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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 21st September, 2021

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ARB. A. (COMM.) 49/2021, I.A. 12271/2021 & I.A. 12272/2021

ELENA POWER AND INFRASTRUCTURE LIMITED

..... Petitioner

Through: Mr. Shri Venkatesh, Mr. Neil Chatterjee and Mr. Jayant Bajaj, Advocates.

versus

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED & ANR.

..... Respondents

Through: Mr. Ciccu Mukhopadhyay, Senior Advocate with Mr. Abhijeet Sinha, Ms. Sonali Jaitley Bakhshi, Mr. Jaiyesh Bakhshi, Mr. Ravi Tyagi, Mr. Shubhanshu Gupta, Ms. Sanjana Bakshi, Mr. Mayank Mishra, Mr. Chirag Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*] impugns the order dated 8th July, 2021 passed by the learned Arbitral Tribunal, whereby an application filed by Shapoorji Pallonji & Co. Pvt. Ltd. – Respondent No. 1 [*hereinafter referred to as 'Shapoorji'*] under Section 17(1) of the Act,

has been allowed; and the Appellant – Elena Power & Infrastructure Limited [*hereinafter referred to as ‘Elena’*] has been directed to return the Retention Bank Guarantee [*‘RBG’*] of Rs. 8,83,00,000/-.

2. In the ongoing arbitration proceedings, Shapoorji is the Claimant and Elena is the Counter-Claimant. The case of Shapoorji before the Arbitral Tribunal is that they have filed a claim seeking, *inter alia*, payment for unpaid bills and prolongation costs. Elena, on the other hand, has a counter-claim for damages suffered on account of defective work and pre-issue of material pertaining to shortfall in reconciliation.

3. During the pendency of the aforesaid proceedings, Shapoorji filed an application under Section 17 of the Act, seeking return of the RBG. Shapoorji’s case, in essence, is that the contract was satisfactorily completed on 1st December, 2016 as per the Completion Certificate issued by Elena on the same date. The Arbitral Tribunal allowed the application and found that the non-return of the RBG – despite the issuance of the Completion Certificate on 1st December, 2016, and the elapsing of the ‘Defect Liability Period’ [*hereinafter, ‘DLP’*] on 1st December, 2017 – is in conflict with the contractual terms under the BTG Contract. In such circumstances, the Tribunal held that the RBG cannot be permitted to be retained or kept alive indefinitely – on a make-belief ground of “incomplete structural works” raised by Elena.

4. Aggrieved with the aforesaid findings, Elena has approached this Court, impugning the Tribunal’s order dated 8th July, 2021.

5. Mr. Shri Venkatesh, counsel for Elena, made the following submissions:

5.1. At an interim stage, the Tribunal has rendered findings on highly-disputed questions of fact, which are conclusive in nature; such findings could only be rendered at the final stage, after the parties would have lead evidence, and not at an interim stage.

5.2. The impugned order has, effectively, set at naught any defence/ counter-claim that Elena may have in the on-going arbitration.

5.3. The Tribunal has conclusively ruled that all the work under the Contract dated 26th March, 2010 for Civil and Structural Work for Boler Turbine Generator Package [*hereinafter referred to as ‘BTG Contract’*] between Elena and Shapoorji stands completed and therefore, in terms of Article 9.2 of the Special Conditions of Contract contained in the BTG Contract, the RBG ought to be returned. This is despite Elena having categorically contended that the structural work is incomplete, details of which were provided on a without-limitation basis.

5.4. The Tribunal’s dismissal of Elena’s claims pertaining to the non-completion of structural works as “make-believe” is misconceived and erroneous, especially at an interim stage, wherein Elena was not required to plead its complete case *in toto* – especially, with regard to the disputed fact in question – with final arguments being reserved for trial. Therefore, upon providing information about the incomplete structural work, it was wrong on the part of the Tribunal’s to have held the entire work was “complete”.

5.5. The observations and findings of the Tribunal that the word “work” appearing in the latter part of the Completion Certificate issued by Elena *viz.* “*the Contractor has completed the work satisfactorily on 01.12.2016*” has, in fact, been read in isolation of the words preceding it, i.e., “*This is to certify that M/s Shapoorji Pallonji & Co. Pvt. Ltd. has completed Civil Work*

BTG Phase-I Amravati TPP (5x270 MW) against EPIL work order No. 3451000035 dt. 29.03.2010.”

