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

\+ CONT.CAS(C) 28/2020

GOVERNMENT OF NCT OF DELHI ..... Petitioner

Through: Ms. Sarita Pandey, proxy counsel for Mr. Anupam Srivastava, ASC for GNCTD. (M:9205174429)

versus

MOHINDER SINGH NARULA ..... Respondent

Through: Mr. Akhil Sibal, Sr. Advocate with Mr. Deepak Khurana, Mr. Vineet Tayal and Ms. Nishtha, Advocates Email: Deepak.k@khaitanandkhaitan.com

% ***Date of Decision: 22nd May, 2024***

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

MINI PUSHKARNA, J: (ORAL)

1. The present petition has been filed alleging willful disobedience of the order dated 24th July, 2014 passed in *OMP No. 932/2011,* wherein, the Court recorded the submission of the respondent to the effect that the Bank Guarantees given by the respondent to the petitioner, would be kept alive during the pendency of the dispute before the arbitrator, and thereafter, for a period of eight weeks, post the pronouncement of the Arbitral Award.

2. The present petition has been filed on the ground that the respondent is in breach of the said undertaking, as the said undertaking given by the respondent to the effect that the Bank Guarantees would be kept alive, was

not adhered to, and the respondent failed to keep the said Bank Guarantees alive.

3. At the outset, learned counsel appearing for the petitioner submits that she is not the main counsel, and seeks time for filing rejoinder.

4. Per contra, learned Senior Counsel appearing for the respondent submits that the present petition has become infructuous, as Arbitral Award has already been passed in favour of the respondent.

5. Learned Senior Counsel appearing for the respondent submits that the present matter pertains to the Bank Guarantees, which had to be kept alive by the respondent. He submits that the direction had been made to keep the said Bank Guarantees alive, only with a view to secure the claims of the petitioner. He submits, that the claims of the petitioner have since been rejected, by the learned Arbitrator in the Arbitral Award dated 30th December, 2021, which has been passed in favour of the respondent. Further, five out of the eight referred Bank Guarantees, were released by the petitioner itself, therefore, there is no cause of action against the respondent for proceeding under the Contempt jurisdiction.

6. Considering the submission made by learned Senior Counsel for the respondent, this Court has taken up the matter for hearing.

7. Facts in brief, are that, a petition, being *OMP No. 932/2011,* under Section 9 of Arbitration and Conciliation Act, 1996 was instituted by respondent/M/s DSC Limited, in which, it was *inter-alia* prayed that pending adjudication of the disputes between the parties, the court may restrain the petitioner herein from levying the compensation amount and/or to recover payments pursuant to Clause 2 of the General Conditions of the Contract.

8. Thus, by order dated 24th July, 2014, passed in *OMP No. 932/2011*, directions had been passed, in the following manner:

> *"1. I am informed by the counsels for the parties that an arbitrator has already been appointed.*
>
> *2. **Mr. Dholakia, who appears for the petitioner, has drawn my attention to order dated 16.12.2011, as modified by order dated 21.12.2011. By virtue of this order, the petitioner was directed to keep the bank guarantees referred to in Annexure P13 (page 99 volume II of the paper book) alive**.*
>
> *3. **Mr. Dholakia says that the said bank guarantees are alive, and that, the petitioner will continue to keep them alive during the pendency of the dispute before the Arbitrator and, therefore, for a further period of eight weeks post the pronouncement of the award**.*
>
> *4. **Having regard to the above, both counsels agree that the captioned petition can be placed before the learned Arbitrator, who will adjudicate upon the same by treating it as an application under Section 17 of the Arbitration and Conciliation Act, 1996 (in short the Act)**.*
>
> *4.1. It is also agreed that pending adjudication of the petition, interim order dated 16.12.2011, as modified by order dated 21.12.2011, will continue to operate.*
>
> *5. At this stage, learned counsel for the petitioner draws my attention to letter dated 1.3.2012 (Annexure P16, page 59 of the paper book), whereby an intimation has been sent to the petitioner with regard to the appointment of the arbitrator.*
>
> *5.1. To be noted, the arbitrator appointed by the respondent is one Mr. K.N. Agarwal. Retired DG(W), CPWD.*
>
> *5.2. The said letter is accompanied by a document, which details the list of claims.*
>
> *5.3. In connection with the said document, Mr. Dholakia says that in so far as claim No. 1 is concerned, the remarks column shows that what the arbitrator is called upon to do is to determine the arbitrability of the said claim. Mr. Dholakia says that the apprehension of the petitioner is that, in case, the arbitrator, comes to the conclusion that the dispute is arbitrable, he may not proceed further to decide the claim on merits.*
>
> *xxx xxx xxx*

8. Mr. Salwan, raises another issue which is that the respondents would need protection with regard to release of payments that the petitioner may call upon them to make based on its reading of the terms of the contract obtaining between parties.

8.1. In this connection, all that can be said that the respondents are at liberty to move ah appropriate application. The learned Arbitrator will pass an order in accordance with; law after hearing the parties.

