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

**Date of Decision: 28<sup>th</sup> March 2024**

+ ARB. A. (COMM.) 18/2024 & I.A. 7167/2024, I.A. 7168/2024, I.A. 7169/2024

ROADWAY SOLUTIONS INDIA INFRA LIMITED ..... Appellant

Through: Mr. Arvind Nayar, Sr. Advocate with  
Mr. Samir Malik, Mr. Shahan Ulla,  
Mr. Varun Kalra and Mr. Krishan  
Kumar, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through: Mr. Ankur Mittal, Mr. Abhay Gupta  
and Mr. Ashish Gajwani, Advocates.

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**  
**J U D G M E N T**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present appeal filed under section 37(2)(b) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the appellant (claimant in the arbitral proceedings) impugns order dated 27.03.2024 made by a 03-Member Arbitral Tribunal, on an application under section 17 of the A&C Act seeking certain interim reliefs.

2. The application contained three prayers, which are read as follows :

*"128. The Claimant therefore prays that pending the hearing and final disposal of the Arbitral Proceedings, the passing of the Award and the enforcement thereof, this Hon'ble Tribunal be pleased to:*



*B.<sup>1</sup> Pass an order of temporary injunction staying the effect, operation, and implementation of the Termination Notice dated 24.05.2023 issued by the Respondent to the Claimant [Exhibit C79], and any and all consequences thereof and consequential steps taken pursuant thereto by the Respondent;*

*C. Pass an order of temporary injunction restraining the Respondent from proceeding with or taking any steps in furtherance of RFP-1 [Exhibit C771]; RFP-2 [Exhibit C787]; NIT-I [Exhibit C75]; or NIT-2 [Exhibit C767];*

*D. Pass an order of temporary injunction restraining the Respondent, its principal officers, servants, agents and all other acting for, and on their behalf, by or through or under them, from encashing the following bank guarantees submitted by the Claimant:*

*i. Performance Security Bank Guarantee dated 27.06.2022 bearing No. TTGGPGE221780068 issued for an amount of Rs. 12,29,30,754/- by the Claimant;*

*ii. Additional Performance Security Bank Guarantee dated 27.06.2022 bearing No. TTGGPGE221780066 issued for an amount of Rs. 3,51,37,643/- by the Claimant [Exhibit C5 Colly];*

*E. Direct the Respondent to maintain status quo with respect to the Performance Security Bank Guarantee dated 27.06.2022 and Additional Performance Security Bank Guarantee dated 27.06.2022;*

*F. Grant ad-interim relief in terms of Prayers A to D above.*

*G. Make and pass such further and/or other orders or grant such other reliefs as this Hon'ble Tribunal deems fit and proper, in the facts and circumstances of the present case."*

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<sup>1</sup> prayers begin with prayer 'B'



3. As perusal of the impugned order shows that the learned Tribunal has dealt with the matter in considerable detail and has addressed all three principal prayers made in the application individually.
4. As recorded in the impugned order, the factual matrix relevant for purposes of the present appeal is as follows :
  - 4.1. Disputes have arisen between the appellant and the respondent from Contract Agreement dated 19.07.2022.
  - 4.2. In the context of the disputes, the learned Tribunal was constituted on 22.04.2023.
  - 4.3. The appellant approached this court by way of O.M.P.(I)(COMM.) No. 41/2023 filed under section 9 of the A&C Act, seeking the *ad-interim* relief of restraining the respondent from encashing 02 bank guarantees both dated 27.06.2022 and for staying the effect and operation of notice dated 31.01.2023 issued by the respondent, whereby the respondent had expressed its intention of terminating the contract.
  - 4.4. However, while the section 9 petition was pending before this court, the respondent sent an e-mail dated 10.02.2023 to Canara Bank invoking the 02 bank guarantees to the tune of about Rs. 5.35 crores. Subsequently, however by an e-mail dated 10.02.2023, the respondent withdrew the invocation of the bank guarantees, on the premise that the amount in question already stood secured in favour of the respondent.
  - 4.5. By way of order dated 13.02.2023 made in O.M.P.(I)(COMM.) No. 41/2023, a Co-ordinate Bench of this court directed that



notice dated 31.01.2023, issued by the respondent expressing their intent to terminate the contract with the appellant, shall be kept in abeyance.