5.6. Despite it being abundantly clear that the word – “work” in the latter part would necessarily draw meaning from the words “civil work” appearing in the preceding part, the Tribunal has wrongly held that the word “work” comprises both civil work and structural work, and thereby, incorrectly drew an inference that all “work” stands completed. This is a manifest error which requires interference by this Court.

5.7. The Tribunal has completely ignored the well-established principles for restraining a party from invoking a Bank Guarantee i.e. ‘irretrievable injury’, ‘special equities’ or ‘egregious fraud’ – none of which has been proven by Shapoorji, as is evident from their pleadings. The Tribunal ought to have limited itself to these principles. The impugned order, by directing the return of the Bank Guarantee, has carved out an exception to the well-recognised principles in law – which is impermissible.

5.8. Applying the aforementioned principles, it is evident that there is no financial harm on account of invocation of the Bank Guarantee. Further, the jurisprudence on ‘egregious fraud’ as laid down by this Court, as well as the Supreme Court, has to be understood as a fraud underlying the contract. It requires a strict standard to be fulfilled, as has been held in a catena of judgments. However, the case put forth by Shapoorji does not meet this criterion at all.

5.9. The issue of expiry of the DLP is immaterial for determining whether the conditions for grant of injunction on invocation of the Bank Guarantee are satisfied.

5.10. The Bank Guarantee in question is unconditional. The terms and conditions contained therein, do not restrict Elena from availing the Bank Guarantee upon a breach of the conditions, on account of the DLP. The BTG Contract awarded to Shapoorji was for undertaking both civil and structural work, which is abundantly clear from a perusal of Article 1 of the BTG Contract. Since the structural work had not been completed, Elena was well within its rights to invoke the RBG.

6. Mr. Ciccu Mukhopadhyay, Senior Counsel for Shapoorji, on the other hand, defends the order of the Tribunal and makes the following submissions:

6.1. The Arbitral Tribunal has carefully examined the materials placed on record and has rightly come to the conclusion that the Completion Certificate unequivocally and unambiguously confirms that the work had been completed. Therefore, Elena has no right to continue withholding the RBG, after the lapse of the DLP.

6.2. There is no material placed on record to buttress the contentions raised by Elena that the structural work had not been completed. This is a bogus claim raised in the arbitration proceedings to withhold the RBG. The work has been completed and this is evident from the Completion Certificate placed on record. Since there is no controversy on this issue, the Tribunal has, therefore, taken the right view.

6.3. It is explicitly stipulated that the RBG was valid until the completion period for the refund of retention money, which is the DLP. Therefore, once completed, the RBG was liable to be returned.

6.4. The Completion Certificate deals with both civil and structural works and the distinction attempted to be created by Shapoorji, is contrary to the terms of the contract.

6.5. The relief granted by the Tribunal, is not a final relief, as apparent from para no. 46 of the impugned order.

7. The Court has extensively heard the arguments of the counsels. In the opinion of the Court, the impugned order does not merit any interference. The law with respect to the grant of injunction against invocation of bank guarantee has been settled by a catena of judicial pronouncements. It is no longer *res integra* that in a case of invocation of Bank Guarantee, the courts have recognized two well-established exceptions viz. 'irretrievable harm' and 'egregious fraud'. However, in the instant case, the stark fact that compels the court to not to interfere is the purpose for which the RBG was issued i.e. the DLP, which has been completed – as is evident from the documents placed on record. In other words, the RBG stood discharged as per the terms of the Contract and the terms of RBG as well. This is the sole factor that has weighed with the Tribunal while deciding the application under Section 17 of the Act.

8. It is beyond any doubt that Elena has issued the Completion Certificate on 1st December, 2016. The plea that has been urged before this Court is that the structural work has not been completed; and that the Completion Certificate, has to be read only *qua* the civil work. This plea was also raised before the Tribunal but it did not find favour with it. The reasons for rejecting this contention are based on the construction of the terms of the contract. Besides, during the course of the arguments, the Court had called upon Mr. Venkatesh to show if there was any sort of communication from

Elena to Shapoorji, during the course of the Contract, evidencing or suggesting that the structural work had not been completed. However, barring a letter dated 17th January, 2017 and its reply thereto, dated 24th January, 2017, no other document was shown to the Court.

