

(2016) 02 DEL CK 0303

In the Delhi High Court

Case No : Arb. A. (Comm.) 7/2016 and IA 2317/2016

G.S. Developers and Contractors Private Limited

APPELLANT

Vs

Alpha G. Group Development Private Ltd. and Others

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, Section 37(2)(b)

Citation : (2016) 5 ADDelhi 601 : (2016) 3 BC 4 : (2016) 229 DLT 503 : (2016) 155 DRJ 415 : (2016) 4 RAJ 485

Hon'ble Judges : V. Kameswar Rao, J.

Bench : Single Bench

Advocate : A.S. Chandhiok, Sr. Adv., Mohit Chaudhary and Damini Chawla, Advocates, for the Appellant; Sandeep Sethi, Sr. Adv., Rajshekhar Rao, Amrita Panda and Debesh Panda, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—IA 2317/2016

Exemption allowed subject to all just exceptions.

Application stands disposed of.

ARB. A (COMM) 07/2016

1. The challenge in this petition under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, is to the order dated February 15, 2016, whereby the learned Arbitrator inter-alia, has, allowed the respondent No. 1 and 2 herein, to encash the five bank guarantees, and directed them to deposit the amount of bank guarantees in an escrow account in a Public Sector Bank and to await the disbursement, subject to the final Award.

2. According to Mr. A.S. Chandhiok, learned Senior Counsel for the petitioner, the subject matter of the application under section 17 of the Act was the following five bank guarantees:-

3. He would state, that against the first four bank guarantees, an amount of Rs. 6,78,00,000/- has been adjusted towards the regular running account bills. The balance, even though is Rs. 5,86,00,000/- still in terms of the statement made on behalf of the petitioner in the hearing on December 12, 2015, an amount of Rs. 7,19,00,000/- shall be deposited by the petitioner with the respondent Nos. 1 and 2. On the fifth bank guarantee, which is a performance guarantee, it is his submission, by drawing attention to page 255, which is the letter of invocation dated November 23, 2015, to state that the same is not in accordance with the terms of bank guarantee inasmuch as, the letter state, the contractor "has neglected to refund and repay by bankers cheque or demand draft". He would state, the bank guarantee for an amount of Rs. 4,12,24,189/- which is 5% of the contractual amount, the invocation being without mentioning any default towards "due, punctual, satisfactory and faithful performance of the work" and, there being special equities, the invocation is for unjust enrichment, need to be set aside.

4. On the other hand, Mr. Sandeep Sethi, would submit that this case does not pertain to five bank guarantees as pointed out by Mr. Chandhiok but relates to nine bank guarantees, the details of which are as under:-

5. According to Mr. Sethi, mobilisation bank guarantees at serial No. 1,2 and 4, which have been amended on February 26, 2014 after, the letter dated February 14, 2014 of the petitioner wherein, the petitioner had pointed to the advances, made by the respondent No. 1 and the financial difficulties faced by the petitioner, had sought overdraft facilities of 4 Crores over and above Rs. 2 Crores already granted. According to him, the petitioner had, itself requested for securing the overdraft facility by way of bank guarantees. He would also state, that the petitioner in the said communication has undertaken to repay or refund the overdraft facility availed by it. According to him, the representation was also, if the petitioner is unable to pay, the amount can be recovered from the payments due to the petitioner or by invoking the bank guarantees. He states, after the letter dated February 14, 2014, the bank guarantees at 1, 2 were amended, in following manner:-

"1) Page No. 1, paragraph 2 stands amended and to 0 be read as follows:

"AND WHEREAS your company paid to the said Contractor a sum of Rs. 4,36,72,568/- (Rupees Four Crore Thirty Six Lacs Seventy Two Thousand Five Hundred Sixty Eight Only) as Mobilization Advance, being 15% (Fifteen percent) of the contract sum."

