(2010) 03 DEL CK 0046

In the Delhi High Court

Case No : O.M.P. No. 548 of 2009

Humboldt Wedag GMBH APPELLANT

Vs

Dalmia Cement Ventures Ltd. and Others RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2010) 03 DEL CK 0046

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Anuradha Lal and Om Parkash, for the Appellant; Jayant Bhushan Mihir Kumar and Gautam Talukdar for Respondent No. 1 and Abhishek Kumar, for the Respondent

Judgement

Valmiki J Mehta, J.—This is the petition u/s 9 of the Arbitration and Conciliation Act, 1996 whereby the petitioner seeks an injunction to restrain the respondent No. 1 (hereinafter "the respondent") from invoking the Bank Guarantee for Euro 2,835,000 and which Bank Guarantee was given to secure the advance payment given by the respondent to the petitioner. The petitioner as the contractor and the respondent as an owner entered into a contract by virtue of the Letter of Intents dated 20.2.2008 whereby the petitioner was to design, engineer, manufacture, supply and sell the cement plants to the respondents for its sites at Belgaum; Karnataka, Gulbarga-I; Karnataka, Gulbarga-II; Karnataka and Meghalaya. The subject contract is dated 17.3.08.

2. In terms of the contract, the respondent gave an advance payment and which advance payment was secured by the petitioner by giving to the respondent the subject Bank Guarantee. The original contract contained a Clause called as Section 26.2 which reads as under:

26.2 Consequences

If the Contract is terminated as per Section 26 - Termination for Convenience, the Seller shall determine:

(i) the cost of material and goods ordered for the purposes of the Contract or for use in connection with supply of the Equipment which have been delivered to the Seller or for which the Seller is legally liable to pay or accept delivery. Such materials and goods shall become the property of and be at the risk of the Buyer when paid for by the Buyer and the Seller shall place the same at the Buyer''s disposal; and

(ii) the amount of any other reasonable expenditure incurred by the Seller in the expectation of completing the whole of the supply of the Equipment as well as cancellation charges as applicable on submission of proofs; and

(iii) the costs for removal of Equipment from the Site and the return of these items to the Seller''s and/or Subcontractors'' workshops as well as the costs of repatriation of the Seller''s and/or Subcontractors personnel; and

(iv) a reasonable amount in respect of loss of profit not exceeding 10% of the total amount due under the Contract to the extent that such profit has not already been paid to the Seller in sums already invoiced;

And shall issue an accumulated invoice certified by the auditor of the Seller payable by means of the Letter of Credit as specified in Annex 11 (Forms of Securities).

3. Pursuant to the fresh discussion and negotiations between the parties, the contract was novated on 5.9.2008 and these novations are as under:

Amendment No. 3 to Contract between Dalmia Cement Ventures Ltd. and Humboldt Wedag GmbH made on March 17, 2008

Contract No. DV-MGH-DLH-PUO-002-00

...Following amendments have been agreed between DCVL &HWG for Plant No. 3 (Gulbarga II) and Plant 4 (Meghalaya).

1) The contract value for plant No. 3 and 4 remains EURO 10,253,500.00.

2) HW Germany confirms placing order of the following items.

a) 12 Nos. Roller Bearing Assemblies b) 3 Nos. Oil Lubrication Systems c) 2 Nos. Rollers Complete welded d) 4 Nos. Rollers with complete studs e) 6 Nos. Gear boxes

The contract value of these items amounts to Euro 7,900,000.00 and it has been agreed between DCVL & HWG as follows:

i) DCVL shall release an advance payment amounting to 10% of Euro 7,900,000.00 by September 15, 2008 at the latest.

ii) DCVL shall open a L/C of 90% of Euro 7,99,000.00 within 15 days from the date of advance payment, latest by September 15, 2008 whereas the confirmation of this L/C shall not be effective before Nov. 15, 2008.

After the advance payment is made and the L/C is opened in accordance with the contract stipulations, DCVL shall confirm one of the following options 1-3:

Option 1: DCVL to Continue the Contract Entirely

In case DCVL confirm continuation of contract by 15th Nov'' 08, the pending portion of Euro 10,253,000.00 minus Euro 7,900,000.00 = Net Euro 2,353,000.00 will be paid as follows:

1.1) the advance payment of 10% of Euro 2,353,000.00 shall be transferred on 15th Nov'' 08 and,

1.2) the L/C of 90% of Euro 2,353,000.00 shall be opened by 15th Nov'' 08 In case that the above mentioned payment conditions have not been fully fulfilled until Nov. 15, 2008 the contract portion value Euro 2,353,000.00 has be to renegotiated.

