
(2010) 10 MP CK 0084
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2131 of 2010

M/s. Biaora Infrastructure Pvt. Ltd., Indore	APPELLANT
Vs	
State of M.P. and Others	RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 7

Citation : (2011) ILR (MP) 1141

Hon'ble Judges : S.S. Kemkar, J;Prakash Shrivastava, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shantanu Kemkar, J.—This order shall govern the disposal of W.P. Nos. 1391, 1491, 2131, 2902 and 3349 of 2010, as all these petitions involve common question of fact and law.

2. For the sake of convenience, facts are taken from W.P. No. 2902 of 2010.

3. The Petitioner claims to be a registered contractor of the Respondents the State Government and the Madhya Pradesh Rural Development Authority (for short, MPRRDA) and is engaged in construction work. According to the Petitioner, a works contract was awarded to it by the MPRRDA in respect of construction / up-gradation of Rural roads under the Pradhan Mantri Gram Sadak Yojana Package No. MP-3911 vide agreement No. 15 dated 1.03.2004. The case of the Petitioner is that immediately after receipt of the work order its staff reached to the site and mobilised all the resources, as per the requirement of the work which was to be completed within the specified period of nine months as per the agreement. The Petitioner alleged that the authorities of the second Respondent MPRRDA who in terms of the agreement were bound to provide the site without there being any hurdle or obstacle failed to provide the site and also to take necessary steps for ensuring handing over of the possession of the site to the Petitioner. The Petitioner further alleged that due to the inaction and lapses on

the part of the authorities of the MPRRDA, the work allotted to it could not be completed within the time fixed, in the circumstances a prayer was made by it to the MPRRDA to extend the time limit fixed in the agreement for the completion of the said work. However, the said prayer for extension of time was not allowed by the MPRRDA and instead attributing the cause of delay in performance of the work on the Petitioner, its contract was terminated vide order dated 16.01.2006.

4. The Petitioner averred that the said order dated 16.01.2006 by which its contract was terminated was challenged by it before the competent authority of the MPRRDA by way of an appeal as provided under the terms of contract, however the said appeal was dismissed vide order dated 24.12.2009 (Annexure P-1). Aggrieved by the order of termination of the contract and the order of dismissal of its appeal the Petitioner claims that it had filed an arbitration petition u/s 7 of the M.P. Madhyastham Adhikaran Adhiniyam 1983 (for short, the Adhiniyam) before the M.P. Arbitration Tribunal, Bhopal (for short the Tribunal). It is the case of the Petitioner that the said arbitration petition is still pending before the Tribunal. The grievance of the Petitioner is that though the aforesaid petition is pending before the Tribunal, the MPRRDA without waiting for the outcome of it, is proceeding to encash the Bank Guarantees furnished by the Petitioner towards Performance Security.

5. Aggrieved by the action of the MPRRDA in proceeding to encash the Bank Guarantees, the Petitioner has filed this petition under Article 226 of the Constitution of India for issuance of a writ restraining the authorities of the MPRRDA from encashing Bank Guarantees with a prayer to issue directions to the MPRRDA and to the Bank not to proceed further in terms of the letter dated 13.01.2010 (Annexure P-3) and 22.01.2010 (Annexure P-4) for encashing the Bank Guarantees.

6. The contention of the Petitioner is when the reference u/s 7 of the Adhiniyam filed by the Petitioner challenging the order of termination of contract and the order passed in appeal is pending consideration before the Tribunal, the action of the MPRRDA in proceedings for encashment of the Bank Guarantees is illegal and is contrary to law laid down by Full Bench of this Court in the case of B.B. Verma and Another Vs. The State of M.P. and Another, . It is the case of the Petitioner in view of Clause 24 and 25 of the agreement entered into between the Petitioner and the MPRRDA the Petitioner having taken recourse of the "Dispute Redressal System" and "Arbitration" till the matter is decided by the Tribunal, the encashment of the Bank Guarantees by the MPRRDA is not permissible. It has been submitted by Learned Counsel for the Petitioner of W.P. No. 3349 of 2010 that in his case the contract has not yet been terminated and as such the Petitioner has not taken recourse of Clause 24 and 25 of the agreement. He however submits that during the subsistence of the contract, the Respondents are proceedings to encash the Bank Guarantees on the basis of delay in performance of work, which according to him is not on account of the Petitioner but occurred due to in action and non co-operation of the officers of the

MPRRDA. Thus according to him unless the liability is decided, the Bank Guarantees cannot be encashed.

7. The Respondents No. 2 and. 3 (MPRRDA) have filed return and have justified the action taken by them for encashing the Bank Guarantees. The Respondents have placed reliance on the various clauses of the Bank Guarantee furnished by the Petitioner. The Respondents have also placed reliance on the. order passed by this Court in the case of Jagdish Constructions Ltd. Vs. M.P. Rural Road Development Authority and Others,

8. Heard Learned Counsel for the parties and perused documents filed by them. It has been stated by Learned Counsel appearing for the parties that the clauses of the bidding documents, agreement and the Bank Guarantees which have been filed in W.P. No. 2902 of 2010 being identical in all the cases the said documents as have been filed in W.P. No. 2902 of 2010 be considered and be treated to be the documents in all the connected cases.