2) Page no. 3, paragraph 1 stands amended, and to be read as follows:

"Notwithstanding anything contained hereinbefore, WE the Canara Bank, 5, Community Centre, Mayapuri, New Delhi hereby irrevocably and unconditionally undertake to pay your company by banker's cheque/demand draft favouring "Gurgaon One Expense Account" and payable at New Delhi on First Demand without protest or demur or proof of condition any and all amount demanded by

your Company in writing, with reference to the guarantee and that the liability of the Canara Bank, 5, Community Centre, Mayapuri, New Delhi, under this guarantee is restricted to Rs. 4,36,72,568/- (Rupees Four Crore Thirty Six Lacs Seventy Two Thousand Five Hundred Sixty Eight Only). Our guarantee shall remain in force until 04.01.2015. Unless a claim in writing is presented to us during the validity period of this Guarantee, all your rights under this guarantee shall be forfeited and we shall be discharged of our liability hereunder."

6. He would lay stress on the amendments, to urge that, in view of the non obstante clause, the invocation of bank guarantees being unconditional, payable by bank on demand, the respondents were within their rights to invoke the same. He states, the contract stands terminated in 2014. The guarantee amounts are the advances made to the petitioner over and above the contractual conditions, on its asking which is sought to be invoked in terms of the bank guarantees. On performance bank guarantees at serial No. 4 and 5, the same being unconditional, the respondents were within their rights to invoke, as there were no restrictions as sought to be urged by the petitioner. He would rely on the following judgments:-

(i) , (2007) 6 SCC 470 Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. and another;

(ii) 2008(4) R.A.J. 211(Del) National Highways Authority of India vs. Elsamex-TWS-SNC Joint Venture;

(iii) , (1991) 4 SCC 230 General Electric Technical Services Company Inc. Vs. Punj Sons (P) Ltd. and another;

(iv) , 1990 (Supp) SCC 727 Wander Ltd. and another vs. Antox India P. Ltd.

7. Mr. Chandhiok, in his rejoinder would draw my attention to clause 20 of the Special Conditions of Contract which refers to mobilisation advance equal to 5% of the contract value. He would state, the concept of mobilisation advance is to spend in the execution of the contract and to be adjusted against the running bills. He would also state, the mobilisation guarantees, could be invoked only on termination, if the complete advance could not be recovered from the bills. According to him, the performance bank guarantees could only be invoked only on being due by reasons of or occasioned by arising out of or resulting out of directly or indirectly the breach by the contractor of its obligation or failure of the contractor to perform its obligation under the agreement. He would draw my attention to the order passed by the Division Bench of this Court dated November 26, 2015, wherein a representation was made that the contract has been cancelled. According to him, the said statement is incorrect, as termination letter dated November 18, 2015 was actually booked only on November 27, 2015 and received on November 28, 2015; and the invocation on November 23, 2015 before termination is bad.

8. Mr. Raj Shekhar Rao, learned counsel for the respondent No. 2, would state

that, the petitioner is not entitled to any relief having approached this Court in earlier round of litigation by concealing the letter dated February 10, 2014, which is an important communication, revealing the stand of the petitioner not to oppose the invocation of bank guarantees. He states, even the statement made by the parties before the Court to deposit Rs. 7.19 Crores has not been honoured. He states, it is a fit case where this Court while dismissing the petition need to impose exemplary cost.

9. Having heard and considered the submissions made by the learned counsel for the parties, there is no dispute on the position of law with regard to bank guarantees. In *U.P Cooperative Federation vs. Singh Consultants & Engineers Pvt. Ltd.*, (1988) 1 SCC 174, the respondent therein entered into an agreement with the appellant for constructing a vanaspati manufacturing plant for the latter. The contract required the respondent to furnish two bank guarantees for proper construction and successful completion of the plant. Bank of India executed two bank guarantees in favour of the appellant. Under the terms of guarantee the bank undertook to make unconditional payments on demand without reference to the respondent. The guarantees also provided that the appellant would be the sole judge for deciding whether the respondent had fulfilled the terms of the contract or not. Disputes arose between the parties as to the erection and performance of the plant. The seller approached the civil court seeking injunction restraining the purchaser from invoking the bank guarantee. The High Court, proceeding on the basis that the injunction was sought not against the bank but against the appellant, restrained the appellant from invoking the bank guarantee. The Supreme Court after elaborate consideration of the matter held:

"Commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere."

