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

% ***Date of decision: 27th May, 2024***

\+ **ARB. A. (COMM.) 53/2023, I.A. 24711/2023, I.A.24712/2023, I.A. 24713/2023, I.A. 981/2024**

UNION OF INDIA

..... Petitioner

Through: Mr. Shashank Garg, CGSC and Ms. Aradhya Chaturvedi, Advocates.

versus

M/S RAMJI DAS DHAL CONST. PVT LTD - PUSHPANJALI CONST.PVT.LTD.

..... Respondent

Through: Appearance not given.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT ***(oral)***

1. A Petition under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as "the Act")* has been filed on behalf of the petitioner Union of India challenging the Order dated 12.09.2023 under Section 17 of the Act, whereby the learned Sole Arbitrator has permitted the release of the following Bank Guarantees:

S.No.	BG Number (Purpose)	Amount (Lakhs)	Issue date
1.	30550lGL0002818 (PBG)	374.00	16.04.2018
2.	30550lGL0002918 (PBG)	56.00	16.04.2018

3.	30550lGL0004018 (PBG)	120.00	05.06.2018
4.	30550lGL0010814 (PBG)	150.00	30.12.2014

2. An application under Section 17 of the Act got filed before the Arbitrator seeking interim relief for directing the release of four Bank Guarantees for an aggregate sum of Rs.4 Crores furnished by the respondent in terms of the Contract inter-se the parties. It is submitted that on 05.09.2017 the respondent declared the work in terms of the Contract as completed. In terms of Clause 55 of General Clauses of Contract (GCC), the respondent submitted the Final Bill within three months from the date of completion of the Contract. As the obligations of the respondent under the Contract were yet to be completed, the respondent furnished three Bank Performance Guarantees in favour of the appellant in substitution of the earlier Performance Bank Guarantees which are as follows:

> *"(i) PBG bearing No. 30550IGL0002818 from Union Bank of India, Agra, for a value of Rs.3,74,00,000/-* ***("PBG 1").***
> *(ii) PBG bearing No. 30550IGL0002918 from Union Bank of India, Agra, for a value of Rs.56,00,000/-* ***("PBG 2").***
> *(iii) PBG bearing No. 30550IGL0004018 from Union Bank of India, Agra, for a value of Rs.1,20,00,000/-* ***("PBG 3")****."*

3. The respondent submitted the Final Bill belatedly on 31.01.2020 which was submitted for a technical check by the appellant and was found to have various discrepancies and unwarranted claims. Several disputes thus,

arose between the parties. The respondent submitted a revised bill claiming reimbursement of Goods and Service Tax (GST) which got implemented during the pendency of the Contract. A revised Final Bill was submitted on 16.04.2022 for the Gwalior site and on 23.04.2022 for the Talbahat site. The claims raised were those which were neither claimed during the pendency of the Contract nor in the Final Bill submitted on 31.01.2020.

4. According to Clause 58 of GCC, the Performance Security furnished by the respondent was to be refunded to the Contractor after the expiration of the Defect Liability Period provided the Final Bill had been paid. After the technical check of the Final Bill, it was found that the Final Bill amount is minus (-)Rs.7,01,28,506.28. The said Final Bill is also subject to further Audit by Principle Controller of Defence Accounts (PCDA).

5. According to the terms of the Contract, the Defect Liability Period expired on 04.09.2019. Because of the disputes that arose between the parties, the matter was referred to Arbitration before which the matter is pending adjudication.

6. The respondent had filed the Application under Section 17 of the Act dated 17.07.2023 seeking release of Bank Guarantees. The Application under Section 17 was allowed *vide* Order dated 12.09.2023 and the appellant was directed to release the three Bank Guarantees and return them to the respondent within fifteen days of receipt of the Order.

7. **The appellant has challenged the Order on the grounds** that it defeats the very purpose for which the Bank Guarantees had been furnished. The Bank Guarantees are separate Contract between the beneficiary and the Bank, independent of the Contract between the respondent and the appellant herein. The appellant had an absolute right to encash the Bank Guarantee

and the Tribunal by way of interim measure, cannot direct the release or restrain encashment of Bank Guarantee, except in the case of fraud or irretrievable harm. The impugned Order is in contravention of the express terms of the Contract. The Bank Guarantees could have been released in terms of Clause 58 of the Agreement subject to fulfilment of the three conditions mentioned therein, viz. (i) expiration of Defect Liability Period, (ii) payment of Final Bill and (iii) submission of 'No Demand' Certificate. Since the Final Bill is yet to be finalized, the release of Bank Guarantees could not have been directed.

