
(2003) 07 DEL CK 0080

In the Delhi High Court

Case No : OMP 85 of 2002

Hindustan Vidyut Products Ltd.

APPELLANT

Vs

Delhi Vidyut Board and Others

RESPONDENT

Date of Decision : 08-07-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2003) 3 ARBLR 190 : (2004) 1 BC 155 : (2003) 106 DLT 41 : (2003) 70 DRJ 95 : (2003) 135 PLR 31

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

Bench : Single Bench

Advocate : P.N. Lekhi and B. Mohan, for the Appellant; Ashwini Kumar and Ruchi Narula, for the Respondent

Final Decision : Dismissed

Judgement

B.N.Chaturvedi, J.—Aggrieved by invocation of bank guarantee by respondents 1 and 2, the petitioner has filed instant petition u/s 9 of the Arbitration and Conciliation Act 1996 seeking a restraint order against respondents 1 and 2 from encashing or Realizing any amount under the bank guarantee in question and injuncting the respondent No.3 from making any payment to the respondents 1 and 2 there under.

2. Facts relevant in the context of present controversy may be noticed briefly. On 30th June, 1992 the respondent No.1 placed a purchase order on the petitioner for supply of 1500 kms of "ACSR Bersimis Conductor" of a total value of Rs.13,92,84,000/- . The delivery was to commence six months from the date of the award letter and was to be completed within 12 months i.e. on or before 30th June, 1993. For each calendar week of delay or part thereof, liquidated damages @1/2% of the contract value, subject to ceiling of 5% of the total contract value, was livable under the contract. In the event of delay or default on the part of the respondent No.1, the petitioner was entitled to reasonable extension of time, apart from being compensated therefore. The petitioner was

required to furnish a performance bank guarantee for 10% of the value of the contract and accordingly a performance guarantee No.3398 dated 3.9.1992 for Rs.91,06,852/-, issued by respondent No.3, as amended vide amendment letter dated 31.12.2001 and validated up to 31st March, 2002, was submitted.

3. The said bank guarantee, according to the petitioner, was a conditional one as upon discharge of the contract the same was to stand automatically determined/ cancelled.

4. There was a delay in establishing the letter of credit favoring the petitioner by the respondent No.1 to secure 85% payment to the petitioner against submission of documents evidencing dispatch. In the circumstances, by a letter dated 28th February, 1994, addressed to the petitioner the respondent No.1 unilaterally re-scheduled the delivery period to commence from February 1994 till the entire order was executed. It is added that delays occurred in payments against the documents negotiated under the letter of credit, on the part of the respondents No.1 and 2, due to which reinstatement of the letter of credit for payments against subsequent supplies also got delayed.

5. During the re-scheduled delivery period the petitioner supplied a total quantity of 299.480 kms. of the conductors between 25th February 1994 and 28th July, 1994. No further supplies could be made thereafter as the letter of credit got expired in view of non extension thereof by the respondents No.1 and 2.

6. On the request of the respondent No.1, further supplies, under the same very contract, were resumed by the petitioner sometime in the year 1996 and during the period from 13th April, 1996 to 15th February, 1997 the conductors to the extent of 537.082 kms were supplied and payments for the same were made to the petitioner. Between 6th July, 2000 and 18th August, 2000, 230.378 kms of the said conductors were further supplied to the respondent No.1 and the petitioner received payment against the same. Thus in all, 1066.940 kms of the conductors out of the total quantity of 1500 kms. were supplied to the respondents and the petitioner received payments therefore.

7. By a letter dated 26th February, 2002 from the respondent No.2, the petitioner was informed that the supplies of the balance quantity of 433.060 kms stood foreclosed/cancelled and the petitioner was required to refund the balance advance payment of Rs.40,09,270.48. Simultaneously, the respondent No.1 made a claim of Rs.23,92,462/- against the petitioner on account of liquidated damages for non supply of 300 kms. (approx) of the conductors in the first phase of supply. The petitioner was required to deposit the said amount of liquidated damages within 10 days failing which, it was told that the amount would be recovered by encashing the bank guarantee.