9. ***It is made clear though that if an award' is passed which is adverse to the interest of the petitioner, the respondents shall not encash the bank guarantees, which are the subject matter of the present petition, for a period of four weeks to enable the petitioner to take appropriate steps, albeit in accordance with law.***

xxx xxx xxx"

(Emphasis Supplied)

9. Perusal of the aforesaid order shows that the intent of the order dated 24th July, 2014, was to protect the interest of the petitioner herein as regards the claims of the petitioner against the respondent. The Bank Guarantees in question were required to be kept alive during the pendency of the arbitration proceedings, and for a further period of eight weeks, post the pronouncement of the Award.

10. Subsequently, the learned Arbitrator gave his Award on 21st December, 2017. In the said Award, the learned Arbitrator refused to adjudicate claim no. 1 of the respondent herein, pertaining to levy of liquidated damages. Thus, the said Award was challenged by the respondent herein in *OMP (COMM) 185/2018,* which came to be disposed of vide order dated 01st May, 2018, in the following manner:

"xxx xxx xxx

4. Issue notice. Learned counsel for the respondent accepts notice.

5. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 21.12.2017 (hereafter 'the impugned award') rendered by the Arbitral Tribunal constituted by a Sole Arbitrator *(hereafter 'the Arbitral Tribunal').*

6. Mr. Dholakia, learned counsel appearing for the petitioner has restricted the challenge to the extent of claim no.1 which pertains to the petitioner's claim regarding levy of liquidated damages. The aforesaid disputes were referred to the arbitrator by a letter dated 01.03.2012. The contents of the said letter read as under:-

> *"Whereas M/s DSC Ltd. vide their letter dt. 15.12.2011 have written that certain disputes have arisen between the above noted parties in respect of the above noted work, I, S.A. Khan, Chief Engineer, Flyover Project Zone F-1, PWD, New Delhi by powers conferred on me under clause-25 of the said agreement hereby appoint Sh. K.N. Agarwal, (Retd. DG(W), CPWD)) as sole Arbitrator to decide and make his award regarding the claims/disputes by M/s DSC Ltd., if any, shown in the statement enclosed subject always, however, to their admissibility under clause-25 of the aforesaid agreement. The Arbitrator shall determine the arbitrability of claim No.1 under the provisions of agreement.*
>
> *The amount of the claims in disputes being above Rs. 1,00,000/- the arbitrator shall give reasons for the award."*

7. The Arbitral Tribunal has declined to adjudicate claim no. 1 on the ground that the reference is incomplete. According to the Arbitral Tribunal, the only dispute referred was with regard to the question of arbitrability of claim no. 1. Since, according to the Arbitral Tribunal, the scope of arbitration did not include any further adjudication, the Arbitral Tribunal has declined to consider the said claim.

8. There is much merit in Mr Dholakia's contention that the letter dated 01.03.2012 cannot be read in the manner in which it has been read by the Arbitral Tribunal inasmuch as the claim no. 1, including the question of arbitrability of the said claim, was referred to the Arbitral Tribunal and the reference was not limited to the question of arbitrability of claim no. 1 alone.

*9. **In the aforesaid view, the impugned award to the extent it deals with claim no. 1 is set aside. The petitioner would be at liberty to seek reference of its claim no. 1 (relating to the levy of liquidated damages) to arbitration. It is clarified that all rights and contentions of the parties in this regard including whether the said dispute is arbitrable are reserved.***

10. The petition is disposed of in the above terms.

xxx xxx xxx"

(Emphasis Supplied)

11. Thus, vide aforesaid order dated 01st May, 2018, the Arbitral Award dated 21st December, 2017, was set aside in regard to the finding under Claim no. 1 of the respondent herein. The respondent was granted liberty to seek fresh reference in that regard. Thus, another Arbitrator was appointed to adjudicate Claim No.1 of the respondent herein.

12. The present petition was filed during the pendency of the aforesaid proceedings before the subsequent Arbitrator on the ground that the subsequent arbitration proceedings before the New Arbitrator, were part of the old arbitration proceedings, which culminated vide Award published on 21st December, 2017.

13. Subsequently, during the pendency of the present petition, final Arbitral Award dated 30th December, 2021 has been pronounced, the relevant paragraphs of which, read as under:

> *"xxx xxx xxx*
>
> *55. **And thus, it is held that neither the original time of contract nor the extended time were of the essence of the contract.***
>
> *xxx xxx xxx*
>
> *56.5 **And therefore, mentioning "without prejudice to the right of Government to recover liquidated damages in accordance with the provisions of clause 2 of the said agreement. "is of no consequence.***
>
> *xxx xxx xxx*
>
> *57.4 **<u>Therefore, since time was not the essence of the contract, the levy of compensation for Liquidated damages by the Respondent is not justified on this count also</u>.***
>
> *xxx xxx xxx*

