



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

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Judgment reserved on: 30.08.2024
Judgment pronounced on: 22.10.2024

+ CONT.CAS(C) 852/2015 & CM APPL. 10368/2017, CM APPL. 27056/2017, CM APPL. 39010/2017, CM APPL. 42701/2017, CM APPL. 46377/2017, CM APPL. 37539/2018, CM APPL.38025/2023 & CM APPL. 44911/2023

GAIL (INDIA) LIMITED Petitioner

Through: Mr. S. V. Raju, Sr. Adv. with
Mr. Ashwin Katria & Mr.
Samrat Goswami, Advs.

versus

JOSE P PHILIP & ORS Respondents

Through: Mr. Rajshekhar Rao, Sr. Adv.
with Mr. Ankit Sibbal, Mr.
Rohit Kumar Yadav, Mr. Nikhil
Saron & Mr. Tanishq Pathak,
Advs.
Mr. Rishi Dwan, Adv.

CONT.CAS(C) 853/2015 & CM APPL. 39011/2017, CM APPL. 42835/2017 & CM APPL. 44840/2023

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CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA
J U D G M E N T

1. This common judgement shall decide the aforementioned Contempt Petitions which have been instituted under Section 12 of the Contempt of Courts Act, 1971, read with Article 215 of the Constitution of India, 1950, seeking issuance of an appropriate action against the respondents for the deliberate and wilful disobedience of the order dated 30.01.2015 passed by this Court in O.M.P. No. 145/2014 & 151/2014. Both the petitions emanate from a common order and raise common questions of law and facts and can be conveniently disposed of together.

FACTUAL BACKGROUND:

2. The petitioner is a Central Public Sector Undertaking ['PSU'] under the Ministry of Petroleum and Natural Gas, Government of India which is incorporated under the Companies Act, 1956 and plays a significant role in the transportation of petroleum and natural gas by laying pipelines, commanding over the 70% of the market share in gas transmission and marketing. The petitioner launched the Kochi-Koottanad Bangalore-Mangalore Pipeline Project¹ designed to transport natural gas (RLNG²) through seven districts in Kerala, Tamil Nadu and ultimately connect Kochi with Bangalore and Mangalore in Karnataka.

3. E-Tenders were floated for executing the work section-wise and

¹ The Project

² Regasified Liquefied Natural Gas



the respondent no.1, in the original petition under the Arbitration and Conciliation Act, is a consortium between Tecpro Systems Ltd. an Indian company incorporated under the Companies Act, 1956 and AMK VIGAZ (VIGAS) of Russia with the latter being the leader of the consortium which submitted a bid for completion of work in certain sectors and the same was accepted by the petitioner by issuing a Fax of Acceptance (FOA) dated 12.01.2012. Subsequently, on 02.02.2012 a Letter of Acceptance (LOA) was issued by the petitioner/GAIL confirming the terms and scope of the contract.

4. That on 20.01.2012 the petitioner/GAIL and respondent No. 1 executed a Contract Agreement for the laying, testing, and commissioning of pipelines along with associated facilities. Subsequently, on 02.02.2012 the petitioner/GAIL issued a Letter of Acceptance to respondent No. 1, confirming the terms and scope of the contract. The relevant details with respect to the Contract Agreements, herein are reproduced below:

Case Title	Length of the Pipeline	Contract Value	Reference No. of Letter of Acceptance dated 02.02.2012
CONT.CAS(C) 852/2015 GAIL (India) Limited v. Jose P Philip	24 inches and 114 Kilometres long	Rs. 68,97,37,075/- (Rupees Sixty-Eight Crore Ninety-Seven Lakh Thirty-Seven Thousand Seventy-Five only)	GAIL/ ND /C&P/ PROJ/ KKB MPL/LAYING/ 11-14/02/C-11/115
CONT.CAS(C) 853/2015 GAIL (India) Limited v. Jose P Philip	30 inches and 91 Kilometres long	Rs. 89,82,67,650/- (Rupees Eighty-Nine Crore Eighty-Two Lakh Sixty-Seven Thousand Six Fifty only)	GAIL/ND/C&P/PROJ/ KKB MPL/LAYING/11-14/02/C-11/114



