
(2009) 08 DEL CK 0330
In the Delhi High Court
Case No : OMP No. 569 of 2008

Maharashtra Seamless Ltd.

APPELLANT

Vs

Indian Oil Corporation Ltd.

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Specific Relief Act, 1963 — Section 14, 41

Citation : (2009) 08 DEL CK 0330

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sandeep Sethi and V. Seshagiri, for the Appellant; V.N. Koura, Rakesh Sawhney and P. Benipal, for the Respondent

Judgement

Manmohan Singh, J.—By this order, I shall dispose of the present petition filed u/s 9 of the Arbitration and Conciliation Act, 1996. The following are the reliefs sought in the petition:

(i) Pass an ad interim order of temporary injunction restraining the Respondent and its officers and any one of them claiming through or under the respondent from, in any manner, giving effect to the impugned letter pending adjudication and disposal by an arbitral tribunal to be constituted of the various claims made by the petitioner against the respondent;

(ii) Pass an ad interim order of temporary injunction restraining the Respondent and its officers and any one of them claiming through or under the respondent from, in any manner, giving effect to the impugned tender for awarding the contract to a third party under the project pending adjudication and disposal by an arbitral tribunal to be constituted of the various claims made by the petitioner against the respondent;

(iii) Pass an ad interim order of temporary injunction restraining the Respondent and its officers and any one of them claiming through or under the respondent

from, in any manner, invoking the Performance Guarantee No. 316020213313-HP dated May 13th, 2008 issued by the Standard Chartered Bank at the instance of the petitioner for a sum of Rs. 8,52,79,100/- in terms of the contract.

2. The brief factual matrix of the case is enunciated in the following paragraphs.

3. The petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of manufacture of seamless pipes and ERW pipes as well as in wind power generation.

4. The grievance of the petitioner arises out of the termination of the contract by the impugned letter dated 17th September, 2008 despite the purchase order allowed by the respondent in favour of the petitioner. The petitioner states that the respondent after following the due process issued purchase order No. PLM/CHBPL/14/1775018 (hereinafter referred to as PO) in favour of the petitioner. The letter of intent in that respect was also issued. The PO was in relation to the supply of bare pipes by the petitioner to the respondent in respect of the Chennai-Bangalore project.

5. The petitioner states that the PO draws the description, quantities and prices together with the delivery schedule of the bare pipes. The PO also classifies the supplies into two lots i.e. lot 1 and lot 2. The PO prescribes the time of delivery which is 4 months from the date of its issuance i.e. by 21st August, 2008 in relation to lot 1. In relation to lot 2, the time limit is seven months from the date of the order which completes by November 2008.

6. As per the terms of the general conditions of the contract, the petitioner was obliged to furnish the respondent with a performance guarantee after the receipt of the acceptance of its bid and the same was duly furnished to the respondent vide letter dated 27th May, 2008 under bank guarantee No. 3160202113313-HP dated 13th May, 2008 issued by the Standard Chartered Bank for a sum of Rs. 8,52,79,100/-.

7. The petitioner contends that during the currency of the arrangement between the petitioner and respondent, as per the PO, the petitioner had conducted the prequalification tests (PQT) upon the bare pipes as per the requirements of the respondent. It is further contended that there were delays in the manufacturing process due to lack of cooperation on behalf of the supplier of raw material, who had been nominated by the respondent. Thus, the petitioner has pleaded that the delay is not attributable to it and therefore should not affect its rights in continuing the contract.

8. The petitioner in the month of August 2008 conducted the said prequalification tests whereby some inconsistencies came to light. Further, failure in the flattening tests gave the respondent a reason to believe that the performance of the contract would not be possible as per the schedule agreed upon. The respondent raised its concern vide letter dated 14th August, 2008 to the petitioner to devise corrective measures to cure the delay in the supply of the

bare pipes. In its response, the petitioner assured the respondent about its technical capabilities and its commitment and also assured the timely completion of the project. Further on 26th August, 2008, the respondent asked the petitioner about the status of the coils and sought confirmation regarding the conducting of PQTs upon change in the manufacturing tests.

9. Thereafter various correspondences were exchanged between the parties. It was agreed that third party inspection was approved by the parties and consequent inspection release note dated 12th September, 2008 was issued by the said party appointed by the respondent. Further, by letter dated 16th September, 2008 sent by the petitioner to the respondent, the petitioner informed the respondent that PQT for lot 1 of 12.75 bare pipes with thickness 0.219" 30360 mtrs, 0.250" 1800 mtrs and 0.375" 748 mtrs. was scheduled for 24th and 25th September, 2008 at its plant at Nagothane.

