(2011) 02 DEL CK 0373

In the Delhi High Court

Case No : CS (OS) No. 440 of 2011

Org Informatic Ltd. APPELLANT

Vs

Tulip Telecom Ltd. and Another RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : AIR 2011 Delhi 258

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Harish Malhtora and Arti Bansal, for the Appellant; Rajiv Nayar and Deepesh Aneja, for defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.

IA No. 2942/2011 (Under Order 39 Rules 1 and 2 CPC)

1. This order shall dispose of an application under Order 39 Rules 1 and 2 read with Section 151 CPC filed by the Plaintiff against the Defendants seeking a restraint order during the pendency of the suit against the Defendants from invoking encashing bank guarantee No. 3406 IL G003608 furnished by the Plaintiff on 30.08.2008 and renewed subsequently from time to time which is now valid till 28.2.2011.

2. Briefly stated the facts of the case are that the Plaintiff has filed a suit for permanent injunction against the Defendant Nos. 1 and 2. It is alleged in the plaint that Bhartiya Sanchar Nigam Ltd. (hereinafter referred to as ''BSNL'') had invited bids for supply, installation and commissioning of project 3 of NIB II on Turnkey Basis, Turnkey solution for implementation of OSS, Messaging, Storage, billing, EMS and security solutions.

3. This project was awarded by BSNL to Telecommunications Consultants India

Ltd. It is alleged that TCIL placed the orders to ORG vide the following three purchase orders:

i) TCIL/15/398/I/05-MM/107P dated 4.12.2007

ii) TCIL/15/398/I/05-MM/40P dated 2.7.2008 (effective from 30.6.2008)

ORG has placed the order vide P.O. No. ORG/GGN/OIL/0036 dated 26.6.2008 on Defendant No. 1 for supply of IBM made hardware /software worth Rs. 47,43,42,080/- as mentioned in Annexure 1 along with P.O.

4. It is alleged that the ORG had placed an order on 26.6.2008 on Defendant No. 1 for supply of IBM made hardware /software worth Rs. 47,43,42,080/-. The purchase order which was placed by ORG reads as under:

PURCHASE ORDER M/s Tulip Telecom Ltd. C-160, Okhla Industrial Area, Phase-I, New Delhi-110020 Contact person: Ltd. Col. H.S. Bedi-9810075198 P.O. No. ORG/GGN/OIL/0036 P.O Date: 26th June, 2008 Project Ref '' NIB MOR Ref''

PR Ref'' Ref.: your quotation through mail Bill to:

ORG informatics Limited 3rd Floor, Orchid Vipul Square, B-Block, Sushant Lok-1, Gurgaon-122 002, Haryana, India Ship To:

BSNL, Sites at Bangalore/Mumbai/ Pune/ Noida C/o TCIL We are pleased to place an order for the materials/services along with the prices listed below subject to the terms and instructions specified S. No. Description Qty.(Nos.) Unit Price(INR) Total Price (INR) 1. BSNL NIB STG as per attached Annexure-I As per Annexure-I As per Annexure I 474,342,080.00 2. NIB Year-2 BO Ms with 3 yrs. Warranty as per attached annexure-II (A,B,C) As per Annexure-II As per Annexure II 474,342,080.00 3. BSNL NIB 50% Expansion as per attached Annexure-III As per Annexure-III As per Annexure III 474,342,080.00 4. BSNL NIB year 2 Media as per attached Annexure-IV As per Annexure-IV As per Annexure IV 474,342,080.00 5. NIB 50% Expansion BOM with 3 yrs, Warranty as per attached Annexure- v. (A,B,C) As per Annexure-V As per Annexure v. 474,342,080.00 Total Price 474,342,080.00 In Words: Rupees Forty Seven Crore Forty Three Lakh Forty Two Thousand Eighty only Terms and conditions:

1. Prices are FOR MUMBAI and for BANGALORE and is firm till the end of the contract and are inclusive of material cost, packaging, 2. Sales Tax/VAT: It is included in the prices both for Mumbai and Bangalore, Service tax: It is included in the prices @ 12.48% 3. Delivery: Immediately after submission of 10% PBG by ORG 4. LD: For any delay in delivery, a liquidated damage @0.5% per week to be deducted from the bill for the non-execution portion with a maximum limit of 10% of the order value. 5. This is an E1/E2 Transaction 6. Payment A) 30% on the supply of all the equipment/material at site the purchaser order in satisfactory condition, city wise.

