(2000) 02 DEL CK 0021

In the Delhi High Court

Case No : OMP 121/92 and I.A. 7301/99

M/s. Radhey Shayam Bansal APPELLANT

Vs

M/s. Indian Farmers Fertilisers Cooperative Ltd. RESPONDENT

Date of Decision : 04-02-2000

Acts Referred:

Citation : (2000) 85 DLT 484 : (2000) 56 DRJ 338

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. D.K. Kapoor, Mr. Raman Kapoor and Mr. F. Hasan, for the Appellant; Mr. Rajiv Bansal, for the Respondent

Judgement

J.B. Goel, J.—This is a petition u/s 41 read with Schedule II of the Arbitration Act, 1940 (for short "the Act") seeking injunction against invoking and encashing of a Bank Guarantee.

2. The respondent had awarded to the petitioner the work of construction of 52 Nos. Type ''D'' residences for IFFCO Township at Aonla, near Bareilly (U.P.) by means of letter No. 9/6/142 dated 10.10.1985 followed by a formal contract executed on 16.12.1985. The total cost of the project was Rs. 1,93,21,192.40 and the work was to be completed within a period 15 months. The contract provided for furnishing by the petitioner of performance bank guarantee equivalent to 5% of the value of the work valid for a period of 12 months till after the completion of the work. Bank Guarantee No. 23/87 dated 22.12.1987 in the sum of Rs. 11, 50,000/- of State Bank of Indore, Gandhidham Branch was furnished. The case of the petitioner is that they completed the work to the satisfaction of the respondent and a completion certificate dated 16.9.1987 (Annexure "D") was issued by the respondent and no complaint about the work was made either during construction or after 12 months of its completion or even till the filing of the petition. On the other hand, their final bill has been withheld and not settled and dues amounting to about Rs. 1.5 crores (as per details given) are due from the respondent. They had also sought the disputes being

referred to arbitration. It is alleged that although the work was completed in time and maintenance period 12 months having expired on 20.10.1988, the validity of the Bank Guarantee has expired, however, by withholding the final bill, the respondent has been inducing the petitioner to get the Bank Guarantee extended from time to time and under such undue influence it was extended till 5.12.1992; and thereafter the petitioner was not willing to extend it further, and the respondent wants to invoke the same illegally. The petition was filed on 3.12.1992. Interim injunction against invocation of the Bank Guarantee was granted on 7.12.1992 and the Bank Guarantee has been kept alive.

3. The respondent in the reply has contested the claim of the petitioner. It is, however, not disputed that the work was completed by the petitioner satisfactorily and also that no defect was pointed out during the maintenance period of 12 months afterwards. It is pleaded that certain other construction works were also awarded to the petitioner and on 16th December, 1989, inter alia the petitioner had agreed that whilst the matters concerning various other work/contract were pending, the petitioner would extend the aforesaid bank guarantee and another guarantee for Rs. 7.74 lakhs available with IFFCO would be discharged. The bank guarantee was extended up to 5th December, 1992 which was being extended pending settlement and resolution of other works and as such it is not open to the petitioner to raise objection. The alleged disputes or claim of Rs. 1.50 crores raised by the petitioner is denied. The encasement of the bank guarantee is valid and proper since the petitioner had obtained discharge of another bank guarantee agreeing to keep this bank guarantee extended. And this bank guarantee is encashi able for satisfaction of the amounts that may be due on final settlement of claims for other works.

Petitioner in its rejoinder affidavit has reiterated its case, whereas no counter affidavit nor any other relevant documents have been placed on record by the respondent.

4. I have heard learned counsel for the parties. Learned counsel for the petitioner has contended that the Bank Guarantee stood exhausted and is liable to be discharged as no liability has been raised against it and on the other hand by wrongfully withholding the final bill/dues of the petitioner, the respondent has been inducing the petitioner to extend the Bank Guarantee illegally. The invocation of the Bank Guarantee in the circumstances is neither valid nor warranted or lawful.

5. Whereas learned counsel for the respondent has contended that the Bank Guarantee has been extended due to pending various other works as was mutually agreed; this bank guarantee was to be kept alive and as it not being further extended after 5th December,1992, it was validly invoked in pursuance of the agreement between the parties. He has relied on AIR 1997 1644 (SC) , State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, and Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., .