10. In *General Electric Technical Services Company Agency (supra)*, the Supreme Court held as under:-

"If the documentary credits are irrevocable and independent, the Bank must pay when demands it made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else..... The Bank cannot be interdicted by the court at the instance of [purchaser] in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties".

11. In *Mahatma Gandhi Sahkara Sakare Karkhane (supra)*, in para 22 the

Supreme Court held as under:-

"In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impressible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

12. The aforesaid position of law remains undisturbed as on date, inasmuch as the Supreme Court in its opinion reported as , (2008) 1 SCC 544, Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd. has in para 12 to 14 held as under:-

"12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Limited (Now Reliance Energy Ltd.) vs. Fenner India Ltd. And anr. this court held :

"10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non- intervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this court, that in U.P. State Sugar Corpn. V. Sumac International Ltd. , (1997) 1 SCC 568 (hereinafter U.P. State Sugar Corpn) this Court, correctly declare that the law was settled.

13. In Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company, this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :

"14.....(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

14. In Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. and anr., this court observed :

" If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury. What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.

[Emphasis supplied]"

13. Keeping in view, the aforesaid position of law, I proceed to apply the same to the facts of this case. The submission of Mr. Chandhiok, primarily revolved round, insofar as mobilisation bank guarantees are concerned, could be invoked only on termination if the complete advance could not be recovered from the bills; and guarantees towards performance, without mentioning any default towards "due punctual, satisfactory and faithful performance of the work order. I may only state here from the perusal of the aforesaid chart, it is clear that the three mobilisation bank guarantees at 1 to 3 above invoked by the respondents were dated 6.1.2012 and 13.12.2012. The amendments therein, to the aforesaid three

mobilisation bank guarantees are, as under:-

"1) Page No. 1, paragraph 2 stands amended and to be read as follows:

"AND WHEREAS your company paid to the said Contractor a sum of Rs. 4,36,72,568/- (Rupees Four Crore Thirty Six Lacs Seventy Two Thousand Five Hundred Sixty Eight Only) as Mobilization Advance, being 15% (Fifteen percent) of the contract sum."

2) Page no. 3, paragraph 1 stands amended, and to be read as follows:

"Notwithstanding anything contained hereinbefore, WE the Canara Bank, 5, Community Centre, Mayapuri, New Delhi hereby irrevocably and unconditionally undertake to pay your company by banker's cheque/demand draft favouring "Gurgaon One Expense Account" and payable at New Delhi on First Demand without protest or demur or proof of condition any and all amount demanded by your Company in writing, with reference to the guarantee and that the liability of the Canara Bank, 5, Community Centre, Mayapuri, New Delhi, under this guarantee is restricted to Rs. 4,36,72,568/- (Rupees Four Crore Thirty Six Lacs Seventy Two Thousand Five Hundred Sixty Eight Only). Our guarantee shall remain in force until 04.01.2015. Unless a claim in writing is presented to us during the validity period of this Guarantee, all your rights under this guarantee shall be forfeited and we shall be discharged of our liability hereunder."