10. Lastly, by letter dated 17th September, 2008 the respondent informed the petitioner that in view of the inconsistencies discovered during the several tests conducted and further considering the large number of rejections of pipes after inspections, there exist reasonable apprehensions as regards the quality of the pipes as well as the timely completion of the project and as the petitioner seems unable to meet the parameters prescribed in the contract, the respondent is left with no option but to procure the bare pipes from an alternative source as per the Clause 4.23 of the general conditions of the contract.

11. In the meantime, the petitioner came across the impugned tender No. PLM/CBPL/07/14 R. By way of instant petition u/s 9 of the Arbitration & Conciliation Act, 1996 the petitioner is seeking temporary injunction restraining the respondents from proceeding with the impugned tender. The petitioner is also impugning the letter dated 17th September, 2008 and is seeking a prohibitory injunction restraining the respondent from proceeding with the actions stated therein and from awarding the tender to any third party. Lastly, interim relief in the form of injunction is sought restraining the respondent from encashing/invoking the performance guarantee No. 3160202113313-HP dated 13th May, 2008 issued by the Standard Chartered Bank for the sum of Rs. 8,52,79,100/-.

12. The instant petition came up for hearing on 31st October, 2008 when one week's time was granted to the respondent to pursue the matter. The matter again came up for hearing on 24th November, 2008 whereby the court issued notice in the main OMP and granted 4 weeks time to file the reply and posted the matter for 2nd February, 2009. The petitioner on 24th November, 2008 informed the court that it had already invoked the arbitration Clause between the parties by issuing notice to the respondent on 22nd November, 2008.

13. The said order was challenged before the Division Bench by filing of an appeal being FAO(OS) No. 473/2008 and vide order dated 2nd December, 2008 the respondent was directed to keep the amount in a "no-lien account" as the respondent received a pay order pursuant to the encashment of bank guarantee.

14. The said appeal again came up before the Division Bench on 15th January, 2009 whereby the order dated 2nd December, 2008 for keeping the amount in the non lien account was vacated. However, directions were issued that in case the petitioner succeeds before the Single Judge, the amount covered by the bank guarantee shall be transmitted to the petitioner within one week. Further, directions were issued to dispose of the said petition within 8 weeks. Accordingly, the matter came up before this court and was finally heard on priority basis.

15. Learned Counsel for the Respondent has apprised the court of further developments and raised objections with respect to the reliefs claimed in the prayer Clauses (i) and (ii) to the effect that the impugned tender for awarding the contract to a third party and the impugned letter dated 17th September, 2008 have already been given effect to after receiving the bid in response to the said tender. In the impugned tender, the respondent has already placed Purchase Order dated 29th November, 2008 for supply of X-70 grade 14" and 12.75" grade dia pipes of the value of Rs. 102,90,17,136.85 on Welspun Gujarat Stahl Rohren Limited and thus, according to the respondent, the reliefs made in prayer (i) and (ii) have now become infructuous.

16. Per contra, the Learned Counsel for the petitioner countered these submissions by stating that awarding of the contract during the pendency of the proceedings cannot take away the rights of the petitioner to challenge the impugned letter and impugned tender and more so when the earlier contract was not validly terminated.

17. At the outset, I find that the reliefs claimed in Clauses (i) and (ii) cannot be granted because of the following reasons:

(a) That the respondent has already granted the purchase order to a third party after following the due process wherein the petitioner itself has participated in the said bid process. The petitioner cannot be allowed to approbate and reprobate at the same time. Once the petitioner itself has participated in the fresh tendering process, it is not allowed to state that the said tendering is in contravention to earlier purchase order.

(b) Even if the petitioner's contention of invalidity of floating of fresh tender during subsistence of the earlier contract is assumed to be correct, the question regarding valid termination or subsistence of the contract can be determined by the arbitral tribunal after adjudication of claims and counter claims of the parties. At this stage, when grant of interim relief was sought, only consideration of this Court is, whether prima facie case is made or not. When the arbitral proceedings are in existence and fully operational and when the petitioner itself has participated in the fresh tender bid and after due process the tender is awarded to Welspun, the interim reliefs claimed in Clauses (i) and (ii) cannot be granted. This court however, leaves it open to the arbitral tribunal to decide the question of validity of the termination of earlier contract and thereafter the claims of the parties may be settled there.