58.4 ***<u>And therefore, I agree with the Claimant's argument that it completed the work within the extended date of completion and on this count also, the Respondent is not entitled to levy any compensation under clause 2 of the contract</u>.***

xxx xxx xxx

62.14 ***<u>It is therefore held that since the Respondent has not suffered any loss as admitted and certified by the Respondent itself, the levy of compensation on account of liquidated damages is not justified in terms of law</u>.***

xxx xxx xxx

63.5 ***<u>In view of above, it is held that since delay in handing over land to the Claimant was more than six months, condition No. 4 at page 10 of the agreement disentitles the Respondent from levying any compensation for delay and the compensation levied by the Respondent is violative of the contract provisions</u>.***

xxx xxx xxx

64.7 ***<u>I therefore conclude that the answer to the question as to 'Whether Claimant was responsible for delay in the work as contended by the Respondent?'. is in NEGATIVE</u>.***

xxx xxx xxx

66. ***<u>To sum up, levy of compensation by the Respondent under clause 2 of the contract is not justified considering the facts and circumstances of the case & contract provisions and also bad in law due to following reasons:</u>***

> ***<u>1. Since neither the contracted time nor the extended time was of the essence of the contract, the levy of compensation for Liquidated damages by the Respondent under clause 2 of the contract is not justified.</u>***
>
> ***<u>2. Since Claimant completed the work within extended date of completion i.e. 31.10.2011, Respondent is not entitled to levy any compensation under clause 2 of the contract.</u>***
>
> *3. Even for the argument's sake, if it is assumed that the provisional extensions were provisional only and these were not final even after expiry of the provisionally extended date, and the*

Respondent had reserved its right to levy compensation; the fact remains that the Respondent granted regular valid extension only up to 30.06.2010 and did not impose any compensation under clause 2 for work not been completed by this extended date. The Respondent did not fix any new date for completion of the work and the work was allowed to be executed by the Claimant and performance accepted by the Respondent even after this extended date. Not fixing any new date of completion after expiry of such extended date makes the time at large and only obligation of the Claimant contractor remains to complete the work in reasonable time; and LD clause becomes inapplicable. Consequently, the Respondent is not entitled to levy any compensation under clause 2 of the agreement.

*4. **Since the Respondent has not suffered any loss, as admitted by the Respondent itself, the levy of compensation on account of liquidated damages is not justified.** It is unilateral, categorical admission & certification of the fact, on the body of EOT Proforma, in unequivocal terms by the Respondent Executive Engineer, who happens to be the Engineer-in-Charge, that the Govt. has not suffered any damages on account of this delay.*

*5. **Since delay in handing over major portion of land to the Claimant was more than six months, condition No.4 at page 10 of the agreement disentitles the Respondent from levying any compensation for delay and the compensation levied by the Respondent is violative of the contract provisions.***

*6. **The entire delay in the execution of work was beyond the control of the Claimant and Claimant was not responsible for delay in the work as contended by the Respondent**. This is further strengthened from the facts that (1) Respondent shifted Milestones as per clause 5 of the agreement without deducting or withholding any amount on account of these Milestones, (2) Respondent did not withheld any amount on account of non-achievement of any Activity Wise Milestones' as provided at page 26 d the contract, (3) Respondent also did not deduct or withheld any amount in case of not achieving the targets for any activity as per condition mentioned at page 55 and 56 of the agreement.*

xxx xxx xxx

AWARD:

*67. **I declare that the levy of compensation upon the Claimant under clause 2 is unjustified in terms of the contract**.*

*68. **<u>Counter Claim No.1</u>: Recovery on account of levy of compensation under clause 2 of the agreement.***

Rs. 26,50,43,038/-

xxx xxx xxx

*68.3. **<u>I have already concluded and declared that the levy of compensation upon the Claimant under clause 2 of the agreement is unjustified in terms of the contract. Therefore, there is no question any recovery on this account and counter claim of the Respondent fails.</u>***

AWARD:
*68.4 **<u>I award NIL amount against Counter claim No. 1 in favour of the Respondent</u>**.*

xxx xxx xxx

*70. **COST:***

*70.1. **<u>Claimant has succeeded in its claim and the Respondent has failed in its counterclaim. Cost has been claimed by the Respondent under counter claim No. 2 and no cost has been claimed by the Claimant. I, therefore, decide that the parties will bear their own cost</u>**.*

*70.2 **AWARD Under Section 38(2) of the Arbitration and Conciliation Act**.*

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*70.2.12 **In view of the above, Under Section 38(2) of the Arbitration and Conciliation Act, I award a sum of Rs. 13,45,000/- in favour of the Claimant.***

xxx xxx xxx

71. Summary of AWARD is given below:

Claim No.	***Description of Claim/Counter Claim***	***AWARD***
	<u>CLAIM:</u>	
Claim No. 1	*On account of Declaratory award that levy*	***I declare that the levy of compensation***

	of compensation under clause 2 is unjustified in terms of the contract.	***upon the Claimant under clause 2 is unjustified in terms of the contract.***
Counter Claim No. 1	*Recovery on account of levy of compensation under clause 2 of the agreement Rs. 26,50,43,038/-*	***NIL***
COST	*Counter Claim No. 2: Cost of arbitration – Rs. 17,45,000/-* *Award under Section 38(2) of A& C Act.*	*Both the parties will bear their respective costs.* *Rs. 13,45,000/- in favour of the Claimant.*

xxx xxx xxx

V. OVERALL CONCLUSION:

I. Levy of compensation upon the Claimant under clause 2 is held as unjustified in terms of the contract & law with its attached consequences.

