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## Technimont Private Limited & Anr. v. ONGC Petro Additions Ltd.

<b>Citation</b>	<b>O.M.P. (I)(COMM) 87/2020</b>
<b>Court</b>	<b>High Court of Delhi</b>
<b>Date</b>	<b>20 June 2020</b>
<b>Bench</b>	<b>V. Kameswar Rao J.</b>

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### **FACTUAL BACKGROUND:**

- The Respondent herein was seeking to establish a Petrochemical Complex at Dehaj consisting of several interdependent units of which a Polyethylene Unit ('PE Unit') and a Polypropylene Unit ('PP Unit') was to be constructed, developed and commissioned by the Petitioners within 28 months as per the terms of 2 contracts executed between the parties herein. However, there were certain delays on account of which the actual completion date was extended.
- The Petitioners were required to furnish three performance BGs (Clause 3.3 GCC) guaranteeing the execution and performance of the works under the contracts and two advance BGs (Clause 3.8 GCC) to secure the mobilization advance paid by the Respondent.
- Even before achieving the mechanical completion, pre-commissioning, and commissioning of the project on May 18, 2015, the Petitioners issued arbitration notices under the relevant provisions of the contracts on account of existence of disputes between the parties. However, the Petitioners did not proceed with the arbitration proceedings until it obtained commissioning certificate for the PP and PE units in 2017. The primary claim of the Petitioners was for damages on account of delay on part of the Respondent in the completion and commissioning of the project to which the Respondent filed counter claims seeking liquidated damages for delay in commissioning of the project and also for the damages incurred by the Respondent on account of defects and damages discovered in the PE unit.
- On January 06, 2020, the Arbitral Tribunal rendered its award ('Award') in favor of the Petitioners and dismissed the Respondent's counterclaim in its entirety. Accordingly, the Respondent took recourse under Section 34 of the Act to challenge the Award. 2
- On March 07, 2020, the Respondent wrote an e-mail to the Petitioners asking them to extend the validity of the BGs on account of pendency of proceedings before the Court under Section 34 of the Act. Subsequently, the Respondent invoked the BGs by e-mails dated March 09, 2020 and March 10, 2020.
- Aggrieved by invocation of the BGs, the Petitioners filed OMP(I)(COMM) 73/2020 which was disposed-off on March 13, 2020 by directing the Petitioners to extend the validity of the aforesaid three BGs for a period of one month within which time, the Respondent shall get their petition under Section 34 listed and seek appropriate orders.
- The Section 34 petition of the Respondent was heard on March 23, 2020 and it was held that the Award be stayed subject to the payment of awarded amounts by the Respondent to the Petitioners and simultaneously Petitioners furnishing bank guarantee(s) for the said amount which shall be kept alive till further orders.
- Accordingly, the parties implemented order dated March 23, 2020 by discharging each other's obligation. As the validity of the BGs was expiring, the Respondent on April 05, 2020 wrote a letter to the Petitioners and called upon them to extend the validity of the BGs which was duly replied by the Petitioners by denying the extension. In response the Respondent vide its letter dated April 07, 2020, decided to invoke the BGs.

- The Petitioners responded to the aforesaid letter of the Respondent vide letter dated April 09, 2020. Being aggrieved the Petitioners filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'), seeking an order to restrain the Respondent from invoking or encashing the Performance Bank Guarantees, furnished by the Petitioner.

#### **ISSUES:**

- Whether the Respondent who has an Award against it whereby all its counter claims have been rejected by the Arbitral Tribunal, can seek extension of the BGs furnished by the Petitioners for performance of the contracts pending adjudication of Respondent's petition under Section 34?
- Whether the Petitioners have been able to demonstrate that BGs should be enjoined by the Court by meeting the twin test for grant of injunction restraining the invocation of bank guarantees?

#### **CONTENTIONS OF THE PETITIONERS:**

- Petitioners primarily contended that the BGs were provided to the Respondent to secure performance of the contracts and commissioning certificates dated February 15, 2017 and April 14, 2017 have been issued and plants have achieved 100% capacity utilization. It was further stated that the Petitioners' claims have been allowed by the Arbitral Tribunal and the counterclaims of the Respondent have been rejected; a losing party in an arbitration cannot seek extension of the BGs or invoke them once it has suffered an Award.
- Moreover, the basis of demand for extension of BGs by the Respondent is on the ground it has challenged the final Award with a stand that BGs are required to be extended as Petitioner failed to perform the contracts, which is an incorrect stand. By order dated March 13, 2020, the court directed the Petitioners to extend the BGs for a month while Respondent can seek appropriate orders in its Section 34 petition which it failed to secure and no direction for extension of BGs was given in Section 34 petition. Mere pendency of Section 34 proceedings does not mean dispute regarding contractual performance exist between the parties as there is no live or pending claim against the Petitioners to seek extension of bank guarantees.
- Lastly, with regard to two BGs, despite having recovered the entire mobilization advance and the counter-claims before Arbitral Tribunal having been rejected, the invocation is fraudulent and as such the Petitioners will need to initiate separate arbitration proceedings to recover the monies paid out to the respondent under the BGs and therefore the special equities are in their favor.

