

(2021) 07 DEL CK 0133

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 184 Of 2021

Atindra Construction Private Limited

APPELLANT

Vs

Gail India Limited & Ors

RESPONDENT

Date of Decision : 15-07-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2021) 07 DEL CK 0133

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Rajshekhar Rao, Animesh Kumar, Tanay Agarwal, Karthik Sundar, Sanjeev Sagar, Nazia Parveen

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

I.A. No. 7508/2021

1. Exemption is allowed, subject to all just exceptions.

2. The application is disposed of.

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3. The petitioner has filed the present petition seeking interim measures of protection under Section 9 of the Arbitration and Conciliation Act, 1996

(hereafter the "A&C Act").

4. The petitioner prays that respondent no.1 (hereafter "GAIL") be restrained from acting in furtherance of a letter dated 08.06.2021 whereby

GAIL had invoked Clause 29 of the General Conditions of the Contract (GCC) and had terminated the contract awarded to the petitioner for the work

of Horizontal Directional Drilling works for Haridwar-Rishikesh-Dehradun Pipeline

Project (Part B). The petitioner further prays that the respondent nos. 1 and 2 be restrained from invoking the Performance Bank Guarantee furnished by the petitioner in furtherance of the decision to terminate the contract in question.

5. Respondent no.2 (TEPL) had issued a notice inviting tender on behalf of GAIL for Horizontal Directional Drilling works for Haridwar-Rishikesh-

Dehradun Pipeline Project. The petitioner had bid for the said works and by a letter dated 21.07.2020, TEPL confirmed the acceptance of the

petitioner's offer. Thereafter, on 07.08.2020, TEPL issued a Fax of Acceptance (FOA) confirming acceptance of the petitioner's offer for

Part B of the contract in question at a value of Rs. 9,89,88,817.92/-plus 18% GST. The FOA of the petitioner's offer for Part A was also

issued on the same date. It is stated that the Kick-Off Meeting (KOM) was held on 14.08.2020. Subsequently, on 20.08.2020, separate Detailed

Letters of Acceptance (DLOA) were issued by GAIL accepting the petitioner's offer in respect of Part A and Part B of the works in question.

6. The petitioner submitted the profile drawings in respect of the works and by an email dated 18.08.2020, the petitioner requested TEPL to approve

the same. The petitioner claims that on 22.08.2020, it submitted revised profile drawings to TEPL as the profile drawings submitted by it earlier were

rejected.

7. On 03.10.2020, TEPL sent an email calling upon the petitioner not to exceed the SOR rates and requested the petitioner to re-plan the length of the

pipelines. The petitioner, on the other hand, requested TEPL to revise the SOR rates as according to the petitioner, the same was necessary on

account of alteration in the specifications of the pipelines. However, the petitioner's request was rejected. On 14.12.2020, TEPL sent a letter to

the petitioner stating that the petitioner's progress regarding the works (both Part A and Part B) were poor and there was a risk that the works

would not be completed within the stipulated time. TEPL further highlighted that the Contract Performance Bank Guarantee (CPBG) had not been

submitted in time; the petitioner had not complied with the Minimum Construction Equipment Deployment Scheme as per the tender conditions; it had

delayed submission of design calculations and profile; it had delayed critical items for execution; the conditions of HDD rigs at site were in poor

condition; and the construction management at site was poor.

8. In view of the policy of the Government, to offer certain reliefs to Contractors, GAIL by its letter dated 19.12.2020 amended the condition of

submitting CPBG equivalent to 10% of the contract value to submitting CPBG equivalent to 3% of the contract value.

9. In view of the alleged defaults on the part of the petitioner, TEPL issued separate show cause notices dated 30.12.2020 to the petitioner in respect

of Part A and Part B of the contract calling upon the petitioner to show cause why action should not be taken on account of the petitioner failing to

submit the CPBG and failing to mobilise minimum equipment as required under the contract.

10. Thereafter, on 31.12.2020, the petitioner submitted a CPBG of Â Rs. 29,69,665/- in favour of GAIL for Part B of the contract. Thereafter, by a

letter dated 06.01.2021, the petitioner also replied to the show cause notice issued by TEPL. The petitioner disputed the allegations made in the show

cause notice. The petitioner further alleged that it had faced difficulties due to â?? incomplete and inadequate report of the soil testing based on

SPTâ?. According to the petitioner, the Soil Testing Agency had proceeded to submit Soil Testing Report based on â??special penetration test for

foundation purpose and not for HDD worksâ??.

11. The response given by the petitioner was not accepted and on 22.03.2021, TEPL issued a letter terminating Part A of the Contract with the

petitioner. Thereafter, on 26.03.2021, GAIL invoked the CPBG furnished by the petitioner in respect of Part A of the contract.

12. On 08.06.2021, TEPL issued a letter terminating Part B of the contract. This has led the petitioner to file the present petition apprehending that the

respondents would invoke the CPBG furnished by the petitioner in respect of Part B of the contract in question.

Submissions

13. Mr Rajshekhar Rao, learned senior counsel appearing for the petitioner, submitted that the respondents were liable to be restrained from invoking

the Bank Guarantee (CPBG submitted by the petitioner in respect of Part B of the contract) as the contract in question had been procured on the

basis of misrepresentation. He submitted that the Soil Testing Report furnished by the respondents along with the tender documents had indicated that

the rocks were at a deeper strata. However, the petitioner had encountered hard rocks at a shallower depth and therefore, the petitioner could not be

held liable. He stated that although the petitioner has not alleged any fraud on the part of the respondents, it has alleged that the contracts were

entered into on the basis of misrepresentation and the Bank Guarantees submitted pursuant to such contracts are liable to be interdicted. He referred

to the decision of the Coordinate Bench of this Court in *Synthetic Foams Ltd. v. Simplex Concrete Pipes (India) Ltd.*: ILR (1987) I DEL 456, in

support of his contention. He also referred to the decision in *UP State Sugar Corporation v. Sumac International Ltd.*: (1997) 1 SCC 568 and, the

decision of this Court in *M/s AMKV-TECPRO v. GAIL (India) Ltd.*: 2015 SCC OnLine Del 6989, in support of his contention.

