(2001) 12 DEL CK 0134

In the Delhi High Court

Case No : OMP No. 202 of 2001

General Engineering Works APPELLANT

Vs

Power Grid Corporation of India Limited and Another RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

Citation : (2002) 95 DLT 477

Hon'ble Judges : B.N. Chaturvedi, J

Bench : Single Bench

Advocate : Amit P. Deshpandey, for the Appellant; Surat Singh, Praveen Bhati and Jagdak Singh, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Chaturvedi, J.—Faced with invocation of two bank guarantees dated 29.5.1999 and 16.7.1999 for Rs. 14,31,636/- and Rs. 13,93,876/- respectively by M/s. Power Grid Corporation of India Limited, respondent No. 1, the petitioner, M/s. General Engineering Works, seeks an injunction against respondent No. 1 restraining it from invoking the same and against Dena Bank, respondent No. 2, from making payment to the respondent No. 1, there under.

2. On 13th of May, 1999, the petitioner was awarded a contract by respondent No. 1 for supply of 8.69 kms. galvanised steel earth wife. The supply was to be made between September, 1999 to November, 2000. In terms of Letter of Award, the general conditions of contract were to apply. In terms of Clause 12.1 of the Letter of Award, the petitioner furnished a bank guarantee No. 4718 dated 29.5.1999 for Rs. 14,31,636/- in favor of respondent No. 1 issued by respondent No. 2, Dena Bank, towards performance security. The petitioner also gave another bank guarantee issued by respondent No. 2 in favor of respondent No. 1 bearing No. 4729 dated 16.7.1999 for Rs. 13,93,876/-. This was furnished for securing lumpsum advance, against which the respondent No. 1 paid an amount of Rs. 13,93,876/- as initial advance, which was to be adjusted against the supplies of total quantity of earth wire.

3. Against the contractual schedule of supply, the petitioner could supply only 169 kms of the galvanised steel earth wire by September, 2000 and failed to make balance supply. According to the petitioner, its factory workers had gone on sudden strike and, consequently, it was forced to declare a lock-out and suspension of work on 17th of June, 2000 at 4.00 p.m. A copy of the notice of suspension of work was promptly delivered by the petitioner to the respondent No. 1 also. Several rounds of talks were held between the petitioner and respondent No. 1 to sort out the issue of balance supply. Vide letter dated 9th of October, 2000, the respondent No. 1 called upon the petitioner to attend a meeting on 11th of October, 2000, but, at the same time, a letter dated 9.10.2000, calling upon the petitioner to supply the entire balance quantity within 30 days from the date of receipt thereof was also issued to the petitioner.

4. Vide letter dated 30.9.2000, the petitioner had requested the respondent No. 1 that in view of suspension of work, which constituted ''Force Majeure'', as per Clause 25 of the General Conditions of Contract, the supply of balance quantity be kept in abeyance without financial repercussions on either side. The respondent No. 1, however, vide their letter dated 12.10.2000,did not accede to the request of the petitioner stating that the suspension of work at petitioner''s factory did not constitute ''Force Majeure'' under Clause 25 of the General Conditions of Contract. By their letter dated 17.11.2000, the petitioner sought to assure the respondent No. 1 that the supply of entire balance quantity would be made within 3/4 months from re-start of production in its factory. The respondent No. 1, however, by their letter dated 15/17.1.2001, informed the petitioner the action had been taken for procurement of balance of 700 kms of galvanised steel earth wire at their risk and cost. Further, the respondent No. 1, by their letter dated 17.5.2001, invoked both the said bank guarantees and called upon the respondent No. 2 to pay the amount thereof to it.

5. The petitioner, vide their letter dated 8.7.2001, sent through counsel, appointed one Shri Suman Khaitan as its Arbitrator in terms of Clause 19 of the Letter of Award, read with Clause 28 of the General Conditions of Contract, and referred the disputes, as set out in para 13 of the petition, to the said arbitrator. Even though no request was made to the respondent No. 1 by the petitioner in their letter dated 8.7.2001 for appointment of second arbitrator, the respondent No. 1 proceeded to appoint Justice N.N. Goswami (Retd.) as the second arbitrator in the matter. The third arbitrator is to be appointed by the said two arbitrators appointed by either side.

6. The invocation of bank guarantees is being challenged on behalf of the petitioner on the plea that the balance supply could not be made due to reasons beyond its control and in view of Clause 25 of General Conditions of Contract, there could be no forfeiture of performance security, that in view of the disputes being referred to arbitration, the amount of bank guarantees could not be recovered until adjudication thereon, and that the respondent No. 1 cannot be allowed to resort to unjust enrichment.

7. Defending invocation of bank guarantees, the respondent No. 1 pleaded that the suspension of work at petitioner''s factory, in the given circumstances, did not constitute ''Force Majeure'' and Clause 25 of the General Conditions of Contract is, thus, not attracted to the present case. It is added that the petitioner was even given the option to make the balance supply through any approved supplier of the respondent No. 1, but it failed to make the same in spite of being allowed a reasonable time for the purpose. In the given situation, the respondent No. 1 was, it is pleaded, left with no alternative but to terminate the contract for the balance supply by letter dated 15.1.2000 and 9.10.2000 on the petitioner for their default to make the balance supplies.