18. Once I have held in the preceding paragraph that the petitioner is not entitled to relief claimed in Clauses (i) and (ii), the discussion is now narrowed down to the issue of grant of interim relief restraining the respondent from invocation of the performance bank guarantee.

19. Learned Counsel for the petitioner Mr. Sandeep Sethi has argued that the present case warrants an injunction against the invocation of the performance bank guarantee on the following grounds. The submissions of Mr. Sethi can be crystallized as under:

(a) That there has been wrongful termination of the earlier contract as the procedure prescribed under Clause 4.23 of general conditions of the contract was not followed and the contract was terminated hastily without properly invoking the said clause. Thus this case becomes a case of fraud of egregious nature and warrants interference of this court by way of temporary injunction.

(b) That the delay in performance is not attributable to the petitioner but to the respondent for the reasons stated in the petition, including the fact that the raw material supplier did not supply the same on time.

(c) That the Respondent itself had conceded to the delay in various correspondences by accepting the supplies. The date of delivery was 21st August, 2008, however, the respondent itself requested the petitioner on 26th August, 2008 to furnish the coils for the purpose of the production of the pipes and to ensure that the petitioner would conduct the prequalification tests. After the conducting of tests, on 12th September, 2008, the release notes were issued and barely a week thereafter, i.e. on 17th September, 2008, the respondent issued the impugned letter.

(d) Mr. Sethi strenuously argued that once there is wrongful termination of a valid contract, encashment of the bank guarantee during the validity of earlier contract is fraud and thus interim injunction can be issued by this court.

(e) The petitioner has laid great emphasis on Clause 4.23.1 of the general conditions of contract and pleaded that the respondent's letter dated 17th September, 2008 does not carry any implicit notice of termination. The petitioner submits that none of the four conditions that had to be satisfied before the purchaser's termination of the contract were satisfied. Without prejudice, even if any of these conditions as mentioned in Clause 4.23.1 were satisfied, as per Clause 4.23.1 (ii), the vendor's failure to deliver goods should have been of a delay of 30 days from the date of delivery, before the vendee's dispatch of the written notice of termination. Since the date of delivery of Lot-1 was 21st August, 2008 and the said notice was issued on 17th September, 2008, i.e. before the expiry of the mandatory period of 30 days, the said letter could not be carrying a valid notice of termination.

(f) That since the delivery date for Lot-2 was 21st November, 2008, no termination in its respect could possibly be issued by letter dated 17th

September, 2008.

(g) That a bare reading of the letter dated 1st December, 2008 from the respondent to the bank proves that the respondent has misrepresented and misstated the material fact about written notice of termination being issued and since the bank guarantee was invoked on this basis, there is an element of fraud.

20. Clause 4.23 of the GCC contained in the PO deals with the termination of the contract and provides as under:

4.23.0 Termination of Contract

4.23.1 In addition to any other right or remedy of the purchaser, and in addition to any other event entitling the purchaser to terminate the contract, the purchaser shall be entitled to terminate the contract by written notice at any time during its currency if;

(i) the vendor refuses to supply all or any of the products which the vendor is required to supply under the contract;

(ii) the vendor fails within 30 days of the date of delivery in respect thereof specified in the delivery schedule to deliver the whole or any part or installment of the products or any item thereof;

(iii) the vendor becomes bankrupt or becomes insolvent or goes into liquidation or winding up;

(iv) the vendor makes a general assignment for the benefit of creditors.

4.23.2 Upon termination of the contract, payment due to the vendor for the product supplied upto the effective date of the termination shall be calculated on the basis of contract, and the vendor shall not be entitled to any other payment or compensation.

4.23.3 Upon termination of the contract, the purchaser shall be entitled to purchase from any other source at the risk and expense of the vendor the undelivered products or any of the them covered by the contract, and to recover from the vendor (in addition to any other amount or compensation that it may be entitled to in terms hereof or otherwise) the difference between the amount payable to the vendor in respect thereof under the contract and the amount actually expended by the purchaser for obtaining the same from other sources. In the event of latter being in excess of the former; and insofar as the purchaser shall not exercise said right of purchase from other sources, the purchaser shall be entitled to recover from the vendor (in addition to any discount, other amount or compensation) the difference between the market price for the undelivered products and the price thereof under the contract, in addition to any other payment or compensation herein or otherwise provided for and reserving to itself the right to forfeit the security deposit, placed by the vendor against the contract.