In case that the before mentioned payment terms under (i), (ii), Option 1.1) and Option 1.2) are fulfilled, HWG has accepted the following delivery periods:

Amendment No. 3 to Contract between Dalmia Cement Ventures Ltd. and Humboldt Wedag GmbH made on March 17, 2008

Contract No. DV-MGH-DLH-PUO-002-00

-- Items for Commencement Amendment to Contractual Agreed Last Plants No. 3 Date Commencement Delivery Time Date of 3 & 4 Date Shipment -- 2 RP 16- Febr. 20, 2008 +3.5 months 18 months Dec. 05, 2009 170/180 -- 1RP7-170/90 Febr. 20, 2008 +3.5 months 19 months Jan. 05, 2010 1RP 16- 170/180 -- Pyro Febr. 20, 2008 +3.5 months 12 months Jun. 05, 2009 Processing Plant 4 -- Option 2: DCVL to buy Spare Parts and to terminate the Smaller Contract Portion

DCVL has the option to take

- 12 Nos. Roller Bearing Assemblies - 3 Nos. Oil Lubrication Systems - 2 Nos. Rollers Complete welded - 4 Nos. Rollers with complete studs - 6 Nos. Gear boxes

At Euro 7,900,000.00 Price. In such case, DCVL will terminate the contract portion of Plant Nos. 3 and 4 in the outstanding amount of EUR 2,353.000.00 by convenience before 15th Nov'' 08.

Option 3: DCVL to terminate the contract for plant No. 3 and 4

In case the DCVL terminates the contract portion of Plant Nos. 3 and 4 entirely by convenience before 15th Nov'' 08, then HWG will estimate the loss due to termination of the contract and will inform DCVL accordingly. The loss finally settled for the termination will not be more than 15% and not less than 10% of Euro 7,900,000.00. This amount shall be covered by advance payment to HW Germany as mentioned under (i) and through payment of the L/C mentioned under (ii). Advance Payment Bank Guarantee will be amended to cover the eventuality of release without refund of advance payment in the event of termination of contract. Likewise L/C terms will have to provide for claiming the loss in excess of 10% of the Euro 7,900,000.00.

4. We are concerned with Option No. 3 which was the novation and amendment to the contract.

5. It is not disputed that by virtue of Section 26 of the Contract, the respondents could have terminated the contract for its convenience i.e. without any fault on the part of either of the parties. Such termination for convenience had the consequences as specified in Section 26.2 of the contract.

6. By virtue of the amendment dated 5.9.2008 made to the contract, Section 26.2 was amended whereby the loss which was quantified at 10% of the total amount due under the contract was amended to not less than 10% but not more than 15% of Euro 7,900,000. In this Option 3, it is clear that the amount of this loss shall be covered by the advance payment made to the petitioner and the advance payment Bank Guarantee will be amended to cover the eventuality of release without refund of advance payment in the event of termination of the contract.

7. The law with regard to interdicting of encashment of a Bank Guarantee is now well-settled. Payment under an unconditional, on demand without demur Bank Guarantee can be injuncted by the Court only in the circumstances of there existing a clear cut case of an egregious fraud or in circumstances called special equities or when the demand may not be in accordance with the Bank Guarantee. I must, at this very stage, state that disputes as to merits under the contract, do not become egregious fraud, and which fraud alleged has to be so apparent and stark on the face of the record that thereby the petitioner can seek restraint of encashment of the Bank Guarantee. Keeping in view the aforesaid parameters of law, let us examine the facts of the present case as to whether the injunction as prayed for by the petitioner can or cannot be granted.

8. The facts narrated above show as under:

(i) Under the contract, which was entered into between the parties, the petitioner did receive the advance payment.

(ii) This advance payment was secured by the subject Bank Guarantee.

(iii) The original contract was amended by the amendment dated 5.9.2008 whereby the loss in terms of Section 26.2 of the contract was amended to not less than 10% but not exceeding 15%, of Euro 7,900,000 and which would therefore be the figure of liquidated damages in case of no fault termination of the contract.

(iv) The Option No. 3 does not envisage the situation in Option No. 2 whereby the respondent was to take spare parts and materials from the petitioner.

9. Mr. Neeraj Kishan Kaul, Senior Advocate for the petitioner, has vehemently contended that the injunction against the encashment of the Bank Guarantee ought to be granted because the petitioner has huge claims against the respondent and which have been duly notified to the respondent by virtue of the letters at pages 38 to 42 of the rejoinder and which claims the petitioner is entitled to by virtue of Section 26.2 of the contract. Mr. Kaul further argued that in any case by virtue of the amendment, the Bank Guarantee should necessarily be reduced by 15% of Euro 7,900,000 because admittedly by the novation, the advance payment refund was to be adjusted by the loss which would be incurred by the petitioner on account of no fault termination by the respondents and which is upto 15% of Euro 7,900,000.

