

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**WPO No. 173 of 2024
RKD Niraj JV and others
Vs
The Union of India and others**

For the petitioners : Mr. Soumya Majumder, Adv.,
Mr. Pratip Mukherjee, Adv.,
Mr. Tarun Chatterjee, Adv.,
Mr. Surajit Basu, Adv.,
Mr. Raju Mondal, Adv.

For the respondents : Mr. Dhiraj Tribedi, Adv.,
Mr. Atarup Banerjee, Adv.,
Ms. Ranjana Chatterjee, Adv.

For the respondent
nos. 3,4,5 and 7 : Mr. Sakya Sen, Adv.,
Mr. Anirban Ghosh, Adv.

Hearing concluded on : 18.04.2024

Judgment on : 23.04.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioners came out successful in a tender process floated by the respondent no. 2 and entered into a work agreement. Pursuant to such agreement, three bank guarantees were executed in favour of respondent no. 2 by the petitioners. Subsequently a dispute arose between the petitioners and the respondent no. 2 and the said respondent terminated the contract with the petitioners on September 30, 2023. One of the bank guarantees bearing no. BG O5172ILG000321 for Rs. 1,06,46,000/- was invoked and encashed by respondent no. 2 by a letter dated September 25, 2023 from the

respondent no. 5, that is the Branch Manager of the Punjab National Bank (PNB), Broad Street Branch.

- 2.** Two other bank guarantees remained to be encashed. The petitioners approached the Commercial Court at Rajarhat under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, “the 1996 Act”) giving rise to MISC. CASE (ARB) No. 76 of 2023, *inter alia* praying for injunction restraining the respondents from taking any steps and/or in furtherance of any notice for invocation of bank guarantees bearing no. BG O51721LG000621 and BG 045720ILPER0008. The petitioners also sought an order for setting apart a sum of Rs. 1,06,46,000/- which had already been received by the respondent no. 1 towards encashment of the earlier bank guarantee. On October 4, 2023, the Commercial Court passed an ad interim injunction in terms of prayer (c) till October 18, 2023. Prayer (c), it is to be noted, pertained to the prayer restraining the respondents from taking any steps and/or in furtherance of any notice for invocation of the remaining two bank guarantees. However, no order was passed regarding setting apart the amount already encashed in respect of the third.
- 3.** According to the petitioners, the order was communicated on the same day to respondent no. 4 and 5, the Branch Managers of the Park Street and Broad Street Branches of the PNB respectively. Whereas respondent no. 5, the Manager of the Broad Street Branch, despite the bank guarantee being already invoked, reversed the process by cancelling the demand draft issued to respondent no. 2 and returned

the amount of Rs. 5,64,00,000/- with regard to BG 051721LG000621, respondent no. 4, the Park Street Branch Manager, did not do so and proceeded with invocation of BG 045720ILPER0008 for Rs. 5,56,52,128/-.

4. It is verbally submitted by learned counsel for the petitioners that although an application was filed under Order XXXIX Rule 2A of the Code of Civil Procedure before the Court taking up the application under Section 9 of the 1996 Act, the same was dropped since, in the meantime, the matter was referred to arbitration.
5. The writ petitioners claim remittance of the amount of Rs. 5,56,52,128/- and crediting of the said amount to their account and a similar prayer regarding the amount previously encashed after invocation by respondent no. 5.
6. Learned counsel for the petitioners argues that despite having knowledge of the order the Commercial Court, the respondent no. 4 deliberately proceeded with invocation of the Bank Guarantee. It is argued that on the ground of parity, since the respondent no. 5, in similar circumstances, reversed the process and re-credited the amount to the account of the petitioners, similar action ought to have been taken by the respondent no. 4.
7. Such invocation at the behest of respondent no. 4 was in blatant violation of the order passed by the Commercial Court under Section 9 and, as such, a direction be given to respondent no. 4 to reverse the process.

