

A YOGRAJ INFRAS. LTD.

v.

SSANG YONG ENG. & CONSTRN. CO. LTD. & ANR.
(Special Leave Petition (C) No. 24746 of 2010)

B JANUARY 31, 2012

[ALTAMAS KABIR AND JASTI CHELAMESWAR, JJ.]

BANK GUARANTEE:

- C *Construction contract – Dispute between parties- Invocation of bank guarantees – Held: Since the petitioner's application u/s 9 of Arbitration and Conciliation Act to restrain the respondent from invoking the bank guarantees was based mainly on allegations of fraud, which have been rejected, and further the partial award has been made by arbitral tribunal, which has not been questioned by the petitioner, the plea relating to special equities, cannot be accepted – Arbitration and Conciliation Act, 1996-s.9.*
- E **Pursuant to a construction contract, the petitioner furnished Bank guarantees whereby the bank undertook to pay to respondent no.1 on its first written demand any sum or sums within the limits of the respective bank guarantees. Dispute arose between the parties relating to the performance of the petitioner in completing the work.**
- F **Respondent no.1 terminated the contract and invoked the bank guarantees. The petitioner made a prayer in an application filed u/s 9 of the Arbitration and Conciliation Act 1996 before the District Judge seeking injunction against the respondent invoking the Bank guarantees.**
- G **The application was dismissed. The appeal therefrom was also dismissed by the High Court. Aggrieved, the petitioner filed the instant special leave petition alleging fraud on the part of respondent no. 1. Supreme Court stayed invocation of the Bank Guarantees. The petitioner**

also filed a criminal complaint against respondent no. 1 A
making the same allegations which were made in the
Special Leave Petition. The complaint was quashed by
the High Court. The Special Leave Petition of the
petitioner was also dismissed by the Supreme Court.
Consequently, respondent No. 1 filed an application for B
early hearing and disposal of the instant Special Leave
Petition.

Disposing of the matters, the Court

HELD: Since the Petitioner's application u/s 9 of the C
Arbitration and Conciliation Act, 1996, was based mainly
on allegations of fraud, which have been rejected, there
was no foundation for the stay order passed in these
proceedings to continue. Both in the criminal D
proceedings as also in the proceedings u/s 9 of the Act,
the petitioner proved to be unsuccessful, at least up to
the High Court stage. In the criminal proceedings, the
petitioner was unsuccessful right up to this Court. In the E
circumstances, the plea urged on behalf of the petitioner
relating to special equities cannot be accepted,
particularly, in view of the fact that such a point had not
been raised earlier. Besides, partial Award has been
made by the Arbitral Tribunal which has not been
questioned or challenged by the petitioner and F
respondent No.1 is entitled to the amount awarded in the
partial Award. [Para 10-11] [462-G-H; 463-A-C]

**CIVIL APPELLATE JURISDICTION : SLP (Civil) No.
24746 of 2010.**

From the Judgment & Order dated 20.08.2010 of the High G
Court of Madhya Pradesh, Principal Seat at Jabalpur in
Arbitration Appeal No. 8 of 2010.

Gagan Gupta for the Petitioner.

H

A Meenakshi Arora for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Special Leave Petition and

the application filed on behalf of the Respondents for early hearing and disposal of the Special Leave Petition were taken up together for consideration. The facts on which the Special Leave Petition is based, are set out hereinbelow.

2. By its letter of acceptance No.NHAI/PH 11/NHDP/ADB/

C GM-11/NS1/746 dated 30th December, 2005, the National Highways Authority of India, hereinafter referred to as 'NHAI', awarded a contract to the Respondent, SSANG YONG Engineering & Construction Co. Ltd., for the National Highways Sector II Project, Package-ADB-II/C-8, which involved the four

D laning of Jhansi-Lakhadon sector KM 297 to KM 351 of National Highway 26 in the State of Madhya Pradesh. The total contract amount for the aforesaid project was more than 750 crores. An agreement was entered into by the NHAI with the Petitioner on 13th August, 2006. Clause 27 of the Agreement

E incorporated an arbitration clause stipulating that all disputes and differences arising out of or in connection with the Agreement dated 13th August, 2006, would be referred to arbitration to be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre

F (SIAC) Rules. For the purpose of reference, Clause 27 of the Agreement relating to arbitration is extracted hereinbelow :

"27. Arbitration

G 27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Ssangyong International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be A
conducted in English language.

