(2008) 05 DEL CK 0089

In the Delhi High Court

Case No : IA No. 1943 and 2992/08 and CS (OS) No. 291/08

Bhandari Engineers and Builders Private Ltd. APPELLANT

Vs

Vijaya Bank and Others RESPONDENT

Date of Decision : 08-05-2008

Acts Referred:

Citation : (2008) 05 DEL CK 0089

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Arvind K. Nigam, Vibhu Bakhru, Pooja M. Saigal and Rahul Sharma, for the Appellant; Ashwini Mata and R. Raja Ballal, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—This suit has been filed by the plaintiff for a decree of declaration and a decree of permanent injunction against defendants seeking a relief that the Court should declare that the counter guarantee issued by Vijaya Bank, defendant No. 1 bearing No. FBG/RFC/01/05 dated 15th January, 2005 in favor of Saudi Hollandi Bank, Riyadh, Saudi Arabia (defendant No. 2) was void and further declaration that the performance guarantee issued by defendant No. 2 dated 19th January, 2005 in favor of defendant No. 3 for a sum of Rs. 12.50 million Saudi Rials for a period of 45 months was void. plaintiff sought a permanent injunction against the defendants restraining the defendant from encashing the performance bank guarantee issued by defendant No. 1 and counter bank guarantee issued by defendant No. 2 in favor of defendant No. 3 and restraining defendant Nos. 1 and 2 from making any payment to defendant No. 3.

2. The basic plea of the plaintiff is that plaintiff was issued a letter of intent dated 12th December, 2004 by defendant No. 3 whereby plaintiff was to be assigned a contract of performance of civil work in Saudi Arabia, District Jeddah. For this purpose the plaintiff was to establish a company in Saudi Arabia and after establishment of such a company, the plaintiff was to get permission of Ministry

of Commerce of Jeddah under Commercial Laws of Jeddah. It is pleaded that plaintiff could do business in Jeddah only if it could get a commercial license from Commerce Ministry of Jeddah. The contract to be awarded by defendant No. 3 to the plaintiff could be awarded only if he had obtained a license to do business from Ministry of Commerce, Jeddah. The plaintiff was not granted the requisite license/registration to do the business in Jeddah and plaintiff was Therefore not awarded the contract as stated in the letter of intent. However as a pre-condition for the award of contract, the plaintiff was to give performance bank guarantee. The plaintiff had instructed its bankers in India viz., Vijaya Bank, defendant No. 1 to arrange the performance bank guarantee for amount of Rs. 12.5 million Saudi Rials hoping that the plaintiff would get a permission of Ministry of Commerce, Saudi Arabia for business. Defendant No. 1, bank had arrangements with defendant No. 2, Bank and through defendant No. 1, bank; a bank guarantee was arranged by the plaintiff in favor of defendant No. 3 for 12.5 million Saudi Rials in anticipation of getting a contract. Though, the performance guarantee was arranged and given to defendant No. 3 but no contract was awarded to the plaintiff in view of the fact that the plaintiff could not get a registration/license from Ministry of Commerce, Saudi Arabia. Since no contract was awarded to the plaintiff, the bank guarantee got issued by the plaintiff in anticipation of receiving the contract could not be encased and was void.

3. It is further submitted by the plaintiff that defendant No. 3 also entered into a sub-contract dated 9th March, 2005 for a value of Saudi Rials 308,000,000/-(308 million) to execute a branch of Sewerage Network, with Bhandari Engineers and Builders Saudi Arabia (BEBSA). BEBSA owned and possessed a valid commercial license issued by Ministry of Commerce, Saudi Arabia. Sh. Ajit Singh Bhandari holds 65% capital share in BEBSA. He was the managing director of BEBSA. Sub-contract dated 9th March, 2005 executed between defendant No. 3 company and BEBSA was independent of, and not connected with, the sub-contract intended to be executed between plaintiff and defendant No. 3. Despite not awarding sub-contract to the plaintiff by defendant No. 3, the performance bank guarantee was sought to be invoked by defendant No. 3.

4. plaintiff, Therefore, filed the suit for injunction. plaintiff made the above application for grant of interim injunction.

