(2000) 07 DEL CK 0169

In the Delhi High Court

Case No : I.A. No. 1652/99 in S. No. 390/99

Gujarat Optical Communication Ltd. APPELLANT

Vs

Department of Telecommunication and Another RESPONDENT

Date of Decision : 31-07-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2000) 56 DRJ 241 : (2001) 3 RCR(Civil) 110

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Rajiv Nayar, Mr. Sandeep Mittal and Mr. D.N. Ray, for the Appellant; Mr. A.K. Bhardwaj, for the Respondent

Judgement

J.B. Goel, J.—By this order plaintiff''s application under Order 39 Rules 1 & 2 CPC for interim injunction against invocation and encashment of bid security bank guarantee (No.2/98 dated 12.3.1998 issued by defendant No.2 - Punjab National Bank) on behalf of plaintiff in favor of defendant No.1 for Rs.25.00 lakhs is being disposed of.

2. Briefly the facts are that defendant No.1 on 20.1.1998 floated a Tender (Tender No.MM/OF/121997/000116) for supply of 6F Optical Fibre Cables along with accessories for a quantity of 13000 Kms. later increased to 13624 Kms. plaintiff had submitted tender for the same along with bid security in the form of a Bank Guarantee in the sum of Rs.25.00 lakhs as per condition of the bid tender documents. plaintiff''s bid being the lowest was accepted on 15.4.1998. However as provided in clause 11 of Special Conditions of Contract, (Section IV) the quantity to be supplied was allocated among ten lowest bidders by adopting the formula of Vendor Rating. Total quantity to be supplied was fixed at 10898 Kms cables out of which 1008 Kms. were allocated to the plaintiff. Defendant No.1 placed Advance Purchase Order No.CP/APO/068/98-99 dated 11.9.1998 for the supply of 1008 Kms. of cables. The plaintiff vide its letter dated 23.9.1998 accepted the conditions of the Advance Purchase Order and also submitted

requisite performance Bank Guarantee dated 29.9.1998 in the sum of Rs.16,81,000/- issued by defendant No.2 valid up to 12.9.2000 as demanded in the Advance Purchase Order. On 20.10.1998, a formal Purchase Order was also placed on the plaintiff for the supply of said 1008 Kms. of cables.

3. Defendant No.1 then placed further Advance Purchase Order dated 23.10.98 (APO/NCT/APO/090/98-99) on the plaintiff for an additional quantity of 9005 Kms. of cables with a demand of a performance Bank Guarantee of Rs.72,06,000/-. This quantity on representation made by the plaintiff was first reduced to 3500 Kms. and then to 2500 Kms. of cables vide letter No.80-8/98-MHC/Vol.II/930 dated 23.11.1998. The plaintiff accepted it and furnished further requisite Performance Bank Guarantee dated 10.12.1998 in the sum of Rs.28,68,000/-. Defendant No.1 in the said letter dated 23.11.1998 also asked Explanation of the plaintiff as to why they could not accept the supply of balance 1000 Kms. Explanation was given by plaintiff in their letter dated December 7, 1998.

4. In the meantime, defendant No.1 on 21.12.1998 floated another tender for the supply of another quantity of 10330 Kms. of the same material. Again the tender of the plaintiff being lowest was accepted. Defendant No.1 placed Advance purchase Order dated 14.1.1999 for 1000 Kms. on the plaintiff, but on the rates which were accepted in respect of the earlier tender which were lower by about Rs.3,556/- per Km. to which plaintiff raised objections. Apparently, the supply having not been made, defendant No.1 by an express telegram dated 12.2.1999 invoked the bid security bank guarantee (No.2/98 dated 12.3.1998) and asked defendant No.2 to remit the amount of Rs.25.00 lakhs by 19.2.1999.

5. plaintiff has filed the suit for declaration and injunction that the conditions of the bid security Bank Guarantee were fulfilled and so it stood discharged and was not liable to be invoked. Along with the suit, the plaintiff also filed the aforesaid application for interim injunction on which this Court vide ex parte interim order dated February 22, 1999 stayed the encashment of the Bank Guarantee. That interim order is still continuing.

6. Defendant No.1 filed written statement and also reply to the application contesting the same. It has been alleged that the plaintiff has committed breach of the terms and conditions of the contract and as such the bid security is liable to be forfeited and that their action is valid and lawful.