14. He further submitted that the petitioner was also disabled from carrying out a survey on its own and referred to the scope of works under the

contract. He emphasized that geological technical investigations were not within the scope of works awarded to the petitioner.

15. Mr Sagar, learned counsel appearing for the respondents, countered the aforesaid submission. He submitted that there was no allegation of fraud

of egregious nature and therefore, invocation of the Bank Guarantee could not be interdicted. Admittedly, the petitioner had failed to perform the

works as contracted on the ground that the condition of the soil was not as represented to the petitioner. However, the contract specifically provided

that it was up to the contractor to either rely on the soil report or undertake a fresh survey. Thus, respondent nos. 1 and 2 could not be held

responsible for failure on the part of the petitioner to perform the contract.

16. He also referred to the decision of the Supreme Court in *Standard Chartered Bank v. Heavy Engineering Corporation Ltd.*: (2020) 13 SCC 574, in

support of his contention.

Reasons and Conclusion

17. It is apparent from the above that the disputes between the parties are, essentially, contractual disputes. The contention that the petitioner had

entered into the contract on the basis of misrepresentation of facts is, *prima facie*, difficult to accept. Although geological investigation was not a part

of the scope of works to be performed by the petitioner, however, the same did not preclude the petitioner from carrying out its own soil testing survey

for the purposes of HDD. Clause 5 of the Scope of Work expressly provided that
â??..Contractor to decide whether they will use the Survey Report

for HDD Profile or they will go for fresh survey, responsibility held with the Contractor.â??

18. The grounds on which a bank guarantee can be interdicted are limited. The same can be interdicted only in exceptional cases of egregious fraud and special equities.

19. In Svenska Handelsbanken v. Indian Charge Chrome: (1994) 1 SCC 502, the Supreme Court held as under:

â??...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice

involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its

terms.....

..there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable

injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.â??

20. In Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power Transmission

Limited: 2014 SCC Online Del 4741, the Division Bench of this Court held as under:

â??145.The legal position which can be summarized would be that a bank guarantee is an independent contract between the bank and the beneficiary

and disputes pertaining to bank guarantees have to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the

main contract between the parties. Where a bank guarantee is a conditional guarantee invocation thereof would have to be in strict conformity with

the conditions on which the guarantee is issued. In such a case an injunction can be granted against payment under the bank guarantee if it is found

that the condition upon which the guarantee was issued has not been complied with or met. But where the guarantee is unconditional and/or the bank

has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee the bank is obliged to honour the same for the

reason like letters of credit, a bank guarantee if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in commerce and transaction which is necessary for economic growth. Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

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147. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.

148. Contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default. Issues of fraud require pleadings to bring out a case of a fraud of an egregious nature and we do not find any brought out in the pleadings. The irretrievable injury or

irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered

remediless.â??

21. In the present case, Mr. Rao fairly conceded that it is not the petitioner's case that there was any fraud on the part of respondent nos.1 and 2.

Although the petitioner is disputing that it had breached the contract and asserts that it is not responsible for non-performance of the contract in

question, however, that cannot be a ground for interdicting a Bank Guarantee.

22. In *Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.*: AIR 1996 SC 2268, the Supreme Court had held as under:

â??We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the

courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is

allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the

contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or

special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the

contract, that the contractor has a counterclaim against the appellant, that the disputes between the parties have been referred to the arbitrators and

that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors

are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The

High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.â??

23. In *UP State Sugar Corporation v. Sumac International Ltd.* (supra), the Supreme Court authoritatively held that:

â??..the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain enforcement of bank

guarantees.â??

24. This Court is unable to accept that a mere allegation of misrepresentation would be sufficient ground for interdicting a bank guarantee. The

reliance in the case of M/s AMKV-TECPRO (supra) is misplaced. In that case, the Court found from the record that it was admitted by the respondent that Right of User (ROU) over land through which the proposed pipeline was to be laid had not been acquired and therefore it was impossible for the petitioner to perform the contract. The Court was persuaded to accept that the facts in that case presented special circumstances warranting interdiction of the bank guarantee.

25. The decision in the case of Synthetic Foams Ltd. (supra) is also of little assistance in view of the law as authoritatively explained by the Supreme Court in several recent decisions. An injunction interdicting a bank guarantee may be issued only in cases of established fraud. In other words, the petitioner seeking such interdiction would necessarily have to plead and indicate sufficient material to establish fraud. Mere unsubstantiated allegations of fraud are insufficient for interdicting the bank guarantee. It has also been authoritatively held that fraud must be of an egregious nature to warrant interdiction of a bank guarantee.

26. In view of the above, the decision that allegations of misrepresentation or suppression of material facts, must be placed on the same footing as an allegation of egregious fraud on the basis of which a bank guarantee could be interdicted, cannot be accepted.

27. In view of the above, this Court finds no merit in the present petition. It is, accordingly, dismissed.

28. It is clarified that the observations made by this Court are limited to the context of the relief sought in this petition. The same shall not prejudice the contentions of the parties in other proceedings including the proceedings before the Arbitral Tribunal. The Arbitral Tribunal shall examine the disputes uninfluenced by any observations made in this order.