(2019) 07 DEL CK 0391

In the Delhi High Court

Case No : Civil Writ Petition No. 8943 Of 2016, Civil Miscellaneous No. 36356 Of 2016

M/S Simplex Projects Ltd	APPELLANT
Vs	
National Buildings Construction Corporation Limited & Ors	RESPONDENT

Date of Decision : 30-07-2019

Acts Referred:
Finance Act, 1994 — Section 77, 78

Citation : (2019) 07 DEL CK 0391

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : S. D. Singh, Meenu Singh, Abir Phukan, Vaishali Goyal, Praveen Kumar Jain, Shitij Chakravarty, Buddy A. Rangandhan

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. Mr Ranganthan, learned counsel who appears for respondent no.4 points out that respondent no.4 has merged with the State Bank of India and, therefore, the Memo of Parties needs to be corrected. In view of the above, the Memo of Parties is amended and State Bank of Travancore Ltd. is replaced by State Bank of India Ltd. as respondent no. 4.

2. The petitioner has filed the present petition, inter alia, impugning a letter dated 19.09.2016 issued by respondent no. 1 (hereafter 'NBCC') to State Bank of Travancore Ltd., inter alia, stating that the petitioner had "not completed all their contractual obligations under the terms and conditions of Contract" and the Bank Guarantees in question (eight in number) were required to be extended. The petitioner further prays that NBCC be directed to return the Bank Guarantees in question.

3. The petitioner is a company engaged in the business of construction. The petitioner was awarded three separate construction contracts by NBCC: (i)

construction of 100 bedded Hospital at Thoubal, Manipur (hereafter referred to as the 'Thoubal Project'); (ii) Accommodation for Urban Employed Youth Women Vendors at New Market, Imphal (hereafter 'the New Market Project'); and (iii) Accommodation for Urban Employed Youth Women Vendors at Laxmi Market, Imphal (hereafter 'the Laxmi Market Project')

4. The petitioner had submitted three Bank Guarantees aggregating Rs. 96,50,000.00/- for securing the due performance of the Thoubal Project. The details of the Bank Guarantees furnished by the petitioner pertaining to the said contract are set out below:-

Sl.No.

Bank Guarantee No.

Date

Amount

1.

7024810BG0000116

23.12.2010

Rs. 2500000.00

2.

7024807BG0000057

27.12.2007

Rs. 3150000.00

3.

7024810BG0000118

23.12.2010

Rs. 4000000.00

5. The petitioner had submitted three Bank Guarantees aggregating Rs. 61,00,000.00/- for securing the due performance of the New Market Project. The details of the Bank Guarantees furnished by the petitioner pertaining to the said contract are set out below: -

Sl.No.

Bank Guarantee No.

Date

Amount

1.

7024807BG0000058

27.12.2007

Rs.1600000.00

2.

7024810BG0000115

23.12.2010

Rs.1000000.00

3.

7024810BG0000117

23.12.2010

Rs.3500000.00

6. The petitioner had submitted two Bank Guarantees aggregating Rs. 93,00,000.00/- for securing the due performance of the Laxmi Market I Project. The details of the Bank Guarantees furnished by the petitioner pertaining to the said contracts are set out below:-

Sl.No.

Bank Guarantee No.

Date

Amount

1.

7024810BG0000119

23.12.2010

Rs.78,00,000.00

2.

7024807BG0000059

27.12.2007

Rs.1500000.00

7. Concededly, all the three projects are now over. It is also not disputed that the Defect Liability Period in respect of the aforementioned three contracts is over and there is no outstanding claim of NBCC against the petitioner in respect of any of the three contracts. The initial period of the term of the Bank Guarantees

in question has also expired. However, the same has been re-validated from time to time at the instance of NBCC.

8. The petitioner's grievance is that notwithstanding that it has duly performed the contracts, NBCC has failed and neglected to return the Bank Guarantees in question. Further, NBCC continues to insist that the same be extended from time to time.

9. In view of the above, the petitioner made several representations to NBCC requesting that the Bank Guarantees in question be returned. However, the said representations were not considered. Aggrieved by the same, the petitioner filed a writ petition being W.P.(C) 2827/2016 seeking similar prayers as sought in the present petition. The said petition was disposed of by an order dated 31.03.2016, whereby NBCC was directed to decide the petitioner's representations and pass a reasoned order within a period of eight weeks.

10. NBCC states that in compliance with the aforesaid order, the representations made by the petitioner were considered and the same were disposed of by an order dated 17.10.2016.

11. Mr Phukan, learned counsel appearing for NBCC has drawn the attention of this Court to the said order which indicates that the petitioner's request for return of the Bank Guarantees in question was rejected on the ground that an appeal with regard to the Service Tax Liability is pending before the Central Excise and Service Tax Appellate Tribunal (CESTAT).

12. In the counter affidavit filed on behalf of NBCC, it is disputed that the quality of work performed by the petitioner was as per the required standards. However, it is not disputed that NBCC has not made any claims on that count. It is, thus, an admitted position that the petitioner has performed the said contracts and NBCC has no claim outstanding against the petitioner in respect of the three contracts in question. Concededly, the defect liability period has also expired. It is clear from the order dated 17.10.2016 passed by NBCC that the Bank Guarantees, furnished by the petitioner for due performance of the contracts, have been withheld on account of non-settlement of Service Tax Liability.