8. It is argued that such invocation being in the teeth of the order of the Commercial Court, the same was illegal and, thus, ought to be reversed in any event.
9. It is argued that since arbitration has already commenced before the Tribunal, the remedy of implementation of the order passed under Section 9 or punishment of the respondent no. 2 for non-compliance of the same before the Court which passed the order under Section 9 cannot be resorted to now. It is argued that the petitioners' account was classified as Non Performing Asset (NPA) entirely due to the illegal invocation of the bank guarantee. If the substantial amount was not debited from the petitioners' account as a result of the invocation, the account would still remain regular. It is argued that such classification should also be reversed as a consequence of the re-crediting of the amount encashed to the petitioners' account.
10. It is contended that despite the order of this Court for the respondent no. 4 to file a report, supported by an affidavit, disclosing exactly when the amount was encashed, such time was not disclosed by the respondent 4 in its affidavit. Thus, adverse inference ought to be drawn against the said respondent.
11. Learned counsel appearing for respondent no. 4 argues that the remedy of the petitioners lay under Order XXXIX Rule 2A before the Court taking up the Section 9 application. Having not pursued the same, the petitioners cannot invoke the writ jurisdiction of this Court for implementation of the Commercial Court's order.

12. Secondly, it is argued by respondent no. 4 that the writ court is not a fact-finding forum and cannot enter into the exact times when the chronology of events happened to ascertain whether the said respondent deliberately flouted the order of the Commercial Court, which would require detailed evidence to be taken.
13. Thirdly, it is argued that a bank guarantee is an independent contract between its beneficiary and the banker. Hence, the bank was duty-bound to honour the request of respondent no. 2 by invoking the same.
14. Lastly, it is argued that the bank had already invoked the bank guarantee prior to intimation of the order to the Bank. The moment the amount was debited, the invocation was complete. Subsequent disbursement of the amount by issuance of demand draft to respondent no. 2 was only a formality. In any event, the demand drafts, it is submitted, were also issued prior to the Bank coming to know of the Commercial Court's order.
15. Upon hearing the arguments of parties, the scope of the writ petition is required to be considered. One of the reliefs sought in the writ petition is relief (b) which is a direction on the respondent nos. 2, 4 and 5 to deposit the amount of Rs. 1,06,46,000/- in the account of the petitioners. However, the self-same relief was sought, though worded somewhat differently, under Section 9 of the 1996 Act. Prayer (d) of the application under Section 9 sought a direction on respondent no. 1 to keep aside and/or set apart the sum of Rs. 1,06,46,000/- received towards the already encashed bank guarantee,

which prayer was not granted by the Commercial Court. Thus, there was a deemed refusal of such ad interim prayer and the petitioners cannot be granted the same relief by the writ court.

- 16.** The only relief which can be considered is prayer (a) in the writ petition which seeks a remittance of the sum of Rs. 5,56,52,128/- which was encashed upon invocation of BG 045720ILPER0008 by the respondent no. 4.
- 17.** The first ground of which the petitioners seeks such remittance is on the ground of parity. The petitioners contend that the Broad Street Branch (respondent no. 5), upon being communicated of the Commercial Court's order, cancelled the demand draft and re-credited the amount to the account of the petitioners despite having already invoked the bank guarantee.
- 18.** Similar action, it is urged, ought to have been taken by the respondent no. 4, the Park Street Branch.
- 19.** However, such argument has no legal footing. The Manager of the respective Branches of the PNB, under the Banking Regulations and the Negotiable Instruments Act as well as banking norms, have the discretion to take action in respect of such exigencies as the present. In the absence of any legal provision to compel the Bank Manager to reverse an already-invoked bank guarantee, there is no legal right of the petitioners which has been infringed by not reversing the same. It is important to note that there is no order of any court and/or judicial or quasi-judicial forum as well directing the Park Street Branch of PNB to do so and as such, it cannot be said that the petitioners have a

legal right to compel the Bank to reverse the transaction. The fact that the Broad Street Branch did so was within the discretion of the Branch Manager of the said Branch and, by itself, cannot be a determinant for the Park Street Branch to take similar action.