II. Both the Counter claims of the Respondent fail.

III. Respondent shall pay a sum of Rs.13,45,000/- (Rupees Thirteen Lakh, Forty-Five Thousand Only) to the Claimant under Section 38(2) of A & C Act, 1996, as amended in 2015.

xxx xxx xxx"

(Emphasis Supplied)

14. Reading of the aforesaid extract of the Arbitral Award dated 30th December, 2021, shows, that the counter claims of the petitioner herein,

have been rejected. The Arbitral Award has been passed in favour of the respondent herein, wherein it is directed that the petitioner herein shall pay a sum of ₹ 13,45,000/-, to the respondent herein.

15. This Court also notes the submission made by learned Senior Counsel for the respondent that the statement was made by the respondent with respect to keeping the Bank Guarantees alive, only for the purposes of securing the amount of compensation, which the petitioner had imposed upon the respondent, under Clause 2 of the agreement.

16. This Court notes that by way of the aforesaid Award, the counter claim of the petitioner herein, as regards levy of compensation, has already been rejected as unjustified, in terms of the contract between the parties.

17. Thus, the relevance of the order dated 24th July, 2014, recording the statement of respondent for keeping the Bank Guarantees alive, no longer subsists, and has become obliterated, in view of the subsequent developments. Thus, there is no occasion for the respondent to keep the Bank Guarantees alive for a claim, which has already been rejected by the learned Arbitrator.

18. On account of the aforesaid, it is manifest that in view of the Arbitral Award, the claim of parties has reached its finality with regard to the said Arbitral proceedings. Therefore, an order passed during the course of the proceedings, cannot survive, and can no longer be said to be enforceable.

19. This Court also notes the reply filed on behalf of the respondent, wherein, the respondent has given the following explanation:

> *"xxx xxx xxx*
>
> *6. The aforesaid premise and contention of the Petitioner, however, is wholly erroneous, misleading and misconceived. In this respect, for ease of reference, the Respondent herein has tabulated its response*

qua each of the Bank Guarantees referred to by the Petitioner in its Petition, as under:

S. NO.	***Bank Guarantee No.***	***Issuing Bank***	***Amount***	***Original Date of Issuance***	***Valid till***	***Respondent's Response***
1.	*0007BG00233608 (inadvertently mentioned as 14010PGO8345002)*	*ICICI Bank*	*7,00,00,000/-*	*17.10.2008*	*02.03.2017 (even as per Petitioner's Statement of Defence filed in the Arbitral Proceedings, more specifically in Para 10.1 thereof)*	*As per practice, the beneficiary under the Bank Guarantee had to send a request for extension/ encashment, as the case may be, before the expiry of the Bank Guarantee. The said Bank Guarantee could not have been extended by M/s DSC Limited without a request letter in this regard by the beneficiary i.e. the Petitioner.* *The aforesaid position is fortified by the fact that the Petitioner had been sending request for extension within the validity period of the Bank Guarantee, basis which the said Bank Guarantee came to be extended by the Bank from time to time. The same is evident from some of such letters dated 16.08.2016, 14.09.2016, 21.10.2016, 23.11.2016, issued by the Petitioner to the Bank, which are collectively annexed*

						herewith as Annexure R-1 (Colly). *However, the Petitioner's last request for extension was made only on 04.03.2017 i.e. after expiry of the validity of the Bank Guarantee on 02.03.2017. Having failed to act in time, the Petitioner cannot seek to hold M/s DSC I Limited responsible for lapse of the said Bank Guarantee, much less allege 'wilful' disobedience on the part of M/s DSC Limited in having to keep the same alive.* ***With respect to the above, it would also be otherwise relevant to mention that M/s DSC Limited in all bonafides had sent a request for extension of the subject Bank Guarantee to the Bank vide letter dated 13.02.2017, which was received by the Bank on 01.03.2017. However, the Bank orally informed M/s DSC Limited that since the Petitioner/Beneficiary had not sent its request for***

						extension by the said date, the Bank would not accept M/s DSC Limited's extension. request for Accordingly, though the said letter was received on 01.03.2017 by the Bank, the same was returned back to M/s DSC Limited. ***The Petitioner's request for extension, being its letter dated 04.03.2017 i.e. after the expiry of the Bank Guarantee on 02.03.2017, was physically served upon M/s DSC Limited only on 20.03.2017. In this respect, it would be relevant to mention that the said letter enclosed a return envelope along with a Speed Post receipt dated 07.03.2017, purportedly addressed to M/s DSC Limited. A perusal of the said enclosure, however, would show that the return envelope bore the wrong address of M/s DSC Limited, basis which it appears that the same was returned back to the Petitioner.*** ***Be that as it may,***

