

(2005) 02 DEL CK 0017
In the Delhi High Court
Case No : OMP 251 of 2003

Jaiprakash Hyundai Consortium

APPELLANT

Vs

Satluj Jal Vidyut Nigam Ltd.

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Citation : (2005) 1 ARBLR 443 : (2005) 3 BC 47 : (2005) 118 DLT 69 : (2005) 80 DRJ 574

Hon'ble Judges : Ramesh Chand Jain, J

Bench : Single Bench

Advocate : R.K. Anand and Lokesh Sawhney, for the Appellant; Mukul Rohtagi and Sanjay Karol, Uttam Dutt, for the Respondent

Judgement

R.C. Jain, J.—The petitioner M/s.Jaiprakash Hyundai Consortium (for short M/s. JHC) has filed this petition u/s 9 of the Arbitration and Conciliation Act, 1996 (for short the Act), read with Section 151 CPC for grant of an ad interim order restraining the respondent M/s. Satluj Jal Vidyut Nigam Limited (earlier known as Nathpa Jhakri Hydro Power Corporation in short known as M/s. SJVN) from encashing the bank guarantees, i.e., the performance guarantees and guarantees in lieu of the retention money aggregating to a sum of Rupees 75 crores in order to effect recovery of their alleged claim of Rs.53.12 crores till the claims of the JHC are finally settled in accordance with the modified clause 67 of the General Conditions of Contract and from implementing its decision contained in the communication dated 30.5.2003.

2. The relevant facts which may be noticed for deciding the present petition are that M/s. JHC, an Indian Company incorporated under the laws of India engaged in the business of construction of river valley and hydro power projects on turn key basis had entered into a contract no. 3.0 vide Agreement No. 4 of 1993 dated 24.06.1993 for execution of civil works for pressure shafts and power house complex. The said agreement is subject to General Conditions of Contract contained in the Arbitration Agreement which inter alias contains an Arbitration

Clause in Clause 67 for settlement of disputes and differences between the parties through Dispute Resolution Board.

3. In terms of Clause 10 of the General Conditions of Contract M/s. JHC was required to give performance guarantee as security for performance of its obligation in accordance with contract while clause 60(iv) of the said Conditions provide for deduction of 10% of the amount by the respondent from the monthly interim payments made to the JHC towards retention money till the total amount was deducted to 10% of the contract price. The petitioner M/s. JHC had accordingly furnished the bank guarantees to meet the requirements of the said clauses valid up to 31st December, 2003.

4. It is alleged that on account of delay owing to reasons solely attributable to the respondent changes/variations from the original plans and execution of Extra items of work, the petitioner filed claim with the respondent on account of Claims of productivity losses, Extension of time cost claims, claims for Extra items, Claims for revision of rates for works done beyond the period of completion, escalation claims, other miscellaneous claims amounting to more than Rs. 36 crores. The petitioner requested the respondent to make the payment of the said amount and the respondent after examining the claims in detail had agreed to release a sum of Rs. 5.90 crores only as ad hoc payment but asked for an undertaking that the amounts, if found to have been paid in excess, shall be recovered as and when the claims are settled. The petitioner gave an undertaking that the said amount could be recovered from the payments against these claims as and when these are settled. According to the petitioner, the total accumulated value of the claim of the petitioner exceeded Rs. 67,36 crores till 25.2.1997 and so the petitioner vide his letters dated 9.1.1997 and 27.2.1997 requested the respondent to release 75% of adhoc payment pending final settlement. The respondent agreed to release a further sum of Rs. 12 crores on 31.3.1997 to the petitioner subject to similar undertaking given by the petitioner to refund the excess amount, if the actual payment due on finalisation of the claims was less than the ad hoc payment released. Thus, the total ad hoc payment released by the respondent became Rs. 17.90 crores. The matter of non-settlement of pending claims of the petitioner and the consequent non-release of the funds also engaged the attention of the World Bank who were funding the project and on the advice and recommendations of the World Bank, respondent hired the services of M/s. Mc.Donough Bolyard Peck, Virginia, USA an International Consultant of repute having vast experience of dealing with such claims arising out of said contract which formed the Claim Review Panel (CRP) to go into the details of various claims preferred by the major contractors of the project. Vide letter dated 23.3.1998, the petitioner made an appeal to the CMD of the respondent for release of the ad hoc payment of Rs. 50 crores against the pending claims of Rs. 297.93 crores as on 31.1.1998. The respondent got the claims of the petitioner examined in the light of the recommendations of the CRP at various levels and agreed to release additional ad hoc payment of Rs. 13.86 crores against EOT claims and Rs. 24.56 crores against other claims subject to

the conditions of obtaining an undertaking from the petitioner vide his letter dated 22.6.1998. The petitioner gave the undertaking in the following terms.

