(2022) 03 DEL CK 0225

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 366 Of 2019

Marshal Infradevelopers India Private Limited — APPELLANT

Vs

Union Of India & Anr. — RESPONDENT

Date of Decision : 29-03-2022

Acts Referred:

Citation : (2022) 03 DEL CK 0225

Hon'ble Judges : Sanjeev Narula, J

Bench : Single Bench

Advocate : Vivekanand, Ashok Singh, Upendra K. Nagar

Final Decision : Disposed Of

Judgement

Sanjeev Narula, J

1. By way of a separate order passed today in ARB.P. 12/2020, an Arbitral Tribunal for adjudication of disputes between the parties stands appointed.

2. In view of the above, before commencing hearing in the matter, Mr. Ashok Singh, counsel for the Respondent, has been queried as to whether he is agreeable for continuation of the interim order granting protection to the Petitioner, till such time that the Arbitral Tribunal decides the instant petition by treating it as one under Section 17 of the Act. Mr. Singh contests and argues that such course would amount to confirmation of the order of injunction of the Bank Guarantee.

3. Although Mr. Singh's contention is incorrect as the Court has only expressed tentative views in the interim order, nevertheless, since the matter pertains to stay on invocation of bank guarantee, counsel for the parties have been heard at length for final disposal of the petition.

FACTUAL BACKGROUND

4. The Petitioner vide Letter of Acceptance dated 27th May, 2019 was awarded

the Contract for the work of 'Earth work in filling, Blanketing, construction of station building, Passenger platform Minor bridges, foot over bridge, Limited height subways, Circulating area and other allied works for new crossing station at Dobh in connection with Rohtak-Meham-Hansi New line' [hereinafter, the "Contract"] by the Respondent.

5. In terms of the afore-noted Letter of Acceptance, Petitioner furnished a Performance Bank Guarantee [hereinafter, "PBG"] – equivalent to 5% of the contract amount – issued by Bank of Baroda [hereinafter, "the Bank"]. This bank guarantee is the subject-matter of the instant petition.

6. The stipulated period for completion of work under the Contract was six months from the date of issuance of the Letter of Acceptance. Petitioner alleges that Respondent delayed in handing over the site. Nevertheless, immediately after award of work, Petitioner made requisite arrangements to carry out the work under the Contract. It has been further contended that the execution of such work was not possible without working drawings and a clear site being provided by the Respondent, owing to which, Petitioner was prevented from completing the work within stipulated timelines. Respondents were oblivious to the difficulties faced by the Petitioner, and in order to cover their failure in performing their obligations, letters dated 15th July, 2019 and 1st August, 2019 were issued – invoking Clause 62 of the General Conditions of Contract ("GCC") for termination of the Contract. Petitioner, vide communication dated 8th August, 2019, responded to the above-stated notices and apprised the Respondent that the work awarded cannot be completed in absence of the working drawings and/ or removal of hindrances at the site. However, instead of appreciating the Petitioner's grievances, the Respondent vide notice dated 9th August, 2019, terminated the Contract in terms of Clause 62 of the GCC.

7. Thereafter, Petitioner approached this Court at the first instance, by way of O.M.P. (I) (COMM.) 279/2019 seeking a stay on termination of the Contract, and as a consequence, a stay on invocation of PBG. However, the said petition was "dismissed as withdrawn", affording the Petitioner liberty to reapproach this Court, since an alternate remedy lay with the Petitioner by way of damages against such termination, and further, as on that date, there was no demand from the Respondent, in relation of the encashment of the PBG.

8. Subsequently, Petitioner received intimation from the Bank that Respondent had sought encashment of PBG. In these circumstances, Petitioner has approached this Court seeking interim measures restraining the Respondent from invoking PBG, till such time that the Arbitral Tribunal is constituted.

9. This Court, on 31st October, 2019, prima facie noticing that the invocation dated 11th October, 2019 was not in terms of PBG, directed Respondent to maintain status quo, as existing on the date of the order. Since then, the present petition has been pending and on account of restricted Court functioning in wake of COVID-19 pandemic, the matter was being adjourned en bloc.

ARGUMENTS ADVANCED

10. Mr. Vivekanand, counsel for the Petitioner, has invoked several grounds for seeking a stay on invocation of PBG – mainstay being that the invocation is not in terms of the PBG. On this short ground, he states that the petition is liable to be allowed. In support of this contention, reliance has been placed upon the judgments in M/s. Harprashad and Co. Ltd. v. Sudarshan Steel Mills and Others 1979 SCC OnLine Del 144, Jyoti Structure Ltd. v. Dakshinanchal Vidyut Vitran Nigam Ltd. & Ors. 2016 SCC OnLine Del 5035, NHPC Ltd. v. HCC Ltd. 2018 SCC OnLine Del 11469 and Shri V.V. Gaupta v. New Delhi Municipal Council & Ors 2006 SCC OnLine Del 276.

