

(2016) 08 DEL CK 0030

In the Delhi High Court

Case No : ARB. A. (COMM.) 10 of 2016 & IA 4167 of 2016

Ircon International Limited

APPELLANT

Vs

Simplex Projects Limited

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 37

Citation : (2016) 6 ArbILR 61 : (2016) 159 DRJ 366 : (2017) 2 RAJ 137

Hon'ble Judges : Vibhu Bakhru, J.

Bench : Single Bench

Advocate : Mr. Krishnendu Datta, Advocate with Mr Jaspreet Singh Chawla, Advocate, for the Appellant; Mr. S.D. Singh, Mr. Rahul Singh, Ms. Surabhi Shukla and Ms. Sneha Ghosh, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Vibhu Bakhru, J.—M/s. Ircon International Limited (hereafter "Ircon")—a Government of India undertaking - has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") impugning an order dated 17.03.2016 passed by the Sole Arbitrator (hereafter "the impugned order") under Section 17 of the Act.

2. By the impugned order, the Arbitrator has held that the encashment of the Bank Guarantee (hereafter "BG") in the sum of Rs. 1,74,83,608/- relating to the mobilisation advance, was not justified to the extent of Rs. 1,30,66,840/-. Consequently, the Arbitrator has directed the release of Rs. 1 crore lying with the Registrar General of this Court to the respondent (hereafter "Simplex") along with interest accrued thereon within a period of 30 days and has further directed Ircon to refund a sum of Rs. 30,66,840/- after adjusting any outstanding interest computed at the rate of 13.75% per annum.

3. Ircon has challenged the aforesaid order mainly on the ground that (i) it is contrary to the established principles for restraining encashment of BGs; and (ii)

that the impugned order is beyond the scope of Section 17 of the Act as according to Ircon, an order directing refund of the monies recovered would not qualify as an interim measure of protection and amounts to final adjudication of the disputes.

4. Before addressing the controversy, it is relevant to briefly narrate the background in which Simplex's application under Section 17 of the Act came to be considered by the Sole Arbitrator.

5. Ircon awarded the work of construction of Road Over Bridge (ROB), including the sub structure and super structure and approaches at Level Crossing No.72, at Patna City to Simplex by a Letter of Acceptance (LOA) dated 19.08.2008. The original value of the said contract was Rs. 34,96,72,164/- and the work was required to be completed within a period of 18 months from the date of the commencement of work, that is, 18 months from 19.08.2008.

6. In terms of the contract, Simplex provided two BGs to Ircon; (i) BG no.0006BG00078913 dated 13.09.2012 from ICICI Bank towards mobilisation advance for a sum of Rs. 1,74,83,608/- and (ii) BG no. 00050100003133 dated 24.03.2010 from Axis Bank towards performance security for a sum of Rs. 69,93,443/-.

7. The execution of the project was delayed and certain disputes arose between the parties with each party alleging that the other was responsible for the delay in execution of the project. Ircon invoked the two BGs and, by separate letters dated 10.07.2015, called upon the respective banks, ICICI Bank and Axis Bank, to pay the amount guaranteed. This led Simplex to approach this Court under Section 9 of the Act [O.M.P.(I) 338/2015], inter alia, praying as under:

"i. allow the present petition by setting aside and quashing the invocation letter dated 10.7.2015 written by the Respondent No. 1 to the Respondent No.2 and 3 for encashment of Bank Guarantee in question and the Respondent No.2 be restrained from encashing the Bank Guarantee No.0006BG00078913 dated 13.9.2012 for a sum of Rs.1,74,83,608/- valid upto 11.9.2015.

ii. restrain the Respondent NO.3 herein to encash the Bank Guarantee No.00050100003133 dated 24.3.2010 for a sum of Rs.69,93,443.00 in favour of Respondent No.1 forthwith

iii. direct the Respondent No.2 and 3 to maintain status quo with respect to the Bank Guarantee No.0006BG00078913 dated 13.9.2012 and Bank Guarantee No.00050100003133 dated 24.3.2010 and the Respondent No.1 be restrained from making any claim and to invoke/encash the aforesaid Bank Guarantees and the Respondent No.2 and 3 be restrained from depositing the Bank Guarantees in the account of Respondent No.1 in any manner.

iv. make the interim orders absolute as per the provisions of Section 9 and till the disposal of the dispute"

8. The said petition was taken up for hearing on 14.07.2015 and on the said date, this Court directed Ircon to maintain status quo as on date till the next date of hearing. This Court further directed that "if the respondent no.1 has received the demand draft from the bank and has not yet deposited the same with the bank, respondent no.1 shall withhold the same till the next date of hearing".