27.3 None of the Party shall be entitled to suspend the B
performance of the Agreement merely by reason of a
dispute and/or a dispute referred to arbitration."

3. According to Clause 1 of the Agreement read with the C
Appendix thereof, the Petitioner was to provide all adequate
manpower, material, plant, machinery, construction equipment
and all other resources, including finance, which would be
required to perform the work Bank Guarantee was furnished
by the Petitioner on 31st October, 2006, whereby the Bank
undertook to pay to the Respondent on its first written demand
and without cavil or argument any sum or sums within the limits
of Rs. 6,05,00,000/-, without there being need to prove or give
any reasons for the demand for the said sum. The guarantor
also waived the necessity of the Respondent Company making
a demand for the debt to the contractor/petitioner before
presenting the demand. The guarantor also agreed that no
change or addition or other modification of the terms of the
contract or of the work to be performed thereunder or any of
the contract documents, which may be made between the
Respondent and the Petitioner, would release the Bank from
its liability under the Agreement. Similarly, three Bank
Guarantees of Rs. 1 crore each and one Bank Guarantee for
Rs. 3 crores were also furnished to secure mobilization
advance.

4. Disputes and differences arose between the parties G
relating to the performance of the Petitioner in completing the
work contracted as per the Agreement dated 13th August,
2006. Consequently, since the Petitioner failed to carry out the
works entrusted and had allegedly been over-paid to the tune
of Rs. 78 crores, the Respondent Company on 22nd
September, 2009, terminated the contract under Clause 23.2
of the Agreement dated 13th August, 2006 and invoked the H

- A Bank Guarantees referred to hereinbefore vide its letters dated 25th January, 2010, 27th January, 2010 and 5th March, 2010. The Respondent No.1 also made a subsequent demand for encashment of the Bank Guarantees by its letter dated 6th May, 2010.
- B 5. In the Special Leave Petition, the Petitioner has sought for an order of injunction against the Respondent No.1 on the basis of alleged fraud on the part of the said Respondent. The Petitioner also filed a criminal complaint against the
- C Respondent No.1 alleging fraud and making the same allegations which have been made by it in the present Special Leave Petition. The learned Magistrate took cognizance on the said complaint and issued process on 5th February, 2010.
- D 6. Aggrieved thereby, the Respondent No.1 challenged the said order of the Magistrate dated 5th February, 2010, taking cognizance of the criminal complaint alleging fraud, by filing a petition under Section 482 of the Code of Criminal Procedure in the Jabalpur Bench of the Madhya Pradesh High Court, for quashing of the cognizance taken by the learned Magistrate.
- E The High Court by its order dated 13th October, 2010, quashed the criminal proceedings commenced against the Respondent No.1. Challenging the said order of the High Court, the Petitioner filed Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011, which was dismissed by this Court on 18th February, 2011. On account of the above, an application for early hearing and disposal of the Special Leave Petition was filed on behalf of the Respondent No.1 urging that since the allegation of fraud had already been decided by this Court, the present Special Leave Petition could be finally disposed of in view of order
- G passed by this Court in Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011. It is in this background that the present I.A. has been filed for early hearing and disposal of the Special Leave Petition.
- H 7. Appearing for the Special Leave Petitioner, who is the

opposite party in the Interlocutory Application filed on behalf of the Respondent No.1, Mr. Jaideep Gupta, learned Senior Advocate, contended that the stay order passed in these proceedings was liable to be continued in view of the special equities in this case. He submitted that the Petitioner Company had invested large sums of money in the project and upon termination of the contract, the dues of either party were yet to be decided and the same could only be done at the time of the final Award. Mr. Gupta submitted that his main emphasis in the Special Leave Petition was with regard to the special equities which existed and the order of stay granted by this Court restraining the Respondent No.1 Company from invoking the Bank Guarantees was liable to be continued till the passing of the final Award by the learned Arbitrator.

