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Court : Delhi

Decided On : Sep-16-2016

Judge : Manmohan Singh

Appeal No. : O.M.P.(I) (COMM.) Nos. 65, 66, 68, 69 & 70 of 2015 & 18, 19, 20 & 21 of 2016

Appellant : TRF Ltd.

Respondent : Energo Engineering Projects Ltd

Judgement :

Manmohan Singh, J.

1. The brief facts in O.M.P. (I) (COMM.) No.65/2015 as per the petitioner are that the petitioner was awarded two separate contracts by Energo Engineering Projects Ltd. (respondent herein)- one pertaining to the supply of Wagon Tippler and Side Arm Charger vide Purchase Order dated 6th May, 2014. Another work order dated 26th May, 2014 was issued to the petitioner for erection and commissioning of the Wagon Tippler and Side Arm Purchaser. The value of the aforesaid two contracts was approximately Rs.50.10 crores. As per the terms of contract, the petitioner was required to execute Advance Bank Guarantee of 10% of the total value of the supply contract and separate Bank Guarantee being a Performance Bank Guarantee for 10% of the order value. Accordingly, the petitioner executed two separate Bank Guarantee in favour of the respondent

aggregating to a value of Rs.9,64,01,600/-. Pursuant to the aforesaid orders, the petitioner started dispatching the goods in question to the respondent from 5 th December, 2014 and had continued to dispatch the said goods up to 29th September, 2015. The petitioner had dispatched materials of a value of Rs.38,29,45,000/-. However, till date, the petitioner has not received the entire consideration against the aforesaid supplies. In this context, it is stated that the petitioner is entitled for receipt of a total payment of Rs.11,13,95,500/- from the respondent which includes the retention amount. In spite of several follow ups being made by the petitioner to the respondent who has not made payment of the amount outstanding to the petitioner. The petitioner submits that the respondent instead of releasing the aforesaid amount, is trying to unnecessarily blame the petitioner for the invocation of Performance Bank Guarantee by the Lanco Projects Ltd. In the said letter, request was once again made to the respondent to clear the outstanding dues of the petitioner.

2. The brief facts in O.M.P. (I) (COMM.) No.66/2015 as per the petitioner are that the petitioner was awarded two separate contracts by respondent, one pertaining to the supply of Wagon Tippler and Side Arm Charger vide Purchase Order dated 10th May, 2014. Another work order dated 10th May, 2014 was issued to the petitioner for erection and commissioning of the Wagon Tippler and Side Arm Purchaser. The value of the aforesaid two contracts was approximately Rs.12,17,67,000/-. As per the terms of contract, the petitioner was required to execute Advance Bank Guarantee of 10% of the total value of the supply contract and separate Bank Guarantee being a Performance Bank Guarantee for 10% of the order value. Accordingly, the petitioner executed two separate Bank Guarantee in favour of the respondent aggregating to a value of Rs. 2,34,03,400/- (Rs.1,12,26,700/- + Rs.1,21,76,700/-). Pursuant to the aforesaid orders, the petitioner started dispatching the goods in question to the respondent from 2 nd December, 2014 and had continued to dispatch the said goods up to 28th September, 2015. The petitioner had dispatched materials of a value of Rs.6,61,20,000/-. Further, the petitioner also manufactured goods for a value of Rs.15,00,000/- to be supplied to the respondent but the said materials have not been dispatched by the petitioner. It is stated that till date the petitioner has not received the entire consideration against the supplies already made by the

petitioner. In this context, it is stated that the petitioner is entitled for receipt of the total payments of Rs. 6,95,99,122/- (Rs.6,29,87,122/- + Rs.66,12,000/-) from the respondent which includes the retention amount in spite of several follow ups made by the petitioner with the respondent. The respondent has not made payment of the amount outstanding to the petitioner. The petitioner states that it apprehends that the respondent on the one hand, is not releasing the outstanding payments due and payable to the petitioner and on the other hand, it would encash the Bank Guarantee executed by the petitioner in its favour to cover up/ make up its financial losses and/or financial crunch due to invocation of its Bank Guarantee by its principal contractor/ Companies.