8. According to the respondent No. 1, the respondent No. 2 had already discharged the bank guarantee No. 4717 dated 17.7.1999 for Rs. 13,93,876/- by making payment of the amount by their demand draft No. 036358 dated 10.7.2001 prior to filling of the present petition. In respect of the second bank guarantee No. 4729 dated 17.7.1999 for Rs. 14,31,636/-, it is stated, the respondent No. 2, has delivered a banker''s cheque No. 135684 dated 17.7.2001. It is accordingly claimed that both the bank guarantees had been discharged prior to passing of the order dated 19.7.2001, directing encashment of the cheque issued by respondent No. 2 to be kept in abeyance.

9. I have heard the parties.

10. Invocation of bank guarantees is sought to be resisted by the petitioner primarily on the grounds, firstly, that non-supply of balance quantity of galvanised steel earth wires being occasioned for the reasons beyond their control, Clause 25 the General Conditions of Contract comes into play and in the given situation, the respondent No. 1 could not terminate the contract and invoke the bank guarantees; secondly, that the respondent No. 1 cannot recover the amount of the bank guarantees without having the disputes decided by the arbitral tribunal; and, thirdly, that by seeking to invoke the bank guarantees, the respondent No. 1 cannot be allowed to have unjust enrichment.

11. An initial advance of Rs. 13,93,876/-, which was to be adjusted against the supplies of total quantity of earth wire, had been made to the petitioner by the respondent No. 1 against the bank guarantee No. 4729 dated 17.7.1999 for Rs. 13,93,876/-. This bank guarantee, according to the respondent No. 1, has already been discharged by respondent No. 2 paying the amount thereof through a demand draft No. 036358 dated 10.7.2001 prior to the filing of the present petition. The petitioner, in its rejoinder, does not deny this fact. Thus, there is no occasion for passing any restraint order against invocation of bank guarantee No. 4729 dated 17.7.1999 for Rs. 13,93,876/- against the respondents.

12. the bank guarantee No. 4718 dated 29.5.1999 for Rs. 14,31,636/- is also claimed to have been discharged by respondent No. 2 as a banker''s cheque No. 135684 dated 17.7.2001 in favor of respondent No. 1 has already been issued. This cheque could not be encased due to counsel''s statement before the Court

undertaking not to encash the same. However, as far as respondent No. 2 is concerned, with the issue of the banker''s cheque for the amount of the bank guarantee, it stands discharged of its liability there under.

13. Now, the only point requiring consideration is, if the respondent No. 1 can be restrained, in the given situation, from encashing the said cheque issued by respondent No. 2 in its favor in pursuance of invocation of performance bank guarantee.

14. Admittedly, in spite of service of default notices by respondent No. 1, the petitioner failed to make any supply beyond 169 kms of earth wires, which was to be supplied up to November, 2000. The petitioner seeks to justify non-supply of balance quantity of earth wire by pleading suspension of work at its factory in view of sudden strike by factory workers, and, consequent, lock-out declared by it. The parties having already appointed their respective arbitrators and all the disputes between the parties, including the plea of ''Force Majeure'' advanced by the petitioner, being subject matter of adjudication by the arbitral tribunal, no finding on this aspect of the matter is called for. Admittedly, the petitioner failed to make the supply within the stipulated period thereby rendering the performance guarantee being invoked by the respondent No. 1.

15. The bank guarantee represents an independent contract between the bank and the beneficiary. Except in the case of fraud, which could be as established fraud, or where irretrievable injury was likely to be caused to the guarantor, the courts would be reluctant to grant injunction against the invocation of bank guarantee. This was so held by the Apex Court in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others,

16. In " U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , the Supreme Court held:

".....an unconditional bank guarantee could be invoked in terms thereof by the person in whose favor the bank guarantee was given and the courts would not grant any injunction restraining invocation, except in the case of fraud or irretrievable injury."

17. Where the bank guarantee is in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee and the person on whose behalf the guarantee was furnished, the Bank is obliged to pay the amount of bank guarantee on its invocation by the beneficiary. The bank has simply to verify whether the amount claimed was within the terms of the bank guarantee. (See " Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, . In the present case, no case of fraud or irretrievable injury is made out to sustain the plea for injunction against invocation of the bank guarantees in question.

18. The next plea that bank guarantees could not be invoked to recover the amount thereof without having the disputes decided by the arbitrators is not good enough to justify the prayer for a restraint order against invocation of the bank guarantees in question.

19. In Ansal Engineering Projects Limited (supra), where one of the contention was that the bank guarantee could not be invoked until the amount due and payable was determined in the suit, negativing the plea so raised, the Supreme Court held:

"It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof....."

20. In para 6 of the same judgment, it was laid down:-

".....The liability of the bank is absolute and unequivocal; it would thereby be clear that the bank is not concerned with the ultimate decision of a court and a tribunal in its finding after adjudication as to the amount due and payable by the petitioner to the first respondent. What would be material is the quantification of the liability in the letter of invocation....."

21. In " Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, , dealing with the question of applicability of the principle of ''unjust enrichment'', the Supreme Court, observed:

".....If the High Court had taken the trouble to see the law on the point, encashment of bank guarantee the applicability of the principle of undue enrichment has no application."

22. The bank guarantees in question have not been placed on record. The invocation of the bank guarantees has not been assailed on the plea that the invocation thereof is being sought in breach of terms of the bank guarantees. No plea of fraud has been advanced, nor it appears to be a case where irretrievable injury is likely to be caused to the petitioner in the event of injunction being refused. The grounds pleaded in support of prayer for injunction being not the ones where invocation of bank guarantees can be injuncted, the petition is liable to be dismissed.

23. In the result, the petition is dismissed.

24. There shall be no order as to costs.