						upon physically Petitioner's receiving the request for extension on 20.03.2017, M/s DSC Limited once again submitted request for extension of Bank Guarantee to the Bank on 24.03.2017. *True copy of M/s DSC Limited's request letter dated 13.02.2017, received by the Bank on 01.03.2017 and 24.03.2017 is annexed herewith as* ***Annexure R-2.*** *True copy of Petitioner's request letter dated 04.03.2017, along with its enclosures, as served upon M/s DSC Limited is annexed herewith as* ***Annexure R-3.*** ***However, as brought out above, since the Petitioner's request was much after the expiry of the Bank Guarantee, the same was not renewed by the Bank.*** ***In view of all the above, there was no non-compliance on part of M/s DSC***

						Limited as regards its statement made before this Hon'ble Court on 24.07.2014, much less any 'wilful' disobedience, as sought to be contended by the Petitioner.
2.	*Old BG No. 5079408B G0001611* *NewBG No. –* *0410916B G1 000454*	*State Bank of Patiala*	*,25,21,519/-*	*16.10.2008*	*Valid till 30.06.2022 and Claim period expired on 30.06.2023.*	***The subject Bank Guarantee was valid and subsisting till 30.06.2022, having a claim period till 30.06.2023 - all of which dates were much after the expiry of 8 weeks from the date of passing of the Final Arbitral Award dated 30.12.2021.*** ***Therefore, M/s DSC Limited had complied with its undertaking in keeping the subject Bank Guarantee alive, as was given before this Hon'ble Court on 24.07.2014.*** *True copy of the last extension dated 16.06.2021 of the said Bank Guarantee issued by the Bank, is annexed herewith as Annexure R-4.* ***Such being the case, there is no basis whatsoever for***

						the Petitioner to maintain the present contempt proceedings qua the subject Bank Guarantee.
3.	*517/2008*	*Canara Bank*	*1,68,00,000/-*	*23.07.2008*	*31.03.2017 (with a valid Claim period upto 30.09.2017)*	***With reference to the said Bank Guarantee, the Petitioner vide its Letter dated 22.03.2017 sent a request for extension of the validity period to the Bank.*** *True copy of the Petitioner's letter dated 22.03.2017 is annexed herewith as* ***Annexure R-5.*** ***It would also be relevant to mention that M/s DSC Limited also issued a request letter for extension of the subject Bank Guarantee on 24.03.2017,*** *true copy of which is annexed herewith as* ***Annexure R-6.*** ***As such, there was no disobedience, much less 'wilful' disobedience on the part of M/s DSC Limited, as sought to be contended by the Petitioner.*** ***However, the Bank neither extended nor released the proceeds of the said***

						Bank Guarantee in favour of the Petitioner, who also did not follow-up on the same, even though the claim period of the subject Bank Guarantee subsisted till 30.09.2017. ***Having failed to act in time, the Petitioner cannot seek to hold M/s DSC Limited responsible for lapse of the said Bank Guarantee, much less allege 'wilful' disobedience on the part of M/s DSC Limited in having to keep the same alive.***
4.	*2995DT*	*State Bank of Patiala*	*2,65,04,303/-*	*20.08.2010*	*05.05.2018*	***The subject Bank Guarantees were released by the Petitioner itself in favour of M/s DSC Limited on 05.05.2018. The said aspect is borne out from the endorsement captioned 'Released' made by the Petitioner itself on the subject Bank Guarantees on 05.05.2018.*** *True copies of the Bank Guarantees bearing the Petitioner's endorsement for release are annexed collectively annexed herewith as*
5.	*2997DT*	*State Bank of Patiala*	*2,65,04,303/-*	*20.08.2010*	*05.05.2018*	
6.	*2998DT*	*State Bank of Patiala*	*2,65,04,303/-*	*20.08.2010*	*05.05.2018*	

						Annexure R-7 (Colly). ***<u>Pursuant to & in line with the aforesaid endorsement for release, M/s DSC Limited issued corresponding letter dated 23.05.2018 to the Bank</u>***, *true copy of which is annexed herewith as* ***Annexure R-8.*** ***<u>Such being the case, there is no basis whatsoever for the Petitioner to maintain the present contempt proceedings qua the subject Bank Guarantees. This also shows that the present Petition is based on assertions, which are factually incorrect and have been made in a wholly irresponsible manner.</u>***
7.	*140GOPG 11297000 2*	*Canara Bank*	*97,04,303/-*	*24.10.2011*	*24.10.2011*	***<u>With reference to the said Bank Guarantee, the Petitioner vide its Letter dated 05.09.2018 sent a request for extension of the validity period thereof to the Bank.</u>*** *True copy of the Petitioner's letter dated 05.09.2018 is annexed herewith as* ***Annexure R-9****.*