3. The brief facts in O.M.P. (I) (COMM.) No.68/2015 as per the petitioner are that the petitioner was awarded two separate contracts by the respondent pertaining to the supply of Reversible Bucket Wheel Type Stacker - cum - Reclaimer vide Purchase Order dated 22nd October, 2011. The value of the aforesaid contracts was approximately for an amount of Rs.37,25,00,000/-. As per the terms of contract, the petitioner was required to execute advance Bank Guarantee of 10% of the total value of the supply contract and separate Bank Guarantee being a Performance Bank Guarantee for 10% of the Order Value. Accordingly, the petitioner executed two separate Bank Guarantee in favour of the respondent aggregating to a value of Rs. 7,03,00,000/- (Rs.3,51,50,000/- + Rs.3,51,50,000/-). Pursuant to the aforesaid orders, the petitioner started dispatching the goods in question to the respondent from 30th April, 2012 and had continued to dispatch the said goods up to 23rd July, 2015. The petitioner had dispatched materials of a value of Rs.35,23,65,000/-. However, till date, the petitioner has not received the entire consideration against the aforesaid supplies. In this context, it is stated that the petitioner is entitled for receipt of a total payment of Rs.5,40,52,473/- (Rs.2,21,89,473/- + Rs.3,18,63,000/-) from the respondent which includes the retention amount of Rs.3,18,63,000/- . In spite of several follow ups being made by the petitioner to the respondent who has not made payment of the amount outstanding to the petitioner. The petitioner states that it apprehends that the respondent on the one hand, is not releasing the outstanding payments due and payable to the petitioner and on the other hand, it would encash the Bank Guarantee executed by the petitioner in its favour to cover up/ make up its

financial losses and/or financial crunch due to invocation of its Bank Guarantee by its principal contractor/ Companies.

4. The brief facts in O.M.P. (I) (COMM.) No.69/2015 as per the petitioner are that the petitioner was awarded two separate contracts by respondent, one pertaining to the supply of Wagon Tippler and Side Arm Charger vide Purchase Order dated 10th May, 2014. Another work order dated 10th May, 2014 was issued to the petitioner for erection and commissioning of the Wagon Tippler and Side Arm Purchaser. The value of the aforesaid two contracts was approximately Rs.12.17 crores. As per the terms of contract, the petitioner was required to execute advance Bank Guarantee of 10% of the total value of the supply contract and separate Bank Guarantee being a Performance Bank Guarantee for 10% of the Order Value. Accordingly, the petitioner executed two separate Bank Guarantee in favour of the respondent aggregating to a value of Rs. 2,34,03,400/- (Rs.1,12,26,700/- + Rs.1,21,76,700/-). Pursuant to the aforesaid orders, the petitioner started dispatching the goods in question to the respondent from 24th December, 2014 and had continued to dispatch the said goods up to 28th September, 2015. The petitioner had dispatched materials of a value of Rs.3,62,00,000/-. However, till date, the petitioner has not received the entire consideration against the aforesaid supplies. In this context it is stated that the petitioner is entitled for receipt of a total payment of Rs. 36,20,000/- from the respondent which includes the retention amount. In spite of several follow ups being made by the petitioner to the respondent who has not made payment of the amount outstanding to the petitioner. The petitioner states that it apprehends that the respondent on the one hand, is not releasing the outstanding payments due and payable to the petitioner and on the other hand, it would encash the Bank Guarantee executed by the petitioner in its favour to cover up/ make up its financial losses and/or financial crunch due to invocation of its Bank Guarantee by its principal contractor/ Companies.

5. The brief facts in O.M.P. (I) (COMM.) No.70/2015 as per the petitioner are that the petitioner was awarded two separate contracts by respondent pertaining to the supply, erection and commissioning of Plough Feeder vide Purchase Order dated 9 th December, 2013. The value of the aforesaid Purchase Order was for a sum of