"(i) that the amount of adhoc payment shall be adjusted against the final amount of these items/claims arrived at by SJVN in consultation with CRP and the difference, if any, shall be recoverable from JHC Along with commercial rate of interest from the date of payment:

(ii) That the adhoc payment to be made by SJVN against these items/claims does not automatically entitle JHC regarding the admissibility;

(iii) That the decision taken by SJVN in consultation with CRP for settlement of above claims shall be final and shall be unequivocally acceptable to JHC "

5. According to the petitioner, he gave the said undertaking under duress and received the total amount of ad hoc payment to the tune of Rs. 56.32 crores. As per the said undertaking given by the petitioner, the claims of the petitioner were settled in consultation with the CRP but respondent Realizing that the recommendations of the CRP were not to its liking, it constituted another body of its own officers called as Claim Review Committee (CRC) to scrutinize the claims of the petitioner which constitution is stated to be bad and illegal on the ground that the officers who formed CRC were not having the requisite experience and expertise and necessary skills to handle the claims under the FIDC conditions. The recommendations made by the CRC were, Therefore, not proper and acceptable. The respondent then appointed yet another Committee Rate Review Committee (RRC) of officers to examine claims relating to extra /deviated amounts for analysing rates of extra/deviated items which ignored the request of the petitioner to look into the detailed aspects and with pre-determined amounts found that a sum of Rs. 62.60 crores was admissible against the claims of petitioner amounting to Rs. 91 crores up to 30.4.2002 and only a sum of Rs. 54.53 crores had been released at the scheduled rates for the deviated/extra amounts. The respondent however, did not agree with the said recommendations and unilaterally decided that only Rs. 6.00 crores as against 62.60 crores as determined by the RRC were liable to be paid to the petitioner against the ad hoc release of Rs. 56.32 crores. Thereafter, the petitioner invoked the jurisdiction of Dispute Review Board (DRB) on 15.3.2000 and preferred a claim of 361.91 crores for compensation for delays attributable to the respondent. However, during the pendency of the matter with DRB and without waiting for the final settlement of disputes by the DRB arbitration, the respondent unilaterally decided to make recoveries of the alleged excess amount of Rs. 56.32 crores paid to the Petitioner on the basis of the manipulated and fraudulent recommendations given by the CRC and another committee of officers overruling the earlier recommendations given by its own appointed CRP.

6. Vide letter dated 2.9.2002, the respondent made suggestions to start the recoveries of the said amount and wanted the petitioner to re-word the bank guarantees furnished by the petitioner towards retention money and

performance security in a manner so as to bring in its ambit the recoveries/ adjustment of excess amount of ad hoc payment already made. This exhibited the understanding of the respondent that the said bank guarantees did not cover the alleged claim of the respondent to recover the excess amount paid by it against EOT, productivity loss, extra/deviated items, escalation and other claims. The petitioner, however, declined the request of the respondent to re-word the bank guarantee and vide their letter dated 7.9.2002 agreed to accept the following suggestions of the respondent.

"a) Any adjustment against the ad hoc payments, made to us against aforesaid cases after due consideration of relevant facts and circumstances from RA Bills is neither in accordance with the Contract provisions nor in accordance with the spirit and intentions of making such adhoc payments. As agreed, the adhoc payments against various cases/claims shall be accounted for after settlement of such cases/claims.

b) The Bank Guarantees towards retention money and the performance security have been furnished in accordance with the contract requirements and shall be operative accordingly. We do not agree for any changes in the same.

c) We agree that the payment to us as a result of the recommendations/ decisions of the DRB including Additional DRB, as the case may be, shall be released to us only when and to the extent such payments exceed adhoc payments already released and no recovery of the adhoc payments shall be made by NJPC, even if any such case is decided by DRB/Additional DRB against us till all such cases have been finally settled. This will, however, be without prejudice to the contractual rights of the parties."