9. The Court further directed that a competent officer of Ircon is to remain present in Court on the next date, that is, 17.07.2015. On the next date, this Court was informed that Banks (ICICI Bank and Axis Bank) had issued the demand drafts for encashment of the BGs and the same had been deposited by Ircon in its bank account on 14.07.2015 at around 5:30 p.m. and 6:00 p.m. This Court noted that this was a clear violation/contempt of the order dated 14.07.2015 as the panel counsel for the Railways was present in Court on 14.07.2015 and had communicated the order to the Manager (Legal), Ircon.

10. In the above circumstances, the Court issued a Show Cause Notice and in the meantime, directed Ircon to deposit the entire amount received on encashment of the BGs with the Registrar General of this Court. In compliance with the said order, Ircon deposited the sum of Rs. 2,44,77,051/- with the Registrar General of this Court in respect of the two BGs, which were the subject matter of O.M.P.(I) 338/2015. It is relevant to state that two other BGs pertaining to another contract had also been similarly encashed and the same were subject matter of another petition [O.M.P.(I) 339/2015]. This Court had also directed that the amounts encashed in respect of those BGs for an aggregate sum of Rs. 1,38,22,777/- be also deposited with this Court.

11. Both petitions, O.M.P.(I) 338/2015 and O.M.P. (I) 339/2015, were taken up by this Court together on 11.01.2016. Insofar as O.M.P.(I)339/2015 is concerned, the amount deposited in this Court was released to Simplex as disputes between the parties had already been adjudicated.

12. Insofar as O.M.P.(I)338/2015 is concerned, this Court noted that the Sole Arbitrator had been appointed and, therefore, directed the said application under Section 9 of the Act to be treated as an application under Section 17 of the Act, to be decided by the Arbitrator. Insofar as the amount of Rs. 2,44,77,051/- deposited in this Court is concerned, this Court directed that a sum of Rs. 1,44,77,051/- along with interest accrued thereon be released to Ircon and the balance amount of Rs. 1 crore along with accrued interest be retained with the Registrar General of this Court in a fixed deposit till the decision of the Arbitrator under Section 17 of the Act.

13. In compliance with the orders passed by this Court, the Sole Arbitrator considered Simplex's application - filed under Section 9 of the Act in this Court - as an application for interim measures under Section 17 of the Act and passed the impugned order.

Submissions

14. Mr. K. Datta, Advocate appearing for Ircon submitted that the impugned order is contrary to the settled principles regarding injunctions against encashment of BGs. He referred to the decision of the Supreme Court in *UP Cooperative v. Singh Consultants and Engineers (P) Ltd.*: (1988) 1 SCC 174, in support of his contention that the BG was an independent contract and its encashment could not be restrained except in case of fraud affecting the underlying transaction. He submitted that in the present case, none of the grounds for restraining encashment of a BG had been established.

15. He further contended that the entire mobilisation advance had not been recovered and, therefore, Ircon was within its rights to invoke the BG furnished against the mobilisation advance. He contended that although Simplex had the option to furnish multiple BGs for values aggregating the mobilisation advance which could be released progressively, Simplex had opted for a single BG and, therefore, the said BG could be encashed even if a small fraction of the mobilisation advance was required to be recovered.

16. Next, Mr. Datta referred to clause 60 of the Contract and contended that in view of the said clause, Ircon was well within its right to encash the BGs even in respect of its claims relating to another contract. He submitted that even though the mobilisation advance - against which the guarantee in question was given - had been partly recovered, Ircon could encash the BGs as it had substantial claims against Simplex, albeit, in relation to another contract.

17. Lastly, he contended that the impugned order was beyond the scope of Section 17 of the Act as it directed Ircon to refund the amounts of Rs. 1,30,66,840/- already recovered by Ircon. Thus, the decision was not in the nature of an interim measure of protection within the scope of Section 17 of the Act.