- 20.** Hence, the ground of parity sought to be invoked by the petitioners is illusory.
- 21.** The next issue which is to be considered is how far the writ court ought to enter into the questions raised by the petitioners. The plinth of the petitioners' arguments is the alleged violation of the order dated on October 4, 2023 of the Commercial Court at Rajarhat.
- 22.** Before going into the question of whether there was any such actual violation, the remedies available to the petitioners on such count are required to be explored.
- 23.** The order-in-question was passed by the Commercial Court under the provisions of Section 9 of the 1996 Act which are exercisable before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. Sub-section (3) of Section 9, however, provides that once the Arbitral Tribunal has been constituted, the Court shall not *entertain* an application under sub-Section (1), unless the court finds that circumstances exist which *may not render the remedy provided under Section 17 efficacious*.
- 24.** Thus, under two circumstances the court can pass orders consequential to Section 9-first, if the order does not amount to

entertaining an application for the first time and second, if the remedy under Section 17 is not efficacious.

25. In the present case, what the petitioners seek is not an interim measure of protection under Section 9 but an implementation of an order already passed by the Court at a relevant point of time when the Arbitral Tribunal had not yet been constituted. Thus, for the purpose of enforcement of its order, the court has not lost jurisdiction even after constitution of the Arbitral Tribunal, even under the contemplation of sub-section (3) of Section 9. The petitioner does not seek the court to *entertain* an application and pass orders for the first time but to *implement* the same. In such a scenario, the remedy provided under Section 17 is not efficacious and orders may very well be passed by the Court which passed the order under Section 9, to protect and implement its own order and to punish any guilty party for non-compliance of the same.
26. Section 17 of the 1996 Act provides similar remedies before the arbitral tribunal as Section 9 provides before the Court, but to be exercised during the arbitral proceedings only.
27. However, the interim measures of protection specifically enumerated in Clause (ii) of Section 17(1) does not contemplate any order for implementation of a previous protection already granted under Section 9 by the Court. Hence, the Commercial Court at Rajarhat never lost jurisdiction to implement its own order by virtue of the powers conferred on it under Section 9(1)(ii)(e) which empowers the court to

pass such other interim measure of protection as appears to the court to be just and convenient.

- 28.** Importantly, Section 9(1) also provides that court shall have the same powers for making orders as it has for the purpose of, and in relation to, any proceedings before it.
- 29.** The above phrase clearly empowers the court which passed an order under Section 9 to make any order for the purpose of or in relation to any proceedings before it, on a co-equal footing as a civil court, to protect and implement its own orders, including taking measures under Order XXXIX Rule 2A of the Code of Civil Procedure for contempt of its orders. Penal measures can be taken by the Commercial Court at Rajarhat for violation, if any, of its order under Section 9 of the 1996 Act even after constitution of the Arbitral Tribunal. Thus, even if the petitioners are correct in arguing that they had filed an application under Order XXXIX Rule 2A of the Civil Procedure Code but the same was dropped due to constitution of the Arbitral Tribunal, such order being palpably erroneous, ought to have been challenged by the petitioners before the appropriate forum. Having not done so, it does not lie in the mouth of the petitioners to seek implementation of the order before this Court.
- 30.** It is well-settled that Order XXXIX Rule 2A is not the only remedy for violation of an injunction order. Implementation of an injunction order, if necessary even by reversal of the acts taken in violation of the same, can be sought from the same court which granted the injunction in the first place. Applying such principle to the present

case, the appropriate remedy before the petitioners would be to approach the court granting the order under Section 9 for implementation of the order of the said court.

