OCD-5

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

APOT/51/2025
WITH
CS-COM/9/2025
IA NO: GA-COM/1/2025

ELLENBARRIE INDUSTRIAL GASES LIMITED
VERSUS
HDFC BANK LIMITED

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 24th February, 2025.

Appearance:
Mr. Jishnu Chowdhury, Sr. Adv.
Mr. Ritoban Sarkar, Adv.
Mr. Rishav Banerjee, Adv.
Mr. Aishwarya Kumar Awasthi, Adv.
Ms. Prerna Shaha, Adv.
…for the appellant

Mr. Ranjan Bachawat, Sr. Adv.
Mr. Rudraman Bhattacharyya, Sr. Adv.
Mr. Sourojit Dasgupta, Adv.
Mr. Aasish Choudhury, Adv.
Ms. Uma Bagree, Adv.
...for respondent no.2

1. The appellant was enjoying an interim order in a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996 since 19th July, 2024. The said order was passed in AP-COM/695/2024. The interim order was to the following effect:-

> "However, in view of the petitioner having made out a very strong prima facie case for getting an injunction, in view of the respondents beneficiaries having not been able to invoke

> the bank guarantee in terms of its clauses, the respondents are restrained by an order of injunction from invoking the bank guarantees in question, respectively dated December 26, 2022 and June 13, 2023, as annexed at pages 88 and 83 of the present application, till August 31, 2024 or until further order, whichever is earlier."

2. Thereafter, on 7th November, 2024, another Co-ordinate Bench disposed of the application for interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 without modifying and/or vacating the order passed on 19th July, 2024. The consideration appears to be that the interim order passed on 19th July, 2024 has taken into consideration all factors and is a reasoned order. The respondent has not preferred any appeal against the said order. Moreover, an Arbitrator has been appointed. The said application was disposed of with the observation that the learned Arbitrator would decide the scope of the interim prayers made in the application under Section 9 of the Arbitration and Conciliation Act, 1996 within the period of three months independent of any observation made in the order dated 19th July, 2024. The plaintiff was directed to approach the learned Arbitrator by filing an application under Section 17 of the Arbitration and Conciliation Act, 1996 with interim prayers.
3. During the course of the arbitral proceedings, it is submitted that the learned Arbitrator was of the view that in absence of HDFC Bank, who had issued the bank guarantee in favour of the respondent, no interim order could be passed against invocation of

bank guarantee. However, it is not reflected from the minutes of the meeting dated 6th January, 2025 nor in the subsequent minute dated 20th January, 2025. In fact, in the minutes of the meeting held on 20th January, 2025, the learned Arbitrator has made the following observation:-

> “2. Mr. Chowdhury learned Senior Advocate submitted that his client has been advised to file a suit restricted to the relief of a preventive injunction restraining the Respondent i.e. Bengal Energy Limited from invoking the BG. He added that such suit has already been filed. He as such does not press the application under section 17 which he had moved on 06.01.2025. The application is as such dismissed as not pressed.
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> 3. In so far as this Tribunal is concerned the Claimant is granted liberty to apply for the preventive injunction before such forum as he may be advised.”

4. We are unable to read the aforesaid observations as refusal to decide the issue of injunctions in absence of the bank.

5. In an invocation for bank guarantee, an order in personem could be passed against the respondent without impleading the bank in certain circumstances. It is possible that the respondent may be injuncted from invoking the bank guarantee provided the appellant is able to make out an appropriate case for injunction. The existence of any dispute between the parties to the contract is not a ground to injunct enforcement of a bank guarantee. If it is a conditional bank guarantee it can be invoked provided it is in accordance with the terms of the guarantee. [see. Hindustan

Construction Co. Ltd. v. State of Bihar & Ors.;1999 (8) SCC 436 (para.8,9,14)]

6. However, Mr. Chowdhury has contended that by reason of the observation of the learned Arbitrator, the suit has been filed by the plaintiff in which an averment has been made with regard to such observation in paragraph 37 of the plaint which for the purpose of convenience is set out hereunder:

> "37. When the matter was taken up for consideration by the Learned Arbitral Tribunal on January 06, 2025 it was observed that:-
>
> (a) While the defendant no.1 was a party to AP No. 695 of 2024 being the petition under section 9 of the Arbitration and Conciliation Act, 1996, on which the interim orders dated July 19, 2024 and November 07, 2024 had been passed, the said defendant no.1 was not a party and/or was not present before the Learned Arbitral Tribunal.
>
> (b) Bank guarantees being a tripartite contract, it would not be permissible for the Learned Arbitral Tribunal to proceed to pass orders similar to those passed by this Hon'ble Court under section 9 of the Act, having regard to the absence of the defendant no.1.
>
> (c) Jurisdictional issue should be avoided by the plaintiff filing a suit, where both the defendants could be impleaded and adjudication had in their presence."

7. It is not disputed from the Bar that it is possible in the arbitration proceeding to have an order of injunction restraining the respondent from invoking the bank guarantee, however, strangely it does not appear that any such prayer was made before the

learned Arbitrator. For a suit court in an interlocutory proceeding to decide such claim, it has to be a fraud going to the root of the agreement of which the beneficiary is trying to take advantage. Injunctions can be granted only on grand of fraud and where the bank has notice of the fraud. The demand for payment must be fraudulent. Before us it is not alleged that Bank is a party to the fraud.

8. On such consideration, we extend the interim order passed by Justice Sabyasachi Bhattacharyya on 19th July, 2024 for a period of two months or until any decision is taken by the learned Arbitrator in the pending proceeding, whichever is earlier.

9. With the aforesaid observation, the appeal and the application are disposed of. In the event the Ld. Arbitral Tribunal decides that in absence of the bank no interim order can be passed and it conforms to the pleading at paragraph 37 of the plaint, the suit shall revive. However for the time being it shall remain stayed.

10. Leave is given to revive the application under Section 17 of the Arbitration and Conciliation Act, 1996.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

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