

\$~J-

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 14.05.2020

%

Judgment Pronounced on: 03.06.2020

+ OMP (I) (COMM.) 218/2019

BHUBANESHWAR EXPRESSWAYS PVT. LTD. Petitioner
Through Mr.Sandeep Sethi, Sr.Adv. with
Mr.Kamal Shankar, Mr.Abhyudai Singh,
Mr.Sidhant Kumar and Mr.Sahil Tandon,
Advocates

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Defendants
Through Mr.Sudhir Nandrajog, Sr.Advocate
with Mr.Tushar Dutta and Mr.C.S.Chauhan,
Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.1898/2020

1. This application is filed seeking following relief:

“ii. to pass appropriate orders and directions to the respondent to deposit the amount of Rs.3,37,73,19,434.10/- (Rupees Three Hundred and Thirty Seven Crores Seventy Three Lakhs Nineteen Thousand Four Hundred Thirty Four and Ten Paise only) in the petitioner's designated 'Escrow Account' which is maintained with Punjab National Bank, Large Corporate Branch, Sector-29, Gurugram (Haryana), bearing Current Account Escrow A/c No.:4615002100001574.”

2. On 25.11.2019, this court disposed of this petition with the following directions:

“51. In my view, the petitioner has made out a *prima facie* case for grant of interim mandatory order and the balance of convenience is also in its favour. I, accordingly, pass the following directions;

(a) Petitioner will furnish an unconditional and irrevocable Bank Guarantee in favour of NHAI undertaking to pay to the NHAI an amount of Rs.3,37,73,19,434.10/- towards the 90% of the debt due as Termination Payment within a period of two weeks from today.

(b) On furnishing of the Bank Guarantee, the respondent shall deposit the said amount in the sum of Rs.3,37,73,19,434.10/- in the escrow account, within three weeks thereafter.

(c) The encashment of the Bank Guarantee shall be subject to final award of the Arbitral Tribunal; and

(d) The petitioner shall keep the Bank Guarantee alive up to a period of six months after the final award is passed by the Arbitral Tribunal.”

3. What follows from the above order is that the petitioner was to furnish an unconditional and irrevocable bank guarantee in favour of NHAI for the stated amount. On furnishing of the bank guarantee, the respondent was to deposit the stated amount in the escrow account of the petitioner within three weeks. The encashment of the bank guarantee was subject to final award of the arbitral tribunal.

4. It is the case of the petitioner that they have furnished an unconditional and irrevocable bank guarantee dated 13.01.2020 issued by Hongkong and Shanghai Banking Pvt. Ltd. in favour of the respondent/NHAI for an amount of Rs.3,37,73,19,434.10/-. The bank

guarantee has been issued at the request of the petitioner's lender i.e. Arcelor Mittal India Pvt. Ltd., to whom 'debt due' amount is due and payable.

5. The respondent however has objected to the bank guarantee. On 31.01.2020, they have written to the petitioner that there is non-compliance with the order of this court dated 25.11.2019 by the petitioner. It is claimed that the bank guarantee was to be furnished by the petitioner and not by any other party at its instance. It is further stated that the party at whose instance the bank issues the guarantee cannot be a third party, having no connection with the contract between the parties, namely, the petitioner and the respondent. Hence, the present application.

6. I have heard Mr.Sandeep Sethi, learned senior counsel for the petitioner and Mr.Sudhir Nandrajog, learned senior counsel for the respondent/NHAI.

7. Learned senior counsel for the respondent argued for a considerable period of time to vehemently urge that this court cannot thrust a third party on to the respondent and hence, the bank guarantee filed by the petitioner cannot be accepted.

8. The parties have also filed their written submissions.

9. The respondent has made the following salient submissions to oppose the present application.

i) It has been strongly urged that this application is not maintainable in accordance with the principle of *res-judicate* as the petitioner had earlier also filed an application being IA No.16981/2019 on the same cause of action praying for similar relief. This application was withdrawn by the petitioner. Another application seeking the same relief cannot be filed.

ii) It is further urged that Arcelor Mittal India Pvt. Ltd. is a complete stranger to the transaction and no bank guarantee can be given at its instance which would be legal and valid. It is stressed that the bank guarantee is a contract under section 126 of the Contract Act, 1872 for which there can only be three parties, namely, the creditors, principle debtors and surety. It does not envisage a fourth party to the contract. It is strongly urged that the respondent cannot be forced to enter into a contractual relationship with the fourth party inasmuch as no court can pass such directions. Reliance is placed on the Judgment of the Karnataka High Court in ***H.Mohd. Khan v. Andhra Bank Ltd., AIR 1983 Karnataka 73***, where the court held that a contract of guarantee involves a contract to which three parties are privy.

iii) It is further urged that the order dated 25.11.2019 of this court is under challenge before the Division Bench and no steps for its implementation should be directed by this court till such time the Division Bench does not have an occasion to deal with the issue.

iv) It is further pleaded that Arcelor Mittal India Pvt. Ltd. is a complete stranger to the transaction. As per the order dated 25.11.2019 of this court the interim directions given are subject to modification by the arbitral tribunal and subject to further directions that may be issued by the arbitral tribunal or by the court. It is pleaded that Arcelor Mittal India Pvt. Ltd. would not be bound by the orders passed by the arbitral tribunal or by the court. Hence, the bank guarantee in question cannot be accepted and is not in compliance with the order of this court dated 25.11.2019.

