

(1999) 02 DEL CK 0034

In the Delhi High Court

Case No : OMP No. 43/99

Coronation Construction Pvt. Ltd.

APPELLANT

Vs

Indian Oil Corporation Ltd. and Others

RESPONDENT

Date of Decision : 19-02-1999

Acts Referred:

Citation : (1999) 2 AD 342 : AIR 1999 Delhi 268 : (1999) 96 CompCas 298 : (1999) 78 DLT 328 : (1999) 49 DRJ 264

Hon'ble Judges : M.S.A. Siddiqui, J

Bench : Single Bench

Advocate : Mr. Sudhir K. Makkar, for the Appellant;

Judgement

M.S.A. Siddiqui, J.

1.The petitioner has filed this petition u/s 9 of the Arbitration and Conciliation Act, 1996 seeking to restrain respondent No.1 from encashing the Bank Guarantee No. 96/200 dated 12.12.1996 in the sum of Rs.18,20,455/- issued on behalf of petitioner by respondent No. 3 in favor of respondent No.1.

2. The facts which are relevant for disposal of the present petition are these :

In response to the tenders invited by respondent No.1, petitioner was awarded the contract for "Enabling works for DHDS and MSPF Project at Mathura Refinery, Mathura, Uttar Pradesh". The total estimated value of the contract was Rs.1,67,39,828/-. The contract was to be completed on 11.3.1997 but the same was completed on 17.1.1998. The bank respondent No.3) gave an unconditional performance guarantee No. 96/200 dated 12.12.1996 for Rs. 18,20,455/-. The bank has also undertaken to make unconditional payment on demand without protest or demur or proof or condition any or all amounts demanded by the respondent No.1. Disputes arose between the parties regarding performance of the contract resulting in invocation of Bank Guarantee by the respondent No.1. It is alleged that the invocation of the Bank Guarantee is vitiated by fraud and further there would be irretrievable injustice to petitioner if the Bank Guarantee

is allowed to be encashed.

3. The principles to be borne in mind by the Court in the matter of grant of injunction against enforcement of Bank Guarantee/irrevocable letter of credit have been laid down in the decisions of the Supreme Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., ; General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, ; Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, ; National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, ; Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., ; Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, ; Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, . Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, ; AIR 1997 1644 (SC); Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, ; I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, and may be summarised as under:-

(i) a bank guarantee is an independent and distinct contract between the beneficiary and the bank and the rights and obligations therein are to be determined on its own terms;

(ii) a bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The bank is not concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee;

(iii) commitments of the banks must be honoured free from interference by the courts. Otherwise trust in commerce internal and international would be irreparably damaged;

(iv) An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of established fraud of an egregious nature as to vitiate the entire underlying contract; or in case of special equities in the form of preventing irretrievable injustice between the parties as noticed in the case of Itek Corporation Vs. The First National Bank of Boston etc. (566 Fed. Supp. 1210). Allegations of irretrievable injustice must be genuine and immediate as well as irreversible.

4. It is alleged by the petitioner that after completion of the work, petitioner submitted its final bills on 9.4.1998 but the same have not yet been cleared by the respondent No. 2. The petitioner has also lodged a claim with the respondent No. 2 for Rs. 86,06,924/-. Despite repeated reminders respondents No. 1 and 2 have failed to clear the final bills submitted by petitioner as a result whereof petitioner has invoked arbitration clause of the agreement by requesting respondent No. 2 to refer the disputes to arbitration in terms of the arbitration agreement. It is also alleged that by the letter dated 13.11.1998, respondent No. 2 asked petitioner to rectify the defects in the work executed by it. It is further

alleged that the defect liability period of petitioner came to an end on 16.1.1999 i.e. after a lapse of one year from the date of the completion certificate issued to petitioner and the entire mobilisation advance has since been recovered by the respondent No. 2 from the bill submitted by petitioner, respondent No.1 is not entitled to invoke the Bank Guarantee in question.

5. It needs to be highlighted that in order to restrain the operation of the either irrevocable Bank Guarantee or irrevocable letter of credit, petitioner must establish a strong prima facie case of fraud of egregious nature committed in the execution of the contract. It is significant to mention that the petition contains no facts or particulars in support of the allegation of fraud. It was nowhere pleaded that petitioner was fraudulently led into entering of contract with 1st respondent. The main contract, pursuant to which the Bank Guarantee in question was issued, was not sought to be void by alleging fraud, nor was it at any point of time alleged that the Bank Guarantee was issued because of any fraud having been played by 1st respondent. On the contrary, it is alleged in paras No. 7.18 and No. 7.19 that invocation of the Bank Guarantee by 1st respondent without assigning any reason is illegal and tantamounts to fraud and further such invocation of Bank Guarantee based on willful suppression of material facts has to be treated and equated as fraud. In my opinion, the aforesaid pleas do not establish a case of fraud committed in execution of the contract. That being so, petitioner is not entitled to the grant of any interim relief against the invocation of the Bank Guarantee on the said ground.

6. Coming to the allegation of irretrievable injustice between the parties, learned counsel for petitioner contended that petitioner has completed the contract to the satisfaction of respondent No.1 for which respondent No.1 has also issued completion certificate on 28.2.1998. The respondent No.1 has also recovered the entire mobilisation advance from the bills submitted by petitioner and the 1st respondent is now trying to unjustly enrich itself by invoking the Bank Guarantee for an amount which has already been recovered by it. Highlighting the alleged special circumstance and/or equity of the present case, learned counsel for petitioner has strenuously urged that there is a serious dispute on the question of performance of the contract, that respondent No.1 has a counter claim of Rs. 86,06,924/- against petitioner, that these disputes are to be resolved by arbitration in terms of the arbitration agreement and that no amount can be said to be due and payable by petitioner to 1st respondent till the arbitrators make their award. In my opinion, these facts are not sufficient to make this case as an exceptional case justifying interference by way of injunction. In order to bring the case within the ambit of special equities in the form of preventing retrievable injustice, it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. According to petitioner, the disputes between the parties are to be resolved by arbitration in accordance with arbitration agreement. Whether, and if so, what is the amount due to petitioner or respondent has to be adjudged in the arbitration proceedings. In this view of the matter, the mere allegation that

1st respondent is attempting to encash the Bank Guarantee for an amount, which has already been recovered by it, is not sufficient to bring the case within the ambit of the irretrievable injustice exception. Thus, there is no case of any irretrievable injury of the type as noticed in the case of Itek Corporation (supra) as there is no difficulty in the judgment of the court being executable in our country.

7. On a perusal of the para No. 5 of the Bank Guarantee in question, it is evident that the bank has unconditionally and irrevocably agreed and undertaken to pay to 1st respondent on demand a sum specified therein. The Bank Guarantee was, thus, undisputedly irrevocable with absolute discretion with 1st respondent to invoke the same. In this view of the matter, the bank (respondent No. 3) cannot be restrained from honouring its commitment under the Bank Guarantee in question.

8. In the result, I do not find any merit in the petition. The petition is accordingly dismissed.