B) 10% on completion of validation.

C) 40% after installation, Commissioning & A/T at all the equipment. The payments shall be made city wise after complete equipment in that city has been successfully installed/commissioned and test certificate by T&D circle. (T&D circle shall issue the A/T certificate only after completion of validation).

7. Mode of payment: Payments to be made through Escrow Account to be opened by TULIP & ORG in Standard Charted Bank, ORG to give instructions to TCIL to remit all payment against this contract to the said Escrow Account and ORG would sent the acknowledgment to TULIP in this respect 8. Bank guarantee: BG @10% of the Contract Value to be provided by ORG to TULIP 9. Corporate Guarantee & PDC for the Contract Value to be provided by ORG to TULIP, PDC''s are as per terms mentioned in Clause 4 & 9 of this PO. 10. ORG to bear interest rate considered @13%, LC charges @1% & TULIP margin is @3%. Interest rate is variable & is subject to change as per SBI PLR. 11. The Nos. of days expected for payment realization is as follow:

30% within 90 days from the date of delivery 10% within 390 days from the date of delivery 40% within 420 days from the date of delivery 20% within 70 days from the date of delivery 12. Warranty and support: This support is for 3 years from the date as mutually agreed by BSNL/TCIL/TCIL/ORG/IBM 13. This purchase order is in connection to BSNL, NIB II PO No. BSNL/DNW/NIB-II/Proj-3/Year-2/PO/2007-08 dated 25.9.2007 and BSNL NB-II Expansion PO to TCIL and subsequent PO from TCIL to ORG 14. End user is BSNL 15. Details of Site address to be provided later on 16. For claiming the payment against the supply of all the equipment materials at site against the PO in satisfactory condition, the following documents are to submitted to the paying authority:

-Invoice -Delivery challis -Clear RR/Goods carrier receipt -Supplier certificate for dispatch -Excise gate pass/Excise invoice or equivalent -Inspection certificate of QA, if applicable -Consignee receipt -Payment shall be made after ensuring that shortages, damages intimated to the contractor have been settled in accordance with the provisions of this PO -No payments will be made for good rejected at the site on testing -TIN/LST no of the vendor in respective state has to be separately furnished for each supply 17. For services: Scope of work for the present PO on TULIP shall be strictly on Back-to-Back basis accordance with the terms, conditions and specifications of the BSNL/TCIL purchase order. This is only restricted to the IBM equipment and services 18. Force Majeure: The above said prices, terms and conditions etc. are valid and binding on us subject to force majored conditions i.e. strike, ware, riot, accident, natural disasters, acts of enemy or acts of GOD or reason beyond our control. Under above said Force Majeure, we shall be absolved of any legal/monetary obligation with reference to or in connection with this contract.

5. According to the purchase order, the Plaintiff herein was required to furnish, in terms of Clause 8 of the order, a bank guarantee @10% of the contract value to TULIP/Defendant No. 1. In addition to this, under Clause 10, Plaintiff was to bear interest rate considered @13% LC charges @ 1% processing charging 1% and

TULIP merging at 3% interest rate being variable and subject to change as per SBI PLR.

6. It has been stated by the learned senior counsel for the Plaintiff that though the purchase order was for a sum of Rs. 47.4 crores and thereby a bank guarantee of 10% would have been to the extent of Rs. 4.07 crores or so while as the bank guarantee which was furnished by the Plaintiff to the Defendant was for a sum of Rs. 5 crores 80 lacs thereby meaning that the bank guarantee was of higher amount and therefore, the bank guarantee was not according to the purchase order and could not be invoked.