5. In terms of clause 37 of the ITB³ read with clause 11 of the SCC⁴ and clause 24 of the GCC⁵, the respondent No.1 had to furnish an irrevocable and unconditional Performance Bank Guarantees [PBGs] in favour of the petitioner/GAIL, in respect of each contract. Pursuant to which the respondent No.1 furnished the bank guarantee dated 12.01.2012. With respect to the SCC, the petitioner/GAIL agreed to advance 10% of the contract value to the respondent No.1 by way of 'mobilization advance', which was subsequently granted to the respondent No.1. Furthermore, in terms of clause 26 of the SCC, it was stipulated that to secure the repayment of the mobilization advance the respondent No.1 was to furnish Advance Bank Guarantees [ABGs] for the amount equivalent to 11% of the awarded contract value covering the mobilization advance to be kept valid till settlement of the mobilization advance along with interest thereon. However, there was a leeway in the clause which allowed the respondent No.1 to submit the bank guarantee of 11% in two stages of 5.5% each. Consequently, ABGs were issued through IDBI Bank by the respondent No.1. For ease of reference, the relevant details with respect to the bank guarantees, herein are reproduced below:

Purchase Order No.	BG No.	Value	Expiry Date
PERFORMANCE BANK GUARANTEE			
56000D1390(Sec-I) ⁶	11650100001747	Rs.8,98,26,765	31.07.2015
5600001391(Sec-II) ⁷	11650100001748	Rs.6,89,73,708	31.07.2015

³ Instructions to Bidders

⁴ Special Conditions of Contract

⁵ General Conditions of Contract

⁶ CONT.CAS(C) 853/2015

⁷ CONT.CAS(C) 852/2015



ADVANCE BANK GUARANTEE			
5600001390 (Sec-I)	120380IBGA00136	Rs.4,94,04,721	13.05.2015
	120380IBGA00137	Rs.4,94,04,721	13.05.2015
5600001391 (Sec-II)	120380IBGA00138	Rs.3,79,35,539	13.05.2015
	120380IBGA00139	Rs.3,79,35,539	13.05.2015

6. Thereafter, the respondent No. 1 requested the petitioner to delay the recovery of the mobilization advance from its running bills, which the petitioner/GAIL allowed by granting a moratorium on interest for the first four RA bills. Recovery was made from the 5th RA bill, covering the period from 1.07.2013 to 15.01.2014.

7. As per the Contract Agreement, the project was to be completed within 15 months from the issuance of the FOA dated 12.01.2012, with the construction phase to be completed by 11.01.2013, and the full project, including commissioning, by 11.04.2013. However, the respondent No. 1 defaulted in fulfilling its contractual obligations. Despite being granted interim extensions for project completion upon request, respondent No. 1 continued to default in its performance. By the end of the extended periods, negligible progress had been made at the worksite. Consequently, aggrieved by the continued delays and non-performance, the petitioner/GAIL issued a letter dated 28.01.2014, to IDBI Bank, seeking encashment of the ABGs furnished by the respondent No. 1.

8. Subsequently, the respondent No.1 filed petitions under Section 9 of the Arbitration and Conciliation Act, 1996, bearing OMP No. 145/2014 and 151/2014. It is pertinent to note that the respondent



No.1 is the original petitioner in the aforementioned petitions, *inter alia* praying for orders restraining the petitioner/GAIL from exercising its contractual right to encash the unconditional PBGs and ABGs. Additionally, respondent No. 1 requested an *ex parte ad interim* injunction against the petitioner/GAIL.

9. Subsequently, this court *vide* order dated 04.02.2014, passed an order granting *ex-parte ad interim* injunction to the respondent No.1. The relevant portion of the order is reproduced below:

“In my view, the petitioner has made out a prima-facie case for grant of ex-parte ad interim orders of injunction. Accordingly, the respondents are restrained from invoking the following bank guarantees till the next date

of hearing, subject to the petitioner keeping them alive till further orders of the Court:

- (i) Performance BG bearing No. 11650100001748 dated 24.01.2012 for an amount of Rs.6,89,73,708/- for Section-II;
- (ii) Advance BG bearing No 120380IBGA00138 dated 13.06.2012 for an amount of Rs.3,79,35,539/- for Section-II; and
- (iii) Advance BG bearing No. 120380IBGA 00139 dated 13.06.2012 for an amount of Rs.3,79,35,539/- for Section-II”

10. Concurrently, on 07.07.2014, the respondent No. 1 served a letter on the petitioner/GAIL invoking arbitration, making several allegations, including claims that the petitioner had failed to complete the requisite ROU acquisition, had delayed handing over the IP and SV Stations, had not provided contiguous ROU⁸ free from encroachments, and had caused financial losses due to the unnecessary

⁸ Right of User



deployment of the equipment. The petitioner/GAIL, by letter dated 02.09.2014, denied all the allegations, asserting that they had counterclaims against the respondent No. 1 amounting to Rs. 8.95 and Rs. 8.5 crores, respectively, for the mobilization advance and interest. Subsequently, on 24.09.2014, respondent No. 1 appointed Hon'ble Justice Arijit Pasayat (Retired), former Judge of the Supreme Court, as the Sole Arbitrator. Justice Pasayat consented and entered the reference, and the arbitration proceedings remained pending.