10. Learned senior counsel for the petitioner has stated as follows:

i) It is settled law that the bank guarantee is an independent contract between the bank and the beneficiary. Reliance is place on the judgments of

the Supreme Court to support the above views including the judgment of the Supreme Court in the case of *Standard Chartered Bank Ltd. v. Heavy Engineering Corporation Ltd. 2019 SCC OnLine SC 1638*.

ii) It is pleaded that Arcelor Mittal India Pvt. Ltd. is the assignee of the debt of the petitioner pursuant to the proceedings in the Supreme Court and the order of the Supreme Court dated 04.10.2018 in Civil Appeal Nos.9402-9405/2018.

iii) It is further pleaded that when NHAI/respondent awarded the contract, it required that a Special Purpose Vehicle be created for running and completing of the project. Hence, the petitioner was incorporated. In the meantime, the respondent has terminated the contract. Hence, no business remains in the petitioner company as the petitioner company was solely floated to carry out the present/project contract. In these circumstances, the petitioner has taken help from its lender for furnishing of the bank guarantee. No prejudice is caused to the respondent.

11. In the above facts what stands out is that this court in its order dated 25.11.2019 directed that the petitioner will furnish an unconditional and irrevocable bank guarantee in favour of NHAI. Thereafter, NHAI will deposit the said amount in the escrow account. The encashment of the bank guarantee was subject to final award of the arbitral tribunal. It is manifest that the bank guarantee was directed to be issued by the petitioner as a security for the payments being released by the respondent. That was the simple object of the said direction. The petitioner has given the bank guarantee. The bank guarantee is issued at the behest of Arcelor Mittal a third party. Based on this, the respondent has created a hue and cry and has opposed the present application tooth and nail. I cannot help but forming an

impression that the respondent are raising tactical issues only to somehow ensure that they do not have to comply with the direction of this court dated 25.11.2019. It is manifest that in the appellate proceedings against order dated 25.11.2019 they have not been granted so far any favourable orders and hence have chosen this path to try and obstruct implementation of the order dated 25.11.2019 of this court.

12. A perusal of the bank guarantee dated 13.01.2020 submitted by the petitioner shows that the banker has undertaken to make such payment upon the beneficiary's demand in writing without any protest, demur or cavil and without being entitled to raise any objection for any reason whatsoever. This is a normal bank guarantee and contains necessary stipulations, which are usually contained in such bank guarantees.

13. I may also note that Arcelor Mittal India Pvt. Ltd. have filed an affidavit through Mr.Kalyan Ghosh, Chief Financial Officer, who has been authorized to swear the affidavit and furnish the undertaking by the Board vide Resolution dated 18.01.2020. The affidavit further states that Arcelor Mittal India Pvt. Ltd. will keep the bank guarantee current and valid in accordance with the orders of this court dated 25.11.2019 and 04.12.2019 till pendency of the arbitral proceedings and for a period of six months from the date of the arbitral award.

14. It is clear that the object of directing the petitioner to furnish the bank guarantee vide order dated 25.11.2019 was to secure the payment which the respondent was directed to deposit in the escrow account. The bank guarantee now furnished by the petitioner with the assistance of Arcelor Mittal, in my opinion, satisfies the said purpose and secures the respondent

for its dues. Mere technical arguments are being raised to try and wriggle out of the directions passed by the court on 25.11.2019 by the respondent.

15. I do not see the need to deal with the other submissions made strongly by the learned senior counsel for the respondent in view of my conclusions noted above. However, for the sake of completeness, I will deal only with two of the said submissions.

16. It was strongly urged that the petitioner had filed a similar application earlier which was withdrawn and the principle of *res judicata* will apply. A perusal of the said application being IA No.16981/2019 shows that in the application what was prayed for was a modification of the order of the court dated 25.11.2019 so that the respondent shall first deposit the stated sum as termination payment in the escrow account and thereafter the petitioner shall furnish the necessary bank guarantee. Clearly, the prayer sought in this application, namely, IA 16981/2019 is entirely different. In any case, the application was simply withdrawn by the petitioner. There is no judgment of the court. I do not see how principle of *res-judicata* would be applicable to such a situation. Presently, the petitioner has already furnished a bank guarantee and is not asking that the respondent should first deposit the stated amount and thereafter they will furnish the bank guarantee. This plea of the respondent is entirely misplaced.

17. The second argument strongly urged was that the respondent does not wish to deal with a stranger Arcelor Mittal. It was strongly claimed that at the time of encashment of the bank guarantee if such a situation arises, the said Arcelor Mittal may turn around and start proceedings against the respondent. It is pleaded that the respondent is not interested in the Arcelor

Mittal and this court cannot force the respondent to deal with the said company.

18. The plea is misplaced. A bank guarantee is a contract between the bankers and the beneficiaries. The respondent for the purpose of the bank guarantee has to deal with the guarantor, namely, the bankers and not the party at the instance the bank guarantee has been given.

19. In my opinion, there is no merit in the plea raised by the respondent. However, to allay the fears of the respondent, I passed the following directions:

The Arcelor Mittal Ltd. shall furnish on affidavit an undertaking by one of its directors stating as follows:

i. That it unconditionally would abide by the orders of this court or of the learned arbitral tribunal pertaining to all issues relating to or arising out of bank guarantee furnished by Hongkong and Shanghai Bank in favour of the respondent.

ii. It will not in any manner seek to initiate legal proceedings challenging or opposing the orders, directions or award that may be passed by the arbitral tribunal dealing with or relating to the bank guarantee in question in any manner whatsoever.

20. On furnishing of the above undertaking, the respondent shall within three weeks as directed by this court in its order dated 25.11.2019 deposit the amount of Rs.3,37,73,19,434.10/- in the escrow account.

21. With the above directions, the present application stands disposed of.

**(JAYANT NATH)
JUDGE**

JUNE 03, 2020/v