21. In order to support his submissions on the allegation of fraud, Mr. Sethi has

relied upon several judgments wherein in appropriate cases, interim reliefs were granted once it was proved that the bank guarantee is vitiated by fraud. The judgments relied upon by the petitioner can be enlisted as under:

- (i) AIR 1997 1644 (SC) - paras 12 to 16.
- (ii) Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, - para 5.
- (iii) BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, - para 28.
- (iv) U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., - para 24 & 54.
- (v) Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, - paras 10-13.
- (vi) Continental Construction Ltd. and Another Vs. Satluj Jal Vidyut Nigam Ltd., - paras 14 to 21.

22. To counter the petitioner's submissions, Mr. Kaura appearing for the respondent submitted the following arguments:

(a) That the arbitration Clause has already been invoked and arbitration proceedings are ripe for disposal. In the said arbitral proceedings, the petitioner has made specific claim qua challenge of the invocation of the bank guarantee. The claim No. 6.3.5 reads as under :

6.3.5 In the above noted facts and circumstances, it is manifest that the invocation and subsequent encashment of the performance Bank Guarantee by the respondent is based on fraud, active concealment and material misrepresentation on the part of the respondent. In view of the above noted unlawful act on part of the respondent occasioning the said loss and damage, the claimant is entitled to be compensated/ restituted a sum of Rs. 8,52,79,100/- (Rupees Eight Crores Fifty Two Lakhs Seventy Nine Thousand One Hundred only) and a further sum of Rs. 39,95,267/-, aggregating to Rs. 8,92,74,367/- (Rupees Eight Crore Ninety Two Lakhs Seventy Four Thousand Three Hundred and Sixty Seven only).

(b) That there is no wrongful termination of the earlier contract and the impugned letter dated 17th September, 2008 clearly states the factum of invocation of Clause 4.23 of the general conditions of the contract. The contract thus stood terminated and the said termination was also accepted by the petitioner by its participation in the fresh tender bidding process.

(c) Alternatively, the pleas regarding validity or valid termination of the earlier contract requires evidence and adjudication and the same cannot be operated against to injunct the bank guarantee which is an autonomous transaction.

(d) That there has been failure on the part of the petitioner to meet the

requirements of the earlier purchase order. The said failure on petitioners part to manufacture pipes according to the agreed specifications in the contract has been appropriately raised in the letter dated 17th September, 2008 and thus the said letter cannot be faulted with and is termination of the contract in all senses.

(e) The respondent states that the relief of restraining it from invoking the Performance Bank Guarantee is infructuous as it has already by letter dated 1st December, 2008 invoked the said bank guarantee for Rs. 8,52,79,100/- and the bank on 2nd December, 2008 has handed over a pay order to the respondent for the said amount.

23. Learned Counsel for the respondent has referred various judgments, the details of which are as under:

- (i) Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, ;
- (ii) Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, ;
- (iii) AIR 1997 1644 (SC) ;
- (iv) Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, ;
- (v) BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, ;
- (vi) Reliance Salt Ltd. Vs. Cosmos Enterprises and Another, ;
- (vii) Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 9 SC 631;
- (viii) Tata Tele Services Ltd. and Ors. v. Union of India 1992 (2) Arb. LR 76 (Delhi); and
- (ix) HVS Technologies Inc. v. Aeronautical Development Agency 2001 (3) Arb LR 241 (Kar).

24. I have given careful consideration to the rival submissions of the parties and have also gone through the records. Before dealing with the submissions, I find it appropriate to discuss the law relating to grant of injunction against the invocation of bank guarantee.

25. In the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , it has been held by the Apex court that:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

26. The same legal position has been reiterated in the case of The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, , wherein it has been held as follows:

8. The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the contract, i.e. bank guarantee. Before issuing the injunction under Order 39 Rules 1 and 2, the court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud.

27. Recently, I had an occasion to examine the law relating to grant of injunction against the invocation of Letter of Credit in the matter of Global Steel Philippines (SPV-AMC) v. STC of India Ltd. and Ors. decided on 8th May, 2009 wherein as regards a similar question, I found that to vitiate the transaction there must exist two pre requisites being fraud of egregious nature and irretrievable injury. Further, there must be clear evidence as to the presence of fraud and the fraud must be known to the bank. In that case, I observed that the case did not fall within the purview of the exceptional circumstances which empower the court to grant injunction.