7. I have heard learned counsel for the parties. Shri Rajiv Nayar, learned Senior counsel for the plaintiff has referred to various tender documents, the Bank Guarantee in question and other relevant documents placed on record and has contended that the Bank Guarantee stood discharged as soon as the contract was awarded to the plaintiff in that the plaintiff accepting the terms and conditions of the Advance Purchase Order and furnishing performance Bank Guarantee in the amount demanded by defendant No.1. In the circumstances, it could not be legally invoked; the defendant No.1 is misusing their power and

position in an high handed manner and it is a clear case of perpetuation of fraud which, if allowed, will cause irreparable loss and harm to plaintiff. Even otherwise, the Bank Guarantee has not been invoked in terms of the said Bank Guarantee. For this reason also, the invocation is not proper.

8. Whereas learned counsel for the defendant No.1/ beneficiary has contended that Bank Guarantee has been invoked on account of breach of obligations undertaken under the contract, the plaintiff has not made supply and failed to execute the contract; and that the invocation is proper and also in terms of the contract and the action of defendant No.1 is legal, proper and valid.

9. I have considered these contentions and the material on record. Two questions arise (1) whether the Bank Guarantee in question is enforceable in the facts and circumstances, and (2) Whether invocation is proper otherwise. That would depend upon the terms and conditions under which the parties had bound themselves.

10. It would be relevant to refer to the circumstances and conditions in which the Bank Guarantee in question was given. The tender inviting bids was governed by the terms and conditions as mentioned in various bid documents (copy of which is Annexure "P" available at pages 60 to 90 of Part III). Relevant clauses pertaining to furnishing of bid security and conditions/circumstances for its forfeiture or discharge which are clauses 7,12,24, 25 and 27 to 29 and clauses 11 and 15.5 of Special Conditions of Contract in Section IV, which so far as relevant for our purpose, provided as under:-

"7. The bid prepared by the bidder shall comprise the following components:

(a) x x x x x x x x x x x x x x x x x x x x x x x x x

(b) Bid Security furnished in accordance with clause 12.

(c) x x x x x x x x x x x

(d) x x x x x x x x x x x

12. BID SECURITY

12.1 Pursuant to Clause 7 of the bidder shall furnish, as part of his bid, a bid security for an amount of Rs.25,00,000/- (Rupees Twenty Five lakhs only) (Omitted portion not applicable).

12.2 The bid security is required to protect the Purchaser against the risk of bidder''s conduct, which would warrant the security''s forfeiture, pursuant to para 12.7.

12.3 The bid security shall be in the form of a Bank Guarantee issued by a scheduled bank in favor of the purchaser, valid for a period of 240 days.

12.6 The successful bidder''s bid security will be discharged upon the bidder''s acceptance of the advance purchase order satisfactorily in accordance with clause in 27 and furnishing the performance security.

12.7 The bid security may be forfeited:

(a) if a bidder withdraws his bid during the period of bid validity specified by the bidder on the Bid form or

(b) in the case of a successful bidder, if the bidder fails:

(i) to sign the contract in accordance with clause 28 or

(ii) to furnish performance security in accordance with clause 28.

24. AWARD OF CONTRACT:

The purchaser shall consider placement of orders for commercial supplies on those bidders whose offers have been found technically, commercially and financially acceptable and whose goods have been Type Approved/Validated by the Purchaser.

25. PURCHASER''S RIGHT TO VARY QUANTITIES AT THE TIME OF AWARD:

The purchaser reserves the right at the time of award of contract to increase or decrease by up to 25% of the quantity of goods and services specified in the Schedule of Requirements without any change in unit price of the ordered quantity or other terms and conditions.

27. ISSUE OF ADVANCE PURCHASE ORDER:

27.1 The issue of an Advance Purchase Order shall constitute the intention of the Purchaser to enter into the contract with the bidder.

27.2 The bidder shall within 20 days of issue of the Advance Purchase Order, give his acceptance along with performance security in conformity with section IX provided with the bid documents.

28. SIGNING OF CONTRACT:

28.1 The issue of Purchase Order shall constitute the award of contract on the bidder.

28.2 Upon the successful bidder furnishing the performance, purchase pursuant to Clause 27, the Purchaser shall discharge its bids security, pursuant to clause 12.

29. ANNULMENT OF AWARD:

Failure of the successful bidder to comply with the requirement of Clause 28 shall constitute sufficient ground for the annulment of the award and forfeiture of the bid security in which event the Purchaser may make the award to any other bidder at the discretion of the Purchaser or call for new bids.