Rs.3, 12,60,000/-. As per the terms of contract, the petitioner was required to execute advance Bank Guarantee of 10% of the total value of the supply contract and separate Bank Guarantee being a Performance Bank Guarantee for 10% of the Order Value. Accordingly, the petitioner executed two separate Bank Guarantee in favour of the respondent aggregating to a value of Rs. 62,52,000.00/- (Rs.31,26,000 + Rs.31,26,000/-). Pursuant to the aforesaid orders, the petitioner started dispatching the goods in question to the respondent from 13th January, 2015 and had continued to dispatch the said goods up to 4 th March, 2015. The petitioner had dispatched materials of a value of Rs.3,06,00,000/-. However, till date, the petitioner has not received the entire consideration against the aforesaid supplies. In this context it is stated that the petitioner is entitled for receipt of a total payment of Rs. 1,71 ,92,000/- (Rs.1,41,32,000/- + Rs.30,60,000/-) from the respondent which includes the retention amount of Rs. 30,60,000/-. In spite of several follow ups being made by the petitioner to the respondent who has not made payment of the amount outstanding to the petitioner. The petitioner states that it apprehends that the respondent on the one hand, is not releasing the outstanding payments due and payable to the petitioner and on the other hand, it would encash the Bank Guarantee executed by the petitioner in its favour to cover up/ make up its financial losses and/or financial crunch due to invocation of its Bank Guarantee by its principal contractor/ Companies.

6. On 18th December, 2015 the above said petitions were filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for seeking interim injunction to restrain the respondent from encashing the Bank Guarantees and the same were listed first time before this Court on 21st December, 2015. Notice was issued in the said petitions.

7. On 23rd December, 2015, the learned counsel for the respondent made the statement that without prejudice to the rights and contentions, the respondent would withhold the invocation of the Bank Guarantees.

8. Thereafter, on 4th January, 2016, the following order was passed:-

1. Learned senior counsels for the petitioner have handed over a chart containing the particulars of the total value of the contract, work executed by the petitioner, payments received by the petitioner as well as the balance outstanding work/supply and balance outstanding payments.

2. Learned senior counsel for the respondent disputes the correctness of the figures given in the petitioner s chart. Let the respondent shall also prepare the chart in response to the petitioner s chart and submit the same before the next date of hearing.

3. The competent officers of both the parties shall meet on 05th January, 2016 in the respondent s office to made an endeavour to resolve the matter. If the parties are unable to resolve the matter, the parties shall prepare a statement of agreed facts with respect to the total value of the project, work/supply done by the petitioner, payments received by the petitioner, balance outstanding work/ supply and balance outstanding payments which shall be placed before this Court on the next date of hearing. The respondent shall also disclose the payments received by the respondent from the principal employer in all the projects. In case the parties are not able to agree on the statement of facts, the particulars mentioned above shall be placed on record by both the parties on affidavit.

4. List for hearing on 12th January, 2016 at 03.00 P.M.

5. The rejoinder to the reply of the respondent be filed by the petitioner within two days.

6. The respondent s statement made on the last date of hearing shall continue till the next date of hearing.

7. Copy of this order be given dasti to counsels for the parties under signature of Court Master.

9. It appears that the settlement could not be materialized. On 14th January, 2016, four more petitions being O.M.P. (I) (COMM.) Nos.18/2016 (Annupur WT Project), 19/2016 (Annupur PF Project), 20/2016 (Kudgi Project) and 21/2016 (Korba Project), under Section 9 of the Act, inter alia, seeking an order that the

respondent be directed to provide security by furnishing Bank Guarantees equivalent to the purportedly outstanding amounts under each of the four projects. The total outstanding amount as per the petitioner is as below:

Petition No.	Amount claimed to be outstanding (I)	Retention Amount (II)	Total (III)
O.M.P. (I) (COMM.) No. 18 of 2015 (Annupur WT)	2,21,89,473	3,18,63,000	5,40,52,473
O.M.P. (I) (COMM.) No. 19 of 2015 (Annupur PF)	1,41,32,000	30,60,000	1,71,92,000
O.M.P. (I) (COMM.) No. 20 of 2015 (Kudgi)	7,31,01,000	3,82,94,500	11,13,95,500
O.M.P. (I) (COMM.) No. 21 of 2015 (Korba)	6,29,87,122	66,12,000	6,95,99,122