8. Ms. Meenakshi Arora, learned Advocate, who appeared for the Respondent Company, submitted that the prayer made on behalf of the Petitioner in the Section 9 application before the District Court, Narsinghpur, seeking injunction against the Respondent No.1 from invoking the Bank Guarantees, was dismissed by the District Judge on 4th March, 2010, and the Appeal therefrom was dismissed by the Jabalpur Bench of the Madhya Pradesh High Court on 20th August, 2010. However, this Court had stayed the invocation of the Bank Guarantees by the Respondent No.1 Company by an interim order dated 31st August, 2010. Ms. Arora submitted that once the cognizance taken by the magistrate on the petitioner's criminal complaint alleging fraud on the part of the Respondent No.1 was quashed by the Jabalpur Bench of the Madhya Pradesh High Court by its order dated 13th October, 2010, and even the Special Leave Petition preferred therefrom was dismissed by this Court on 18th February, 2011, the very basis for seeking injunction in the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, stood removed. Ms. Arora submitted that in addition to the above, a partial Award had been made by the Arbitral Tribunal in Singapore on 30th June,

- A 2011, in favour of the Respondent No.1. Ms. Arora submitted that in terms of the agreement between the parties, the Respondent No.1 Company had made huge cash advances to the Petitioner for completion of the project, but the same had not been fully repaid by the Petitioner and that as a result, the
- B Respondent No.1 should be permitted to invoke the Bank Guarantees to realize the outstanding amounts. According to Ms. Arora, the dues of the Respondent No.1 Company were far beyond those claimed by the Petitioner. Ms. Arora submitted that since the partial Award had not been challenged by the
- C Petitioner, the execution thereof could not be stayed and the Respondent No.1 was, therefore, entitled to recover the amount under the partial Award. According to Ms. Arora, the plea taken by the Petitioner in the criminal complaint and the present Special Leave Petition was the same and since the allegation
- D of fraud against the Respondent No.1 by the Petitioner has been negated, the interim order restraining the Respondent No.1 from invoking the Bank Guarantees was liable to be vacated.

9. Ms. Arora submitted that since payment under a Bank

- E Guarantee can normally be stopped only on two grounds and on no other, viz., on grounds of fraud and special equity, and the ground of fraud having been rejected upto this Court, the only other ground available to the Petitioner to stop the invocation of the Bank Guarantees was on account of special equities and in the instant case the Petitioner had failed to indicate any such special equity which entitled the Petitioner to an order of restraint against the Respondent No.1 from invoking the Bank Guarantees in question,

10. Having heard learned counsel for the parties, we are

- G inclined to accept Ms. Meenakshi Arora's submissions that since the Petitioner's application under Section 9 of the Arbitration and Conciliation Act, 1996, was based mainly on allegations of fraud, which have been rejected, there was no foundation for the stay order passed in these proceedings to
- H continue. We cannot lose sight of the fact that both in the

criminal proceedings as also in the proceedings under Section 9 of the aforesaid Act, the Petitioner proved to be unsuccessful, at least upto the High Court stage. In the criminal proceedings, the Petitioner was unsuccessful right upto this Court. In the aforesaid circumstances, we are unable to accept the submissions relating to special equities urged by Mr. Jaideep Gupta, particularly in view of the fact that such a point had not been raised earlier. A

11. In addition to the above, we also have to keep in mind the fact that a partial Award has been made by the Arbitral Tribunal which has not been questioned or challenged by the Petitioner and the Respondent No.1 is entitled to the amount awarded in the partial Award. B

12. Accordingly, we are not inclined to disturb the order of the High Court and the Special Leave Petition is, therefore, dismissed with cost of Rs. 1 lakh to be paid by the Petitioner Company to the Supreme Court Legal Services Committee. The Interlocutory Application is also disposed of by this order. C

R.P.

Matters disposed of.

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