						<u>It would be relevant to mention herein that such request was also made by M/s DSC Limited vide its letter dated 11.09.2018,</u> *true copy of which is annexed herewith as* ***Annexure R-10.*** ***<u>However, the Bank vide its letter dated 27.11.2018 for the first time stated that it could renew the said Bank Guarantee only upon M/s DSC Limited providing 100% margin money.</u>*** *True copy of letter dated 27.11.2018 issued by the Bank is annexed herewith as* ***Annexure R-11.*** ***<u>M/s DSC Limited, however, did not have the requisite financial capacity to provide such margin money. In this regard, it is stated that due to various issues and difficulties, which were being faced by the infrastructure/ construction sector, the projects which were undertaken by M/s DSC Limited, were delayed and/or stalled. which consequently led to M/s DSC Limited</u>***

						<u>suffering huge losses, inter- alia, on account of cost and time overruns, non-recovery of payments etc., all of which were totally beyond its control, with no support from the Employers.</u> *With respect to the above, reference & reliance is placed upon the Profit & Loss Account of M/s DSC Limited for the Financial Year 2018- 19, which is part of its Audited Financial Statement for the relevant year and filed with the Registrar of Companies. True copy of the Profit & Loss* *Account of M/s DSC Limited for the Financial Year 2018-19 (being part of the Audited Financial Statement of the said year) is annexed herewith as* ***Annexure R-12.*** ***<u>In such view, there was no disobedience, much less 'wilful' disobedience on the part of M/s DSC Limited in keeping the said Bank Guarantee alive.</u>***
8.	*5079410B*	*State*		*21.10.2010*	*12.12.2013*	***<u>The subject Bank</u>***

	G0003700	*Bank of Patiala*	*2,65,04,300/-*			***<u>Guarantee was released by the Petitioner itself in favour of M/s DSC Limited. The said aspect is borne out from the endorsement captioned 'B.G. Released in favour of M/s DSC Ltd' made by the Petitioner itself on the subject Bank Guarantee.</u>*** *True copy of the Bank Guarantee bearing the Petitioner's endorsement for release is annexed herewith as* ***Annexure R-13****.* ***<u>Pursuant to & in line with the aforesaid endorsement for release, M/s DSC Limited issued corresponding letter dated 12.12.2013 to the Bank</u>****, true copy of which is annexed herewith as* ***Annexure R-14.*** ***<u>Such being the case, there is no basis whatsoever for the Petitioner to maintain the present contempt proceedings qua the subject Bank Guarantees.</u>***

A perusal of the aforesaid table would show that the stance of the Petitioner that M/s DSC Limited did not comply with the statement *made by it before this Hon'ble Court, as recorded in Order dated 24.07.2014, is wholly erroneous, baseless and untenable.* ***Infact, as is evident from the above, 5 out of the 8 referred Bank Guarantees were released by the Petitioner itself in favour of M/s DSC Limited, and still the Petitioner has filed the present Petition seeking to initiate contempt proceeding, in a wholly irresponsible manner****.*

7. ***Without prejudice to the above, and most pertinently, the aforesaid factual position, does not in any manner whatsoever suggest any 'wilful" disobedience on the part of M/s DSC Limited as regards continuing to keep the remaining 3 out of 8 Bank Guarantees alive. The said position assumes significance, inasmuch as, absence of 'wilful" disobedience would not warrant contempt proceedings, as have been preferred by the Petitioner herein.***

With respect to the above, it would also be relevant to mention that the Petitioner has in its Petition failed to make out a case of 'wilful' disobedience on part of M/s DSC Limited, much less having to substantiate the same. Having not so done, it is most respectfully and humbly stated that the present contempt proceedings are not maintainable, and which, merit being dismissed*.*

xxx xxx xxx"

(Emphasis Supplied)

20. Considering the aforesaid reply, it cannot be said that there is 'willful' disobedience by the respondent herein, which is the key factor for proceeding under contempt proceedings. The respondent has explained the ensuing circumstances, as regards the validity of the Bank Guarantees. It has been held time and again, that to hold a party guilty of contempt, the disobedience should be willful. The element of willingness, is an indispensible requirement, to charge under the Contempt Act. Thus, in the case of ***Ram Kishan Versus Tarun Bajaj and Others***[1], Supreme Court has held as follows:-

"xxx xxx xxx

11. *The contempt jurisdiction conferred on to the law courts power to punish an offender for his wilful disobedience/contumacious*