10. On 6 th February, 2016, the petitioner had also filed five petitions being Arb. P. Nos.85/2016, 86/2016, 87/2016, 88/2016 and 89/2016, under Section 11(5) read

with Section 11(6) of the Act for seeking appointment of a retired Judge of the Supreme Court as an Arbitrator for adjudication of the disputes between the parties by declaring the Arbitrator already appointed by the respondent ineligible and further declaring such appointment void ab initio. The said petitions were heard by the Court at the first instance and the same were dismissed by order dated 19th April, 2016, mainly, on the reason that the Arbitral Tribunal has already been constituted who has entered into reference. The Arbitral Tribunal has already ensured the compliance of the provision under the amended Act about no conflict. The said orders have been challenged by the petitioner in the Supreme Court which are pending for disposal.

11. As far as being O.M.P. (I) (COMM.) Nos.65/2015, 66/2015, 68/2015, 69/2015 and 70/2015 are concerned, the main argument of Mr.Rajiv Nayar, learned Senior counsel appearing on behalf of the respondent, is that the Bank Guarantees are unconditional and irrevocable. Therefore, the respondent cannot be restrained from exercising its contractual rights to encash the Bank Guarantees except on two grounds, as recognized by law, i.e. fraud of egregious nature and encashment resulting in irretrievable harm and injustice to a party at whose instance the Bank Guarantee is issued. The petitioner in the present petitions has failed to satisfy the Court that the present petitions are covered within the ground of fraud or irretrievable harm and injustice. Thus, this Court has no option but to dismiss the said petitions. The above referred petitions were argued by the counsel from time to time. Even written submissions were also filed.

12. On the other hand, the contention of Mr.Amit Sibal, learned Senior counsel for the petitioner is that the intent of the respondent to invoke the Advance Bank Guarantee of the petitioner is egregious fraud on the part of the respondent. It is argued by Mr.Sibal that the respondent has received the entire money towards the supplies made by the petitioner from NTPC for all the projects, however, the respondent has not paid the amount to the petitioner. It is also stated that the respondent has deliberately concealed this fact from this Court about the receipt of the money from NTPC. It was only pursuant to the order dated 4th January, 2016 that the respondent disclosed the said fact that the petitioner is, at all times, willing to complete the contract and perform its obligations under the contract. Even, the

petitioner had given the proposal, without prejudice, to complete its obligation without receiving any amount till the obligations are completed and in fact, it is the respondent who is not allowing the petitioner to complete the obligation. Mr.Sibal submits that under the terms of the Purchase Order 1 in OMP No.70 of 2015 (Annupur WT), the petitioner had to provide advance bank guarantee of 10% of the total order value amounting to Rs.3,51,50,000/- and a performance bank guarantee of 10% of the order value being Rs. 3,51,50,000/-. The total Bank Guarantee towards Purchase Order 1 was valued at Rs.7,03,00,000/-. Similarly, under Purchase Order 2, in OMP No.68 of 2015 (Annupur PF), the petitioner had provided Bank Guarantee of Rs.31,26,000/- towards advance bank guarantee and Rs.31,26,000/- towards performance bank guarantee. The petitioner has, as admitted by the respondent, over the period of the Contract made supplies of the entire equipment agreed under the Contract. Further, most of the erection and commissioning required under the Contract has also been done.

13. It is also submitted by Mr.Sibal that a sum of Rs.2,21,89,473/- in Annupur (WT) Project towards Purchase Order 1 and Rs.1,41,32,000 in Annupur (PF) Project towards Purchase Order 2 are due against the equipment supplied by the petitioner. He submits that the above amounts are due and pending from the respondent despite the respondent having received the said amounts from Lanco, i.e. the principal employer.

14. Mr.Sibal submits that his submissions are supported by the email dated 9 th November, 2015 received by the petitioner from the respondent, wherein a letter dated 6 th November, 2015 was reproduced and which set outs inter-alia the following facts:-

(i) Respondent is struggling with M/s Lanco for release of huge outstanding of more than Rs.20 Crores;

(ii) Though erection and commissioning of entire CHP at MB Anuppur except two Wagon Tipplers is completed and the plant is under commercial use, respondent has not been paid the outstanding payment;

(iii) Respondent has informed LITL that Wagon Tippler will be commissioned only after receipt of payment;

(iv) Respondent had assured that the balance payment shall be released to the petitioner immediately upon receipt from Lanco and the petitioner should not perform the balance commissioning work until one week after receipt of payment from Lanco by the respondent.

