



O.A. No.600 of 2023

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WEB **ABDUL QUDDHOSE, J.**

This application has been filed under Section 9 of the Arbitration and Conciliation Act, seeking for an injunction restraining the respondent from invoking / encashing the Advance Bank Guarantee, dated 24.11.2015 for a sum of Rs.5,35,95,630/-.

2. The learned Special Government Pleader (CS) on instructions would submit that his submissions before this Court can be treated as the contentions of the respondent as he is making his submissions only on instructions of the respondent. Therefore, he would submit that there is no necessity for the respondent to file a counter in this application.

3. There seems to have been a dispute between the applicant and the respondent under a contract. The dispute was referred to arbitration and an Arbitral Tribunal was constituted in terms of the Arbitration Clause. The Arbitral Tribunal has passed an Arbitral Award dated 28.04.2023. As per the Majority Award, a sum of Rs.25,00,30,211/- is payable to the applicant by the respondent. In the very same arbitration, a counter claim has also been made by the respondent. The Majority Award has also determined the amount payable



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by the applicant to the respondent at Rs.15,80,89,340/-. If the amounts payable by the respective parties are set off against each other, a sum of Rs.9,19,40,871/- will become due and payable by the respondent to the applicant. As part of the terms and conditions of the contract, the applicant had given a performance Bank Guarantee to the respondent to an extent of Rs.5,35,95,630/- on 24.11.2015. The applicant has filed this application on the apprehension that the respondent will encash the aforesaid Bank Guarantee pursuant to the Majority Arbitral Tribunal Award. The applicant has stated that it will amount to unjust enrichment as under the Arbitral Award, even if the amounts are set off, which is payable by each of the parties, it is only the respondent, who is liable to pay money to the applicant and not the applicant to the respondent.

4. The learned counsel for the applicant drew the attention of this Court to the Majority Arbitral Award, dated 28.04.2023 and also drew the attention of this Court to the relevant paragraphs wherein, the amounts due and payable by each of the parties to the other is mentioned. The amounts determined by the Arbitral Tribunal by the majority of its Arbitrators is also not disputed by the Special Government Pleader(CS) appearing for the respondent. However, he would submit that being an independent contract, the respondent is entitled to enforce the Bank Guarantee as even according to the Arbitral Award a sum of



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Rs.20 Crores is due and payable by the respondent to the applicant which includes the Bank Guarantee amount.

5. On the contrary, the learned counsel for the applicant would submit that if the interest amount on Rs.25,00,30,211/- is calculated, another sum of Rs.13,17,24,819/- will become due and payable by the respondent to the applicant.

6. Infact, the Majority Arbitral Award has been passed only recently i.e. on 28.04.2023. As seen from the Typed set of papers, the applicant has also filed an application under Section 33 of the Arbitration and Conciliation Act, 1996 seeking for certain clarification / modification of the Arbitral Award and the said application was filed on 26.05.2023. A counter affidavit has also been filed by the respondent on 10.06.2023 to the said application before the Arbitral Tribunal. The time period for challenging the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996 is also not yet over. Both the learned counsels submit on instructions that they propose to challenge the Majority Arbitral Award, dated 28.04.2023 as both the parties are seeking for enhancement of the amounts determined by the Arbitral Tribunal.

7. As on date, the applicant is having the benefit of an Arbitral Award



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which entitles them to receive a minimum sum of Rs.10 Crores from the respondent as stated supra. Since as on date, no challenge has been made to the Arbitral Award, dated 28.04.2023 by either of the parties, the interest of the applicant will have to be protected. In case, the respondent is allowed to encash the Bank Guarantee, it may amount to unjust enrichment by the respondent. As on date, when there is no challenge to the Majority Arbitral Award, dated 28.04.2023, the applicant is entitled to receive the amount as determined under the Arbitral Award, dated 28.04.2023. However, necessarily the Bank Guarantee for a sum of Rs.5,35,95,630/-, dated 24.11.2015 has to be kept alive till the Majority Arbitral Award attains finality either by the dismissal of an application filed under Section 34 of the Arbitration and Conciliation Act or till the period for challenging the Arbitral Award gets over.

8. An injunction can be obtained by a party from invoking Bank Guarantee, when he establishes fraud or he suffers irretrievable injustice. In the instant case, no fraud is alleged by the applicant. But, in case the respondent enforces the Bank Guarantee it will lead to irreparable injustice to the applicant, in case, the Arbitral Award has attained finality, and it would amount to unjust enrichment made by the respondent. Admittedly, as on date, a sum in excess of the Bank Guarantee amount of Rs.5,35,95,630/- is due and payable by the respondent to the applicant as per the Majority Arbitral Award, dated



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9. For the foregoing reasons, in order to strike a balance and in order to protect the interest of the applicant as well as the respondent, this Court disposes of this application by passing the following order :

a) There shall be an order of injunction as prayed for in O.A. No.600 of 2023 on condition that the applicant renews the Bank Guarantee periodically.

b) The applicant is directed to renew the Bank Guarantee one week prior to its expiry with an intimation given to the respondent.

c) In case, the applicant fails to renew the Bank Guarantee for a sum of Rs.5,35,95,630/-, one week prior to the expiry of the Bank Guarantee, the respondent is entitled to enforce the Bank Guarantee and encash the same.

d) The cost incurred for renewing the Bank Guarantee shall be incurred solely by the applicant.



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