[1] ***(2014) 16 SCC 204***

conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. ***Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither be fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of the contempt jurisdiction on mere probabilities***. *(Vide V.G. Nigam v. Kedar Nath Gupta [V.G. Nigam v. Kedar Nath Gupta, (1992) 4 SCC 697 : 1993 SCC (L&S) 202 : (1993) 23 ATC 400] , Chhotu Ram v. Urvashi Gulati [Chhotu Ram v. Urvashi Gulati, (2001) 7 SCC 530 : 2001 SCC (L&S) 1196] , Anil Ratan Sarkar v. Hirak Ghosh [Anil Ratan Sarkar v. Hirak Ghosh, (2002) 4 SCC 21] , Bank of Baroda v. Sadruddin Hasan Daya [Bank of Baroda v. Sadruddin Hasan Daya, (2004) 1 SCC 360] , Sahdeo v. State of U.P. [Sahdeo v. State of U.P., (2010) 3 SCC 705 : (2010) 2 SCC (Cri) 451] and National Fertilizers Ltd. v. Tuncay Alankus [National Fertilizers Ltd. v. Tuncay Alankus, (2013) 9 SCC 600 : (2013) 4 SCC (Civ) 481 : (2014) 1 SCC (Cri) 172] .)*

12. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is "wilful". The word "wilful" introduces a mental element and hence, requires looking into the mind of a person/contemnor by gauging his actions, which is an indication of one's state of mind. "Wilful" means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the

contemnor cannot be punished. *"Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct." (Vide S. Sundaram Pillai v. V.R. Pattabiraman [S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591] , Rakapalli Raja Ram Gopala Rao v. Naragani Govinda Sehararao [Rakapalli Raja Ram Gopala Rao v. Naragani Govinda Sehararao, (1989) 4 SCC 255 : AIR 1989 SC 2185] , Niaz Mohammad v. State of Haryana [Niaz Mohammad v. State of Haryana, (1994) 6 SCC 332 : AIR 1995 SC 308] , Chordia Automobiles v. S. Moosa [Chordia Automobiles v. S. Moosa, (2000) 3 SCC 282] , Ashok Paper Kamgar Union v. Dharam Godha [Ashok Paper Kamgar Union v. Dharam Godha, (2003) 11 SCC 1] , State of Orissa v. Mohd. Illiyas [State of Orissa v. Mohd. Illiyas, (2006) 1 SCC 275 : 2006 SCC (L&S) 122 : AIR 2006 SC 258] and Uniworth Textiles Ltd. v. CCE [Uniworth Textiles Ltd. v. CCE, (2013) 9 SCC 753] .)*

xxx xxx xxx

15. It is well-settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. *[See Sushila Raje Holkar v. Anil Kak [Sushila Raje Holkar v. Anil Kak, (2008) 14 SCC 392 : (2009) 2 SCC (L&S) 497] and Three Cheers Entertainment (P) Ltd. v. CESC Ltd. [Three Cheers Entertainment (P) Ltd. v. CESC Ltd., (2008) 16 SCC 592 : AIR 2009 SC 735]]*

xxx xxx xxx"

(Emphasis Supplied)

21. Similarly, in the case of ***Anil Ratan Sarakar and Others Versus Hirak Ghosh and Others***[2]**,** it has been held as follows:-

"xxx xxx xxx

15. It may also be noticed at this juncture that mere disobedience of an order may not be sufficient to amount to a "civil contempt" within the meaning of Section 2(b) of the Act of 1971 — the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act and lastly, in the

2 ***(2002) 4 SCC 21***

event two interpretations are possible and the action of the alleged contemnor pertains to one such interpretation — the act or acts cannot be ascribed to be otherwise contumacious in nature. A doubt in the matter as regards the wilful nature of the conduct if raised, question of success in a contempt petition would not arise.

xxx xxx xxx"

(Emphasis Supplied)

22. This Court also takes note of the submission made by learned Senior Counsel for the respondent that objections to the Award under Section 34 of the Arbitration and Conciliation Act, 1996 have been filed by the petitioner herein. However, there is no stay granted against the said Arbitral Award.

23. Even otherwise, this Court notes that by order dated 24th July, 2014, the respondent was to keep the Bank Guarantees alive only for a period of eight weeks, post the pronouncement of the Award. Since the Award has already been pronounced way back on 30th December, 2021, the aforesaid period of eight weeks, has long expired.

24. At this juncture, it would also be relevant to note the finding of the learned Arbitrator in the Arbitral Award dated 30th December, 2021, as regards the issue of keeping the Bank Guarantees alive. Thus, the learned Arbitrator, has held as follows:

"xxx xxx xxx

VII. ***Thus, all issues mentioned under Para 5 to Para 8 and their Sub-Paras of the Hon'ble High Court's abovementioned Order, including the issue of Bank Guarantee, were to be raised by the respective parties before the Ld. Arbitrator Shri K.N. Agrawal, who was already appointed and the Ld. Arbitrator was to pass the order after hearing the parties.***

44.5.4. ***It has not been brought out by the parties whether the said petition was placed, and above issues were raised by the respective parties before the Ld. Arbitrator Shri K.N. Agrawal, or not; if the petition was placed and issued were raised then what were the***

<u>decisions of the Ld. Arbitrator; and if not, then what were the reasons of not placing the petition and raising the issued before the Ld. Arbitrator Shri K.N. Agrawal.</u>