- 4.6. Subsequently however, *vide* order dated 24.05.2023, the section 9 petition was dismissed; whereupon the respondent issued fresh Notices Inviting Tender ('NITs') and Requests for Proposal ('RFPs') on the same date; and also terminated the contract in terms of clause 63.1 of the Conditions of Particular Application ('CoPA') governing the contract.
- 4.7. This led the appellant to file an intra-court appeal bearing FAO(OS)(COMM) No. 114/2023; in which, *vide* order dated 25.05.2023, the Division Bench granted to the appellant limited interim relief restraining the encashment of the bank guarantees, provided that they had not already been encashed.
- 4.8. Thereafter, *vide* judgment dated 29.05.2023, the Division Bench disposed-of the appeal, granting to the appellant liberty to move an application under section 17 of the A&C Act before the learned Tribunal seeking necessary reliefs, while directing that the stay on encashment of the bank guarantees would *continue till the first sitting* of the learned Arbitral Tribunal.
- 4.9. The learned Tribunal held its first sitting on 03.06.2023 and extended the interim order made by the Division Bench; which order continued till the passing of impugned order dated 27.03.2024.



- 4.10. For the sake of completeness it may be noted, that in the meantime, the constitution of the learned Tribunal was changed in its entirety by reason of certain intervening circumstances.
5. In this backdrop, the learned Tribunal has dealt with each of the reliefs sought in the section 17 application in the following way :
- 5.1. Insofar as the relief of injuncting the respondent from proceeding with the fresh RFPs and NITs is concerned, the learned Tribunal has held that that relief had become infructuous since the respondent has already gone ahead and awarded the contract to a third-party, and the validity of termination of the appellant's contract is required to be decided in the main proceedings.
- 5.2. In relation to the other relief, *viz.* of discontinuance or disengagement of the appellant from other on-going projects and disqualifying/debarring the appellant from participating in future tenders is concerned, the respondent took the stand that the pendency of the arbitral proceedings would have no adverse effect on the 04 other projects that the appellant was handing for the respondent at present, noting that 02 of those projects were in fact awarded after termination of the contract that is subject matter of the arbitral proceedings. As recorded by the learned Tribunal, the respondent made it clear that the fate of the section 17 application would have no adverse impact on the said 04 projects, which would be governed by their own terms and conditions. This stand was taken by the respondent by way of an affidavit dated 08.03.2024 filed before the learned



Tribunal, and was based on a policy of the Ministry of Road Transport & Highways of India, which is binding upon the respondent. The respondent however contented that they would be free to take their own decision in relation to *other projects* and in relation to the appellant's disqualification/debarment for participating in future contracts, though these would not be impacted by the decision in the section 17 application.

- 5.3. The learned Tribunal has then proceeded to decide the interim prayer against threat of the appellant being disqualified from participating in future RFPs/NITs. In this behalf, suffice it to say, the learned Tribunal has *held in favour* of the appellant, and after a fairly detailed discussion, has come to the conclusion that the appellant satisfies all three tests, viz. of making-out a *prima-facie* case, of satisfying the learned Tribunal that balance of convenience lies in the appellant's favour, and also that irreparable loss and injury would be suffered by the appellant as a consequence. Accordingly, the learned Tribunal has held in favour of the appellant, granting a limited interim protective order as to the appellant's entitlement to participate in future tenders that may be issued by the respondent.
6. However, insofar as the relief sought against invocation of the 02 bank guarantees is concerned, the learned Tribunal has *held against* the appellant. This is the essential grievance raised by the appellant by way of the present appeal.



7. On this point, the impugned order proceeds in the following backdrop:

**“Injunction in respect of Bank Guarantees**

*47. As we have pointed out in the narration of facts, the claimant submitted two Bank Guarantees dated 27-06-2022 for a total amount of Rs. 12,29,30,754/-. On 10-02-2023, the respondent sent a mail to the Canara Bank invoking the Bank Guarantees to the extent of Rs. 5,35,72,684/-. But this invocation was withdrawn immediately, by the respondent, as they found that the payments due to the claimant under the Interim Payment Certificates, was adequate to secure their interests.*

*“48. From 13-02-2023 to 24-05-2023, the claimant stood protected by an interim order passed by the learned Single Judge of the Hon’ble High Court of Delhi. But after the dismissal of the application under Section 9 by the learned Single Judge on 24-05-2023, the contract was terminated and fresh RFP / NIT was issued. Therefore, the Division Bench of the High Court passed a limited interim order on 29-05-2023 directing the respondent not to invoke the Bank Guarantees. The said order was continued by Tribunal. In this background, it is to be seen whether the claimant should continue to have the benefit of an interim injunction restraining the respondent from invoking the Bank Guarantees.”*