5. Notice of the application was served upon defendants. Defendant No. 1 put appearance and filed written statement. Defendant No. 1 took stand that plaintiff had not come to the Court with clean hands and suppressed the material facts from this Court and the application was a patent abuse of the process of law. Defendant also raised jurisdictional question on the ground that the contract entered into between the plaintiff and defendant no 3 was governed by Rules and Regulations of Kingdom of Saudi Arabia and this Court had no jurisdiction. The third objection raised by defendant No. 1 was that the contract of guarantee was an independent contract. It was a contract between defendant No. 1 and defendant No. 2. Defendant No. 1 had issued a bank guarantee at the request of

plaintiff in favor of defendant No. 2 who in turn issued a counter guarantee in favor of defendant No. 3. There are no allegations of a fraud against defendants. The pleas taken by the plaintiff of non-grant of sub-contract are all baseless and false.

6. Counsel for the plaintiff and defendant argued and had taken me through the various documents. A perusal of documents of plaintiff placed on record by defendant No. 1 would show that contentions of the plaintiff were not only devoid of merits but plaintiff concealed the material facts and documents from the Court and approached the Court with unclean hands. The letter of intent which plaintiff placed on record, though seems to have been issued by defendant No. 3 but was of no consequence as the plaintiff had not got issued the bank guarantee in favor of defendant No. 3 on the basis of this letter of intent. The bank guarantee in question was got issued by plaintiff through defendant No. 1 at the behest of BEBSA, a closely associated company with plaintiff and registered in Saudi Arabia, who had received a contract for civil work of laying of sewerage lines to the tune of Rs. 308 million Saudi Rials. The letter dated 16th December, 2004 issued by defendant No. 3 in favor of BEBSA about this sub-contract has been placed on record by defendant No. 1. Based on this sub-contract issued in favor of BEBSA, the plaintiff, a close associate of BEBSA in India, was granted further sub-contract for part of the work awarded to BEBSA. This is clear from extracts of minutes of meeting of Board of Directors of plaintiff submitted with the Vijaya Bank at the time of seeking bank guarantee. The first and second resolutions passed in the Board meeting dated 6th December, 2004 are as under:

RESOLVED THAT the company do request the Vijaya Bank, for allowing the company the Non Fund Based Foreign Bank Guarantee Facility to the extent of Rs. 12.50 million SAR equivalent to Rs. 15.00 Crores (Rupees Fifteen Crores only) representing 5% of 250 million SAR for performance of Branch Sewerage Network in the North Central District, Jeddah Contract.

FURTHER RESOLVED THAT the S.Amrik Singh Bhandari, Chairman and Managing Director of the company be and is hereby authorized to secure the said facilities and to execute all documents and papers as required by the said Bank and to affix common seal if required and to do all such acts and deeds and things as may be necessary to secure the above facilities

7. After these resolutions, an application was made to the bank for issuance of bank guarantee. With this application for approvals, plaintiff made annexures containing the details of contract and nature of work to be done by the plaintiff. Annexure ''G'' to application made to Vijaya Bank is the contract entered into between plaintiff and Bhandari Engineers and Builders Saudi Arabia, on which plaintiff relied and sought performance bank guarantee. The bank guarantee was sought from defendant No. 1, bank on the basis of this sub-contract. A perusal of various terms and conditions of this sub-contract between BEBSA and plaintiff shows that BEBSA and plaintiff were closely associated and both agreed that in case of any claims or demands raised by the sub-contractor and such claims and

demands being similar as claims and demands of the contractor against the owner or third party, the sub-contractor shall make no claims or demands against the contractor but both will join hands and such claims and demands shall be made against the third party or parties considered to be at fault.

8. On 7th January, 2005, plaintiff wrote a letter to Exim Bank and again recorded therein that the contract was awarded to BEBSA for 308 million Saudi Rials and the plaintiff has been given a sub-contract. plaintiff enclosed the Board Resolution above and also specified that the bank guarantee is to be in favor of BEBSA which in turn is to submit the bank guarantee to defendant No. 3 as work has been allotted to plaintiff on back to back basis. It was also mentioned that Sh. Ajit Singh Bhandari having stake in plaintiff was a non- resident Indian working in and residing in Saudi Arabia and he owned 65% share of BEBSA.