11. In view of the continued default and non-performance by respondent No. 1, the petitioner, pursuant to Clause 29 of the GCC, terminated the Contract Agreement through a letter dated 24.09.2014, citing non-performance of work, non-approval of price escalation, and failure to comply with statutory provisions. Subsequently, MECON Limited, by letter dated 26.09.2014, notified respondent No. 1 regarding the necessary documentation and formalities required for the contract closure, in accordance with Clause 49 of the SCC, following the termination.

12. In the interregnum, OMP No. 145/2014 and 151/2014 were contested between the parties and this court *vide* order dated 30.01.2015 disposed of the said petitions, holding that the interim order passed in the order dated 04.02.2014 shall continue during the pendency of the Arbitral proceedings subject to the respondent No.1 keeping the PBGs and ABGs alive during the pendency of the aforesaid proceedings. The relevant portion of the order is reproduced below:

"21. In the circumstances the Court directs that the interim order



passed on 4th February 2014 in both petitions will continue during the pendency of the arbitral proceedings subject to the Petitioner keeping alive the PBGs and ABGs during the pendency of the arbitral tribunal."

13. Being aggrieved by the order dated 30.01.2015, the petitioner/GAIL filed an appeal before the Division Bench, bearing FAO (OS) No. 351/2015, under the provisions contained in section 37 of the Arbitration and Conciliation Act, 1996.

14. It is claimed that on a conjoint reading of orders dated 4.02.2014 and 30.01.2015, the petitioner was restrained from invoking and encashing the PBGs and ABGs furnished by the respondent No.1 in favour of the petitioner/GAIL until the disposal of the arbitral proceedings, subject to the respondent No.1 keeping the same alive. In the letter dated 17.07.2015, respondent No. 1 confirmed their understanding of the order dated 30.01.2015 to Mecon Limited wherein the operative part of the said order was set out.

15. That on 21.07.2015, the petitioner/GAIL, through its agent MECON Limited, requested the respondents to extend the validity of the Bank Guarantees and submit the original copies of the extended guarantees. Despite receipt of the request, the respondents failed to submit the extended guarantees. On 28.08.2015, the respondents revalidated the PBG but failed to renew the ABGs. Subsequently, on 12.10.2015, the respondents claimed that their banker, IDBI Bank, refused to renew the ABGs, alleging that no renewal request had been received from the petitioner/GAIL. The petitioner/GAIL asserts that it is under no obligation to request renewal from the respondents' banker, and as per the court's order dated 30.01.2015, the respondents



were legally obligated to keep the Bank Guarantees valid without seeking modification of the said order.

SUBMISSIONS

16. Mr. Raju, learned senior counsel for the petitioners alluded to the order dated 21.03.2017 during the present proceedings whereby an undertaking was given on behalf of the respondents that the amount under the ABGs to the tune of ₹17 crores is being arranged and some time was sought. It was pointed out that later *vide* order dated 08.05.2017, an undertaking was given to make a deposit of ₹17.46 crores by 31.07.2017, and eventually, as recorded in the order dated 28.11.2017 during the proceedings, ₹8 crores were deposited by the respondents by 29.11.2017.

17. It was vehemently urged by Mr. Raju, learned senior counsel for the petitioners that the ABGs expired on 13.08.2015 and the same were not deliberately renewed, which is clearly wilful disobedience of the directions of this Court. It was urged that although an excuse is taken by the respondent that CIRP⁹ had been initiated against M/s Tecpro Systems Limited with effect from 07.08.2017, however, it is pointed out that the same occurred before the deadline to make payment was set, which was to be 31.07.2017.

18. Mr. Raju learned senior counsel for the petitioners also urged that by way of an afterthought, the respondents now seek to blame third parties such as Ernst & Young and Edelweiss and their plea that as individuals, they were not liable and cannot be sustained.