6. Article 31 of the contract between the parties provided for completion of the work satisfactorily in accordance with the contract and for maintenance and repair liability for a period of 12 months after completion. The petitioner in para 8 of the petition has pleaded as under:-

"That either in the completion period or thereafter at no stage whatsoever, respondents raised any claim or damage but on the other hand the respondents admitted that a sum of Rs. 1.5 lakhs is payable to the petitioners under the above contract, though final bill of the petitioners have not so far been finalised by the respondents.

7. In support of it a certificate dated September 16,1997 issued by Shri S.R. Sahore, Executive Director of the respondent has also been placed on record (Annexure D) where he has certified as under:-

"This is to certify that M/s. Radhey Shayam Bansal were awarded the work of construction of 52 Nos. Type `D'' houses at AONLA Dist. Bareilly, U.P. at an estimated value of Rs. 1,93,22,192/-. The above job was completed satisfactorily.

Their performance had been good and they were found to be technically, financially and organizationally sound."

8. There is no denial of the correctness of statement about satisfactorily completion of work and of this certificate. In any case, it is not the case of the respondent that the work executed was not satisfactory or any complaint about the quality of the work or maintenance during 12 months of its completion was ever made.

Para 3 of the letter of intent No. 9/6/142 dated 10.10.1985 provided for furnishing of performance guarantee which reads as under:-

PERFORMANCE GUARANTEE

"You shall furnish a Performance Guarantee equivalent to the amount of 5% of the total value of the work in the form of Guarantee from any of the nationalised Banks/Insurance Company in the prescribed format valid up to a period of 12 months from the schedule date of completion."

The petitioner accepted these terms and furnished bank guarantee No. 23/87 dated 21.12.1987 issued by State Bank of Indore, Gandhidham Branch Kutch, Gujarat which inter alias provided the following conditions:-

1. Now, the conditions of this bond/guarantee is such that if the Principal shall duly perform and observe all the terms, provisions, conditions and stipulations of the contract including the covenants concerning guarantees /warranties / maintenance stipulated therein, on the part of the principal to be performed and observed according to the true purpose, intent and meaning thereof or if no default of the Contractor, the Surety shall satisfy and discharge the damages sustained by the owner thereby up to the amount of the bond guarantee herein then the obligation herein shall be null and void but otherwise shall be in full

force and effect for a period of 12 months.

2. This Guarantee herein contained is not revocable by notice during currency and will remain in full force until all the undertaking, covenants, terms, conditions and agreements of the said contract are performed and fulfillled or until it is, by noticed in writing revoked by the owner.

3. We do hereby undertake to pay the amount due and payable under this Guarantee without any demur merely no demand from the owner stating that the amount claimed is due by way of that loss or damages caused to or suffered or would be caused to or suffered by the reason of any breach by the said Principal of any of the terms and conditions contained in the said Contract or by reason of the said Principal''s failure to comply with any of the conditions with regard to the Contract set out in this Bond. Any such demand made on us shall be restricted at an amount not exceeding Rs. 11,50,000-(Rupees Eleven Lakhs Fifty Thousand Only).

4. We further convenant that the guarantee herein contained shall remain in full force and effect and that it shall continue to be enforceable till all dues of the owner under or by virtue of the said Contract have been fully and properly carried out by the said Principal and discharged the bond.

9. It is not the case of the respondent that any dues of the respect remain outstanding against the petitioner in respect of this contract or they have incurred any liability in connection with this contract. On the other hand, the petitioner has raised claims against the respondent to the tune of Rs.1.5 crores for which they had asked the respondent to appoint an arbitrator as per terms of the contract which contains an arbitration clause. The respondent in their letter dated 27.7.1993 (Annexure C to the rejoinder) have admitted as under :-

"As you are aware we have been repeatedly telling you that there is no dispute between us. However, on your request it is proposed to refer the matter for arbitration to the following:-

1. Sh.B.Bera, Chief Engineer (Civil), PDIL.

2. Justice H.L.Anand (Retd.), Delhi High Court Judge.

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This letter also confirms that the respondent has no grievance/complaint or claim in respect of this work against the petitioner. Para 4 of the aforesaid letter of intent provided for the terms of payment which reads as under:-

4. TERMS OF PAYMENT

Payment terms will be as under:-

(a) 10% mobilisation advance shall be paid to you against guarantee of similar amount, in the format prescribed, from any of the nationalised Banks/Insurance Company. This is payable subject to furnishing a Performance Guarantee as required in para 3 above.

