12.11.2010 and 0480310FG0015267, 0480310FG0015268 and 0480310FG0015266 all dated 03.12.2010 and the bank guarantees issued by National Bank of Yemen being L/G NB33/94/2010 dated 25.12.2010 and L/G NB33/95/2010, L/G NB33/96/2010 and L/G NB33/97/2010 all dated 08.12.2010 will no longer be enforceable and should be treated as cancelled. The State Bank of India is further directed to return the bank guarantees issued by National Bank of Yemen being L/G NB33/94/2010 dated 25.12.2010 and L/G NB33/95/2010, L/G NB33/96/2010 and L/G NB33/97/2010 all dated 08.12.2010.

10. The petition along with pending applications is disposed of in the above terms.

REKHA PALLI, J

JUNE 23, 2020

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