Section IV: Special Conditions of Contract

11. The purchaser intends to limit the number of technically and commercially responsive bidders to 10(Ten) from the list of such bidders arranged in decreasing order of their Vendor Rating starting from the highest for the purpose of ordering against this tender. The bidder with the highest Vendor Rating will be considered for about 20% of the tendered quantity and the balance quantity will be ordered on the remaining selected bidders in direct ratio of their Vendor Rating. However, the purchaser reserves the right for the placement of order of entire quantity on the bidder with the lowest quoted/evaluated price.

15.5 Vendor with the highest vender rating will be regarded as the V-1 and others in the descending order of their rating for the purpose of distribution of the quantities to be ordered. However, the ordering price for procurement will be the lowest one out of the prices quoted by the vendors selected for the ordering on vendor rating basis.

11. The tenders were opened and evaluated on 15.4.1998. plaintiff''s tender was the lowest. However, applying Vendor Rating Formula, a quantity of 10898 Kms. of cables was allocated among the lowest ten bidders as under:-

Firm Ranking Allocated Qty(Km) 1. M/s. OPTEL V-1 2179.0 2. M/s. Aksh V-2 1062.0 3. M/s. Sterlite V-3 1051.0 4. M/s. Sudershan Telecom V-4 1036.0 5. M/s. GOCL (plaintiff) V-5 1008.0 6. M/s. Birla Ericsson V-6 986.0 7. M/s. Uniflex V-7 937.0 8. M/s. CMI Ltd. V-8 883.0 9. M/s. RPG V-9 880.0 10. M/s. HFCL V-10 876.0 -------- 10898.0 --------

12. Quantity of 1008 Kms. was allocated to the plaintiff and an Advance Purchase Order for the supply of 1008 Kms. of cables was placed by defendant No.1 on the plaintiff vide APO No. CT/APO/068/98-99 dated 11.9.1998, the total value of the material so ordered was Rs.3,36,13,080.54. Accordingly, a performance Bank Guarantee of Rs.16,81,000/- valid for two years to be furnished within 20 days was demanded from the plaintiff. plaintiff accepted the terms and conditions of the said Advance Purchase Order unconditionally vide their letter dated September 23, 1998 and also furnished performance Bank Guarantee of the amount as demanded (No.10/98 dated 29.9.1998 of the Punjab National Bank, Ahmedabad, Kankaria Road Branch) valid up to 12.9.2000. This fulfilled the requirement of clause 27 noticed above. This Bank Guarantee was accepted and a purchase order No. CT/PO/044/98-99 dated 20.10.1998 for supply of the said quantity of 1008 Kms. was placed by defendant No.1 on the plaintiff. This constituted signed "award of contract" on the plaintiff under Clause 28.1 And under Clause 28.2 the purchaser was obliged to discharge the bid security of Rs.25 lakhs. In other words, it stood discharged and so could not be forfeited thereafter.

13. In the advance purchase order the demand for supply of additional quantity to the extent of 25% as contemplated in Clause 25 was not made nor any such right to place order for such extra quantity was reserved. However, defendant No.1 vide another Advance Purchase Order No.CT/APO/090/98-99 dated

23.10.1998 placed order for additional quantity of 9005 Kms. and a performance Bank Guarantee of Rs.72,06,000/- was also demanded from the plaintiff, delivery period being six months. plaintiff in their letter dated October 26, 1998 expressed inability to meet the delivery period as mentioned in this order and offered to supply 416 Kms. per month. Defendant No.1 reduced the quantity to 3500 Kms. and the bank guarantee amount to Rs.33,35,000/-. This quantity was further reduced to 2500 Kms. and the Bank Guarantee to Rs.28,68,000/- vide letter No. File No.80-8/98/MNC/GOCL/971 dated 3.12.1998. But at the same time asked for Explanation for the remaining quantity of 1000 Kms. as under:-

"........However, you are again requested to explain in details why the quantity of 1000 Kms. in excess of this order would not be accepted by your firm."

14. This order for supply of 2500 Kms. was accepted by the plaintiff vide their letter dated December 7, 1998 and following Explanation for the said quantity of 1000 Kms. was given:-

"We had already conveyed our acceptance for the quantity of 3500 Kms of 6F OF Cables at our quoted price earlier vide our letters dated 14.11.98, 27.11.98. In our letters, we had tried to explain our genuine difficulty in executing the quantity in the specified time schedule given to us. We had requested your goodself in our letters to amend either the quantity or the delivery period whichever is acceptable and suitable to you. We, Therefore, once again convey our willingness to accept the additional quantity of 1000 Kms 6F OF Cable along with the accessories at our quoted price with a request to provide us reasonable time for execution of the same."