28. Keeping in mind the aforementioned position of law and principles relating to the grant of the injunction against invocation/encashment of bank guarantee, I shall now deal with the submissions of parties:

(a) Firstly, the thrust of the contentions of the parties seems to be built on the premise of the timing related to the termination of the contract and whether either party has adhered to the conditions/stipulations relating to the termination of the contract. However, it can be said with certainty that this issue shall be determined by the Arbitral Tribunal after examining the counter claims of the parties. At best, it can be said that the same may be a breach of the conditions of the contract which can again be conveniently dealt with by the arbitrator. Whether the termination is wrongful shall be determined by the arbitrator and the same cannot vitiate the bank guarantee as there is no fraud which can be prima facie found on this count.

The submissions as regards termination of the contract prior to expiry of time prescribed of 30 days in lot 1 and lot 2 may have force in establishing the wrongful termination of the contract, and the same shall be decided by the arbitrator. But even in view of breach of the contractual obligations, it cannot be said that there is fraud of egregious nature much less an ordinary fraud.

(b) Secondly, whether the delay in performance as stated by the petitioner is attributable to the respondent or not is again a matter of trial which requires examination and shall be appropriately dealt with at the arbitration proceedings. The delay or waiver by the respondent in any case cannot lead this court to interfere with the invocation of bank guarantee as the same is not covered anywhere in the exceptions laid down by the Apex Court.

(c) Thirdly, the submission that there is misstatement of facts in the letter dated 17th September, 2008 to the bank about termination of the contract and thus the same is a fraud also has no merit. It is according to the petitioner that no valid termination of the contract has occurred and neither the respondent nor its banker would assume this as a misstatement as according to them, the contract has been terminated. The fraud, be it of ordinary or of egregious nature, must be clear, specific and unambiguous and must not be vague, blurred or based on assumptions. The two pre-qualifications of establishing fraud are that there must be existence of clear fraud and that the same must be in knowledge of the bank that the demand which is made or likely to be made is fraudulent at the time of presentation. The said alleged misstatement as stated by the petitioner was obviously not known to the bank as fraudulent. Thus, it cannot be said that there is any element of fraud/ordinary fraud much less fraud of egregious nature which vitiates the bank guarantee.

29. The other submissions relating to the failure of performance i.e. failure of delivery by the petitioner in time and waiver by the respondent in relation to delay in performance are again matters of trial and should be decided by the arbitrator while adjudicating the claims between the parties.

30. Lastly, the bank guarantee which is impugned in the present case contains the specific stipulation in Clause (iii) which gives the respondent power to increase or vary or forbear from enforcing all or any of the obligations of the contractor under the contract without affecting the liability of the bank. Such stipulation again confirms the conclusion that the bank is not aware that the demand which is made or likely to be made is fraudulent. The invocation or presentation of bank guarantee for encashment is thus completely independent and autonomous transaction.

31. The present case, when seen from the perspective of law relating to injunction in contractual matters, does not warrant grant of injunction. The reason for the same would be that the contract in the present case falls within the purview of Section 14 of the Specific Relief Act, 1963 wherein monetary compensation would be an adequate relief. The law relating to injunction is well

settled that where a contract is not specifically enforceable as per the Clauses stipulated u/s 14 of the Specific Relief Act, an interim order in the form of injunction qua contract cannot be passed enforcing negatively. The same can be enforced and compensated in terms of monetary relief as at this stage there are allegations made by the parties against each other which are pending before the Arbitral Tribunal.

32. From the above discussion, it can be said that the essential ingredients which warrant the interference of this court to restrain the invocation of bank guarantee No. 316020213313-HP are prima facie missing. There are no special equities or irretrievable injuries in favor of the petitioner. The questions relating to valid termination, its timing or whether it is breach of the contract shall be gone into by the arbitral tribunal. As the arbitration proceedings are still pending, I find that if the petitioner has any grievance, it is entitled to damages, in case suffered by it, u/s 14 and 41 of the Specific Relief Act.

33. In view of my above discussion, I find that all the disputes of the parties can be determined in the arbitration proceedings which are pending and the arbitrator shall be within his rights and powers to consider and go into the entire gamut of dispute, including the challenged encashment of the bank guarantee.

34. The petition is dismissed in the above terms.

35. It is made clear that the observations made in this order are tentative and will not bind the Arbitral Tribunal. The parties are left to bear their own costs.