- 31.** The third option open to the petitioners was to approach the Arbitral Tribunal and seek interim orders under Section 17(1)(ii)(e) seeking such other interim measure of protection as may appear to the Arbitral Tribunal to be just and convenient, to be precise, seeking a reversal of the invocation of bank guarantee, if the petitioners are otherwise entitled to do so in law, as a fresh measure of protection in its own right.
- 32.** Thus, there is no reason why the writ court should permit itself to be substituted as an executing court to implement the order passed under Section 9 of the 1996 Act, even if there were to be a violation of the order passed under Section 9.
- 33.** The next germane question is whether the writ court can act as a fact-finding forum. Although there are certain lines of judgments which propound that the writ court shall not shirk its duty merely on the ground of factual issues being involved by relegating the petitioners to other forums, it is also well-settled that if detailed evidence of particular facts are required for coming to a conclusion as to factual disputes, the writ court does not, in normal circumstances, interfere.
- 34.** In the present case, in order to explore the possibility of deciding factual issues on affidavits, the respondent no.4 was directed to file a report supported by an affidavit, which has been filed, as has been an exception thereto by the petitioners.

- 35.** It is an accepted position that the e-mail communicating the order under Section 9 dated October 4, 2023 reached respondent no.4 at 8:26 PM. Allowing for a marginal error of a few minutes, it is not in dispute that the communication of the order was not received by the respondent no.4 before the said time. The bank takes a stand that the bank guarantee had already been invoked by debiting the amount-in-question from the account of the petitioners at around 5:57 PM, which is substantiated by the report and Annexures thereto filed by the respondent no.4. The bank pleads that the exact time of creation of invocation of bank guarantee was 5:57 PM.
- 36.** After the invocation was created and the amount was debited from the petitioners' account, for all practical purposes, the invocation of bank guarantee from the end of the bank was complete. The subsequent issuance of demand draft and handing over of the same to the recipient were mere formalities, having nothing to do with the invocation itself.
- 37.** Nonetheless, in paragraph 16 of the report, the respondent no.4 contends that even the three demand drafts were handed over to one Anjan Chatterjee of the Metro Railway, Kolkata(respondent no.2) aggregating to an amount of Rs.5,56,52,128/- which tallies with the bank guarantee-in-question. The identity of the said Anjan Chatterjee is also annexed to the report.
- 38.** It is pleaded in paragraph 17 of the report that the issuance of the demand draft in the light of the terms and conditions mentioned in the bank guarantee also took place prior to the communication

and/or knowledge of the order passed by the Commercial Court at Rajarhat. Such stand of the bank has not been rebutted by the petitioners by cogent contrary evidence. Thus, the serious conclusion of deliberate violation of the order of the Commercial Court cannot be arrived at in any event, even on the yardstick of preponderance of probability, let alone on the strict yardstick of 'beyond reasonable doubt'.

- 39.** The writ court is not sufficiently equipped, in view of statements made oath versus oath, to decide such issue conclusively. As such, despite the endeavour of the Court not to shirk its duty of adjudication even on facts, the materials on record are utterly insufficient to hold the respondent no. 4 guilty of deliberate violation of the order of the Commercial Court on merits as well. Such an adjudication would require threadbare evidence to be adduced and appreciated on the relevant chronology and turn of events.
- 40.** Thus, there is no scope whatsoever of directing the reversal of the invocation of bank guarantee as prayed for by the petitioners.
- 41.** The entire basis of the reversal of NPA classification sought by the petitioners is the prayer for reversal of invocation of bank guarantee which, having not been granted above, such classification cannot also be quashed by this Court.
- 42.** Thus, the petitioners have failed to make out a case justifying any of the reliefs sought in the present writ petition.
- 43.** Accordingly, WPO No.173 of 2024 is dismissed on contest without any order as to costs.

- 44.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

After the order is passed a stay is prayed for on behalf of the writ petitioners. However, since the writ petition has been dismissed, there is no scope of grant of any interim orders. Accordingly, such prayer is refused.

(Sabyasachi Bhattacharyya, J.)