15. Performance Bank Guarantee in the sum of Rs.28,68,000/- as demanded was also furnished along with their letter dated December 10, 1998. This was accepted and a Purchase Order No.CT/PO/086/98-99 dated 23.12.1998 for supply of 2500 Kms. of cable was placed by defendant No.1 on the plaintiff. This must have been supplied as no dispute has been raised in the pleadings about this purchase order.

16. Defendant No.1 then placed further Advance Purchase Order vide their letter No.CT/APO/126/98-99 dated 14.1.1999 for the supply of 1000 kms. at the rate accepted on 15.4.1998. Before this order was placed, in the mean time, further tenders were invited on 21.12.1998 for the supply of a quantity of 10330 Kms. of the same material and again the plaintiff''s tender being the lowest was accepted but at a price higher by Rs.3,555.89 per km. The plaintiff objected to this order in their letter dated 25.1.1999 and disputed the liability to supply the same at old rate in view of fresh quotations having been invited and accepted. But defendant No.1 has invoked the Bid Security Bank Guarantee of Rs. 25.00 lakhs furnished initially, vide their telegram dated 12.2.1999 and asked the bank to remit the amount by 19.2.1999 when the plaintiff filed the present suit.

17. The tender documents do not contemplate placing of orders for supply of material in piecemeals. Though clause 25 gave right at the time of award of

contract to increase or decrease the quantity by/up to 25% of the quantity of goods but no such right was exercised when the award of contract was made in terms of Clause 25. Under clause 28.1., the issue of purchase Order constituted the duly signed "award of contract" to the successful bidder and under Clause 28.2 upon the successful bidder furnishing the performance guarantee pursuant to clause 27, the purchaser was obliged to discharge the bid security. Under clause 29, it was only in the case of successful bidder failing to comply with the requirements of clause 28 which would constitute ground for the annulment of the award and the forfeiture of the bid security.

18. Also under clause 12.7, the bid security could be forfeited in two circumstances: Firstly, if the bidder withdrew his bid during the period of bid validity. Admittedly this is not the case and this clause is not attracted; secondly in case the successful bidder: (i) fails to accept the contract and (ii) to furnish performance security in accordance with clause 28. As already noticed, plaintiff had accepted Advance Purchase Order and furnished the Bank Guarantee and thereafter purchase order was placed, material against which was also supplied. This second condition is also not attracted and as such the bid security in question is not liable to be forfeited and plaintiff is entitled to its discharge.

19. However, learned counsel for the defendant No.1 has contended that the bid security was liable to be forfeited for failure of the plaintiff to execute the contract in terms of condition No.3(a). Condition No.3 of the Bond reads as under:-

3. If the Bidder, having been notified of the acceptance of its bid by the Purchaser during the Period of Bid validity:

(a) fails or refuses to execute the Contract, if required, or

(b) fails or refuses to furnish performance security, in accordance with the Instructions to Bidders.

20. Emphasis has been laid on the words "execute the contract". According to learned counsel for the defendant No.1, it meant that the contract shall be executed by completing the supplies as ordered. Whereas according to learned senior counsel for the plaintiff, this clause is to be read in the light of clause 12.7(b)(i) of the tender documents where the words are "to sign the contract in accordance with clause 28" and a signed contract came into existence on acceptance of advance purchase order and furnishing of Performance Bank Guarantee.

21. Obviously, the bid security was furnished in pursuance of requirement of clause 12.7 of the bid documents reproduced earlier. Bid document has not used the words "execute the contract" but the words "signing of contract".

22. According to Black''s Law Dictionary (Sixth Edition), the word "execute" means:-

"to execute; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note."

And "execution" means:-

"Execution of contract includes performance of all acts necessary to render it complete as an instrument and imports idea that nothing remains to be done to make complete and effective contract."

And in "The New Laxicon Webster''s Dictionary of the English Language" (Deluxe Edition) the word "execute" means:-

"to carry out, put into effect, to execute an order, to perform; to draw up and complete in correct legal form."

23. According to Long man Dictionary of Contemporary English the word "execute" means:

"to carry out; to perform or to do completely (an order, plan, or piece of work); to make effective in law (an important written paper) by having it signed, witnessed etc."