9. Before dealing with issue raised in this petition it would be appropriate to consider the law laid down by the Supreme Court in the cases of unconditional Bank Guarantees. In case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , the Supreme Court has observed thus:

A Bank Guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. It contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction, contracts. Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank. An unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given. It is for this reason that the courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be cause to the guarantor.

10. In the case of Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, it has been held by the Supreme Court:

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. The clause in the Bank Guarantee specifically provides that the demand made by the President of India

shall be conclusive as regards the amount due and payable by the Bank under this guarantee and the liability under the guarantee is absolute and unequivocal. In the face of the clear averments, it is trite to contend that the Bank Guarantee is a conditional Bank Guarantee. Therefore, the Bank has no case to resist the encashment of the Bank Guarantee. It is true that the Bank Guarantee 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.

11. In the case of Jagdish Constructions Ltd. Vs. M.P. Rural Road Development Authority and Others, it has been observed by Single Bench of this Court as under:

An unconditional Bank Guarantee is encashable on the very demand of the beneficiary and the demand according to the terms of guarantee is conclusive. In such type of guarantee, the beneficiary is the sole judge as to whether there is any breach of underlying or primary contract and the bank is not concerned with the underlying contract unless otherwise expressly provided for. In present case, performance guarantee furnished in favour of Respondent No. 1 beneficiary, is unconditional one without any strings attached to it as is clear from perusal of performance guarantee furnished in favour of Respondent No. 1. Neither a prior notice nor determination or quantification of loss would be necessary for invoking the performance guarantee such as the one furnished by the Petitioner. No doubt, it is true that in exceptional cases, such as fraud of which the bank has the notice, Court may issue injunction but otherwise it is open for the parties to settle their disputes as per the mode provided under the contract. In the present petition, it is not the case of the Petitioner that fraud of which the bank had notice.

12. In view of the aforesaid legal position we find that it has now been well settled that in the case of unconditional Bank Guarantees the court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud. If the guarantees furnished by the Bank are unconditional, the employer is the sole judge regarding the question as to whether any breach of contract has occurred and if so, the amount of loss to be recovered. It is not necessary that before invoking the performance guarantee the employer should assess the quantum of loss and damage and mention the ascertained figure, when the Bank Guarantee is unconditional one. The encashment of unconditional Bank Guarantee does not depend upon adjudication of disputes. This view also find support from the judgments of the Supreme Court in the case of Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, and in the case of Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay,

13. Now coming to the facts of the case. The relevant provisions of the

agreement entered into between the Petitioner and the MPRRDA and the relevant clauses of the Bank Guarantee furnished by the Petitioner are extracted below. Clause 32 of the bidding document provides for performance security. Clause 24 of the agreement provides for dispute redressal system and Clause 25 of the agreement provides for arbitration.

32. - Performance Security

32.1 - Within 10 (ten) days after receipt of the Letter of acceptance, the successful Bidder shall deliver to the Employer a Performance Security of five percent of the Contract Price, for the period of five years and the time for completion of works plus additional security for unbalanced Bids in accordance with Clauses 27.3 and 27.4 of ITB and Clause 46 Part I General Conditions of Contract and sign the contract.

32.2 - The performance security shall be either in the form of a Bank Guarantee or fixed deposit Receipts, in the name of the Employer, from a Scheduled commercial bank.

24. Dispute Redressal System.

If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works thereunder, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence.

25. Arbitration

Either party will have the right of appeal against the decision of the competent authority, nominated under Clause 24, to the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983 provided the amount of claim is more than Rs. 50,000/-.

14. The Bank Guarantee for performance security in terms of aforesaid Clause 32.1 and 32.2 of the bidding document which has, been executed by the Petitioner contains various clauses. Clauses 1, 2, 3 and 6 of the Bank Guarantee which are relevant are extracted below which reads thus:

Clause 1, 2, 3 and 6 of the Bank Guarantee:

1. In consideration to the. Chief Executive Officer/ General Manager Madhya

Pradesh Rural Road Development Authority (hereinafter called "the Authority") having agreed to exempt....(Herein after called "the said Contractor(s)") from the demand, under the terms and conditions of an Agreement dated....made between....And, for....(hereinafter called "the said Agreement") security deposit for the due fulfillment by the said contractor (s) of the terms and conditions contained in the said agreement on production of Bank Guarantee for (Rupees....only). We....Bank Limited (hereinafter referred to as "the Bank") do hereby undertake to pay to Authority an amount not exceeding Rs.Against any loss or damage caused to be suffered or would be caused to or suffered by Authority by reason of any breach by the said Contractor(s) of any terms of conditions contained in the said agreement.

