

Hindustan Construction Co. Ltd vs National Hydro Electric Power ... on 23 June, 2020

Author: Rekha Palli

Bench: Rekha Palli

Via Video Conferencing

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. (I)(COMM) 150/2020

HINDUSTAN CONSTRUCTION CO. LTD.Petitioner
Through: Mr. Dayan Krishnan, Sr. Adv. with
Mr. Jayant Mehta, Mr. Rishi
Agrawala, Ms. Shruti Arora, Ms.
Sanjeevi Seshadri, Mr. Ankit Banati
and Ms. Malavika Lal, Advs.

Versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION LTD.
.....Respondent
Through: Mr. Piyush Sharma, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
ORDER

% 23.06.2020 I.A. 4773/2020 (exemption)

1. Allowed, subject to all just exceptions.

I.A. 4774/2020 (exemption)

2. The applicant will file the requisite affidavits and court fees within two weeks of the normal functioning of the Court being restored.

3. The application is disposed of.

O.M.P. (I)(COMM) 150/2020

4. By way of this petition under Section 9 of the Arbitration and Conciliation Act, 1996, the petitioner has sought a direction from this Court restraining the respondent from encashing, invoking or taking any precipitative steps to recover any monies under the petitioner's bank guarantees for the amounts of Rs.107.80 crores towards retention deposit, Rs.101.32 Crores towards performance, and Rs.5.24 Crores towards Advance, furnished in favour of the respondent as per the terms of the contract dated 09.03.2009.

5. Learned senior counsel for the petitioner, Mr. Dayan Krishnan submits that pursuant to an agreement executed between the parties on 09.03.2009, the petitioner had completed the work and was duly issued a completion certificate on 26.06.2018. He submits that although the defects liability period for the project was fixed at two years during which period the petitioner had, at the respondent's behest, furnished 48 bank guarantees which were to remain valid during the aforesaid defects liability period, the respondent had subsequently decided to extend the defects liability period by another one year. Consequently, the petitioner has been directed to extend the validity of all the 48 bank guarantees for a further period of one year. Mr. Krishnan further submits that as on date all the 48 bank guarantees have been extended and though 22 of the original bank guarantees have already been received by the respondent, the remaining 26 bank guarantees, after due extension, have already been dispatched to the respondent by way of courier on 18.06.2020. He submits that since the respondent is presently stationed at a distance of 70 KM from Srinagar, the said courier has not yet been received by the respondent. Yet, notwithstanding the fact that the respondent has been duly informed of this development, the respondent has, on the premise that the petitioner has failed to send the original extended bank guarantees to it, sought to invoke some of them. He submits that the petitioner has received information about this turn of events only through the concerned Banks, i.e., Punjab National Bank, ICICI and Jammu & Kashmir Bank. He, therefore, prays that the respondent be restrained from encashing the bank guarantees or initiating precipitative action in this regard.

6. Issue notice. Mr. Piyush Sharma, accepts notice on behalf of the respondent. He prays for and is granted three days' time to file reply. Rejoinder thereto, if any, be filed within three days thereafter.

7. Learned counsel for the respondent while not disputing that the 16 bank guarantees, detailed herein below, have been sought to be invoked only on account of the petitioner's failure to deliver the extended bank guarantees to the respondent in original, submits that the petitioner has failed to remove the defects despite repeated requests of the respondent and therefore the respondent was justified in invoking the same.

8. I have considered the submissions of the learned counsel for the parties and with their assistance perused the record. Even though the legal position in this regard is clear that Courts ought to be circumspect while interfering with enforcement of bank guarantees, but the facts of the present case compel me to pass an interim order in favour of the petitioner. As per the respondent's own stand, which is also reflected in the documents on record, the bank guarantees are sought to be encashed only on account of the fact that the original extended bank guarantees have not been received by the respondent till date. It is pertinent to note that vide its letter dated 11.06.2020, the respondent had directed the petitioner to extend the bank guarantees and ensure that the extended original bank guarantees are delivered to the respondent within seven days, failing which the respondent would initiate action to encash them. Although the original bank guarantees were suitably extended by the petitioner and dispatched on 18.06.2020 itself, the respondent has probably not received them yet on account of delivery delays caused by the COVID-19 pandemic. It is, thus, evident that the respondent has initiated action for encashment for these bank guarantees without appreciating the fact that the petitioner cannot be faulted for non-receipt of the original bank guarantees by the respondent. The petitioner has, therefore, made out a prima facie case for restraining the

respondent from encashing the bank guarantees in question, the balance of convenience is also in favour of the petitioner and it is evident that the petitioner will incur irreparable loss in case the bank guarantees are encashed by the respondent at this stage.

9. Accordingly, while granting time to the respondent to file reply, the respondent is, till the next date, restrained from encashing the 16 bank guarantees listed hereinbelow or taking any precipitative steps in this regard:-

1. BGo393BG00002518 Rs.65,00,000/-
2. BGo393BGR0048618 Rs.1,50,00,000/-
3. 09020000612 Rs.1,65,00,000/-
4. 09020001312 Rs.2,60,00,000/-
5. 09020004513 Rs.3,36,84,272/-
6. JKB/BN/BG-40 Rs.2,51,52,235/-
7. JKB/BN/BG-53 Rs.3,66,61,039/-
8. JKB/BN/BG-51 Rs. 2,84,70,921/-
9. JKB/BN/BG-61 Rs.6,01,69,128/-
10. JKB/BN/BG-62 Rs.2,50,51,787/-
11. JKB/BN/BG-67 Rs.3,15,13,810/-
12. JKB/BN/BG-81 Rs.2,64,12,947/-
13. JKB/BN/BG-84 Rs.1,75,78,237/-
14. 0446IPBG1512003 Rs.2,03,81,250/-
15. 0446IPBG1602001 Rs.1,54,56,145/-
16. 0446IPBG1605002 Rs.79,91,465/-

10. At request, list on 01.07.2020.

REKHA PALLI, J JUNE 23, 2020 SDP