8. By a letter dated 11th March, 2002, addressed to respondent No.2, the petitioner stated in reply that in view of foreclosure of the contract, the same stood discharged and it was thus relieved of any further obligation there under. The petitioner conveyed its willingness to the respondents to refund the amount

of the balance advance payment of Rs.40,09,270.48 provided the bank guarantee was got duly cancelled. The claim for liquidated damages, was however, disputed by the petitioner on the ground that by 15th February, 1997 it had already supplied 836.56 kms. of the conductors, which were accepted by the respondents 1 and 2 and the payments for the same were made, without any reservation on account of alleged claim of liquidated damages and, Therefore, the delay, if any, in supply of the conductors stood waived and the claim on account of liquidated damages, apart from being time barred, is rendered stale.

9. The respondent No.2 wrote back vide his letter dated 14th March, 2002 to the petitioner that as it had failed to refund the balance advance payment and had further omitted to deposit the amount of liquidated damages, they were proceeding to recover the same by advising its banker (respondent No.3) to release the said payments to them against the bank guarantee in question. A copy of this letter was endorsed to the respondent No.3 thereby invoking the bank guarantee for realization of a sum of Rs.40,09,270.48 and Rs.23,92,462 on account of refund of balance advance payment and liquidated damages respectively. The petitioner in turn approached this Court by way of instant petition with the prayer as set out at the very outset.

10. Refund of balance advance payment of Rs.40,09,270.48 and liquidated damages to the tune of Rs.23,92,462/- constitute the demand raised by the respondents, which they seek to recover, on petitioner's failure to pay the same, by encashing the bank guarantees. The petitioner accepts its liability in relation to the amount as aforesaid on account of balance advance payment. The dispute is confined to the claim of liquidated damages only. Precise plea of the petitioner to its liability in this regard is that with the foreclosure of the contract, the same came to an end and as a result thereof, it stood absolved, of its liability, if any, on liquidated damages count. Respondents counter plea is that foreclosure of the contract was applied to, in view of a request on behalf of the petitioner in that regard and Therefore, it is not open to the petitioner to seek umbrage under the aforesaid plea. It is added that while acceding to the request of the petitioner for foreclosure of the contract, the respondent reserved its right to claim liquidated damages as per terms and conditions of the contract, which would be evident from its letter dated 26th February, 2002 (Annexure-G) , addressed to the petitioner. Another argument advanced on behalf of the petitioner is that as the respondents had accepted the supplies and also made the payments Therefore, without any reservation on account of alleged claim of liquidated damages, the delay, if any, in the first phase of supply, stood waived and the same is rendered stale, apart from being time barred.

11. To lend assurance to the aforesaid pleas raised on behalf of the petitioner, learned senior counsel appearing for the petitioner, made references to Clauses 8, 14, 26 and 41 of the Contract. Clause 8 pertains to the construction of the contract; Clause 14 provides that the time was essence of the contract while Clause 26 relates to the termination of the contract caused by the owner for

reasons other than contractors default. Clause 41 captioned as "Limitation OF Liabilities" reads thus;

b1 "LIMITATION OF LIABILITIES:

The final payment by the owner pursuant to the contract shall, mean, the release of the contractor from all his liabilities under the Contract. Such final payment shall be made only at the end of the Guarantee/Warranty period, and till such time the contractual liabilities and responsibilities of the contractor shall prevail. All other payments made under the Contract shall be treated as on-account payments."

Clause 21 of the Contract relates to liquidated damages. It reads to the following effect:-

"21.1 If the contractor fails to successfully complete the Contract Operations within the time fixed under the Contract, the Contractor shall pay to the owner as liquidated damages and not as penalty, a sum specified for each specified period of delay. The details of such liquidated damages are brought out in the accompanying Special Conditions of Contract.

21.2 The total amount of liquidated damages for delay under the contract will be subject to a maximum of five percent (5%) of the contract price unless, otherwise specifically mentioned in Special Conditions of Contract.

21.3 Equipment and materials will be deemed to have been delivered only when all its components, parts are also delivered. If certain components are not delivered in time, the equipment and materials will be considered as delayed until such time the missing parts are also delivered."