18. Mr S.D. Singh, learned counsel appearing for Simplex countered the arguments advanced by Mr Datta. He submitted that the BG in question was not an unconditional BG but was for recovery of mobilisation advance. He referred to clause 3 of the Contract, and submitted that since in the present case, it was not disputed that the mobilisation advance had been recovered to the extent of Rs. 1,30,66,840/-, the BG could not be encashed to that extent. He referred to the decision of the Supreme Court in *Hindustan Construction Co. Ltd. v. State Of Bihar and Others*: (1999) 8 SCC 436 in support of his contention that invocation of the BG was not in terms thereof.

Reasoning and Conclusion

19. As indicated hereinbefore, Simplex's application under Section 17 of the Act was initially filed in this Court under Section 9 of the Act and was considered by this Court for the first time on 14.07.2015. At that stage, Simplex had prayed for an order quashing the letter of invocation dated 10.07.2015 and had further sought an order restraining the banks (ICICI Bank and Axis Bank) from encashing the BGs. On 14.07.2015, this Court passed an ad interim order inter

alia restraining Ircon from encashing the demand drafts in the event the same had been received by Ircon. Since the demand drafts had been encashed after passing of the order, this Court had directed the amounts recovered by encashment of BGs, to be deposited with the Registrar General of this Court. Subsequently, the application under Section 9 of the Act was directed to be considered by the Arbitrator by treating the same as an application under Section 17 of the Act.

20. The impugned order must be read in the above context and, thus, cannot be construed as an order in the nature of an interim award directing refund of amounts already recovered by Ircon. The impugned order must be understood in the context of Simplex's application under Section 9 of the Act. At the material time when the application was moved, Ircon had not deposited the demand drafts in its accounts.

21. As indicated above, this Court had directed deposit of the amount of the BGs in this Court. Plainly, this was for the purpose of ensuring that Simplex is not presented with *fait accompli*. In the circumstances, the contention that the release of the funds deposited/recovered by Ircon are beyond the scope of Section 17 of the Act cannot be accepted.

22. The next question to be considered is whether the injunction restraining the encashment of the BGs ought to have been granted as the import of the impugned order is to restrain Ircon from encashing the BG furnished to secure recovery of mobilisation advance, to the extent of Rs. 1,30,66,840/-. It has been contended on behalf of Simplex that the BG was not unconditional and its invocation was not in terms of the said BG. In order to address the aforesaid issues, it is necessary to advert to the language of the said BG, the relevant extract of which is reproduced hereunder:-

"In accordance with the provisions of the conditions of contract, Sub-Clause 3.2 ("Advance Payment") of the above-mentioned contract, M/s. Simplex Projects Limited, having its registered office at 12/1, Nellie Sengupta Sarani, Kolkata - 700 087 (hereinafter called "the Contractor") shall deposit with M/s. IRCON International Limited, a bank Guarantee to guarantee his proper and faithful performance under the said Clause of the Contract in an amount of Rs.1,74,83,608/- (Rupees One Crore Seventy Four Lacs Eighty Three Thousand Six Hundred Eight Only).

We, the ICICI Bank Limited, having registered office at "Landmark", Race Course Circle, Vadodara - 390 007 and one of its branch among others at ICICI Bank Limited 20, Sir R.N. Mukherjee Road, Kolkata - 700 001 (hereinafter referred to as "the Bank") as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment to M/s. IRCON International Limited on their first demand without whatsoever right of objection on our part and without his first claim to the Contractor, in the amount not exceeding Rs.1,74,83,608/- (Rupees One Crore

Seventy Four Lacs Eighty Three Thousand Six Hundred Eight Only).

XXXX XXXX XXXX XXXX XXXX

This guarantee shall remain valid and in full effect from the date of the advance payment under the Contract upto 12th March, 2013 (until M/s. IRCON International Limited receives/recovers full repayment of advance along with interest accrued thereon from the Contractor)."

23. Although it cannot be disputed that the above BG was furnished to Ircon for securing the sums advanced by Ircon in terms of sub-clause 3.2 of the Contract, however, the same does not render the BG a conditional one. It has been expressly stated that the Bank agrees to unconditionally and irrevocably guarantee the payment to Ircon on its first demand without any right of objection.

24. An unconditional BG is one where the bank agrees to unconditionally pay the guaranteed amount to the beneficiary on a demand being made in terms of the BG. The fact that the BG was furnished at the instance of Simplex in terms of clause 3.2 of the Contract, would not in any manner dilute the unconditional nature of the said BG.

25. The reliance placed by the learned counsel for Simplex on the decision of the Supreme Court in Hindustan Construction Co. Ltd. (supra) is misplaced as in that case the language of the BG was materially different. In that case, the BG had expressly provided that the bank would pay an amount not exceeding Rs. 10,00,000/- "in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract."