9. The plaintiff knew it very well that the plaintiff had entered into a sub-contract with BEBSA and not with defendant No. 3 and had obtained bank guarantee in respect of the portion of sub-contract awarded to it by BEBSA, in discharge of the obligations of BEBSA. This is clear from the letter dated 24th September, 2005 written by plaintiff to defendant. This letter makes it clear that though the plaintiff had undertaken to do work in Saudi Arabia on sub-contract basis from BEBSA, but had been facing difficulties due to its own follies and negligence and had not been able to start the work in time and defendant No. 3 had been pressing BEBSA to start the work in time and threatening to invoke the bank guarantee. Para 7.2 and 7.3 of this letter reads as under:

7.2 From the above, it may be observed that against a non-funding Bank Guarantee issued by BEandBPL of S.R.12.5 Million and with an investment of S.R. 3.25 Million only. Bhandari Engineers and Builders Pvt. Ltd. are likely to earn a profit of S.R.12.03 Million in foreign exchanges. Further, the financial exposure has been reduced considerably. The out-flow of foreign exchange from the country has been reduced from S.R.8.5 Million to S.R. 2.8 Million. Further, additional counter bank guarantee was required for purchase of Equipments to the tune of S.R. 10.0 Million, which has been eliminated. Against this investment, it is anticipated that the company will earn a Foreign Exchange equal to S.R.12.03 Million. Not only we have been able to save encashment of Bank Guarantee but Staff and Management of BEandBPL would gain experience for working in Saudi Arabia and would be in better position to participate in the big development programme that have been announced recently. We expect that with our performance, we will be able to get ourselves approved as Principal Contractor with the various departments in Kingdom of Saudi Arabia.

7.3 We once again request that due to the above circumstances beyond our control, we could not get the Commercial License in time and started the work. Therefore, an alternative solution was to be found to avoid encashment of Bank Guarantee. By this arrangement, we have saved encashment of Bank Guarantee and reduced our exposure to the tune of 10 Million S.R. The working experience gained out of the present arrangement will help BEandBPL to do future business with more confidence and less risk. We wish to add that our engineering capability have been appreciated by many other Saudi Engineering Contractors and have offered for Joint Venture which we are deferring till our company is fully commercially ready to do business. We wish to add that within one year, the cash flow would ease out and the Bank Guarantee would be fully protected with the cash surplus.

10. From the entire correspondence between the parties I come to conclusion the plaintiff misrepresented to the Court that the project granted by defendant No. 3 to BEBSA was different and the bank guarantee given by the plaintiff was intended to be given in respect of certain other contract. It is even otherwise not believable that the plaintiff would have given a bank guarantee when no contract had been signed or could be signed with the plaintiff. The bank guarantee was given by plaintiff after the plaintiff signed contract with BEBSA. This had nothing to do with the letter of intent placed by the plaintiff on record. This letter of intent seems to have been obtained by the good offices of BEBSA from defendant No. 3 to enable the plaintiff to get itself registered in Saudi Arabia. This had nothing to do with the bank guarantee. The bank guarantee was furnished by the plaintiff at the behest of BEBSA for due performance of the part of the contract to be performed by BEBSA and sub-contracted to the plaintiff and that seems to be the reason that plaintiff approached this Court only recently, though the bank guarantee was given in January, 2005. The plaintiff is not entitled for an interim injunction.

11. Even otherwise the bank guarantee categorically provides that the parties shall be governed by law of Saudi Arabia. Any dispute with regard to bank guarantee shall be resolved by the competent authority in Kingdom of Saudi Arabia according to Saudi Arabian Government laws and rules. Since this bank guarantee was furnished to a bank in Saudi Arabia, it is an independent contract between defendant No. 1 and defendant No. 2 and they had liberty to choose the place of jurisdiction. This Court has no jurisdiction to entertain the suit of the plaintiff. The application filed by the plaintiff and suit filed by the plaintiff both are liable to be dismissed.

12. The suit and the application are not maintainable and dismissed as such.