12. Intricacies of various terms and conditions attracting application of liquidated damages may be the subject of interest for arbitral tribunal to adjudicate upon the justifiability of the demand raised against the petitioner but so far as the question relating to invocation of the bank guarantee is concerned, key to decide the issue confronting for the present, lies in the terms and conditions of the bank guarantee. Reproduction of relevant part of the bank guarantee would make it easier to answer the problem. Material part of the bank guarantee runs as extracted hereunder:-

""We, Dena Bank, M-36 Connaught Circus, New Delhi.....do hereby guarantee and undertake to pay the owner, on demand any or, all monies payable by the Contractor to the extent of Rs.1,39,28,400/- (Rupees One Crore thirty nine lacs twenty eight thousand four hundred only) as aforesaid at any time up to 31.3.1995 without any demur, reservation, context, recourse or protest and/or without any reference to the Contractor. Any such demand made by the owner on the Bank shall be conclusive and binding notwithstanding any difference between the owner and the Contractor or any dispute pending before any court, Tribunal, Arbitrator or any other authority....."

13. The bank guarantee represents an independent contract between the bank and the beneficiary and the terms thereof bind both the parties. The terms of the bank guarantee are thus extremely material. The invocation must Therefore be in accordance with the terms of the bank guarantee and any deviation there from would render the very invocation bad in law. 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 interfere with the invocation of bank guarantee. This is the law laid down by the Supreme Court in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, .

In " UP Cooperative Federation Limited Vs. Singh Consultants & Engineers (Pvt) Limited" (1998) 1 SCC 174, 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."

14. In a series of decisions of the Supreme Court in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, ; Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., : National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, : State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, : Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, as also in AIR 1997 1644 (SC) .", the same principle of law has been reiterated.

15. For application of aforesaid principle, it is however important to bear in mind that the bank guarantee should be 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 could be pending between the beneficiary under the bank guarantee and the person on whose behalf the guarantee was furnished. The bank has simply to verify whether the amount claimed was within the terms of the bank guarantee. Unless fraud or special equity is, prima facie, made out as triable issue by specific pleading and a strong evidence so as to prevent irretrievable injustice to the party concerned, beneficiary cannot be restrained from encashing the bank guarantee till decision of the arbitrator/Court on amount due and payable to the beneficiary (See Ansal Engineering Projects Limited (Supra) .

16. Adverting to the case on hand, it is unnecessary to delve deeper into the pleas raised on behalf of the petitioner that with the foreclosure of the contract the same came to an end and as a result it stood absolved of liability, if any, for liquidated damages and that on respondents accepting supplies and making payments Therefore without any reservation on account of any alleged claim of liquidated damages, the delay, if any, in the first phase of supply stood waived

and the same is rendered stale and also barred by time.

17. Above extracted portion of bank guarantee clearly indicates that it unequivocally and unconditionally binds the bank concerned to make payment of the amount to the beneficiary on demand without any demur, reservation or protest and without any reference to the contractor. The demand by the beneficiary on the bank was to be conclusive and binding notwithstanding any difference or dispute between the beneficiary and the contractor or pendency of any dispute before any Court, Tribunal, Arbitrator or any other Authority. Thus the pleas raised on behalf of the petitioner to resist invocation of bank guarantee are alien to the terms and conditions of the bank guarantee and Therefore no weightage can be attached thereto. No case of fraud or irretrievable injury is pleaded to sustain the prayers for a restraint order against invocation of the bank guarantee in question.

18. On behalf of the petitioner reference was made to a decision in U.P. Cooperative Federation Limited (supra) and two decisions of this Court in Walchandnagar Industries Ltd. Vs. Cement Corporation of India 1996 V AD (Delhi) 12 and Vindhya Telelinks Ltd. Vs. Mahanagar Telephones Nigam Limited & Anr 2002 2 AD (Delhi) 778, in support of the pleas raised on its behalf. These decisions, however, in no way appear to promote the arguments advanced on behalf of the petitioner against the invocation of the bank guarantee in question. The invocation of the bank guarantee is not shown to have been in breach of terms of the bank guarantee. No plea of fraud or irretrievable injury has been advanced. No prima facie case for grant of injunction as prayed for is thus made out. The petition is, in the circumstances, liable to be dismissed.

19. In the result, the petition is dismissed.

20. No costs.