26. The Supreme Court highlighted the aforequoted language of the BG and held that the BG was conditional on the contractor failing to fulfil his obligation as expressed in clause 9 of the contract in question. The express language to the aforesaid effect is absent in the BG in question.

27. The next question to be addressed is whether Ircon could be restrained from encashing the BG to the extent of Rs. 1,30,66,840/- in view of the fact that mobilisation advance to the aforesaid extent had been recovered by Ircon.

28. At the outset, it would be necessary to note that there is no dispute as to the fact that the BG in question was furnished by Simplex to secure the mobilisation advance provided by Ircon to Simplex. Simplex had also furnished another BG for due performance of the contract in the sum of Rs. 69,93,443/-. The aforesaid performance BG was also encashed by Ircon and the Arbitrator has not directed refund of the said amount. Although the Arbitrator has observed that the breach of contract on account of delay was not attributable to one party alone, he has refrained from expressing any final conclusion. The Arbitrator noted that Ircon had terminated the contract and in terms of clause 50.2 (a) was entitled to

forfeit the whole or such portions of the performance security amount. He observed that since the dispute in regard to the alleged breach of contract was to be finally adjudicated, no ruling in regard to the BG issued as performance security could be made at the present stage. However, insofar as the BG for securing mobilisation advance is concerned, there was no dispute as to the relevant facts.

29. It cannot be disputed that the BG in question was provided in terms of clause 3.1(iii) of the Contract. Clause 3 of the Special Conditions of Contract is relevant and is reproduced below:-

"3.0 MOBILIZATION ADVANCE

3.1 Conditions for Payment: If requested by the Contractor in writing, the Employer/Engineer shall make an interest bearing mobilisation advance payment to the Contractor for an amount not more than 10 (Ten) percent of the original contract value. The mobilisation advance shall be paid exclusively for the costs of mobilisation in respect of the Works. The Mobilization advance shall be simple interest bearing at the rate of 13.75 % per annum. Payment of such advance shall be made after fulfilment of the following conditions to the satisfaction of the Engineer:-

- i) Execution of the agreement between the Engineer and the Contractor.
- ii) Submission of Performance Security by the contractor in accordance with Clause 8.2 of General Conditions of Contract.
- iii) Submission of an unconditional bank guarantee in the format annexed as Annexure-I from a scheduled bank in India for an amount equivalent to the mobilisation advance being paid and amount of interest for one year. The Bank guarantee may be split into not more than four separate Bank Guarantees & each having a minimum value of 2.5% of the original contract value. Such Bank Guarantee shall remain effective until the advance payment along with the interest has been recovered from the Contractor. Bank guarantee(s) for the amount recovered from the Contractor shall be released to the Contractor progressively.

3.2 Payment:

After fulfilment of the pre-conditions as described in para 3.1 above, the mobilisation advance shall be released to the Contractor in following stages:-

Stage - I - Maximum 5% of the contract value on fulfilment of the conditions described in clause 3.1 above.

Stage - II - Maximum 5% of the contract value on establishment of site camps and offices, mobilisation of necessary Plant and Machinery and man power and other facilities for commencement of work.

3.3 Recovery:

The recovery of 1st instalment of mobilisation advance along with upto date interest shall commence from the Contractor's on account bills w.e.f. 3rd on account bill or on completion of works to a value of 15% of the total contract value, whichever is earlier and the full recovery shall be effected before completion of works for a value of 80% of the total contract value. The recovery schedule shall be made by the Engineer based on the payments made.

3.4 Calculation of Interest:

Interest shall be computed on diminishing balance basis on the amount of advance outstanding. The date of issue of cheque shall be reckoned as the date on which the recovery has been made for purpose of computing the outstanding advance and working out the interest."

30. It is apparent from the above that the BG in question was required only to secure the amount advanced to Simplex as mobilisation advance. In terms of the contract, it was not obligatory on the part of the contractor to avail of the mobilisation advance. However, Ircon had agreed to grant the same subject to fulfilment of certain conditions, one of which was an unconditional BG to secure the amount of mobilisation advance as well as the interest thereon. Clause 3.1(iii) also provided an option for the contractor to split the BG into not more than four BGs, each having a minimum value of 2.5% of the original contract value. Admittedly, the BGs were to be released progressively and commensurately with the recovery of the mobilisation advance. In the present case, there is no dispute that Ircon has recovered the mobilisation advance with interest to the extent of Rs. 1,30,66,840/-.