10. In my opinion, the contentions as put forth by the petitioner merit a limited acceptance. The limited entitlement for injunction with respect to encashment of the subject Bank Guarantee, is with respect to the second argument as advanced by Mr. Kaul. This argument is borne out and substantiated from the amendment dated 5.9.08 which makes it clear that advance payment refund shall be reduced by the figure of loss not less than 10% and not exceeding 15% of Euro 7,900,000 in case of no fault termination of the contract. Admittedly, in this case, there is a no fault termination of the contract, and therefore, by the admitted amendment between the parties, the subject Bank Guarantee of Euro 2,835,000 shall stand reduced by 15% of Euro 7,900,000. Meaning thereby the respondent can encash the Bank Guarantee, however, encashment of this Bank Guarantee will be for the amount of the Bank Guarantee less a sum of Euro 11,85,000 i.e. 15% of Euro 7,900,000.

11. That a Bank Guarantee need not to be encahsed for the entire amount but it can be encashed for a limited amount has been held by the Supreme Court in the judgment reported as Fenner (India) Ltd. Vs. Punjab and Sind Bank, .

12. So far as the other contention of Mr. Kaul is concerned that the petitioner is entitled to restrain the respondent with respect to its claims of losses by virtue of other parts of Section 26.2, in my opinion, this contention is not worthy of acceptance. The position today, is that this is only a claim of the petitioner and not an adjudicated claim. It is not necessary that the petitioner is bound to succeed in its claim, it may, but today it cannot be said so. Disputes under the contract, cannot interdict the payment under the Bank Guarantee. Therefore, simply because the petitioner has made claims against the respondent, however well merited they may be, cannot entitle the petitioner to seek restraint against encashment of an unconditional, on demand and without demur Bank Guarantee as it has been repeatedly held that the contract of Bank Guarantee is an

independent contract and has to be read as per its terms.

13. The last contention which was raised by Mr. Kaul in terms of the language of the Bank Guarantee was that the Bank Guarantee was given towards fulfilment of contractual obligations and in this case there does not arise the issue of fulfilment of contractual obligations because the contract has been terminated on account of no fault termination. Again I find that this argument is of no help to the petitioner because surely the expression "contractual obligations" would necessarily include the obligations of the petitioner for refunding by it to the respondent, of amounts which the petitioner is not entitled to retain. Refund of the advance payment and which is secured by the Bank Guarantee will surely fall within the expression "contractual obligations" of the petitioner. Mr. Jayant Bhushan, Learned Senior Counsel for the respondent, has rightly argued that today, there is no letter of invocation and when the letter of invocation would be made it would be made in terms of the Bank Guarantee and in which invocation letter it will be necessarily stated that the contractual obligations have not been performed by the petitioner entitling the respondents to invoke and encash the Bank Guarantee. I may only note that the Court or the bank does not go into the merits of the breach of the contractual obligations and in case of an unconditional Bank Guarantee a demand made by the beneficiary is treated as final with respect to existence of the circumstances entitling the beneficiary to invoke and encash the Bank Guarantee. The argument of Mr. Kaul, is therefore rejected, that the Bank Guarantee in question does not envisage encashment in case of a no fault termination.

14. In my opinion, therefore, the petitioner, neither has a prima facie case nor has the balance of convenience in its favour or that it will be caused any irreparable injury as required under the law with respect to injunction against encashment of Bank Guarantee. The catena of judgments of the Supreme Court and of this Court with respect to encashment of Bank Guarantee, therefore, have to be followed by this Court and injunction as prayed for by the petitioner cannot be granted.

15. The present petition is therefore only partly allowed whereby the respondent is permitted to encash the Bank Guarantee of Euro 2,835,000 minus therefrom a sum of Euro 11,85,000.

16. Since the petition is partly allowed and partly dismissed, I would not impose the complete costs upon the petitioner. Ordinarily, I would have imposed 100% of the costs of these proceedings upon the petitioner by virtue of para 37 of the judgment of Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , because the petitioner has illegally sought injunction against encashment of the entire amount of the Bank Guarantee, however, in the peculiar facts of the case, I order that this petition stands disposed of in terms of the directions given above subject to payment of costs of Rs. 50,000/- by the petitioner to the respondent.

17. With the aforesaid observations, the petition stands disposed of.