7. This excessive amount of the bank guarantee has been explained by the learned senior counsel, for the Defendant No. 1 as being inclusive of various amounts on account of interest rate @13%, LC charges, processing charges, and the margin money as enunciated in Clause 10 of the terms and conditions of the purchase order.

8. It is the case of the Plaintiff that according to the purchase order, the Defendant had supplied goods hardware/software worth Rs. 37 crores only although it was under an obligation to supply the same to the tune of Rs. 47 crores but the payment was to be made in terms of schedule enunciated in Clause 11 read with Clause 16 of the purchase order which shows that the payment was to be made in a staggered manner and the claim for payment had to accompany number of documents like invoices, delivery challis, goods carrier receipt, excise gate pass, inspection certificate etc. It has been contended by the learned senior counsel for the Plaintiff that despite the Plaintiff having approached, the Defendant on different dates by way of letters, details of which are given in the plaint, requiring the Defendant No. 1 to complete its part of obligation by supplying of balance goods and submit the request for payment along with the requisite documents enunciated in the purchase order, the Defendant No. 1 has neither responded to the letters nor supplied the balance hardware/software to the tune of approximately Rs. 10 crores. It is alleged that abruptly a letter dated 21.2.2011 issued invoking the bank guarantee furnished by the Defendant No. 2 in favour of Defendant No. 1 for and on behalf of the Plaintiff. It is contended by the learned Counsel for the Plaintiff that the entire exercise of the Defendant in invoking the bank guarantee is without any compliance with the terms and conditions of the purchase order which will result in irretrievable injustice to the Plaintiff inasmuch as the Plaintiff would not be able to retrieve the money from the Defendant No. 1. It was contended that the method of payment as well as the modalities of payment have been enunciated in the purchase order itself and if one reads the contents of the bank guarantee then it would be clear that the terms and conditions of the purchase order had to be satisfied by the Defendant No. 1 before the bank guarantee could be invoked. It was also contended by the learned senior counsel for the Plaintiff that his contention is supported by the judgment of our own High Court in Puri International (P) Ltd. Vs. National Building Construction Co. Ltd., where the

invocation of bank guarantee was stayed by this Court on the ground that the guarantee had not been invoked in accordance with the terms and conditions of the bank guarantee, as the beneficiaries of the guarantee in the said case had not shown to the banker that it had suffered any loss or damage as was envisaged under the terms and conditions of the guarantee.

9. The learned senior counsel for the Plaintiff has vehemently contended that though the guarantee is valid till 28.2.2011, he is prepared to extend the validity of the guarantee till such time as the Court may direct and in the meantime, the dispute which has arisen between the Plaintiff and the Defendant No. 1 could be referred for adjudication to the appropriate forum envisaged by the contracting parties.

10. The learned senior counsel for the Respondent who had appeared on behalf of the Defendant No. 1 in response to the service of summons contended that he does not intend to file any reply immediately to the application under order 39 Rules 1 and 2 CPC and would make submissions that the Plaintiff is not entitled to any restraint order against the invocation of the bank guarantee.

11. For this purpose, the learned senior counsel for the Defendant No. 1 has contended that it is established by catena of judgments by now that the bank guarantee is an independent contract between the beneficiary and the bank and even if there is any dispute between the contracting parties, the same cannot be made as the basis of staying the invocation of the bank guarantee. It was also stated by him that the two contingencies which have been visualized by the Apex Court repeatedly in which invocation of the bank guarantee can be stayed are fraud of egregious nature which goes to the root of the execution of the bank guarantee itself or the irretrievable injustice being caused to the Plaintiff. Reliance was placed on Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, and AIR 1997 1644 (SC) .

12. It is further stated that so far as the fraud is concerned, it is not the case of the Plaintiff. The only ground which has been set up and has been urged by the Plaintiff before this Court is that of irretrievable injustice being caused to the Plaintiff in case the bank guarantee is invoked.

