O.A.No.366 of 2024

RESERVED ON 21.08.2024	PRONOUNCED ON 03.10.2024

K.KUMARESH BABU.,J

ORDER

This Original Application had been filed for the following prayer:-

a)to grant an order of injunction restraining the respondents herein, their men, agents, assigns, sub-ordinates or any other person claiming through them from either invoking encashing, invoking or crediting the performance bank guarantees in BG.No.0993016BG1001266, dated 25.01.2021 with validity upto 03.08.2024 and claim period upto 03.08.2025 and BG.No.0993019BG0000213, dated 20.11.2023 with validity upto 31.08.2024 and claim period upto 30.11.2024, pending disposal of the arbitral proceedings and pass such further or other orders.

2. Heard Mr.P.Dinesh Kumar, learned counsel appearing for the applicant and Mr.P.S.Raman, learned Advocate General appearing for Mr.Gautam S.Raman, learned counsel appearing for the first respondent.

3. The learned counsel appearing for the applicant would submit that the first respondent had floated a tender for the work of “design, build and operate a 45 MLD capacity Tertiary Treatment Reverse Osmosis Plant” (hereinafter referred to as “Plant”) for a period of 15 years with ancillary works. The applicant was declared as highest bidder on the award of said contract. A letter of acceptance was also issued on 25.11.2016 and the applicant was called upon to furnish a performance guarantee for a value of Rs.12,24,50,000/-. A Bank Guarantee for the said amount from the second respondent was produced by the applicant. He would submit that the above mentioned contract had two phases, firstly 'design and build component' and secondly 'Operation and Maintenance of the said plant' for a period of 15 years. He would submit that the special conditions of contract, makes it clear that the Bank Guarantee furnished covers the period of design and build and one year of the operation period. In view of the intervention of the NGT and the Ministry of Forest and Environment, the design and build part of the contract got delayed and therefore, the applicant and the first respondent were constrained to vary the contract design by rerouting the laying of said pipelines. For the said variations, additional costs were incurred and the contract price also got escalated. An additional performance security was also furnished by the applicant to the tune

of Rs.1,55,75,000/-. Thereafter, the applicant had successfully executed the above mentioned scope of work by including the works covered under the supplement contract. The plant was successfully completed and inaugurated on 01.10.2019, which has also not been denied by the first respondent. He would contest that the feed water supplied by the respondent herein, will be processed in the plant in three stages and after the feed water passes through all the three stages, the product water will be supplied to the industries through transmission lines. It is the obligation on the part of the respondent to supply the feed water from the maturation pond of its old STP. The feed water that was supplied started creating problems in functioning of the plant, since there was high content of algal formation. When this was brought to the notice of the first respondent after serious deliberation, the respondent had permitted the applicant to take the feed water from old STP plant from an earlier stage than from the maturation pond. In view that the feed water supplied to the plant did not meet both the standards of quality and quantity as specified in the contract, the applicant failed to meet the quantity to supply the product water. Further the substandard supply of feed water had also led to damage the membranes of the plant. The substandard supply of water had also been admitted by the first respondent. A request was placed to the respondent to replace the membranes from the other plant, which was also acceded to by the respondent. The claim for replacement of membranes is still pending with the respondent. In the interregnum, show cause notice was issued to the applicant noting down the defects and calling upon to rectify the defects within a period of seven days, failing which it is understood that the first respondent had contemplated to suspend and terminate the contract and also invoke the Bank Guarantee. He would submit that the situation of damage of membranes and supply of less quantity of product water was to the reason which can only be attributed due to the supply of feed water, which did not meet the standards of quality and quantity assured by the respondent, which had caused the contract in not being fully performed at the hands of the applicant and the applicant cannot be found fault with it. Therefore, he had filed a present application seeking for an injunction restraining the respondents from encashing the Bank Guarantee.

4. Countering his arguments, the learned Advocate General appearing for the first respondent would submit that even though a delay had occasioned in view of the intervention, the first respondent is not invoking the Bank Guarantee for the reason of delay in establishing the plant. The plant in fact was established on

14.10.2019, and thereafter, the applicant had to also operate and maintain the plant. The performance guarantee is valid not only till the plant is established, but till the Performance Guarantee Test Run for both quality and quantity is completed. He would submit that till date the said test had not been done by the applicant and therefore, 100% work cannot be said to have been completed. He would rely upon clause 2.3 of Schedule 3 to the contract to support his contentions in this regard. Even with regard to the establishment of the plant, the learned Advocate General would submit that apart from the intervention of the NGT and MOEF, the applicant had also delayed the process of laying the pipeline. He would further submit that the TDS of the product water had not been maintained by the applicant as prescribed and it was always above permitted TDS level and the applicant cannot blame the first respondent for the algal bloom in the feed water. The test reports indicate that due to the chlorine that had been extensively used by the applicant in treating the feed water, the membranes had been damaged and not otherwise. He would further submit that no materials have been placed to contend that the feed water was not as per the obligation of the first respondent. He would further submit that this Court at this juncture cannot entertain the claim of the applicant as to the obligation of the first respondent. He would also submit that the applicant is not operating the plant any more and alternative arrangements have been made to operate the plant and infact the first respondent is making payments directly to the supplier of the applicant and also salaries to the employees employed in the plant. The non-performance of its obligation by the applicant could only be contested and secured by way of the present Bank Guarantee and therefore, there is no impediment in continuing the injunction.

5. I have heard the rival submissions made by the learned counsels appearing on either side and perused the materials placed on record.

6. It had been heavily contended by both the learned counsels appearing on either side that the reasons for quality and quantity of the product water not meeting the standard was attributed against one and other. I am of the considered view that such dispute cannot be decided by this Court in this Section 9 Application and it is for the parties to resolve the said issue in an appropriate arbitration proceedings. In the counter affidavit filed by the first respondent, it had been indicated that the first respondent had incurred a revenue loss of Rs.48.44 crores and also had to expend a sum of Rs.38.96 crores to refurbish the plant in

order to operate the plant in full efficiency. The counter further indicates that direct payments are being made to the vendors by the first respondent for which the applicant had also given consent. It is also the case of the first respondent in its counter that the first respondent had been making all essential payment for the vendors such as manpower agents, chemical supplier and day today worker expenses for the operation of the plant to supply the product water to various companies of their required quality and quantity. In fact the said averments effectively substantiate that the operation and maintenance of the plant is not being carried out by the applicant, but only indicates that the same is being carried out by the first respondent. Even though a rejoinder had been filed by the applicant with regard to the operation and maintenance as averred in the counter had not been answered to by the applicant.

7. For the foregoing reasons, I am of the view that the first respondent is entitled to encash the Bank Guarantee given as performance guarantee.

8. In view of the same, the injunction granted by this Court shall stand vacated and consequently, the Original Application stands dismissed.

03.10.2024

Index :Yes/No
Internet:Yes/No
Pbn

K.KUMARESH BABU, J.
Pbn

Pre-Delivery Order in
O.A.No.366 of 2024

03.10.2024