11. On the other hand, Mr. Ashok Singh, counsel for the Respondents, contends that the present petition is not maintainable in view of the law relating to the stay on invocation of bank guarantees – which is no longer res integra. He submits that (i) the PBG must be honoured in accordance with the terms thereof and (ii) the Bank is not concerned with the relationship between the parties; and (iii) the terms of the PBG also explicitly stipulate this condition. Thus, Respondents have the right to invoke the PBG since the Petitioner failed to meet the contractual obligations and improve the rate of progress, despite the issuance of warnings letters and since the Respondents suffered losses on account of non-performance of the Contract by the Petitioner. Mr. Singh also placed reliance upon contractual provisions contained in the terms of the 'Special Tender Conditions and Instructions to Tenderers' [Clauses 5 and 5.2 of the Special Tender Conditions and Instructions to Tenderers.], which vest with Respondents – the right to invoke PBG in the event the Contract stands terminated. Besides, reliance is placed upon the judgments in Gangotri Enterprises Ltd. v. Union of India and Others (2016) 11 SCC 720, M/s. Hind Construction Contractors v. State of Maharashtra (1979) 2 SCC 70, United Engineers (Malaysia) v. National Highways Authority of India 2008 SCC OnLine Del 182 and R.C.M. Infrastructure v. The State Highway Authority of India 2019 SCC OnLine Jhar 397.

ANALYSIS

12. The Court has considered the contentions of the parties. The law on bank guarantees is well-established and its principles have been reiterated by the Courts in many cases. It would suffice to note that the restraint on invocation of an unconditional bank guarantee can only be granted in cases falling amongst the well-known exceptions recognised by the Court viz. egregious fraud, irretrievable injury, and special equities. [See U.P. State Sugar Corporation v. Sumac International Ltd. AIR 1997 SC 1644; C. Himadri Chemicals Industries Ltd. v. Coal Refinery Company, 2007 (8) SCC 110; ANS Constructions Pvt. Ltd. v. Ramagunda Fertilizers & Chemicals Ltd. O.M.P. (I) (COMM.) 156/2019 dated 24th May, 2019.]

13. In the instant case, the ground urged by the Petitioner is centred around

terms of the PBG. Therefore, in order to rule on the objection urged by the Petitioner, it is necessary to take note of the salient terms of the instant PBG, which reads as under:

“2. We Bank of Baroda, further agree that (and promise) to pay the amounts due and payable under this guarantee without any demur merely on a demand from the Government through the FA&CAO/Const, Northern Railway, Kashmere Gate, Delhi-110006, stating that the amount claimed is due by way of loss or damage caused to or would be caused or suffered by the Government by reason of any breach by the said contractor of any of the terms of conditions contained in the said agreement or by reason of the contractor failure to perform the said agreement. Any such demand made on the Bank shall be conclusive as regards the amount due "and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs 62,51,115/- (Rupees Sixty Two Lakh Fifty One Thousand One Hundred Fifteen Only).

3. (a) We Bank of Baroda further undertake to pay to the Government any money so demanded notwithstanding any dispute or dispute raised by the contractor (s) in any suit or proceeding pending before any court or Tribunal relating to liability under this present being absolute and unequivocal, (b) The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and the contractor(s) shall have no claim against us for. making such payment.

4. We Bank of Baroda to further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said agreement and that it shall continue to be enforceable till all the dues of the Government under or by virtue of the said agreement have been fully paid and its claims satisfied or discharged by Dy. Chief Engineer/Const/ TKJ, Northern Railway, Tilak Bridge, New Delhi on behalf of the Government, certify that the terms and conditions of the said agreement have been fully and properly carried out by the said contractor(s) and accordingly discharges this guarantee.”