2. We....Bank Limited, do hereby undertaken to pay the amount due and payable under this guarantee without any demure merely on demand from the Authority starting that the amount claimed is due by way of loss or damage caused to or suffered by the Authority by reason of any breach by said Contractors) of any of the terms or conditions Contained in the said agreement or by reason of the Contractors) failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regard 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.

3. We Bank....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 dues of the Authority under or by virtue of the said Agreement have been fully paid and its claim satisfied or till Authority certifies that the terms of the said agreement have been fully and properly carried out by the said Contractor (s) and accordingly discharges the guarantee. Unless a demand or claim under this guarantee is made on in writing on or before the 15.02.2010 we shall be discharged from all liability under this guarantee thereafter.

4....

5....

6. We bank....hereby unequivocally undertake that if the Authority invokes the guarantee the bank (issuing branch).... will make the payment to the Authority without any reference and demur.

15. As noted above Clause 24 and 25 of the agreement provides for a dispute redressal system and also provides for arbitration. According to these clauses in case of any dispute or difference between the contractor and the MPRRDA in connection with or arising out of the contract the same shall be referred to the competent authority of the MPRRDA. The decision of the competent authority has been made appealable at the instance of either party by way of arbitration before the Tribunal if the claim is of more than fifty thousand. Clause 32 of the bidding document requires furnishing of performance security of 5% of the contract

price, which shall be either in the form of a Bank Guarantee or fixed deposit receipts. Failure to comply with the furnishing of Bank Guarantee or fixed deposit was to be treated as sufficient cause for cancellation of the award of contract and forfeiture of the earnest money. On going through the terms of the Bank Guarantee furnished by the Petitioner as extracted above, we find that the Bank Guarantee is unconditional Bank Guarantee as the same is encashable on the very demand of the MPRRDA. It provides an undertaking by the Bank to pay to the MPRRDA the amount due and payable under the guarantee without any demur merely on a demand from the authority of the MPRRDA on stating that the amount claimed is due by way of loss or damage caused to or suffered by the authority by reason of any breach by the Petitioner of any of the terms or conditions contained in the said agreement or by the reasons of Petitioner's failure to perform the said agreement. The Bank Guarantee also provides that any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under the guarantee. It also provides unequivocal undertaking by the Bank that if the MPRRDA invokes the guarantee, the Bank will make the payment to the MPRRDA without any reference and demur. The terms of the Bank Guarantee are unequivocal and unconditional and recite that the amount would be paid without demur or objection and shall be conclusive as regards the amount due and payable by reason of any breach of the contract or any terms or conditions contained in the agreement. In the circumstances in our considered view, the contention of the Petitioner that in view of the fact that the matter is pending consideration before the Tribunal or the contention of the Learned Counsel for the Petitioner in W.P. No. 3349 of 2010 that the contract has not been terminated and merely on the basis of delay in work the Bank Guarantee is sought to be encashed and the same cannot be encashed, cannot be accepted. The Bank Guarantees being unconditional, the MPRRDA is the sole Judge regarding the question as to whether any breach of the terms of the contract was occurred. The encashment of the unconditional Bank Guarantees furnished by the Petitioner towards performance security will not depend upon the adjudication of dispute. The contract of the Bank Guarantee by way of Performance Security entered into between the parties is independent of the main contract. In the circumstances the Petitioner's prayer to restrain the Respondents from encashing the Bank Guarantees is misconceived and cannot be accepted. This view find support from the law laid down in Hindustan Steel Workers Construction Ltd. v. State of Bihar (supra), Daewoo Motors India Ltd., Dwarikesh Sugar Industries Ltd. (supra), Hindustan Steel Workers Company v. G.S. Atwal (supra) and Oil and Natural Gas corporation Ltd. (supra).

16. Reliance of the Learned Counsel for the Petitioner on the Full Bench judgment of this Court in the case of BB Verma (supra), is mis placed. The case of BB Verma (supra) is based upon entirely different footing. In that case, the Full Bench has held that a claim against the contractor for payment of sum or money under the contract cannot be recovered by the Government from the contractor as arrears of land Revenue invoking the provisions of M.P. Land

Revenue Code, 1959 without a decision of Superintending Engineer or the Tribunal under the Adhiniyam where the contractor disputes the amount before the SE or the Tribunal. In the case of BB Verma (supra), question about encashment of the unconditional Bank Guarantee furnished as Performance Security on account of allegation of the breach of the terms of agreement or on termination of contract for such breach was not referred to and has not been decided. However in the present case as observed above, the Petitioner having furnished the unconditional Bank Guarantees as Performance Security, the MPRRDA is entitled to encash the same for the alleged breach of the conditions of the contract. In view of the terms of the Bank Guarantee the law laid down by the Supreme Court, the invocation of the Bank Guarantee cannot be ordered to be withheld till the matter is finally decided under the Dispute Redressal System provided under the contract.

17. In view of the aforssaid, we find no merit in the writ petition. The petition fails and is hereby dismissed with no orders as to costs.