15. Mr.Sibal has supplied the details of calculations across the three NTPC projects, namely, Kudgi, Kobra and Sipat which are given as under:-

CALCUATIONS ACROSS THE THREE NTPC PROJECTS NAMELY KUDGI, KORBA AND SIPAT

I.	Percentage of supplies made towards the projects	
a.	Kudgi Project-90%	
b.	Korba Project-87%	
c.	Sipat Project-48%	
II.	Total PBG submitted across three projects	
a.	Kudgi Project -	Rs.5,01,09,200.00
b.	Korba Project -	Rs.1,21,76,700.00
c.	Sipat Project -	Rs.1,21,76,700.00
	Grand Total-	Rs.7,44,52,600.00
III.	Invoices Outstanding as per Respondent	
a.	Kudgi Project -	Rs.6,51,03,100.00
b.	Korba Project -	Rs.5,76,42,849.00
c.	Sipat Project -	Nil
	Grand Total-	Rs.12,27,45,949.00
IV.	Admitted retention amount	
a.	Kudgi Project -	Rs.3,82,94,500.00
b.	Korba Project -	Rs. 66,12,000.00

c.	Sipat Project -	Rs. 36,20,000.00
	Total Retention Amount -	Rs.4,85,26,500.00

16. Mr.Sibal submits that it is admitted position that even as per the respondent the total invoices not paid is of a value of Rs.12,27,45,949.00/- as against the total Performance Bank Guarantee amount submitted by the petitioner of Rs.7,44,52,600.00/-.

He states that even if the retention amount is also added to the total value of the invoices not paid by the respondent, the same would be as under:

a.	Invoices not paid -	Rs.12,27,45,949.00
b.	Retention amount -	Rs. 4,85,26,500.00
	Grand Total -	Rs.17,12,72,449.00
V.	Advance bank guarantee amount	
a.	Kudgi Project	- Rs.4,62,92,400.00
b.	Korba Project -	Rs.1,12,26,700.00
c.	Sipat Project -	Rs.1,12,26,700.00
	Total Retention Amount -	Rs.6,87,45,800.00

Mr.Sibal submits that it is an admitted fact that the respondents have already appropriated the entire Advance Bank Guarantee amount while determining the figure of invoices not paid by them.

17. As mentioned earlier, a large number of disputes are raised by both the parties and a number of documents are referred on behalf of both the sides so as the judgments. They have also made submissions on merit. Mr.Sibal submits that in the nature of the disputes having arisen in the present matters where the percentage of supplies of goods and performance is so high, the Court is empowered to decide such issues and for the purpose the Court can also go into the merits of the case.

18. Admittedly, the Arbitral Tribunal has already been constituted. In case, the Court goes into the details of the matters, the case of one of the parties would be

prejudiced. The present nine petitions which are filed by the petitioner after 23rd October, 2015 i.e. under the amended Act, Section 9(3) of the Act has been amended which is mandatory in nature.

19. Section 9(3) of the Act reads as under:-

9. Interim measures, etc. by Court.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

20. Thus, I am of the view that as soon as the Special Leave Petition filed by the petitioner is disposed of, the prayer made in the nine petitions can be considered by the Arbitral Tribunal. There is no impediment or a situation where the remedy provided under Section 17 of the Act is not efficacious. Thus, let these petitions be treated as applications under Section 17 of the Act which may be decided by the Arbitral Tribunal at an early date once the Arbitral Tribunal shall commence the first hearing. Till the said petitions are decided, the interim directions which are issued by way of statement not to take any steps for invocation shall continue, subject to the condition that the petitioner shall keep the bank guarantee alive till the decision of application under Section 17 of the Act. The Arbitral Tribunal at the time of deciding the said application would pass the appropriate orders in this regard. All pleadings of these petitions shall be filed by the petitioner once the Arbitral Tribunal will commence the proceedings.

21. The above mentioned petitions are accordingly disposed of.

22. No costs.