[Emphasis Supplied]

14. In light of the afore-noted terms, Respondent invoked the PBG in question, in the following terms:

“No:- 18/Const/A/cs/Books/BG/Encashment/14/08/2020 Dated 11.10.2019

The Branch Manager

Bank of Baroda,

Rohtak (Main) Branch,

Taleram Complex, Near SYS restaurant,

Rohtak-124001, Haryana

Reg:- Encashment of BG No.07521GPER002219 dated 20.07.2019 for Rs 62,51,115/- valid up to 19.08.2020 of M/s Marshal Infradevelopers India Private Limited, House No.17, Sector-14, Rohtak-124001

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The above mentioned BG is sent herewith lor immediate encashment and remit the amount through Bank Draft in favour of FA&CAO/Const./Northern Railway, Kashmere Gate, Delhi, as the contract has been terminated & the amount of BG has been forfeited by the Railway.

DA; (BG Original-Four Pages, Original)"

[Emphasis Supplied]

15. It would be trite to state that invocation has to be strictly in terms of the bank guarantee. [See Ansal Properties & Industries v. Engineering Projects (India) Ltd., 1997 (41) DRJ; Punj Sons (P) Ltd. v. Hong Kong & Shanghai Banking Corporation and Anr., 1991 (20) DRJ 154; Puri International Ltd. v. National Building Corporation and Anr., 1997 (41) DRJ 592, Basic Tele Services Ltd. v. Union of India 2009 SCC OnLine Del 1657.] On a bare perusal of the afore-noted Letter of Invocation, it manifests that the same does not satisfy the conditions as stipulated in the PBG. In the Letter of Invocation, Respondents have simply mentioned that the Contract has been terminated. It does not state whether the alleged breach on the part of the Petitioner resulted in any loss(es) and/ or damage(s) to the Respondents. Whereas, the terms of the PBG extracted hereinabove clearly stipulate that the demand must state "that the amount claimed is due by way of loss or damage caused". Respondent can certainly invoke the PBG in event of any breach in terms and conditions contained in the Contract; or for any failure on part of the Petitioner, however, the essential pre-requisite is that the claim should be towards loss(es) and/ or damage(s), which must be asserted. Thus, the Respondent's bare assertion that the Contract has been terminated, does not meet the conditions for invoking the PBG. Mr. Singh is correct in submitting that Respondents have a contractual remedy for invocation of PBG in event of termination of the Contract, nonetheless the enforcement of such a stipulation would still require conditions of the PBG to be met. Further, the judgements cited by Mr. Singh are not applicable to the factual matrix of the present case – as they do not deal with the ground for injunction of PBG, as has been urged by the Petitioner.

16. The Court, in the instant petition, is to only analyse whether such invocation is in terms of the PBG. On this issue, ex facie the Letter of Invocation does not meet the stipulated requirements, as it makes no mention of loss(es) and/ or damage(s) suffered due to termination. Therefore, in the opinion of the Court, the Petitioner is entitled to an order of restrain. On the afore-noted ground along, the Court finds a prima facie case in favour of the Petitioner. The balance of

convenience also lies in favour of the Petitioner and irreparable loss would be caused in case a restraint order was not passed in its favour.

17. Before parting, the Court would also like to note that during the course of arguments, Mr. Vivekanand has handed over a reply received by the Petitioner in response to an RTI application dated 8th February, 2021, wherein it has been stated as under:

"Sub:- Information sought out in RTI no. NRCOG/R/E/21/0071) Dated 29.01.2021.

Ref: - Online RTI Registration No. NRCOG/R/E/21/0071 Dated 29.01.2021

In reference to above the point wise reply related to the work "Earth work in filling. Blanketing, construction of station building, Passenger platform Minor bridges, foot over bridge, Limited height subways, Circulating area and other allied works for new crossing station at Dobh in connection with Rohtak-Meham-Hansi New line" awarded to M/s Marshal Infra developers India Private Limited on 27/05/2019 is as under

1. Copy of letter of acceptance attached.

2. Date of Start: 27/05/2019

3. Original intended completion date: 26/11/2019

4. Termination date: 13/08/2019

5. No amount of liquidated damage (LD) or any penalty imposed on contractor from 24/05/2019 to 12/08/2019.

6. No amount of liquidated damage (LD) or any penalty imposed on contractor on 13/08/2019.

7. No amount of liquidated damage (LD) or any penalty imposed on contractor after 13/08/2019.

This is for your information please."

[Emphasis Supplied]

18. The above reply suggests the Respondents have themselves not levied any liquidated damages/ penalty till date, despite termination of the Contract in 2019. Be that as it may, this is an aspect that should be examined by the Arbitral Tribunal and not by this Court.

19. In view of the above, the present petition is allowed and the interim order dated 31st October, 2019, stands confirmed. It is however clarified, that the present order does not preclude the Respondent from invoking the bank guarantee by way of fresh invocation, if so advised.

20. With the above directions, the present petition is disposed of.