8. Thereafter, the learned Tribunal goes-on to consider the statements filed by each of the parties, in relation to the value of the work completed by the appellant, as indicated in certain Interim Payment Certificates. The learned Tribunal observes that there is huge variation between the amount claimed by the appellant to be due and the amount that the respondent says is payable. The learned Tribunal then observes as follows :

*“51. From the statements furnished by the claimant and the respondent, it is seen that there is a huge variation between the amount claimed by the claimant to be due and the amount alleged*



*by the respondent to be due to the claimant. At this stage, we will not be in a position to decide the quantum.*

*“52. If the Bank Guarantees are allowed to be invoked, the Tribunal can always direct refund, in the event of the claimant succeeding in the main proceeding. But if the invocation of Bank Guarantees is stopped, the claimant may have to pay the contractual rate of interest on the amount due, if the main proceeding is decided against them. Moreover, even if an order of restrain (sic) is issued, the claimant may have to keep the Bank Guarantees alive, during the pendency of these proceedings, thereby incurring expenditure towards bank charges.*

*“53. Therefore we do not think that an injunction restraining the respondent from invoking the Bank Guarantees should be granted.”*

(emphasis supplied)

9. As a result, the learned Tribunal has been pleased to pass the following order :

**“Result**

*In view of what is stated above, the Application filed by the claimant under Section 17 is disposed of to the following effect:-*

*(i) The prayer for interim injunction restraining the respondent from terminating the subject-contract and from proceeding with or taking any steps in furtherance of RFP-1, RFP-2, NIT-1 and NIT-2 and awarding the subject-contract to a third party is dismissed as infructuous;*

*(ii) The prayer for interim injunction restraining the respondent from invoking the Performance Security Bank Guarantee dated 27-06-2022 for an amount of Rs.12,29,30,754/- and from invoking Additional Performance Security Bank Guarantee dated 27-06-2022 for an amount of Rs.3,51,37,643/- is dismissed;*

*(iii) Till the disposal of the main arbitral proceeding, there will be a limited interim order of injunction restraining the respondent from preventing the claimant from participating in future tenders, RFPs and NITs;*



*(iv) The projects that are now ongoing namely Package-10, Satara-Kargal, Package 08 and Package 09, shall not be affected, by the termination of the subject-contract and the outcome of this Application. In other words those four contracts shall continue to be governed by their own terms and conditions and this Order shall not cast as a shadow on those four projects; and*

(v)

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(emphasis supplied)

10. The court has heard Mr. Arvind Nayar, learned senior counsel appearing for the appellant, at considerable length.
11. Mr. Nayar submits, that while on the one hand the learned Tribunal has held in the appellant's favour insofar as the three essential ingredients for granting interim relief are concerned, on the other hand, the learned Tribunal has proceeded to deny relief to the appellant insofar as invocation of the bank guarantees is concerned.
12. Mr. Nayar further argues, that as the record would show, in the proceedings filed for interim relief in this court, both the Co-ordinate Bench as well as the Division Bench, were pleased to hold in favour of the appellant and had restrained encashment of the bank guarantees, which position has now been reversed by the learned Tribunal.
13. Mr. Nayar also points-out that the learned Tribunal has given no reasons for its conclusion, permitting invocation of the bank guarantees. Senior counsel argues that once the learned Tribunal had applied the triple-test and held in favour of the appellant in relation to other reliefs, the relief against invocation of the bank guarantees was in fact, a consequential relief, which ought to have followed.



14. Mr. Ankur Mittal, learned counsel is present on behalf of the respondent on advance copy; but has not been called-upon to address the court.
15. Upon a careful consideration of the submissions made by Mr. Nayar, this court is of the opinion that the learned Tribunal was in no way bound by the interim orders granted by the Co-ordinate Bench or by the Division Bench of this court in the various proceedings referred to above. In fact, concededly the Division Bench had extended the interim order restraining the invocation of bank guarantees *only till the first sitting* of the learned Arbitral Tribunal. That order was however continued by the learned Tribunal till the final decision on the section 17 application. In the meantime, the very constitution of the learned Tribunal also came to be changed; during which period also the invocation of the bank guarantees remained stayed. The interim order passed by the Division Bench had therefore long outlived its intent and purpose.
16. However, as observed above, all three reliefs sought by way of the section 17 application have been considered in detail by the learned Arbitral Tribunal, and after due consideration and reasoning, the learned Tribunal has held that insofar as staying the effect of the termination notice is concerned, that relief has been rendered infructuous, since in the meantime not only did the contract stand terminated, but fresh NITs and RFPs had been issued and a fresh contract had been awarded to a third-party. That being said, the learned Tribunal has observed that the validity of the termination



would, of-course, be considered on its merits in the course of the arbitral proceedings.