7. Vide a communication dated 19.4.1993, the respondent informed the petitioner that the existing bank guarantees towards performance security and retention money furnished by the petitioner were valid up to 31.12.2003 and desired the petitioner to extend the validity of those bank guarantees beyond 31.12.2003 also stating that in case the petitioner declined to do so, the existing bank guarantees would be invoked if ad hoc payments remained un-adjusted by 31.12.2003. It is alleged that the threat contained in the said communication was not only contrary to the language of the bank guarantees but also against the express understanding as would be exhibited from the letter dated 2.9.2000. The petitioner in order to show his bona fide and commitment to work informed the respondent that it was agreeable to furnish fresh bank guarantees before 31.12.2003 for the outstanding amounts of ad hoc payment and to maintain the same for the outstanding amounts of such payment till the settlement of the claim by ADRB. Despite this offer of the petitioner, the respondent in utter disregard of the decision taken earlier between the representatives of the parties and superseding its own letter dated 19.4.2003, vide a letter dated 30.5.2003 received by the petitioner on 2.6.2003 asked the petitioner to deposit a sum of Rs. 53.12 crores with the respondent within 20 days of the issue of the letter failing which the respondent threatened to invoke and encash the bank

guarantees of the petitioner given to the respondent against the retention money and performance security.

8. Aggrieved by the said action, the petitioner has approached the Court with the present petition and claiming the above said reliefs.

9. Notice of the petition was issued to the respondent and vide order dated 11.6.2003 postponing the hearing of the matter to 10.7.2003 the court ordered that period of 20 days given by the respondent in their letter dated 30.5.2003 was extended till the next date of hearing. The said interim arrangement has continued till date.

10. The respondent has contested the petition and has filed a detailed reply raising preliminary objections about the maintainability of the petition inter alias on the grounds that the petitioner is not entitled to any relief by way of interim measure of any protection from this Court in as much as the conduct of the petitioner disentitles him to the said relief as the petitioner having undertaken to refund and return the amount of ad-hoc payment received by him under express undertaking cannot be allowed to challenge the action of the respondent in recovering the excess amount which the petitioner is liable to pay; the respondent is within its rights to enforce bank guarantees furnished by the petitioner in case of its failure to refund and return the excess ad hoc amount. The respondent has disputed the interpretation and construction given by the petitioner to various clauses of the contract, the undertakings given by them, their various letters and have maintained that the respondent is within its rights to recover the amount by invoking and encashing the bank guarantees furnished by the petitioner towards performance security and retention money. In the rejoinder, the petitioner has controverted the objections and pleas raised in the reply of the respondent and has reiterated the averments made in the petition.

11. I have heard Mr. R.K. Anand, learned Senior Counsel representing the petitioner and M/s Mukul Rohtagi and Sanjay Karol, Senior Advocates representing the respondent at length and have given my anxious consideration to their rival submissions.

12. Mr. R. K. Anand, learned counsel representing the petitioner has strongly urged that the respondent is not within its rights to invoke and encash the bank guarantees given by the petitioner towards performance security and in lieu of retention money for the purpose of realisation of ad hoc payment of Rs. 56.32 crores. He has pressed the following grounds in this regard:

(i) The bank guarantees sought to be invoked by the respondent were given for specific purposes namely to secure the due performance of the contract and towards retention money and can be enforced only for that purpose and no other purpose;

(ii) The petitioner has already successfully and to the satisfaction of the respondent completed its obligations under the contract which was completed on

31.12.2002, Therefore, the petitioner is entitled to the return of the said guarantee after one year of the expiry of the contract on 31.12.2003;

(iii) The action of the respondent in recovering the amount of advance payment is premature because the claim of the petitioner to the extent of Rupees 542 cores as on 31.12.2002 is pending adjudication before DRB (Dispute Review Board) and ADRB (Additional Dispute Review Board) and the amount of ad hoc payment would become payable to the respondent only after the DRB and ADRB has adjudicated upon the claims of the petitioner and amount can only be adjusted from the amount payable to the petitioner;

(iv) The threatened action of the respondent in recovering the amount by enforcing the two bank guarantees is patently against the conditions subject to which the amount was released by the respondent and accepted by the petitioner.