13. It was contended by the learned senior counsel for the Defendant No. 1 that the Apex Court has observed that the kind of irretrievable injustice which must occur to a party in case invocation of bank guarantee is not stayed is the fact which is akin to what is visualized in the case Itek Corpn. v. First National Bank of Boston where the Court had restrained a party from invoking a bank guarantee on the ground of irretrievable injustice on account of the fact that the money could not have been retrieved from the bank in a country which was under turmoil, at that point of time.

14. It is contended by the learned senior counsel that therefore, the irretrievable injustice which occur on account of invocation of the bank guarantee must be of such a nature which will make it practically impossible for a party to retrieve the

money from the opposite party with whom it has entered into the contract, while as in the instant case, the Defendant No. 1 is a solvent company running its business and therefore, no irretrievable injustice will be caused to the Plaintiff in case the bank guarantee is permitted to be invoked.

15. It has also been contended by the learned senior counsel for the Defendant No. 1 that the bank guarantee which has been furnished by the Defendant No. 2 for and on behalf of the Plaintiff to the Defendant No. 1 was initially given on 30.8.2008 and was valid up to 30.8.2009 and it has been successfully extended on 26.8.2009, 27.2.2010, 27.8.2010 and 26.11.2010 and is presently valid till 28.2.2011. It is contended that while extending the validity of the bank guarantee, not even on a single occasion earlier, the Plaintiff has raised the question of any dispute regarding non supply of equipment by the Defendant No. 1 to the Plaintiff. Therefore, this plea which is sought to be set up by the Defendant No. 1 now as a ground for seeking restraint order against invocation of the bank guarantee is only an afterthought and cannot be made a basis.

16. I have carefully considered the submissions made by the learned senior counsel for the parties and have gone through the record. There is no dispute regarding the law laid down by the Apex Court in respect of bank guarantee which has sufficiently been crystallized in a number of judgments. One para from the case titled AIR 1997 1644 (SC) would be sufficient to enunciate the scope of the same. It has been observed by the Apex Court as under:

The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to res train the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

"The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damages. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contract is not barred and the cause of action for the same is independent of enforcement of the guarantee.

17. In the light of the aforesaid legal position, so far as the question of fraud is concerned, that is neither pleaded nor urged and is therefore, completely ruled out. The only ground which has been taken by the Plaintiff for staying the invocation of the bank guarantee is irretrievable injustice. The kind of injustice which is being pleaded by the Plaintiff in the instant case is not of the type of irretrievable injustice as is enunciated in ITEK Corporation''s case or somewhat similar to that which would make it impossible for the Plaintiff to retrieve money from the Defendant No. 1, though the Plaintiff may have a genuine dispute with regard to the non supply of equipment for the remaining value of the purchase order which is stated to be to the tune of Rs. 10 crores.

18. The plea of the learned senior counsel for the Plaintiff that before invocation of the bank guarantee, the Defendant No. 1 ought to have complied with terms and conditions of the purchase order as enunciated in Clause 11 and 16 wherein he had to submit the bills along with various documents also does not convince this Court. This is on account of the fact that if the condition enunciated in Clause 10 or 11 are read to be a part of the terms and conditions of the bank guarantee then we will be doing violence not only to the contents of the bank guarantee but also to the law repeatedly laid down by the Apex Court that the bank guarantee is an independent contract between the beneficiaries and the banker and the only thing which is to be seen is that whether the bank guarantee is invoked in terms of the bank guarantee. It is in this background that the contents of the bank guarantee become important. It will be worthwhile to reproduce the contents of the bank guarantee. I have purposely highlighted the portions, which deals with the relevant part as to how the bank guarantee has to be invoked, which reads as under:

Whereas, as per P.O. No. ORG/GGN/OIL/0036 dated 26.6.2008 (PO) placed on TULIP by ORG Information Ltd. having its registered office at 321, Abhishek Complex, Old Padra Raod, Akshar Chowk, Vadodarra and the Beneficiary has to supply materials worth Rs. 47,43,42,080/- to ORG towards execution of Order No. TCIL/15/398/I/05-MM/107P dated 4.12.2007 and TCIL/15/398/I/05-MM/40P dated 2.7.2008 respectively awarded by Telecommunications Consultants India Ltd. Delhi to ORG, against which payment is to be repaid within one year from the date of this bank guarantee as per terms and conditions mentioned in the

P.O."

