1 19.1.2022

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)

F.M.A.T. 15 of 2022
With
CAN 1 of 2022

Exide Industries Limited
Vs.
West Bengal Renewable Energy Development Agency

Mr. Ratnanko Banerjee, Sr. Advocate
Mr. A. Banerjee
Mr. Jaydeb Ghorai
Mr. Suman Chatterjee
Mr. Diptesh Ghorai .... For the Appellant.

Mr. Samrat Sen, Sr. Advocate
Ms. Amrita Panja Moulick ..... For the Respondent.

Re: **<u>CAN 1 of 2022</u>**

This is an appeal from a judgement and order dated 24th December, 2021 in a commercial cause in an application under Section 9 of the Arbitration and Conciliation Act, 1996 dismissing the application.

The prayers in the Section 9 application were as follows:-

"a) An order of temporary injunction be passed restraining the respondent and other acting on its behalf from invoking the two bank guarantees, one dated 27.08.2019 bearing no.006BGR0087420 and another dated 16.10.2019 bearing no. 0006BGR0123320.

b) Alternatively, if the two bank guarantees have already been invoked, an order be passed restraining the respondent and others acting on its behalf from appropriating the sum invoked in respect of the said two bank guarantees in their own account and may further be directed to keep the invoked sum in a separate account till the disposal of the arbitration proceedings along with other reliefs. "

S.D.

The learned judge, inter alia, held that since the two bank guarantees have already been invoked during the pendency of the Section 9 application, the application has become “infructuous”. The prayer of the appellant/petitioner for keeping the amount in a separate account was also rejected on the ground that the respondent was a government organization providing a ‘sovereign guarantee’.

This case arises out of an agreement dated 20th September, 2019 between the parties under which the appellant/petitioner was to do design & engineering, manufacture, procurement, supply, installation, testing and commissioning of Ground Mounted Grid Connected Solar Photovoltaic Power Plant of specified capacity on turn-key basis.

While entering into the agreement the appellant/petitioner had furnished a performance guarantee to the respondent for an amount Rs.2.61 crores and an additional performance security also in the shape of a bank guarantee for the same amount.

Mr. Ratnanko Banerjee, learned senior advocate for the appellant/petitioner submits that there was utter breach on the part of the respondent in fulfilling their obligations under the contract, mainly delayed handing over of the site and that is why the work was not started on time and had to be rescheduled. He also submits that in the letter of termination of the agreement dated 21st September, 2021 there is no claim for damages against his client. Hence if the respondent does not have a monetary claim they cannot possibly justify invocation of the said guarantees. Elements of fraud and special equity existed.

Mr. Samrat Sen, learned senior advocate for the respondent contends that the appellant/petitioner had done no work at all and that his client was compelled to issue the show cause notice and thereafter terminate the contract. The work had to be entrusted with another contractor. The additional amount expended by the government to get the work completed would have to be recovered from Mr. Banerjee's client as damages, termed in works contract terminology as 'risk purchase'.

The contract between the parties contains an arbitration clause which is 4.4 and is as follows:-

"4.4 Arbitration

The provisions of Arbitration and Conciliation Act, 1996 will apply with respect to Arbitration proceedings between the parties.

Each party shall appoint one Arbitrator and third Arbitrator shall be nominated by the said two Arbitrators who shall act as presiding Arbitrator.

The venue of the Arbitration proceedings shall be in the State of West Bengal. The decision of the majority of the Arbitrators shall be final and binding upon both the parties.

The cost of the Arbitration shall be borne equally by the parties.

Any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators, in accordance with the provisions set forth below.

The owner and the Contractor shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. if the two arbitrators do not succeed in appointing a third arbitrator within 28(twenty eight) days after the latter of the two arbitrators has been appointed, the third arbitrator shall, at the request of either party, be appointed by the Appointing Authority for arbitrator.

If for any reason an arbitrator is unable to perform its function, the mandate of the Arbitrator shall terminate in accordance with the provisions of applicable laws and a substitute shall be appointed in the same manner as the original arbitrator.

The decision of a majority of the arbitrators(or of the third arbitrator chairing the arbitration, if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction as decree of the court. The parties there by waive any objections to or claims of immunity from such enforcement.

The arbitrator(s) shall give reasoned award to withstanding any reference to the arbitration herein

i) The parties shall continue to perform the respective obligations under the Contract unless they otherwise agree.

ii) The owner shall pay the Contractor any monies due to the Contractor except for the works referred to the Arbitrator."

The reasons apart from those enumerated above given by the learned judge for rejecting the application are, inter alia, as follows:

"13. **Although the Petitioner claim that fraud has been committed, at this stage, nothing has been proved on the basis of the aspersions as made by the Petitioner. Fraud, special circumstances or special equity can only be proved by way of tendering evidence and at this stage, I do not find apparently from the various correspondences annexed with the record that any special circumstances has been arrived so that the Court can interfere by restraining the Respondent from invoking the bank guarantee. The matter or the dispute shall be adjudicated by the Ld. Arbitrator on the basis of the evidence tendered before him.**

14.The Petitioner even fails to prove categorically that any fraud has been committed. Non-performance of any condition of a contract does not amount to fraud unless there is any fraudulent intention."

We are of the opinion that since fraud had been asserted by the appellant/petitioner and a case of special equity sought to be made out, there was no occasion for the learned judge to defer consideration of these issues by observing that it would be decided on the basis of the evidence produced before the learned Arbitrator. In the Section 9 application, the learned judge was required to decide the legality of invocation of the bank guarantees after considering the issues of fraud, special equity and so on, on affidavit evidence. Its consideration could not be deferred. Here the learned judge seems to have fallen into error.

However, the fact remains that during the pendency of the Section 9 application the said two bank guarantees were invoked and encashed by the respondent.

We are of the view that in this state of affairs the arbitration should be commenced immediately.

In terms of the said arbitration clause, we direct either party to nominate their arbitrator within four weeks of communication of this order. The third arbitrator be nominated by the said appointed arbitrators within a period of four weeks thereafter. Once the arbitral tribunal is constituted it will immediately consider under Section 17 of the said Act the issue regarding the invocation of the said two bank guarantees afresh on hearing the parties and by a reasoned decision. Till such time the amount realized on invocation of the said two bank guarantees shall be kept in a separate interest bearing term deposit account by the respondent in its own name with a nationalized bank upon intimation to the appellant/petitioner.

We record Mr. Banerjee's submission with regard to the subject matter of IA 3/2021, pending before the learned court below that the bank guarantee referred to therein may be returned to the appellant/petitioner.

This is so because the guarantee requirements have been fulfilled by his client by furnishing the said two bank guarantees for Rs.2.61 crores each. The one which is the subject matter of IA 3/2021 is superfluous and may be returned to his client.

If the respondent agrees with this submission the said bank guarantee may be returned to Mr. Banerjee's client. If this assertion is contested then the application IA 3/2021 may be decided by the court below on the date fixed for hearing the application i.e. 27th January, 2022.

Dispensing with all formalities the appeal and the connected application (CAN 1 of 2022) were heard and is disposed of by this judgement and order.

(I.P. Mukerji, J.)

(Aniruddha Roy, J.)