19. Mr. Rajshekhar Rao, learned senior counsel for the respondents,

⁹ Corporate Insolvency Resolution Process



however, pointed out that the respondents were the Chief Executive Officers, CMD, Vice Chairman and Managing Directors of the aforesaid two companies, which formed the consortium and the directions dated 30.01.2015 was addressed to the aforesaid two companies in the consortium and although the respondents were not individually liable to make good the losses yet they liquidated their own assets and paid a sum of ₹8 crores during the course of the proceedings but for the fact that they are now facing personal insolvency in terms of Section – 95 of the IBC¹⁰, which enables the creditors to initiate insolvency process against a Personal Guarantor through a Resolution Professional. It was urged that the respondents were never parties to the original arbitration proceedings and they cannot be held personally liable in respect of contractual obligations of the consortium companies and since the CIRP proceedings are still pending, he alluded to Civil Miscellaneous Application No. 44911/2023 to the effect that directions should now be issued to the IRP¹¹ to get the relevant bank guarantees extended.

ANALYSIS AND DECISION

20. I have given my thoughtful consideration to the submissions advanced by the learned counsels for the parties at the Bar. I have gone through the relevant record of this case.

21. The Contempt of Courts Act, 1971 envisages a civil contempt which should demonstrate a wilful disobedience of a decision of the Court. Avoiding long academic discussion, in the cited case of **U.N.**

¹⁰ Insolvency and Bankruptcy Code

¹¹ Insolvency Resolution Professional



Bora v. Assam Roller Flour Mills Assn.¹², after examining a plethora of case law on the subject, it was reiterated that:

- (i) It should be shown that there was due knowledge of the order or directions and that the disobedience is a deliberate, conscious and intentional act.
- (ii) When two views are possible, the element of wilfulness vanishes as it involves a mental element.
- (iii) Since the proceedings are quasi-criminal in nature, what is required is a proof beyond reasonable doubt since the proceedings are quasi-criminal in nature.
- (iv) when a distinct mechanism is provided and that too, in the same judgment alleged to have been violated, a party has to exhaust the same before approaching the court in exercise of its jurisdiction under the Contempt of Courts Act, 1971.
- (v) While dealing with a contempt petition, the Court is not expected to conduct a roving inquiry and go beyond the very judgment which was allegedly violated.

22. In a subsequent decision by the Supreme Court in the case of **Urban Infrastructure Real Estate Fund v. Dharmesh S. Jain**¹³, at page 682, the Supreme Court referred to some earlier decision on the subject and observed:

“19.2. R.N. Dey v. Bhagyabati Pramanik, (2000) 4 SCC 400], wherein this Court held that the weapon of initiating contempt proceedings could not be used for execution of a decree or implementation of an order. That is, a court should not invoke contempt jurisdiction, where alternate remedies are available to secure the terms of an order. We are mindful of the fact that contempt proceedings should not be of the nature of execution proceedings in disguise.”

¹² (2022) 1 SCC 101

¹³ (2022) 6 SCC 662



23. In view of the aforesaid proposition of law, reverting back to the instant matter, at the outset, this Court has no hesitation in holding that the present contempt proceedings against the respondent cannot be sustained in law. First things first, it is evident that the respondent no.1 was a Chief Executive Officer; respondent no.2 was the Chairman cum Managing Director, and the respondent no.3 was Vice Chairman and Managing Director of M/s Tecpro Systems Limited. They were not parties to the OMP No.145/2014 and 151/2014, which petitions were instituted by the two consortium companies.

24. The order dated 30.01.2015 passed by this Court in proceedings under Section 9 of the Arbitration and Conciliation Act, thereby directing that the PBG and ABG 'be kept alive' during the pending of the arbitral proceedings were directed to the consortium companies. So, therefore, technically speaking there were no directions to each individual respondent though in a practical sense they were the person in charge and control of the day-to-day affairs of the company and the respondent no.1 company.

25. It would be expedient to refer to the decision in the case of **Rosan Sam Boyce v. B.R. Cotton Mills Ltd.**¹⁴ by the Supreme Court, wherein it was held that an undertaking given by the person in management and control will be the undertaking of the Company itself. It is well ordained in law that the theory of attribution lays down a settled principle that acts of Directors, who are in management and control, are deemed to be acts of a company which is a legal

¹⁴ (1990) 2 SCC 636



identity, which has no mind or body to think and act. It is well settled also that acts of Directors in control are attributable as the acts of the company and treated as such. Reference can be had to decision by the Supreme Court in the case of **Daichi Sankyo Company Limited v. Oscar Investments Limited**¹⁵.

26. Therefore, if the corporate veil is lifted, the respondents can be said to be responsible for not deliberately extending the ABGs after its expiry on 13.08.2015. The position that clearly emerges is that when served with the notices in the present contempt proceedings, the respondents appeared in person before the Court on 21.03.2017 and requested some time to defer the judgment so as to arrange the necessary funds. Pursuant thereto on 08.05.2017, Mr. Sandeep Sethi, learned senior counsel for the respondents appeared and stated on instructions that a sum of ₹17.46 crores shall be deposited with the Registry of this Court on or before 31st July 2017.

