(2013) 01 BOM CK 0128

In the Bombay High Court

Case No : Arbitration Petition (L) No. 1514 of 2012

IVRCL Ltd. (formerly known as IVR Prime Urban Developers Ltd.)	APPELLANT
Vs	
IOT UTKAL Energy Service Ltd.	RESPONDENT

Date of Decision : 10-01-2013

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

Citation : (2013) 01 BOM CK 0128

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Anand Poojari instructed by M/s. S.I. Joshi and Co, for the Appellant; S.U. Kamdar a/w. Prakash Shinde and Ms. Jaisy Mani instructed by M/s. MDP Partners, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this petition, petitioner seeks injunction in respect of the bank guarantee issued by Indusind Bank, Secunderabad branch dated 4th June 2010 for the sum of Rs. 52,58,33,000/- on behalf of the petitioner in favour of the respondent under clause 14.3.1 of the contract towards mobilization advance given by the respondent to the petitioner. The bank guarantee was due to expire on 23rd November 2012. Since the petitioner did not renew the bank guarantee before 23rd November 2012, the respondent by its application dated 22nd November 2012 invoked the said bank guarantee by addressing a letter to the bank and demanded payment in respect thereof. The petitioner vide its letter dated 20th November 2012 to the respondent contended that as the work had been completed to the extent of 96.14% which according to the petitioner was substantial completion of work, further extension of bank guarantee was not required and requested the respondent to return the same. The respondent not having returned the bank guarantee, petitioner filed this petition u/s 9 and seeks injunction in respect thereof.

2. The learned counsel appearing for the petitioner submits that the bank guarantee was furnished under clause 14.3.1 (1) and (2) of the contract which reads thus :

14.3.1 The Contractor shall be paid non recoverable interest free Mobilization Advance equivalent to 10% (Ten percent) of the Contract Price subject to fulfillment of the conditions :

(1) Signing of the formal Contract between the Employer and Contractor.

(2) Mobilization Advance payment shall be released to Contractor upon submission of acceptable Bank Guarantee(s) for the equivalent amount valid up to the completion period of works. Bank Guarantee shall be returned to the Contractor up on substantial completion of the Works.

3. Relying upon this clause, the learned counsel submits that the petitioner had already completed work to the extent of 96.14% and thus, in view of the petitioner completing substantial completion of work, respondent was liable to return the performance of bank guarantee and could not have applied for invocation thereof. In the alternative, it is submitted that another bank guarantee of Rs. 10.97 crore has already been furnished by the petitioner by way of performance guarantee which is still valid and subsisting and lying with the respondent. The learned counsel submits that in view of clause 14.3.1, respondent thus, cannot insist for payment under the said bank guarantee.

4. Mr. Kamdar, the learned senior counsel appearing for the respondent, on the other hand strongly relied upon the terms of the bank guarantee and more particularly paragraph Nos. (a) (ii) to (iv) which read as under :

(ii) This Guarantee/Undertaking shall be a continuing guarantee and shall remain valid and irrevocable for all claims of the Employer upon the Bank made in writing up to the midnight of 23rd May 2012 (validity date).

(iii) The Employer shall have the fullest liberty without reference to the Bank and without affecting in any way the liability of the Bank under this guarantee/ undertaking, at any time and/or from time to time to amend or vary the contract and/or any of the terms and conditions thereof or relative to the said Advance and/or to extend time for performance of the said contract in whole or part and/ or payment of the said advance in whole or part or to postpone for nay time and/ or from time to time any of the said obligations of the Contractor and/or the rights, remedies or powers exercisable by the Employer against the Contractor and either to enforce or forbear from enforcing any of the terms and conditions of or governing the said Contract and/or the said Advance or the securities, available to the Employer and the Bank shall not be released from its liability under these Presents and the liability of the Bank shall remain in full force and effect notwithstanding any exercise by the Employer of the liberty with reference to any or all the matters aforesaid or by reason of time being given to the Contractor or any other forbearance, act or omission on the part of the Employer to the Contractor or of any other act, matter or thing whatsoever which under any lay could (but for this provision) have the effect of releasing the Bank from its liability hereunder or any part thereof and the Bank hereby specifically waives any and all contrary rights whatsoever.

(iv) The obligations of the Bank to the Employer hereunder shall be as principal to principal and shall be wholly independent of the Contract and it shall not be necessary for the Employer to proceed against the Contractor before proceeding against the Bank and the guarantee/undertaking herein contained shall be enforceable against the Bank as principal debtor notwithstanding the existence of any undertaking or security for any indebtness of the Contractor to the Employer (including relative to the said Advance) and notwithstanding that any such undertaking or security shall at the time when claim is made against the bank on proceedings taken against the Bank hereunder, be outstanding or unrealized.

5. Relying upon the aforesaid conditions of the bank guarantee, the learned senior counsel submits that bank guarantee is an independent contract and thus, no reference to the contract entered into between the petitioner and the respondent for execution of work can be considered for the purpose of deciding the issue of injunction in respect of the bank guarantee. It is submitted that in any event, in view of the conditions set out in the bank guarantee and more particularly in para (a) (iv), it is clear that the bank was under an obligation to the employer as principal to principal, the bank was liable to honour the terms of the guarantee. I am inclined to accept this submission made by the learned senior counsel. Considering the terms of the bank guarantee, it is clear that the bank guarantee is an independent contract and thus, reference to any of the provisions of the contract would be irrelevant while deciding this application u/s 9.

6. Clause (a) (ii) to (iv) of the bank guarantee indicates that the bank guarantee is an unconditional bank guarantee payable on demand without protest or proof or satisfaction and without reference to contract and once the employer raises demand thereunder, the bank is liable to honour the same. The position of law is well settled that in case of unconditional bank guarantee, bank is under obligation to honour such guarantee, once demand is raised by the beneficiary of the bank guarantee. In my view, whether the work is completed substantially or not, is an issue which can be adjudicated upon by the arbitrator and cannot be gone into by this Court u/s 9.

7. In my view, no case is made out for interim relief as sought by the petitioner. Petition is therefore dismissed. There shall be no order as to costs. Ad interim order passed by this Court is vacated.