(b) 95% of the value of work done as progressive payments against running bills to be certified by Engineer within 21 days of submission, subject to the recovery of the following.

- Moblisation advance recovery on pro-rata basis.

- Cost of cement, steel and any other consumable materials issued services rendered by IFFCO.

- Any other recoveries which becomes due.

(c) Balance 5% payment which will be treated as retention money shall be paid against final bill duly certified within 45 days of issue of completion certificate by the authorised representatives of owner/Consultants.

10. The grievance of the petitioner is that even his final bills have not bees settled so far and under the threat to invocation of the bank guarantee they had been induced to extend the bank guarantee from time to time. The work having been completed satisfactorily and the maintenance period of 12 months also having been over without any complaint or liability of the petitioner, the obligation of the petitioner as well as of the bank in respect of this guarantee stood discharged and the bank guarantee became unenforceable and was liable to be discharged. The invocation of the bank guarantee thus would not be warranted and is contrary to the terms of the bank guarantee.

11. The respondents, however, in para 5 of the reply to the petition have pleaded as under:-

"With reference to the contents of paragraph 5 it is submitted that a Bank Guarantee No. 23 of 1987 dated 22nd Dec., 1987 was issued by the State Bank of Indore, Gandhidham Branch for an amount of Rs.11,50,000/-. It may, however, be pertinent to mention that the petitioner had on 16th December, 1989 inter alia, agreed that whilst the matters concerning various final bills pertaining to the works/contracts in respect of A, B and D type quarters and development work are being examined the petitioner would extend the aforesaid guarantee and the other guarantee for Rs. 7.14 lakhs then available with IFFCO would be discharged."

12. The alleged agreement dated 16.12.1989 has not been placed on record. Assuming that there was such arrangement but this is not the case of the respondent pleaded that the petitioner has any outstanding dues of the respondent. The bank guarantee is not being invoked for any such liability. The letter of invocation of the bank guarantee has not been placed on record by the respondent and has been withheld unreasonably. As there was no outstanding liability against the bank guarantee, it would follow that the bank guarantee is not being invoked for the violation of this bank guarantee and the invocation of the bank guarantee thus is not lawful.

13. No doubt the law relating to invocation of bank guarantees is well settled. The beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending dispute and the bank giving such a bank guarantee is bound to honour it as per its terms except in case of fraud and irretrievable harm or injustice to the other party.

14. It is equally settled that the beneficiary is entitled to invoke the bank guarantee and seek its encashment in accordance with the terms and tenor of the bank guarantee. And obviously the bank guarantee could be invoked if any liability contemplated covered by the bank guarantee is payable by the contractor under the terms of the bank guarantee.

15. The bank guarantee thus has to be construed and invoked strictly in accordance with the terms and tenor of the bank guarantee and the bank would not be liable to honour its invocation if it is not in terms of the guarantee. The bank guarantee in the present case obviously stood discharged on the satisfactorily completion of the work and maintenance period of 12 months thereafter being over without any liability remaining outstanding thereunder. Perhaps that is why the respondent has not placed on record copy of their invocation letter. Obviously, the respondent has been getting the bank guarantee extended unreasonably in violation of the terms and conditions of the bank guarantee by exercising undue influence and thereby the petitioner had to incur expenditure to keep the bank guarantee alive for over 10 years by now. The respondent in the circumstances was not justified in inducing the petitioner to keep it alive on such failure to invoke it.

16. This petition is accordingly allowed. The respondents are hereby restrained from invoking bank guarantee No.23/87 issued by State Bank of Indore, Gandhidham Branch Kutch, Gujarat in the sum of Rs. 11,50,000/- on behalf of the petitioner.

17. Since the bank guarantee has been kept alive after the institution of the present petition in pursuance of this court''s order dated 7.12.1992 as a condition of stay, the petitioner is entitled to reimbursement of the expenses so incurred by them in keeping the bank guarantee alive. It is accordingly ordered that the respondent shall pay to the petitioner a sum of Rs. 20,000/- within one month as compensation. If this amount is not so paid, they shall also pay interest thereon @ 15 per annum till payment.

18. Petitioner is also awarded costs of these proceedings assessed at Rs. 5,000/-.

I.A. No . 7301/99 is dismissed as infructuous.

19. OMP 121/92 I.A. 7301/99 are disposed of.

