

\$~13 (Original Side)

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

+ ARB. A. (COMM.) 35/2021, I.A. 9313/2021, I.A. 9314/2021,  
I.A. 9315/2021 & I.A. 9316/2021

UNION OF INDIA

..... Petitioner

Through: Ms. Monika Arora, CGSC with  
Mr. Shriram Tiwary, Adv.

versus

M/S RCCIVL-ITIL P LTD (JV)

..... Respondent

Through: Mr. Arvind Minocha, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**ORDER (O R A L)**

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**02.08.2021**

(Video-Conferencing)

1. The appellant claims to be aggrieved by orders dated 24<sup>th</sup> March, 2021 and 17<sup>th</sup> April, 2021, whereby the learned Arbitral Tribunal disposed of the appellant's application under Section 23(3), and the respondent's application under Section 17, of the Arbitration & Conciliation Act, 1996 ("the 1996 Act").

2. Mr. Arvind Minocha, learned Counsel for the respondent in the present appeal has drawn my attention to a communication dated 28<sup>th</sup> June, 2021, addressed by the Union Bank of India to the appellant, following which, in my opinion, nothing survives for adjudication in the present appeal.

3. As such, a very brief recital of facts may suffice.

4. As per the covenants of the contract between them, the respondent furnished performance security to the appellant by way of Bank Guarantee for ₹ 13,06,06,000/-.

5. The respondent moved an application, before the learned Arbitral Tribunal, under Section 17 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), for release of the aforesaid Bank Guarantee. By order dated 6<sup>th</sup> November, 2020, the learned Arbitral Tribunal allowed the application and directed release of the aforesaid Bank Guarantee of ₹13,06,06,000/- to the respondent. The respondent, nonetheless, granted time to the appellant to finalize the final bill of the respondent.

6. Upon finalization of the final bill of the respondent, the appellant submits that it became aware that, in fact, it was entitled to recover ₹ 6.26 crores from the respondent. The appellant, accordingly, moved an application before the learned Arbitral Tribunal under Section 17 of the 1996 Act, seeking review of the order dated 6<sup>th</sup> November, 2020. The said application was dismissed by the learned Arbitral Tribunal on the ground that no power, to review its decision, lay with it. The appellant challenged the said order before this Court by way of Arb A (Comm) 10/2021, which was disposed of, by this Court, vide order dated 26<sup>th</sup> February, 2021. In view of the claim of ₹ 6.26 Crores, which, according to the appellant, it was entitled to recover from the respondent, this Court modified the order dated 6<sup>th</sup> November, 2020, of the learned Arbitral Tribunal, by directing release, to the respondent, of the Bank Guarantee of ₹

13,06,06,000/- less ₹ 6.26 crores. The Bank was also directed to treat the Bank Guarantee as restricted to ₹ 6.26 Crores.

7. In view thereof, this Court restored the Section 17 application of the respondent to the learned Arbitral Tribunal, to consider whether, despite the claim of the appellant, the respondent was, nonetheless, entitled to release of the surviving Bank Guarantee of ₹ 6.26 crores.

8. The appellant, in the interregnum, filed a counter claim before the learned Arbitral Tribunal, against the respondent, for the aforesaid amount of ₹ 6.26 crores. The application for permission to file the counter claim was allowed by the learned Arbitral Tribunal, *vide*, order dated 24<sup>th</sup> March, 2021 subject to costs which, according to Mr. Minocha, learned Counsel for the respondent, was to the tune of ₹ 50,000/-. Ms. Arora, learned CGSC frankly acknowledges that the said amount has not been paid by the appellant. As such, as on date, there is, *stricto sensu*, no counter claim of the respondent on the record of the learned Arbitral Tribunal or, even if the counter claim is on record, it cannot be adjudicated in the absence of compliance with the order directing payment of costs.

9. It is a matter of record that despite being entitled, as it contended, to recover ₹ 6.26 Crores from the respondent, the appellant did not move any application under Section 17 of the 1996 Act, before the learned Arbitral Tribunal, to secure the said amount. Instead, the appellant merely filed an amended reply to the Section 17 application of the respondent, bringing this fact to the notice of the learned

Arbitral Tribunal.

**10.** The learned Arbitral Tribunal has passed two orders on 24<sup>th</sup> March, 2021 and 17<sup>th</sup> April, 2021 by which the appellant claims to be aggrieved. The conjoint effect of these orders is that, while the application of the appellant for placing the amended reply to the Section 17 application of the respondent has been allowed, the respondent's Section 17 application has also been allowed. In other words, apart from the amount which, as per the order dated 26<sup>th</sup> February, 2021 *supra* of this Court in Arb. A. (Comm.) 10/2021 already stood released to the respondent, the surviving amount of ₹ 6.26 Crores was also directed by the learned Arbitral Tribunal to be released to the respondent and, consequently, the Bank Guarantee was discharged in full.

**11.** It is essentially with this direction that the appellant claims to be aggrieved.

**12.** Mr. Minocha, learned Counsel for the respondent, on the other hand, submits that nothing survives for adjudication in this appeal, as, consequent to passing of the impugned orders by the learned Arbitral Tribunal, the Bank has written to the appellant, stating that, as there was no order staying the direction issued by the learned Arbitral Tribunal, the Bank Guarantee stood discharged in full in favour of the respondent.

**13.** Ms. Monika Arora, learned CGSC for UOI submits, with emphasis, that the learned Arbitral Tribunal was in error in failing to secure the appellant's claim of ₹ 6.26 Crores against the respondent.

**14.** I am unable to agree. The appellant has not chosen, to this day, to file any application before the learned Arbitral Tribunal under Section 17(2)(b) of the 1996 Act, seeking securing of its counter-claim of ₹ 6.26 crores. Nor has the appellant even chosen to pay the costs, subject to which alone the counter-claim was permitted to be taken on record. No fault can, therefore, be found with the learned Arbitral Tribunal in not securing the counter-claim amount of ₹ 6.26 crores.

**15.** To my mind, nothing survives for adjudication in the present appeal. In the absence of any application by the appellant, for securing of its counter-claim amount, the learned Appellate Tribunal was only seized with the respondent's application (restored by the order dated 26<sup>th</sup> February, 2021 of this Court) for return of the Bank Guarantee submitted by it. That stands allowed by the learned Arbitral Tribunal, by the impugned order. The Bank has already taken consequential steps in pursuance thereof, though Ms. Arora doubts whether the amount has been credited to the account of the respondent. Even if the amount has not been credited to the account of the respondent, once the Arbitral Tribunal directed return of the entire Bank Guarantee, and the Bank has also written to the appellant, intimating that the Bank Guarantee stood discharged in full in favour of the respondent, this Court can hardly stand between such discharge and crediting of the amount to the account of the respondent.

**16.** Ms. Arora, learned CGSC submits that the appellant would move an application before the learned Arbitral Tribunal under

Section 17 of the 1996 Act, seeking appropriate directions to secure the amount of its counter claim. Needless to say, this Court has not interdicted the appellant from doing so and any such application, if moved, shall be considered by the learned Appellate Tribunal on its own merits, in accordance with law.

**17.** In view thereof, the present appeal stands disposed of as having become infructuous and not surviving for adjudication. Liberty, shall, however, stand reserved with the appellant to move a substantive application under Section 17 of the 1996 Act before the learned Appellate Tribunal which, if moved, shall be decided on its own merits.

**C.HARI SHANKAR, J**

**AUGUST 2, 2021**

*Aj/ss*