31. It is Ircon's case that notwithstanding the undisputed position that (a) Ircon has recovered the mobilisation advance to the extent of Rs. 1,30,66,840/- and (b) that the BG in question was furnished only to secure the recovery of the mobilisation advance, Ircon was still entitled to encash the BGs for the following reasons:-

(a) That the entire mobilisation advance had not been recovered and as Simplex had provided a single BG for the entire amount of the mobilisation advance, the same could be encashed. It is contended that Simplex could have opted for splitting the BG into separate BGs of a lesser value and had Simplex opted for doing so, the BGs would have been released but since Simplex opted for a single BG instead of multiple BGs for lesser sums, Simplex was not obliged for a partial release of the BG in question.

(b) That in terms of clause 60 of the contract, Ircon is entitled to retain any sum for Ircon's claims for another contract and, thus, Ircon could have invoked the said BG against its claims in another contract.

32. In my view, both the aforesaid contentions are without merit. Merely because Simplex did not opt for splitting the BG into separate BGs of lesser sums, would not disentitle Simplex from getting the BG released to the extent it had repaid

the mobilisation advance. Merely because, there is a singular BG for a larger sum, does not entitle the beneficiary to invoke the BG for the entire amount. The BG amount only puts a cap on the maximum amount that would be paid by the bank. There was no restriction on Ircon to claim a lesser amount against the said BG. Since, admittedly, only a sum of Rs. 44,16,768/- remained to be recovered against mobilisation advance, Ircon was obliged to invoke the BG only to the aforesaid extent.

33. The second contention, namely, that Ircon is entitled to invoke the BG provided to secure mobilisation advance for claims in relation to another contract is also not persuasive.

34. Clause 60 of the Contract reads as under:-

"60.0 Lien In Respect Of Claims In Other Contracts

Any moneys due to the Contractor either alone or jointly with others, including the performance guarantee amount returnable to him may be withheld or retained or encashed by exercise of lien by the Client/Employer/ Engineer against any claim of the Client/Employer/ Engineer or any other branch, office department or subsidiary of the client/Employer/Engineer in respect of a sum of money arising out of or under any contract other than the present contract made by the Contractor alone or jointly with the client/Employer/Engineer or any other branch, office, department or subsidiary of the client/Employer/Engineer. It is agreed term of contract that the sum of money so withheld or retained under this clause by the client Employer/Engineer, shall be kept withheld or retained till the claims arising out of or under the contract, are either mutually settled or determined by the Arbitrator, or by the competent court, as the case may be and that the Contractor shall have no claim for interest or damages whatsoever on this account or any other account, in respect of any sums of money withheld retained, under this clause and duly notified to the Contractor."

35. A plain reading of the aforesaid clause indicates that although Ircon is entitled to withhold moneys due to the contractor including the performance guarantee amount returnable to the contractor, however, Ircon is not entitled to encash the BG against mobilisation advance. Although, the aforesaid clause covers the performance BG ? which Ircon had already encashed - the same does not cover BG furnished to secure mobilisation advance.

36. The law relating to granting injunctions against invocation of the BG is now well settled. Indisputably, a BG is a separate and independent contract and a Court would not interfere with the same unless the party presents a strong prima facie case of an established fraud vitiating the underlying agreement. It is only an exceptional case that a Court would interfere with invocation of a BG.

37. In the normal circumstances, the invocation of the BG cannot be injuncted. However, in the present case, the Arbitrator has examined the case on merits and has found that the invocation of the BG furnished at the instance of Simplex

was not justified in terms of the contract between the parties. The Arbitrator has been unable to accept Ircon's stand that even though it had recovered the mobilisation advance, it would nonetheless, be entitled to invoke the security provided for due recovery of the said amount.

38. The aforesaid findings of the Arbitrator are in the nature of final findings and I find no infirmity with the conclusions of the Arbitrator. The scope of interference under section 37 of the Act is also limited and unless the order passed by the Arbitrator is perverse or unsustainable in law, the courts would be reluctant to interfere with the discretion exercised by the Arbitrator.

39. Thus, in the given facts of the present case, I am of the view that no interference with the impugned order is called for.

40. The appeal is, accordingly, dismissed. The pending application also stands disposed of.