17. Insofar as the other relief of debarring the appellant from participating in future tenders is concerned, the learned Tribunal has held in favour of the appellant, thereby granting interim protection and assuring the appellant's entitlement to participate in future tenders.
18. However, as far as invocation of the bank guarantees is concerned, after giving due consideration to the value of the work claimed to be completed by the appellant; and the respondent's version thereon, the learned Tribunal has come to the conclusion that, at the interim stage, there is no basis to injunct invocation of the bank guarantees. The discussion in the impugned order would also show that the appellant had failed to even allege a case of 'fraud'; and had also failed to make-out a case of 'special equities' in its favour that would warrant restraining invocation of the bank guarantees.
19. The law as to invocation of bank guarantees is settled. A brief reference to some decisions of the Supreme Court in this behalf may not be out of place here :

In ***BSES Ltd. vs. Fenner India Ltd. & Anr.***<sup>2</sup> the Supreme Court says :

*"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been*

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<sup>2</sup> (2006) 2 SCC 728



reiterated in so many judgments of this Court [See e.g. *U.P. State Sugar Corpn. v. Sumac International Ltd.*, (1997) 1 SCC 568 at pp. 574-77, paras 12-16; *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735 at p. 741, para 13. See also *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766; *Centax (India) Ltd. v. Vinmar Impex Inc.*, (1986) 4 SCC 136.], **that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997) 1 SCC 568] (hereinafter “U.P. State Sugar Corpn.”) *this Court, correctly declared that the law was “settled”* [Ibid. at p. 574, para 12, per Sujata V. Manohar, J.]”**

(emphasis supplied)

In *U.P. State Sugar Corporation. vs. Sumac International Ltd.*<sup>3</sup> the Supreme Court observations are the following :

“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. **The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee.** The courts have carved out only two exceptions. **A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.** Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of

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<sup>3</sup> (1997) 1 SCC 568



*such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. ....”*

(emphasis supplied)

Again, in ***General Electric Technical Services Co. Inc. vs. Punj Sons (P) Ltd.&Anr.***<sup>4</sup> the Supreme Court has said :

“9. The question is whether the court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of respondent 1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in a recent judgment of this Court in *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] wherein Sabyasachi Mukharji, J., as he then was, observed (SCC p. 189, para 28) that “[I]n order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operations will get jeopardised”. It was further observed that the Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course

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<sup>4</sup> (1991) 4 SCC 230



*should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an “egregious nature as to vitiate the entire underlying transaction”. It is fraud of the beneficiary, not the fraud of somebody else.”*

(emphasis supplied)

20. It is also needs no detailed articulation, that interference by court under section 37(2)(b) of the A&C Act is warranted only in exceptional circumstances, when the court finds that the use of the discretionary power under section 17 of the A&C Act by an Arbitral Tribunal is palpably arbitrary, capricious, irrational or perverse. This Bench has itself so held in *Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Estate Ltd. and connected matters*<sup>5</sup>, while explaining the scope of interference by court under section 37 of the A&C Act in the following words :

*“29. A brief consideration as to the scope of the power of this Court under Section 37(2)(b) of the A&C Act would not be out of place at this point. The law is long settled, that the use of power under Section 37(2)(b) of the A&C Act to interfere in “discretion” exercised by an Arbitral Tribunal under Section 17 of the A&C Act, has to be guarded and sparing. Interference is warranted only in exceptional circumstances, in cases where the discretionary power of the Arbitral Tribunal has been used in a manner that is palpably arbitrary, capricious, irrational or perverse. [Manish Aggarwal v. RCI Industries and Technologies Ltd., (2022) 3 HCC (Del) 289] It is not permissible for a court to substitute the views it might have taken had it decided on the interim measures of protection in place of the view taken by the Arbitral Tribunal. It is not for the court to replace its own discretion in place of that of the*

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<sup>5</sup> 2023 SCC OnLine Del 1087



*Arbitral Tribunal, unless impelled to do so on the grounds enumerated above.”*

(emphasis supplied)

21. In the circumstances of the present case, this court is of the view that no ground is made-out for interfering with order dated 27.03.2024 passed by the learned Arbitral Tribunal on the application under section 17 of the A&C Act, within the limited ambit and scope of the jurisdiction of this court under section 37 of the A&C Act.
22. The appeal is accordingly dismissed *in-limine*; without however any order as to cost.
23. Pending applications, if any, also disposed-of.

**ANUP JAIRAM BHAMBHANI, J**

**MARCH 28, 2024**

*V.Rawat*