44.5.5. ***<u>It is also a fact to that none of the parties have made any application, before this Tribunal, under section 17 of the Act for any interim measure of protection in respect of any matter mentioned under section 17 (1) (ii) of the Act.</u>***

xxx xxx xxx

44.5.7. Respondent, in its submissions before this Tribunal, has stated that the Claimant had committed contempt of the Hon'ble High Court of Delhi by not keeping the Bank Guarantees alive. ***<u>However, it appears that neither the Respondent placed the matter before the Ld. Arbitrator Shri K.N. Agrawal for his decision nor it filed any contempt petition against the Claimant in the Court till 15.01.2020. It is to mention here that the Arbitral Tribunal of Ld. Arbitrator Shri K.N. Agrawal was in existence for more than 3 years after the Order was passed by Hon'ble High Court on 24.07.2014 in O.M.P. 932/2011 as the Award was issued by the Ld. Arbitrator on 21.12.2017. As intimated by the Respondent vide its letter dated 03.02.2020, a Contempt Petition was filed by the Respondent in the Hon'ble High Court of Delhi which was admitted on 15.01.2020.</u>***

xxx xxx xxx"

(Emphasis Supplied)

25. The facts and circumstances of the present case clearly show that upon pronouncement of the Arbitral Award dated 30th December, 2021, the statement of the respondent herein to keep the Bank Guarantees alive, merged with the final Arbitral Award, wherein, the counter claims of the petitioner herein, have been rejected. Rather, directions have been issued against the petitioner herein to pay certain sums to the respondent. Thus, the natural corollary of passing of the Arbitral Award is that there are no claims of the petitioner against the respondent, and no amounts are due and payable by the respondent to the petitioner herein.

26. On account of the subsequent events culminating in an Arbitral

Award in favour of the respondent, and against the petitioner, it cannot be said that there are any existing or continuing directions of this Court, which have been violated by the respondent.

27. At this stage, it would be relevant to note the judgment passed by a coordinate Bench of this Court, in the case of ***M.M.T.C. LTD. Versus Priyanka Overseas Ltd. and Another***[3], wherein, it has been held that punishment under contempt, requires willful disobedience of an existing or continuing direction of a court. Thus, it has been held, as follows:

> *"xxx xxx xxx*
>
> *10. **The same is unacceptable for the reason that the order of which contempt is alleged must be existing. In addition, it is a settled principle in law that punishment under contempt requires wilful disobedience of an existing and continuing direction of this court. Reliance is placed on the judgment of the Hon'ble Supreme Court dated 21.07.2008 in Patel Rajnikant Dhulabhai and Anr. v Patel Chandrakant Dhulabhai and Ors., Cont.Cas.(C) 12-13 of 2006 in SLP(C) 7659-7660 of 2004. The operative portion reads as under-:***
>
> > *"48. **Reading of the above clause makes it clear that the following conditions must be satisfied before a person can be held to have committed a civil contempt;***
> >
> > ***(i) there must be a judgment, decree, direction, order, writ or other process of a Court (or an undertaking given to a Court);***
> >
> > ***(ii) there must be disobedience to such judgment, decree, direction, order, writ or other process of a Court (or breach of undertaking given to a Court); and***
> >
> > ***(iii) such disobedience of judgment, decree, direction, order, writ or other process of a Court (or breach of undertaking) must be wilful.***
>
> *11. **Reliance is further placed on Star Residents Society (Regd.) and Others versus M.N. Bhardwaj and Others (2001) SCC OnLine Del 1294, wherein the operative portion reads as under:-***

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[3] ***2023 SCC OnLine Del 6402***

> *"5. **Be it may, it would not be sufficient to proceed for initiating proceedings for contempt, which require blatant defiance of an existing order, which was missing in this case.** Counsel then attempted to urge that even after 19.1.2000, construction was carried out. He placed reliance on photographs taken on 26.1.2000 and 72.2000 to show the progress in construction. Examination of the photographs prima facie shows that the shutterings had been removed. Although on the first flush, it appears that there is progress of construction work. But a careful examination reveals it to be a case of removal of shuttering. In any case it is not one of those cases where it can be stated with certainty that there has been contumacious defiance of the order passed, which is required for initiating proceedings for contempt."*

*12. **As of today, no amount is found due and payable by the respondent to petitioner. Hence, the respondent cannot be said to be flouting the directions of this court, when in view of the subsequent developments, the order dated 23.03.2007, of which non-compliance is alleged, no longer stands or exists.***

13. The contempt petition is accordingly dismissed.

xxx xxx xxx"

(Emphasis Supplied)

28. Accordingly, it is held that in view of the subsequent developments and the Arbitral proceedings having culminated into an Arbitral Award, the contempt proceedings in the present matter, cannot survive. In a case, where the order in contempt, has lost its force or relevance, there is no occasion for this Court to pass any orders in contempt proceedings.

29. Considering the aforesaid, no merit is found in the present petition. The same is accordingly, dismissed.

MINI PUSHKARNA, J

MAY 22, 2024
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