13. Before I deal with the above contentions of the learned counsel for the petitioner, I may at once notice the undisputed factual position. It is admitted case of the parties that disputes have arisen between the parties in relation to certain amounts which the petitioner had claimed towards extension of time, productivity loss, and claim for extra/deviated items of work which were under the consideration of the respondent but due to lack of requisite expertise and skill in settling those claims, an independent agency M/s Mc Donough Bolyard Peck, Virginia, USA was hired to go into the said claims of the major contractors including the petitioner which was called CRP (Claims Review Panel). The CRP found the claims of the petitioner justified/ admissible to the extent of Rs. 56.32 crores as against the total claims of the petitioner. On a consideration of the same, the respondent had in fact released the payment of Rs. 13.86 crores against extension of time claims and Rs. 24.56 crores against other claims on 31.3.1998 and 22.6.1998. An amount of Rs. 5.90 crore and Rs. 12 crores having already been released to the petitioner prior to the constitution and recommendations of CRP. It is also not disputed that the ad hoc payments were released to the petitioner subject to certain conditions imposed by the respondent and the corresponding undertaking given by the petitioner before the release of the payment and certain conditions which were subsequently imposed/ modified/ altered after the release of the payment when the question of return of the said amount arose. It may also be noticed that the question of release of ad hoc payment to the petitioner towards various claims of the petitioner was considered by the respondent on several requests consecutively made by the petitioner in its communications dated 6.11.1996, 26.12.1996, 9.1.1997, 27.2.1997, 29.3.1997, 23.3.1998, 22.6.1998 and 31.12.1999 and sometimes towards the end of June 1998, the respondent had consciously agreed to release the third ad hoc payment amounting to Rs. 24.56 crores against various pending claims of the petitioner. In order to tide over its financial crisis, the petitioner accepted the payment of the above amount and gave the following undertaking:

"(i) that the amount of ad hoc payment shall be adjusted against the final amount of these items/ claims arrived at by N.J.P.C. in consultation with C.R.P.

And the difference, if any, shall be recoverable from us Along with commercial rate of interest from the date of payment.

(ii) that the ad hoc payment to be made by N.J.P.C. Against these items/ claims do not automatically entitle us regarding its admissibility.

(iii) that the decision taken by N.J.P.C. in consultation with C.R.P. for settlement of above claims shall be final and shall be unequivocally acceptable to us."

The said undertaking governed not only this payment but also the earlier two payments of Rs. 5.9 crore and Rs. 12 crore released to the petitioner in the years 1996 and 1997.

14. It appears that after the recommendations of the C.R.P., the respondent appointed another Committee of its officers called Claim Review Committee (CRC) and based on the recommendations of the said Committee, the respondent wants to recover the amount of ad hoc payment from the petitioner. It is also admitted that the DRB/ADRB is seized of the disputes/differences between the parties and has yet to settle the same. Therefore, the moot question which arises in this case is whether the respondent is justified in invoking the bank guarantees furnished by the petitioner for the purpose of recovery of the alleged excess amount of ad hoc payment.

15. Mr. Mukul Rohtagi, learned senior counsel representing the respondent on the strength of the terms and conditions of the contract, stipulations contained in the bank guarantees in question and having regard to the conditions on the basis of which the ad hoc payment was released has strongly urged that the petitioner is not entitled to any interim measure of protection against the enforcement of the said bank guarantees. According to him, the bank guarantees furnished by the petitioner towards performance security and retention money are absolute in terms and unconditional bank guarantees and, Therefore, the respondent is within its rights to enforce the same for recovery of any amount due to them including any excess amount of ad hoc payment from the petitioner. Mr. Rohtai urged that enforcement of the bank guarantees can be restrained only if it is established that a fraud has been committed in relation to the bank guarantees and/or irreparable injury would result to the petitioner if enforcement is not restrained or there exist any special equity in favor of the petitioner who is furnishing the bank guarantees. There is no dispute to this legal proposition because it emerges from various judgments of the Apex Court and various High Courts. Reference with advantage can be made to the celebrated judgment of the Supreme Court in the case of AIR 1997 1644 (SC) . In para-12 of the said judgment the Supreme Court taking into account various earlier decisions of that Court, ruled as under:

"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a

guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, Therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

16. This position was reiterated with approval by the Supreme Court in subsequent cases i.e. Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, and in Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, . In the last case the Supreme Court held that for encashment of bank guarantee the bank cannot have any valid resistance, except of course, in a case of fraud. The bank guarantee furnished by the Bank is an unconditional and absolute bank guarantee. Therefore, the bank has no case to resist the encashment of the bank guarantees. The Supreme Court further held that it is true that the bank guarantees has to be read in conjunction with the terms of the contract but when the bank guarantee itself is in absolute terms, the agreement between the company and the first respondent would be of no avail to the bank.

