(2014) 09 SHI CK 0077

In the High Court Of Himachal Pradesh

Case No : Arb. Case No. 49 of 2014

Ahluwalia Contracts (India) Ltd.	APPELLANT
Vs	
Himachal Pradesh State Electricity Board	RESPONDENT

Date of Decision : 15-09-2014

Acts Referred:

Citation : (2014) 09 SHI CK 0077

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : S.K. Maniktala and Ankush Dass Sood, Advocate for the Appellant; J.S. Bhogal, Senior Advocate, Satish Sharma, Advocate, Sanjay Dalmia, Advocate and Ashok Kumar Nanda, Additional Superintending Engineer, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Dharam Chand Chaudhary, J.—Petitioner is a Contractor and entered into a contract for the Design, Engineering, Manufacturing, Testing of Equipment, Erection, Commissioning along with other allied Works such as Earthmat & Civil Works on Turn Key Basis of 132/33 KV, 1X25/31.5 MVA Sub Station at Maliana, (Near Shimla) with the respondent-Corporation previously known as State Electricity Board. The contract agreements in this behalf are Annexure P-2 and Annexure P-3. The petitioner started the execution of the work awarded, however, on certain disputes having arisen, expressed its intention to rescind the contract in terms of Clause 3.33 of the contract agreement vide letter dated 19th September, 2013 read with letter dated 19.12.2013 Annexures P-20 and P-24. The respondent-Corporation invoked the performance bank guarantee and bank guarantee in lieu of the mobilization advance vide its letter dated 07.07.2014, Annexure P-34. This has led in filing the present petition with the following prayers:

"(a) Pass an order staying operation of the letter dated 04.07.2014 bearing No. SE(D)ES/SSD-273/Maliana/2014-2168, of respondent No. 1, levying liquidated damages on the petitioner and further restraining respondent No. 1 and its agents, employees, servants etc. from giving any effect thereto; and/or taking any coercive action on the basis thereof;

(b) pass an order restraining respondent No. 1 by itself or through its employees, agents, servants etc from invoking the Bank Guarantees furnished by respondent No. 2 Bank on behalf of the petitioner, and as more specifically detailed in para 6 & 7 above, and further restraining respondent No. 2 Bank from encashing the said Bank Guarantees furnished by respondent No. 2 to respondent No. 1 on behalf of the petitioner;

(c) pass ad-interim ex-parte orders in terms of prayers (a) and (b) above, and confirm the same after notice to the respondents;

(d) award costs of the present proceedings in favour of the petitioner and against respondent No. 1.

(e) pass such other and further order or orders or such directions as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case and to meet the ends of justice."

2. In the interim, vide order passed on 14.07.2014, the parties have already been directed to maintain status quo as on that day i.e. at 2.45 p.m. qua invoking of bank guarantees. Consequent upon the order passed on 22nd July, 2014, the bank guarantees which were going to be expired on 31.07.2014 and 04.08.2014 stands renewed for a further period of six months from the date of expiry thereof.

3. Mr. S.K. Maniktala, learned counsel representing the petitioner has urged that in view of its dues worth lacs of rupees under the bills duly certified by the officers of the company unpaid, the bank guarantees could have not been invoked. Also that, the bank guarantees have been sought to be invoked by a person not competent to do so under the terms and conditions of the bank guarantees. He has also highlighted from the other record and the circumstances under which the bank guarantee and performance guarantee can be invoked. Reliance has been placed on the judgment of the Apex Court in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, .

4. On the other hand, Mr. J.S. Bhogal, learned Senior Advocate assisted by Mr. Satish Sharma, Advocate has strenuously contended that the respondent-Corporation has made the payment in advance and as the petitioner-Contractor has failed to execute the work, therefore, has every right to realize its dues by invoking the bank guarantees. It has also been pointed out that letter dated 07.07.2014, Annexure P-34 whereby the bank guarantees have been sought to be invoked is issued by the competent authority i.e. the Deputy Chief Engineer (Designs), a post was nomenclatured as Director (Designs), at the time when contract agreement executed and the work awarded. Mr. J.S. Bhogal, has placed reliance on the judgment of the Apex Court in Himadri Chemicals Industries Ltd.

Vs. Coal Tar Refining Company, .

5. On analyzing the submissions made on both sides and also the entire record, admittedly, the work awarded to the contractor has not been completed, in terms of the agreement. It is the petitioner-Contractor who intended to rescind the contract on account of non-payment of its dues as per the bills raised and also on account of alleged defaults made by the respondent-Corporation, highlighted in para 21 of the petition. On the other hand, respondent-Corporation has sought to invoke the performance guarantee and bank guarantee furnished by the petitioner-Contractor against the mobilization of funds vide letter Annexure P-34.

6. True it is that in terms of the law laid down by the Apex Court in Himadri Chemicals Industries Limited, supra, injunction order to restrain the realization of a bank guarantee should not be passed by the Court in a routine manner and in each and every case except for a case of fraud and also that in a case where allowing of encashment of bank guarantee is likely to result in irretrievable harm or injustice to the party, which has furnished the same. There is no quarrel qua the legal principles so settled by the Apex Court in this judgment. The fact, however, remains that prima-facie, the petitioner-Contractor owe handsome amount towards the respondent-Corporation. The bills duly certified have been produced on record along with the rejoinder. It is rather the case of the petitioner-Contractor that the respondent-Corporation may resort to encashment of the bank guarantees, however, on adjustment of the amounts under the certified bills payable to it against the mobilization funds advanced to the petitioner. The bank guarantee have also been sought to be invoked through the Deputy Chief Engineer instead of Superintending Engineer (Designs) and Director (Designs). No doubt, according to Mr. J.S. Bhogal, the post of Superintending Engineer (Designs) and Director (Designs) in the erstwhile Board have since been nomenclatured as Deputy Chief Engineer (Designs), however, it could have been clarified so in the letter Annexure P-34. Otherwise also, in the nature of the interim order proposed to be passed, no prejudice is likely to be caused to the respondent-Corporation because the performance guarantee and bank guarantee in lieu of mobilization advance will remain in its custody and kept alive by the Contractor. Otherwise also, the Arbitrator has since been appointed, of course, the appointment of the purported Arbitrator is subject matter of dispute in Arb. Case No. 57 of 2014 filed by the petitioner-Contractor. The said petition vide separate order of the day has been adjourned to 27th October, 2014 for filing reply and clarification of the doubts of the petitioner-Contractor qua the appointment of the Arbitrator. Therefore, on the appointment of the Arbitrator having entered into the reference, the parties on either side can also approach the Arbitrator for settlement of the issue qua encashment of the bank guarantees during the course of arbitral proceedings. In the event of the parties on either side opt for such a course, it is expected that in that eventuality, the Arbitrator to decide such issue being uninfluenced by this order or any observations, if any, made. I, therefore, find the present a case where at this stage it may not be proper to allow the respondent-Corporation to invoke the bank guarantees.

Therefore, interim order passed in this petition on 14.07.2014 is hereby made absolute.

7. The petition stands disposed of accordingly, however, with a direction to the petitioner-Contractor to keep alive the bank guarantees by way of its renewal till the completion of arbitral proceedings or the issue of revocation thereof is decided by the Arbitrator/Court.