### **CONTENTIONS OF THE RESPONDENTS:**

- Respondent chiefly contended that the BGs are unconditional and irrevocable, out of which four have already been invoked and as such the present case needs to be seen and decided on the principles governing grant of injunction, restraining the invocation of the BGs on the twin test of egregious fraud or irretrievable harm, which are not satisfied. The Respondent's invocation of BGs is justified as it has protectable interest related to the performance of the contract and the petitioners cannot get the relief of return of BGs as similar prayer was rejected by the Arbitral Tribunal.
- Alternatively, the previous orders of the Court required the Petitioners to extend the validity of the BGs and the Respondent shall deposit the charges in the Court till the decision of Section 34 Petition. As on date, all the contracts are still valid and subsisting and the Petitioners have not been able to discharge their obligations under the contracts. Merely 4 because an arbitral Award has been pronounced against the Respondent does not mean that pending its challenge, the disputes cease to exist. It was further contended if the Court set aside the Award in the Section 34 Petition, it will entitle the Respondent to invoke BGs for any breaches / non-performance and recover its liquidated damages in respect of which it is settled law that there is no requirement of an order of Court / Tribunal.

### **JUDGEMENT:**

- The Court restrained the Respondent from invoking the BGs furnished by the Petitioners. It was observed that the Award ensures benefit to the Petitioners being a successful party and it is the successful party who can seek its enforcement under Section 36 of the Act and also secure interim relief under Section 9 of the Act in furtherance of such enforcement. This position of law is well settled in the case of *Dirk India Private Limited v. MSEG C (2013) 7 Bom. CR 493* followed by *Nussli Switzerland Ltd. v. Organizing Committee FAO (OS) 121/2014* wherein the Division Bench agreed with the reasoning of the Court in *Dirk (Supra)* holding that a losing party cannot file a petition under Section 9 of the Act.
- The Respondent being a losing party, in order to overcome the decision in *Dirk (Supra)*, sought an order against the Petitioners that they shall keep the BGs alive till Section 34 petition is decided, proceeded to invoke the BGs which could not have been done directly and are precluded from invoking the same in light of orders under Section 34 petition.
- Respondent placed reliance on *K. Kishan v. Vijay Nirman Company Pvt. Ltd. 2018 (10) SCALE 256*, to lay emphasis that disputes continue to exist till such time the arbitral Award attains finality and there are other obligations under the contracts which have not been completed by the Petitioner for which reason the Respondent can invoke the BGs for which emphasis was laid upon *Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353*, which provided that the challenge to the



arbitral award means the 'dispute' between the parties continue, in which case an application preferred by the operational creditor must be rejected however, it was held that the judgment has no applicability in the facts of this case as it does not relate to a litigation under the IBC.

- The Court categorically held that the Respondent by invoking the BGs intends to secure counterclaims which were rejected by the arbitral tribunal, which is clearly impermissible in view of the position of law noted above. The Court further rejected the argument of the Respondent that if the Award is set aside, the respondent can invoke the BGs to satisfy its claims without resorting to arbitration / Court and rejected the same as a fallacious argument. It is settled law that the claims (counterclaims in the present case) so 5 rejected are not deemed to have been allowed in favor of respondent as held in *Dirk and followed by Oil and Natural Gas Corporation Ltd. v. Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd.*, 2018 SCC Online Bom 6034, *State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd.*, 2014 (144) DRJ 220.
- It was further held that even if the Respondent succeeds in its Section 34 petition, the setting aside of the arbitral Award in rejecting the counterclaims of the respondent does not result in the same being decreed in its favor. It would be open to the respondent to commence fresh proceedings against the petitioners [Ref. *International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181]. It follows that, till such time there is an adjudication of the counter-claims, in favor of the Respondent, no sum is due in praesenti nor any sum is payable to the Respondent, for it to invoke the BGs. The Court further rejected the Respondent's contention that the invocation of the BGs has to be strictly seen as per the law relating to the BGs as misplaced and not applicable in the facts of the present case and placed reliance on *M/s. Mukti Credits Pvt. Ltd. v. Indra Prstha Power Generation Co. Ltd. OMP (I) (COMM) 113/2019*, wherein the Court restrained the respondent therein from invoking a bank guarantee, post an arbitral award on the ground that no sum was due to the Respondent and the objections of both the parties to arbitral award under Section 34 were pending.
- Finally, the court rejected the contention that Petitioner be directed to extend validity of the BGs with charges for such extension to be deposited by the Respondent in this Court or in the alternative, the Respondent be allowed to invoke the BGs and deposit the money in this Court. Such approach is clearly inequitable in view of the facts and circumstances of this present case and will certainly open flood gates of litigation in the country. It may have a pernicious effect as even after losing before an Arbitral Tribunal, a party may invoke BGs of the winning party to realize what it could not achieve before the Arbitral Tribunal, through claims/counterclaims.