17. Mr. R.K. Anand, learned senior counsel representing the petitioner has not and perhaps could not possibly dispute the above legal proposition but he has strongly argued that the said legal position has no application to the facts and circumstances of the present case more particularly so because firstly the respondent has not yet approached the bank to enforce the bank guarantees and obtaining the payment thereof but vide a communication dated 30.5.2003 has only threatened to do so in case the amount of ad hoc payment received by the petitioner is not restored to them. This factual position is borne out from the record and this explains the reason why the bank has not been arrayed as a party in the present proceedings. Therefore, the role of the bank in accepting the request of the respondent or otherwise has not yet come into picture, though the application of the legal position to the facts of the present case cannot be denied.

18. This Court has noted in detail various conditions subject to which the respondent had released various amounts of ad hoc payment to the petitioner and the conditions subject to which the petitioner was to refund the said payment back to the respondent. One of the conditions was that the refund

would be sought by the respondent only after final adjudication of the claims between the parties. Admittedly as on date, the claims of the petitioner and counter claims have not been finally adjudicated and the same are pending before the DRB and ADRB and the extent of those claims is stated to be more than Rs. 300 crores. During the hearing of the petition, the Court was informed that vide an award dated 8.12.2004 the ADRB has awarded a sum of Rs. 68.49 crores in favor of the petitioner/contractor towards EOT cost under contract along with interest @10% p.a. compounded monthly for the extended period from 1.1.1998 to 31.12.2002 and simple interest @10% on the above amount after 31.12.2002. This is a significant development and has a great bearing on the question with which we are concerned in the present proceedings i.e. the right of the respondents to invoke the performance guarantees and retention money bank guarantees furnished by the petitioner. Assuming for the sake of argument that the respondents have right to enforce the bank guarantees in view of their absolute and unconditional nature and having regard to the terms and conditions of the contract, still the award of ADRB has brought a significant change in the situation because as per respondent's own case, they have no other money of the petitioner lying with them, except the amount of bank guarantees, to fall back for the recovery of the amount of ad hoc payment made to the petitioner. In fact, on earlier occasion the respondent has given a credit of about Rs. 3.00 crores to the petitioner on the basis of an earlier award and adjusted the said amount towards ad hoc payment thereby reducing the net payable amount to Rs. 53.12 crores from Rs. 56.32 crores. What it would show? It would show that the respondent had agreed to adjust the amount of ad hoc payment received from the petitioner from any amount payable by them to the petitioner under any award. Today the petitioner has an award of more than Rs. 68.00 crores with interest in their favor and Therefore any haste on the part of the respondent to enforce the bank guarantees furnished by the petitioner is not understandable. During the pendency of the present proceedings the petitioner expressed its willingness to effectuate its offer of furnishing fresh bank guarantee for the outstanding amount of ad hoc payment and to maintain the same till settlement of its claims in related cases by DRB/ADRB. This was not acceptable to the respondent because according to them they are within their rights to enforce the existing bank guarantees for realisation of the outstanding amount of ad hoc payments.

19. This Court having considered the matter in its entirety, is of the considered opinion that on the face of the facts and the circumstances and the material available on record, the respondent is not justified in invoking the existing bank guarantees given by the petitioner towards performance security and retention money for the purpose of recovery of outstanding ad hoc amount from the petitioner at this stage. Interest of justice would be adequately met if interest of the respondent is safeguarded to the extent of the outstanding amount of the ad hoc payment by asking the petitioner to furnish bank guarantee of the equivalent amount in favor of the respondent till the settlement of all the disputes between

the parties in relation to the contract through the DRB/ADRB.

20. In the result the petition is partly allowed and the respondent is hereby restrained from giving effect to and acting upon the communication dated 30.5.2003, subject to the petitioner furnishing a bank guarantee in the sum of Rs. 53.60 crores in favor of the respondent and maintain the same for any outstanding amounts of such payments till final settlement of disputes/ differences between the parties by DRB/ADRB in terms of the Arbitration Agreement. The bank guarantee shall be furnished by the petitioner within a period of four weeks from today.

21. Petition stands disposed of accordingly.