14. The amendment to paragraph 1 clearly reveals that notwithstanding anything contained herein before, the bank had irrevocably and unconditionally undertook to pay the respondents, the amount under the bank guarantees without protest or demur or proof of condition any and all amount demanded by the respondents with reference to the guarantee. The said stipulation, makes it clear that the bank guarantee being irrevocable and unconditional without any protest or demur, was necessarily to be honoured by the bank. The submission of Mr. Chandhiok, that the bank guarantees could be invoked only on termination and that too, if the amount being due would not be tenable. The amendments to the bank guarantees have not been controverted. If that being the factual position, the position of law would be applicable to the facts of this case. The petitioner, therefore cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantees. The question needs to be considered, whether the present case falls under any of or both the exceptions, whether there is a fraud of which bank had notice and whether there are any special equities in granting injunction. The Supreme Court has repeatedly held that fraud, if any must be of an egregious nature so as to vitiate the underlying transaction. A perusal of the pleadings, would note, the petitioner had summed up the challenge to the invocation of the bank guarantees in the following manner:-

I. Overreaching the adjudicative process (i.e. to frustrate the result of invocation of CI. 52.1).

II. Invocation being contrary to the terms of the Bank Guarantee. Thus, invocation being in breach of express terms of Bank Guarantee(s).

III. That there are special equities in favour of the Appellants, so as to justify grant of injunction.

IV. It is Appellant who would suffer irretrievable injury in event of Bank Guarantees being permitted to be encashed.

V. Invocation is an act of arm twisting by Respondent NO.1 intending to its unjust enrichment.

VI. Invocation of Bank guarantees is an abuse of authority by Respondent No. 1.

VII. Present is a case of egregious fraud by the Respondent No. 1 where despite taking and getting the amounts set-off, illegal invocation is done.

VIII. Conduct of Respondent NO.1 amounts to complete breach of trust.

15. The aforesaid grounds of challenge, are primarily based on the statement of the petitioner that from the perusal of the language of the bank guarantees and the letter of invoking bank guarantees, it is a case of egregious fraud and of special equities. I am afraid, that the language of the bank guarantees and the letter invoking bank guarantees surely, does not make out a case of special equities or egregious fraud. On a perusal of the pleadings, no case of fraud has been made out. The only ground being, the bank guarantees could only be invoked upon termination or when an amount is due, or the amounts being set off, would not make a case of fraud of egregious nature as to vitiate the underlying transaction. The ground that encashment of bank guarantees would cause irreparable injury, suffice to state, that the parties are before the Arbitral Tribunal and the amount has been directed to be deposited in an escrow account. So the said ground is unsustainable. I note for benefit, the reliance placed by Mr. Sethi on the judgment of this Court in National Highways Authority of India (supra), wherein this Court has held 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, hence have to be ignored.

16. I also note, for benefit, the judgment relied by Mr. Sethi, in the case of Wander Ltd. and another(supra), wherein the Supreme Court has held the appellate court will not interfere with the exercise of discretionary jurisdiction and substitute its own discretion except where discretion has been exercised arbitrarily, capriciously or perversely. Suffice to state, it is not such a case.

17. Insofar as the judgments relied upon by Mr. Chandhiok, are concerned, insofar as the judgment in Hindustan Construction Co. Ltd. vs. State of Bihar(supra), the same is in the peculiar facts of that case keeping in view the terms of guarantee as noted by the Supreme Court in paras 12 and 13 of the judgment and would be of no help to the petitioner. That apart, in State Trading

Corporation of India Ltd.(supra), there is a clear finding wherein this Court has held that invocation of bank guarantee was an abuse of power, primarily on a finding that there was no breach of contract by the sellers and the quality of the grain which has been supplied by the respondent No. 3 to the petitioner was as per contractual obligation, it was incumbent upon the petitioner to have first entered into a negotiation with the respondent no. 3 before it could have invoked the bank guarantee. This Court had, on a finding that the petitioner in that case was well within the knowledge, but still it insisted upon invoking the bank guarantee, which is a concealment and suppression of the facts and has dismissed the petition holding invocation as bad. The judgment of U.P. State Sugar Corporation (supra), would not help the petitioner.

18. In the end, I note the learned Arbitrator, has, in the impugned order directed the respondents herein to deposit the amount of the bank guarantees in an escrow account in a Public Sector Bank to await disbursement subject to the final award, which in my view has protected the interest of the petitioner herein.

19. I do not see any merit in the petition. The same is dismissed.