27. Admittedly, ₹8 crores were deposited by 29.11.2017 and as was recorded in the proceedings of this Court on 28.11.2017 that Mr. Sandeep Sethi, learned senior counsel was representing all three respondents. The amount was deposited by way of cheques with the Registrar General of the High Court of Delhi and the same were duly honoured too and converted into Fixed Deposit Receipts which were also released in favour of the by the petitioners as recorded in the order sheet dated 19.03.2018.

28. As regards the remaining amount, the respondents were directed to file an affidavit of assets, movable and immovable properties, and

¹⁵ (2023) 7 SCC 641



pursuant thereto each of the three respondents filed such affidavits which are a matter of record. All said and done, this Court finds merit in the plea by Mr. Rajshekar Rao, learned senior counsel for the respondents that the respondents in their individual capacities did all they could do to muster up enough funds so as to make good the losses to the petitioners but could not do so for personally facing insolvency process under the IBC. It needs to be emphasized that, it is only during the pendency of the present proceedings that the respondents gave undertakings to comply with the directions and fallout of the non-compliance of the order dated 30.01.2015.

29. It is borne out from the record that a plea has been taken that M/s Tecpro Systems Limited could not keep the ABGs alive since its account was declared as NPA¹⁶ by the IDBI Bank and it was initially declared as SICK company and filed its SICA¹⁷ reference before the BIFR¹⁸ *vide* case no.86/2015 registered on 14.07.2015.

30. The plea by Mr. Rajshekar Rao, learned senior counsel for the respondents that on initiation of the CIRP proceedings against M/s Tecpro Systems Limited *vide* order dated 07.08.2017 moratorium came to be enforced under Section 14 of the IBC cannot be brushed aside, and therefore, any liability towards the PBGs and the ABGs or in the alternative for extension of the same was in the domain of the IRP. The aforesaid discussions clearly invite an interference that the respondents despite their best efforts were unable to renew the ABGs with IDBI Bank particularly when their bank account had been

¹⁶ Non-Performing Assets

¹⁷ Sick Industrial Companies Act, 1985

¹⁸ Board for Industrial and Financial Reconstruction



declared NPA and subsequently filing of the reference before the BIFR.

31. It goes without saying that the order dated 30.01.2015 was assailed by the petitioner in FAO(OS) 351/2015 and the Division Bench of this Court considered the plea of the respondents that it is unable to renew the bank guarantees for reasons beyond their control, and, in fact, the respondents voluntarily conceded and had given statement for early encashment by GAIL of the other performance bank guarantees issued by the Axis Bank. The PBGs timeline with the Axis Bank were to expire 30.07.2015 and the same were eventually allowed to be encashed in January, 2016. Accordingly, the order dated 30.01.2015 of the learned Single Judge in OMP proceedings was quashed *vide* order dated 28.01.2016 giving liberty to the petitioners/GAIL to seek appropriate remedy and relief for the amount thereof.

32. On the point of impleadment of the respondents in the main proceedings, reliance in this regard can be placed to the decision in the case of ***Census Commissioner v. Krishnamurthy (supra)***, wherein it was held that an order is not binding on the party who was not impleaded in the proceedings. Any order passed without their participation can be ignored as a violation of the principles of natural justice. Likewise in the case of ***Ranjan Kumar v. State of Bihar***¹⁹, the Supreme Court re-affirmed that no adverse order can be passed against the party not made a respondent to the proceedings. At the cost of repetition, the lead members of the consortium, AMK VIGAZ and

¹⁹ (2014) 16 SCC 187



its directors were not impleaded in the contempt petition and neither were all the directors of the M/s Tecpro Systems Ltd. Hence, it can be safely said that the contempt proceedings are procedurally flawed and not maintainable. As recognised in the case of **Deepali Designs & Exhibits Pvt. Ltd. v. PICO Deepali Overlays Consortium**²⁰, a consortium member may be treated separately from the consortium for certain obligations and in this case financial liabilities of M/s Tecpro Systems Ltd. were transferred to be discharged by the IRP, subject to the availability of sufficient funds at his disposal.

33. In view of the foregoing discussions, this Court finds that there was no intentional, wilful or contumacious neglect on the part of the respondents in complying with the directions of this Court dated 30.01.2015. Hence, the aforesaid contempt petitions are dismissed. All pending applications are also disposed of.

DHARMESH SHARMA, J.

October 22, 2024
Ch

²⁰ CS(Comm.) 1590/2016