9. The aforementioned communication dated 17th January, 2017 reads as under:

*"To
General manager
Rattanindia Powerplant Amravati
Nandgaon peth MIDC*

Date: 17/01/2017

Sub.: Work completion certificate

Dear sir,

This is to bring to your notice that we have completed all our works as per the wo no:- EPIL/CIVIL/ATPP/BTG CIVIL/001 (BTG) & 345100022 l(BOP) November'15 and after that other extra works which you had told us to complete, was also completed satisfactory including snag list by november 2016. And also Final bill submitted and quantity certified by your billing dept. So, the defect liability period starts from 1st December 2015 onwards.

This is for your kind attention & further records.

Regards

*S.S. Babu
DGM (Projects)
Shapoorji Pallonji Co. Pvt. Ltd."*

10. The reply dated 24th January, 2017 to the aforementioned communication, reads as under:

"To,

Date: 24.01.2017

*Mr. S. Sundara Babu,
DGM (Projects)
Shapoorji Pallonji Co. Pvt. Ltd.*

*Sub: Reg Work completion certificate
Ref: Your letter dated 17/01/2017.*

Dear Sir,

With reference to your letter, dated.17/01/2017 regarding completion of all works as per work order No: EPIL/CIVIL/ATPP/BTGCIVIL/001 (BTG) and 3451000221 (BOP) as on Novemeber-2015, I would like to remind and update you about the status of ongoing civil works in BTG area in the month of November-15 and their actual handover dates, for your kind information:

- 1. More than 50% of doors, & windows fixing, fire door accessories fixing, glass fixing for windows and ventilators was pending. Finally these works were completed in the month of November-2016.*
- 2. Not even a single toilet block in TG area were commissioned and handed over to RPL till then. Eventually handed over in the month of October- 16*
- 3. lot of internal and external painting work for buildings was balance in TG and work shop area. It was completed in the month of October-16.*
- 4. Laying of precast slabs over trenches were balance in BTG area. Completed in the month of November-16. Some trenches were covered with MS plates due to prolonged delay in casting of precast slabs.*
- 5. Incomplete brickwork, plaster and concrete works, punch list clearance and handing over the buildings were completed in November-16.*

It is also to bring to your kind notice that final bill for BTG was submitted on 21/1/2017 but till date bar bending schedules for some structures are yet to be submitted and final reconciliation of FIM are pending from your end without which final bill cannot be certified.

From the above points it is very much evident that SPCL had not completed the civil works as per work WO No: EPIL/CIVIL/ATPP/BTGCIVIL/001 (BTG) by November 2015 and hence cannot affirm that defect liability starts from 1st December 2015.

As per contract, defect liability starts from the date of completion certificate issued by the Engineer-in-charge and as on date (24/01/2017), RPL has not issued any work completion certificate against WO no: EPIL/CIVIL/ATPP/BTGCIVIL/001 (BTG) and 3451000221 (BOP). Therefore defect liability commencement date (1st December 2015) as noted by you, is incorrect and not accepted to RPL.

This is for your kind information and records please.

Thanking you

*For Rattanindia Power Ltd.
(Authorised Signatory)"*

11. A perusal of the aforesaid document does not satisfactorily corroborate the aforementioned contention averred before the Court. The said document does not bring out the distinction sought to be canvassed before the Court that – the structural work was not completed. Be that as it may, this is a question which is still to be urged before the Arbitral

Tribunal and the Court would, therefore, this Court will refrain from making any comment on this issue. However, for the purpose of granting interim orders of protection, the Tribunal was justified to grant the on the interim relief on the basis of the documents on record, which clinchingly demonstrate that work stood completed and Shapoorji was entitled to an order of the nature passed by the Tribunal.

12. The Court also *prima facie* finds merit in the contentions urged by Mr. Mukhopadhyay, that the civil work would be subsequent to the completion of structural work in the logical flow of things. The communication referred hereinabove, which points out the pending “external painting works for the building” etc. fall under the ambit of civil work as per the Completion Certificate, that indisputably stand completed. The contention urged by the Elena, regarding the structural work not having been completed, therefore, is not founded in any merit.

13. In view of the foregoing, the Court does not find any arbitrariness, unreasonableness or perversity in the impugned order which drives the Court to interfere under Section 37(b) of the Act.

14. In lieu of the above, the present appeal is dismissed. Needless to say, the observations made hereinabove, and also those contained in the impugned order, are tentative in nature and would, therefore, not influence the Arbitral Tribunal at the stage of final adjudication of the disputes between the parties.

SANJEEV NARULA, J

SEPTEMBER 21, 2021

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(corrected and released on 14th October, 2021)