

(2021) 06 CAL CK 0081
In the Calcutta High Court
Case No : Arbitration Petition No. 261 Of 2021

Texmaco Rail And Engineering Limited	APPELLANT
Vs	
Upper Tamakoshi Hydropower Limited And Ors	RESPONDENT

Date of Decision : 25-06-2021

Acts Referred:

Citation : (2021) 06 CAL CK 0081

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Sabyasachi Chaudhury, Shounak Mukhopadhyay, Tridib Bose,
Rajarshi Dutta, VVV Sastry

Judgement

The petitioner prays for an injunction restraining the respondent no. 1 from invoking the performance guarantee given by the petitioner in respect of supply and erection of a Hydro Electric Project in Nepal. According to the petitioner, the project commenced from 2012 and is presently ongoing which is within the knowledge of the respondent no.1.

Learned counsel appearing for the petitioner submits that the respondent no.1 made an interim payment to the petitioner for various components of the work done as recently as in April, 2021 without imposition of liquidated damages as provided under the contract. Counsel places a letter dated 26th

April, 2021 issued by the Project Consultant of the respondent no.1 to the petitioner under sub-clause 15.1 of the conditions of the contract calling upon the petitioner to correct and rectify the hydraulic control systems at the Head Works and make all the gates fully functional within two weeks from the date of the letter. Counsel submits that the date on which the notice to correct was issued, namely, 26th April, 2021, was in the midst of the

second wave of the pandemic and refers to a notification of the State Government dated 15th May, 2021 in this regard. Counsel submits that in view of the pandemic, the time given for carrying out the rectification work was not reasonable and that the respondent no. 1 terminated the contract by a notice dated 20th June, 2021. The letter of termination refers to the notice to correct dated 26th April, 2021 and alleges that there has been delay on the part of the petitioner to complete the project. Counsel submits that the petitioner replied to the notice of termination by a letter on the very next day i.e. 21st June, 2021 and assured the respondent no. 1 that a definite Work Plan would be submitted by the petitioner by the next day i.e. 22nd June, 2021 for supply of equipment and a detail completion plan for the consideration of the first respondent. The respondent no.1 in the meantime invoked the performance guarantee comprising of two components; one in Euros and the other in Nepali Rupees, which would be evident from a communication dated 21st June, 2021 from the State Bank of India, Commercial Branch, Kolkata, being the respondent no.2 herein to the petitioner. Counsel submits that the notice of invocation of the performance guarantee comprising of the two bank guarantees should be stayed on the special equities in the matter which would be evident from a letter from the respondent no. 1 dated 23rd June, 2021 in which the respondent no. 1 agrees to withdraw its claim against the performance guarantee on the condition that an equivalent amount is deposited by the petitioner to the bank account of the respondent no.1. Counsel submits that a meeting has been arranged between the parties today i.e. 25th June, 2021 in Nepal in terms of the letter issued by the respondent no. 1 on 23rd June, 2021 and that there is an urgent need to restrain the respondent no.1 from proceeding with invocation of the bank guarantees given as part of the performance guarantee under the contract. Upon hearing learned counsel this Court is of the view that special equities exist in the matter for allowing the prayer for restraining the respondent no.1 from invoking the bank guarantees as mentioned in the petition. Such special equities would be established from the series of facts including the interim payment made by the respondent no.1 to the petitioner in February, 2021 without imposing liquidated damages for either non-completion or delay. Second, the notice to correct of 26th April, 2021 mentions an unreasonable condition for carrying out the rectification work which, at first

glance, appears to be of an extensive nature. It is common knowledge that there was an interruption in normal functions and daily life in general from

15th May, 2021 in the State of West Bengal which is continuing till date. Hence, the period of fifteen days given to the petitioner to correct the defects

was insufficient and unreasonable. The conduct of the respondent no.1 as evident from the letter of 23rd June, 2021 is astonishing to say the least.

While the respondent no.1 agrees to withdraw its claim towards the performance guarantee against the petitioner, it makes such withdrawal

conditional upon the petitioner putting in an equivalent sum at the same time and further extends a "welcome" to the petitioner's officers to its

project office for a meeting scheduled for today. The significant fact is that this letter of the respondent dated 23rd June, 2021 is post-invocation and

the respondent agreed to withdraw its claim towards invocation.

In view of the above facts, there are sufficient reasons for passing an order in terms of prayer (a) of the petition in the absence of which the petitioner

would be irretrievably prejudiced in the event the respondent no.1 proceeds with the invocation.

There shall accordingly be an order of injunction restraining the respondent no.1 from realizing the sums in Euro as well as NPR or any part thereof

under the bank guarantees bearing the numbers stated in the petition dated 16th February, 2012 or any corresponding counter guarantees given in

respect of the contract between the parties. The order of injunction shall also restrain the concerned banks from releasing any payment to the

respondent no.1 under the bank guarantees or the counter-guarantees. The order shall remain in place for ten days from date.

The advocate-on-record of the petitioner is directed to serve the respondents within forty eight hours from date. Since this order has been made ex

parte, the respondents shall be at liberty to pray for vacating or modifying of the same.

List this matter on 8th July, 2021.