IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO. 34865 OF 2023

M/s Xylem Water Solutions India Pvt. Ltd. ...Petitioner

Versus

M/s Sasan Power Limited & Anr. ...Respondents

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- Mr. Jehaan Mehta i/b Meiron B. Damania (King Stubb & Kasiva), for Petitioner.

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CORAM : MANISH PITALE, J.

DATE : 19th DECEMBER, 2023.

P. C. :

1. Heard learned counsel for the petitioner.

2. By this petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner, *inter alia,* is seeking an injunction against respondent No. 1 from encashing the bank guarantee. According to the learned counsel for the petitioner, the petitioner is justified in seeking ad-interim relief without notice to the respondent, for the reason that if notice is served, the bank guarantee would be encashed forthwith, thereby rendering the petition itself infructuous. It is also fairly stated on behalf of the petitioner that although the law pertaining to bank guarantees specifically lays down that the Court ought to be slow in granting such injunction, in the facts of the present case, the petitioner believes that an exceptional case is made out for pressing ad-interim relief before this Court.

3. The learned counsel for the petitioner has invited attention of this Court to the documents on record. He seeks permission to place on record an additional affidavit alongwith documents which pertains to a notice issued to the respondent No. 2 – Bank on behalf of the petitioner to inform the Bank that the respondent No. 1 seeks to encash the bank guarantee in a conditional manner. The additional affidavit be placed on record within one week from today.

4. This Court has considered the material on record, in order to examine as to whether ad-interim direction sought on behalf of the petitioner can be granted. In the present case, the respondent No. 1 had placed a purchase change order dated 08th February, 2023 for purchase of submersible pumps. In that regard, 10% of the amount was transferred in favour of the petitioner, in respect of which the petitioner had furnished the aforesaid bank guarantee.

5. The petitioner was required to supply the submersible pumps. The material on record shows that the bank guarantee was extended on one occasion and as on today, bank guarantee is alive till 31st December, 2023.

6. It is the case of the petitioner that the communications placed on record would show that the petitioner has imported two

submersible pumps from Sweden in the context for the purchase change order and that when communications were addressed to respondent No. 1 with regard to the supply of the submersible pumps, on 12th September, 2023, the respondent No. 1 communicated to the petitioner that it was not in a position to procure the two submersible pumps. In the same communication, the respondent No. 1 indicated that the order would stand canceled and that the third submersible pumps in respect of which the original order was issued in May, 2022, would also stood canceled.

7. According to the petitioner, thereafter, number of communications were addressed to the respondent No. 1, but, there was no response and the petitioner apprehended that the bank guarantee may be encashed. It is the case of the petitioner that on its part, the petitioner had kept the submersible pumps ready for supply and the respondent No. 1 could not have turned around to refuse to accept the two submersible pumps kept ready by the petitioner and it could not have cancelled the order itself.

8. Apart from this, this Court finds that the bank guarantee itself refers to a clause in the Special Condition of Contracts / GCC and in that sense, *prima facie,* the bank guarantee cannot be termed to be an unconditional bank guarantee.

9. Apart from this, it is also found that in the very same

document i.e. the bank guarantee, reference is made to a purchase order dated 03rd July, 2023 and a specific contract number is also recorded. There is substance in the contention raised on behalf of the petitioner that the said bank guarantee does not refer to the subject purchase change order and in that sense it could be said that the bank guarantee is defective / fraudulent.

10. This Court has also taken note of the fact that while sending communication dated 07th November, 2023, to the respondent No. 2 – Bank, the respondent No. 1 has indicated as if the invocation itself is conditional. *Prima facie,* this Court finds that in the first instance, the respondent No. 1 has indicated that if no instruction is received from the petitioner for extending the validity of the bank guarantee upto 30th June, 2024, and in the event, there is a request to remit the bank guarantee amount, the aforesaid bank guarantee would stand invoked on the part of respondent No. 1. This is also a factor, which this Court is inclined to take into account, while considering the prayer made on behalf of the petitioner. Subsequent communications exchanged between the parties indicate that on 28th November, 2023, the respondent No. 1 emphatically communicated to the petitioner that it had decided to encash the bank guarantee. Thus, the petitioner has been able to make out a case of urgency and consideration of its prayer for grant of ad-interim relief, without notice to the respondents.

11. Reference is made to judgments of the Supreme Court in the case Hindustan Construction Co., Ltd. Vs. State of Bihar and Others[1] and Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co.,[2], to place before this Court the well settled principles pertaining to the invocation of bank guarantee and in that context the approach to be adopted by the Court, while considering the prayer for grant of injunction restraining the encashment of bank guarantee.

12. This Court finds that the fraud is one of the grounds that could be invoked for seeking such an injunction, although the Court is required to be slow in granting such reliefs.

13. But, in the facts of the present case, this Court is convinced that the bank guarantee itself *prima facie* appears to be defective / fraudulent, in as much as it refers to a purchase order which does not have any connection with the subject purchase change order dated 08th February, 2023. The material on record *prima facie* indicates that while the petitioner was ready with the submersible pumps, it was the respondent No. 1 which expressed its inability to receive the same and this Court also finds that the invocation of the bank guarantee itself can be said to be conditional. These factors are in favour of the petitioner for granting limited ad-interim protection till the next date of listing.

1 (19990 8 SCC 436
2 (2007) 8 SCC 110

14. In view of the above, there shall be ad-interim reliefs, till the next date of listing, in terms of prayer clause (a) and (b), which read as follows :

"(a) That this Hon'ble Court restrain by an order of injunction Respondent No. 1 by itself, or through is employees, servants and/or agents or otherwise from encashing the ABG;

(b) That this Hon'ble Court restrain by an order of injunction Respondent No. 1 and Respondent No. 2 by themselves, or through their employees, servants and/or agents or otherwise from acting on the letter dated 7th November, 2023 or otherwise encashing the ABG;"

15. Issue notice to the respondents, returnable on **18th January, 2024.**

16. The petitioner is permitted to additionally serve the respondents by way of private service and to file an affidavit of service before the next date of listing.

(MANISH PITALE, J.)