(A) Under the terms of the said P.O. and in consideration of provision of the materials supplied, ORG is required to provide an irrevocable and unconditional performance bank guarantee for Rs. 5,80,00,000/- (Rupees Five Crore Eighty Lakh only) in favour of the beneficiary for the due fulfillment of the terms and conditions contained in the said P.O."

(B) The guarantor has, at the request of ORG, agreed to issue this irrevocable unconditional guarantee for a amount of Rs. 5,80,00,000/- (Rupees Five Crores Eight Lacs only) in favour of TULIP and guarantor agrees, undertakes and guarantees to TULIP as under:

We, Punjab National Bank undertake to pay TULIP any money so demanded notwithstanding any dispute or disputes raised by ORG in any suit or proceeding pending before any Court or tribunal relating thereto our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be valid discharge of our liability for payment hereunder and ORG shall have no claim against us for making such payments.

19. The portion which has been highlighted clearly lays down that the PNB / Defendant No. 2 undertakes to pay to Defendant No. 1 any money so demanded notwithstanding any dispute or disputes raised by the Plaintiff herein in any suit or other proceedings which may be pending or contemplated with regard to the liability of the Defendant No. 1 so far as the contract is concerned.

20. This is further supported that the fact that it will be complied with by the bank absolutely unequivocal and so far as the Plaintiff is concerned, it will have no claim against the bank also for having made such a board. This clearly shows that despite their being any dispute between the Plaintiff and the Defendant No. 1 whether the real, apprehended or contemplated on the mere invocation of the bank guarantee by the Defendant No. 1, Defendant No. 2/ bank is under an obligation to release the money to the Defendant No. 1.

21. It is not in dispute that on 21.2.2011, the Defendant No. 1 has invoked guarantee furnished by the Defendant No. 2 for and on behalf of the Plaintiff to the Defendant No. 1 which was valid till 28.2.2011 and having invoked the bank guarantee, the Defendant No. 2/bank is under an obligation to pay the amount of guarantee to the Defendant No. 1 and there cannot be any restraint order as there is no irretrievable injustice being caused to the Plaintiff.

22. The judgment which has been relied upon by the learned senior counsel for the Plaintiff in order to support his point that invocation of the bank guarantee be stayed is distinguishable from the facts of the present case. In Puri''s case the language of the bank guarantee was different then the one in the present case. In the said case, it was specially laid down that the amount which was given to the person on whose behalf the bank guarantee was furnished was by way of mobilization advance and it was laid down in the bank guarantee that the liability

of the banker is limited to the extent of mobilization advanced and invocation must indicate that the beneficiary has suffered loss or damage on account of non performance of the work by the parties on whose behalf of the bank guarantee had been furnished. While as the beneficiary in the said case had in the invocation letter not mentioned that it had suffered any loss on account of non performance of the obligation by the party to whom the mobilization advance had been given but also on the contrary a batch of 15 bank guarantee were invoked by one letter. It was in this factual matrix that the learned Single Judge of this Court had stayed the invocation of the bank guarantee by observing that the invocation in the said case was not inconformity with the terms and conditions of the bank guarantee while as in the present case, it cannot be said that the invocation in the present case is not in conformity with the terms and conditions of the bank guarantee and accordingly, no parallel can be drawn between the two cases.

23. For the reasons mentioned above, I am of the considered opinion that this is not a case where the Plaintiff has been able to make out a prima facie case that irretrievable injustice will be caused on account of invocation of the bank guarantee much less the other two conditions are satisfied namely the balance of convenience or the irreparable loss and accordingly, the application of the Plaintiff under Order 39 Rules 1 and 2 CPC deserves to be dismissed.

24. The Defendants are directed to file their written statement and reply to the remaining applications within 30 days with an advance copy to the Plaintiff who may file rejoinder/replication thereto within two weeks, thereafter.

25. List before the Joint Registrar on 28.4.2011.