13. The additional affidavit has been filed on behalf of NBCC enclosing therewith an order dated 31.01.2011 passed by the Commissioner, Central Excise, Shillong confirming the demand of Rs. 86,66,726/-, an education cess of Rs. 1,65,335/- against the petitioner in respect of the construction contracts executed by it. In addition, the Commissioner has also imposed penalties under Sections 77 and 78 of the Finance Act, 1994. The Commissioner has held that the petitioner has provided the commercial or industrial construction service which is chargeable to service tax.

14. The said order is a composite order, whereby Service Tax Liability has been imposed on NBCC as well. The Commissioner had found that NBCC had carried out construction involving value of Rs. 21,45,98,516/- against agreements

executed in the year 2005-06 and Rs. 2,99,23,612/- in terms of the agreement executed in the year 2008-9. It was held that since NBCC had received 10% agency charges, the same were chargeable to service tax. Accordingly, the Commissioner has confirmed the demand of Rs. 25,05,068/- on account of service tax and Rs. 50,102/- as education cess. In addition, the Commissioner has also imposed a penalty on NBCC.

15. Admittedly, the said Service Tax Liability relates to the 'New Market Project' and the 'Laxmi Market Project' There is no service tax issue pertaining to the Thoubal Project. Nonetheless, NBCC has withheld the release of the Bank Guarantees furnished in respect of the Thoubal Project as well.

16. It is relevant to mention that according to NBCC, no service tax is payable in respect of any of the three projects. Accordingly, both the petitioner as well as NBCC, have filed appeals against the order dated 31.01.2011 before the Central Excise and Service Tax Appellate Tribunal (CESTAT), which is pending. Mr Phukan contends that there is a possibility that NBCC may not prevail in its appeal and the demand may be upheld. In such eventuality, NBCC would have to pay the assessed service tax and penalty along with interest. He contends that the same would be recoverable from the petitioner and NBCC is required to be secured against the said liability.

17. In this view, the first and foremost question to be addressed is whether NBCC is entitled to recover the assessed service tax and penalty from the petitioner. Secondly, even if it is accepted that NBCC is entitled to do so, the question that arises is whether NBCC is entitled to withhold the release of Bank Guarantees furnished in respect of the Thoubal Project.

18. Mr Phukan had relied on Clauses 4.2.3 and 5.1 of the Letter of Intent (LOI) dated 24.01.2005 in support of the contention that all tax liability is required to be borne by the petitioner. He submitted that all the three contracts included similar clauses. The said clauses are set out below:

"4.2.3 You shall also be responsible for all taxes that may be levied herein after on the transactions between you and NBCC.

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5.1 You shall be fully responsible and liable for the payment of all taxes duties, tolls, octroi, duties, excise duty, cess/ royalty etc., on all materials and articles that you may use for this work. Any Increase In the aforesaid taxes, duties, levies, cess/ royalty etc., that may arise during the currency of the contract shall also be on your account and shall not be paid/reimbursed to you by NBCC."

19. A plain reading of clause 4.2.3 of the LOI indicates that the petitioner would be responsible for payment of all taxes that may be levied on the transaction between the petitioner and NBCC. NBCC has been assessed for Service Tax

liability on the Agency Charges received by NBCC and not on the contracts entered into between the petitioner and NBCC. The contention that NBCC is required to be secured in respect of the said charges, is bereft of any merit. Clause 4.2.3 and Clause 5.1 of the LOI only relate to the taxes that are leviable on the transactions between the petitioner and NBCC. The petitioner is not liable, in any manner, to pay service tax that is assessed on the Agency Charges received by NBCC from the principal employer. The said charges are wholly outside the scope of the contracts executed between the petitioner and NBCC. Thus, the contention that NBCC is liable to be secured against the said charges is fundamentally flawed.

20. Since, NBCC has not canvassed any other ground for withholding the Bank Guarantees in question, the present petition is liable to be allowed.

21. In view of the above, it is not necessary to consider the issue whether NBCC is justified in withholding the Bank Guarantees furnished by the petitioner in respect of the Thoubal Project. However, for the sake of completeness, this court considers it apposite to decide the said question as well.

22. Admittedly, there is no issue pertaining to recovery of service tax in respect to the Thoubal Project. In this view, there is no justifiable reason for the NBCC to withhold the three performance bank guarantees furnished by the petitioner in respect of the said project. It is difficult for this Court to accept that NBCC is entitled to withhold the securities provided by the petitioner in respect of one contract, as against any possible dues that may be in respect of any other contract. A plain reading of the Bank Guarantees furnished by the petitioner indicates that they are performance bank guarantees to secure the performance of the contract in question. Concededly, the Thoubal Project has been duly performed and, therefore, the Bank Guarantees furnished in respect of the said project is liable to be released.

23. In view of the above, the petition is allowed and NBCC is directed to forthwith return the Bank Guarantees in question to the petitioner.

24. The pending application is disposed of.