24. The word "execute" thus would mean to sign as well as to perform. What meaning is to be given in this case. That would depend upon the intention of the parties.

A surety is considered a "favoured debtor" and his liability is strictissimi juris.

Lord Westburn LC, in Blest Vs. Brown (1862) 45 ER 1225 stated this liability in the following words:-

"It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement, You have no hold upon him. He is bound, Therefore, merely according to the proper meaning and effect of the written engagement that he has entered into."

This has been referred to with approval by His Lordship Sarkar, J. in M.S. Anirudhan Vs. The Thomco''s Bank Ltd., .

25. The bank guarantee in question so far as relevant provided:-

THE CONDITIONS of the obligation are :

1. If the Bidder withdraws its bid during the period of bid validity specified by the Bidder on the Bid Form; or

2. Refusal to extend the bid security and bid validity as asked by the purchaser.

3. It the Bidder, having been notified of the acceptance of its bid by the purchaser during the Period of Bid validity.

(a) fails or refuses to execute the Contract, if required, or

(b) fails or refuses to furnish performance security, in accordance with the instructions to Bidders.

We undertake to pay to the purchaser up to the above amount (i.e. Rs. 25.00 lakhs) upon receipt of its first written demand, with out the Purchaser having to substantiate its demand, provides that in its demand, the Purchaser will note that the amount claimed by it is due to it owing to the occurrence of one or both of the two conditions, specifying the occurred conditions or conditions.

This guarantee will remain in force as specified in clauses 12 and 28.2 of section II of the Bid Document up to and including Thirty (30) days after the Period of bid validity, and any demand in respect thereof should reach the Bank not later than the specified date/dates."

26. Under Clause 12.7 the bank guarantee was liable to be forfeited, inter alia, if the successful bidder fails: (a) to sign the contract in accordance with Clause 28; or (b) to furnish performance security in accordance with Clause 28.

And Clause 28.2 mandates for its discharge upon the successful bidder furnishing the performance bank guarantee.

27. The plaintiff had fulfilled the conditions contemplated in Clause 28. In that view of the matter the bid security bank guarantee would stand discharged on placement of the purchase order on the plaintiff on 23.10.1998.

28. Now coming to the second point whether the bank guarantee has been validly invoked? The invocation of the bank guarantee is made by telegram dated 12.2.1999 which reads:-

"Encash the bank guarantee No.BG 2/98 dated 12.3.1998 for Rs. 25,00,000/- (Rs. Twenty Five Lakhs Only) and remit amount through A/C payee demand draft payable at Delhi and drawn in favor of Pay and Accounts Officer, Department of Telecom. (HQ) by 19.2.1999."

29. Relevant portion from the bank guarantee has been extracted above. According to its terms, the Bank is liable to pay on fulfillment of the following conditions:- (1) the demand by the purchaser, (2) with note that the amount claimed by it is due to it owing to the occurrence of one or both of the two conditions and (3) specifying the occurred condition or conditions.

30. Apart from the fact that the guarantee was to remain valid and in force as specified in Clauses 12 and 28 of Section II of the documents (already reproduced above), none of these conditions/requirements have been noted/ stated in the invocation letter. These are the conditions precedent to be fulfilled for invoking the bank guarantee.

31. Recently, a Division Bench of this Court in National Building Construction Co. Vs. Puri International (P) Ltd. & Anr. (FAO (OS) 127/97 decided on July 28, 2000)

has also held that the bank guarantee should be strictly construed and the beneficiary is entitled to invoke the bank guarantee and seek its encashment strictly in accordance with its terms and tenor. Only then the bank will be liable to pay under the bank guarantee.

32. The invocation made in this case does not specify the breaches/violations which may have given occasion to invoke the bank guarantee in question. This invocation thus is not in terms of the bank guarantee and hence is not proper and valid and is of no avail.

33. For these reasons the application for interim injunction is allowed and by means of an ad interim injunction, defendants are hereby restrained from invoking and/or encashing the Bid Security Bank Guarantee No. 2/98 dated 12.3.1998 of Rs.25.00 lakhs issued by defendant No. 2 on behalf of the plaintiff till the disposal of the suit. Interim order passed on July 22, 1999 stands modified accordingly.

34. Nothing stated herein shall be deemed to be expression of opinion on merits of the suit.

I.A.No. 1652/99 is allowed and disposed of.