8. Further, the Final relief as was sought by the respondent, has been granted to it by way of an Interim Order. Under Section 17, only an Interim Order to secure, protect, preserve the subject matter can be made, but if the Final permanent release is granted, it is an irreversible process defeating the bonafide claim of the Appellant. The learned Arbitral Tribunal has erroneously interpreted the meaning of the expression *"just and convenient"* under Section 17(1)(ii)(e) of the Act. The term "*just and convenient"* are not to be interpreted in accordance with the principles of morality, fair play and /or equity, but in accordance with the provisions of the statute. In other words, a thing which may look unjust and inconvenient when looked through the lens of morality, but it may be completely valid and legal if looked through the eyes of law.

9. Therefore, the concept of equity with morality cannot be imported as its basis while interpreting Section 17. A jurisdictional error has been committed by over reaching the provisions of Section 17 of the Act. The principles for granting interim relief are similar to those while granting interim relief under Order XXXIX Rule 1 and 2 C.P.C. The interim relief

had to qualify the triple test of *prima facie case*, *balance of convenience* and irreparable *loss and injury.* The respondent has not been able to establish prima facie case in its favour and the balance of convenience also did not lie in favour of the respondent. The learned Tribunal did not even consider that no irreparable loss or injury would be caused to the respondent if the interim relief was denied. The only cost to the respondent would have been the charges to be paid for renewal of the Bank Guarantee. However, when the matter is still under adjudication, such monetary loss to keep the Bank Guarantees alive while the claims of the parties were being adjudicated, cannot be termed as irreparable loss. It is, therefore, submitted that the impugned Order suffers from patent illegality and is liable to be set aside.

10. **No formal Reply** was filed on behalf of the respondent. However, it is submitted that as per the terms of the Contract, the Bank Guarantee was liable to be released on compliance of three conditions as have been stated by the appellant itself. All the three requirements stand satisfied; according to the appellant itself the outstanding dues is in the negative. Therefore, the learned Arbitrator has rightly directed the release of the Bank Guarantees.

11. The learned counsel for the respondent has relied on the case of *GAIL India Limited Vs. Triveni Engineering and Industries Limited* in ARB. A. (COMM) 3/2019 decided on 31.01.2019; *Union of India Vs. RCCIVL-LITL (JV)* 2022 SCC OnLine Del 4340; *Bharat Sanchar Nigam Limited vs. Teracom Limited* in OMP (COMM) 431/2019 decided on 28.03.2022 and *Union of India Vs. M/S Varindera Constructions Ltd.* in ARB. A. (COMM.) 41/2023 decided on 13.12.2023.

12. It is asserted that Section 37 of the Act, 1996 provides a forum of Appeal to this Court if the Arbitral Tribunal has granted or refused to grant

any interim measure under Section 17 of the Act. However, there is a limited power to intervene in an Appeal against Order rendered by arbitrators in response to applications filed under Section 17 of the A&C Act. The learned counsel for the respondent has relied on the cases of *Union of India Vs. M/S Ramji Das Dhal Construction Pvt. Ltd*. in ARB. A. (COMM.) 1/2024 decided on 15.01.2024 and *Elena Power And Infrastructure Ltd. Vs. Shapoorji Pallonji And Company Private Limited and Anr.* in ARB. A. (COMM.) 49/2021 decided on 21.09.2021.

13. It is thus, argued that the impugned Order does not suffer from any infirmity and the Appeal is liable to be rejected.

14. **Submissions heard.**

15. Clause-58 of the General Conditions of Contract provides as under:-

> *"58. Refund of Performance Security.*
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> *The Performance Security deposit mentioned in condition 19 above may be refunded to the Contractor after the expiration of the defects liability period (vide Condition 40) by the P.M. provided always that the contractor shall first have been paid the final bill and have rendered a No-Demand Certificate on the form at Annexure 'G' to these conditions."*

16. The terms of the GCC therefore provides that the Bank Guarantees can be returned on compliance of the three conditions namely: (i) on payment of Final Bill, (ii) issue of 'No Demand' Certificate and (iii) on expiry of the Defect Liability period.

17. It is the case of the appellant itself that the outstanding against the Final Bill is in negative which implies that about Rs.7 crores are already extra towards the Appellant. Secondly, the Completion Certificate has been

given on 05.09.2017. The Defect Liability period has also got over on 04.09.2019. All the three requirements which are required to be fulfilled before a Bank Guarantee can be directed to be released, stand duly complied in the present case.

18. Whether there are still any outstanding liabilities, whether the Final Bill has not been processed correctly, whether the delay in submitting the Final Bill was of the respondent are all the disputes, with which the learned Arbitrator is already seized of, while adjudicating the Claims of the respondent. The Bank Guarantee, as has been submitted by the appellant itself, is a separate contact de hors the challenges under the Contract. It has been rightly observed by the learned Arbitrator that since the three pre-requisites for release of the Bank Guarantee are satisfied, there is no reason to withhold the Bank Guarantees.

19. The learned Arbitrator has rightly directed the release of the Bank Guarantees within seven days of this Order. There is no ambiguity, perversity or illegality in the Order of the learned Arbitrator.

20. There is no merit in the present Appeal which is hereby dismissed, along with the pending applications.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 27, 2024
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