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(2020) 02 DEL CK 0049

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 20 Of 2020

Power Max (India) Pvt. Ltd — APPELLANT

Vs

Jindal Urban Waste Management (Guntur) Ltd & Anr — RESPONDENT

Date of Decision : 05-02-2020

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 9
Indian Contract Act, 1872 — Section 73, 124

Citation : (2020) 02 DEL CK 0049

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Manish Kumar Srivastava, Shivangi Krishna, Rijul Taneja, Nilava Banduyo Pandey, Rajiv R Mishra, Dr.Kumar Jwala

Final Decision : Dismissed

Judgement

Rekha Palli, J

1. The present petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeks interim directions restraining the respondent no. 1 from

invoking or encashing the bank guarantee dated 25.07.2018 for an amount of Rs. 57,85,089/- and a subsequent bank guarantee dated 12.12.2018 for a

sum of Rs. 8,65,000/-.

2. The petitioner is a company having its registered office at Kolkata and claims to be a leading multifaceted engineering entity in the country. The

respondent no. 1 is a company providing Municipal Solid Waste Management Solutions covering the entire cycle of waste collection, disposal,

treatment and generation of energy from waste. The respondent no. 2 is the bank through which the aforesaid two bank guarantees have been issued,

in respect whereof the present petition has been filed.

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3. On 18.07.2018, the respondent no. 1 placed a work order (Work Order I) on the petitioner for erection, commissioning and performance guarantee

test (PGT) of two boilers at their Waste to Energy Project (WTE) in Guntur, Andhra Pradesh. The value of Work Order I was initially assessed at

Rs. 6,69,34,347.78/-, which was subsequently enhanced by a sum of Rs. 35,00,000/-. The respondent no. 1 thereafter placed a second work order

dated 27.11.2018 (Work Order II) in favour of the petitioner for MSW and TG Building Structural Fabrication and Erection Works at the same

project, for a total value of Rs. 86,55,000/-. As per the terms of the aforesaid two work orders, the petitioner was entitled to receive 10% of the

advance payment against submission of the advanced bank guarantees by the petitioner. Each of these advanced bank guarantees was to have a

validity of one month from the date of completion of the work orders. Pursuant thereto, the petitioner submitted two advance bank guarantees to the

respondent no.1; Advance Bank Guarantee bearing no. 0150118IFG000336 dated 25.07.2018 for an amount of Rs 57,85,089/- expiring on 31.01.2020

and Advance Bank Guarantee bearing no. 0150118IFG008192 dated 12.12.2018 for an amount of Rs 8,65,500/- expiring on 11.03.2020 (also referred

to as â??subject Bank Guaranteesâ??).

4. The petitioner has contended that pursuant to the receipt of the work orders and the advance payment, it mobilised its manpower and machinery at

the job site and began diligently carrying out the work, which it continued to do. By contrast, the respondent no. 1 defaulted in performing its

obligations under the work orders right from the very beginning. The petitioner has also claimed that the respondent no. 1 failed to provide the civil

front structural material, mechanical equipment as also designs in accordance with the time schedule prescribed under the work orders. As a result,

the time frame for carrying out the works kept being extended by the respondent no.1 through various amendments of its own accord, without

imposition of any liquidated damages, which has been admitted by the respondent no. 1, and clearly shows no default on the petitionerâ??s part. The

petitioner has finally claimed that while it was in the process of carrying out the assigned work, the respondent no. 1 illegally sought to invoke the two

bank guarantees vide its letter dated 20.01.2020 by alleging failure on the petitioner's part to adhere to the terms of the work orders.

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5. Aggrieved by the invocation of these bank guarantees, the petitioner approached this Court by way of O.M.P(I) (COMM.) 16/2020, wherein this

court, on 23.01.2020, directed the respondent no. 2 to maintain status quo with respect to the bank guarantees. The next day, the respondent no. 1

informed this Court that the letter dated 20.01.2020 invoking the bank guarantees had been withdrawn. However, it transpires that on 23.01.2020

itself, the respondent no. 1 had terminated the work orders issued in favour of the petitioner with immediate effect, which termination was carried out

in accordance with the terms and conditions of the work orders. The terms of the termination were subsequently modified by the respondent no.1 to

the extent that the same would be in effect after 15 days from the date of the order of termination. It appears that shortly after the issuance of the

termination order, the respondent no. 1 once again sought to invoke the two bank guarantees vide its letters dated 27.01.2020.

6. It is in these circumstances that the present petition has been filed.

7. Learned counsel for the petitioner while assailing the invocation letters and advancing submissions for grant of interim relief in its favour has raised

primarily two contentions. Firstly, he submits that the invocation of the bank guarantees by the respondent no.1 is beyond the terms thereof as these

guarantees, notwithstanding the fact that they are termed as such, are actually in the nature of an indemnity letter. He submits that the bank

guarantees clearly employ the word 'indemnify' to specify their use or purpose in the event of a loss and, therefore, they have to be regarded as letters

of indemnity within the meaning of Section 124 of the Indian Contract Act, 1872, which indemnity could be invoked only once the losses had been

quantified under Section 73 of the said Act. He submits that under these guarantees, the respondent Bank is liable to indemnify the respondent no.1

only to the extent of the actual loss suffered by it on account of any breach of contract by the petitioner and, therefore, the respondent no. 1 could not

invoke these bank guarantees unless the losses it claims to have suffered were conclusively determined by a competent authority in accordance with

law. He also submits that merely because the bank guarantees contain the words 'unconditional' does not mean that the nature of the guarantees itself

is unequivocal or unconditional as their invocation was predicated on the quantification of loss suffered by the respondent no.1 by the alleged breach of

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the work orders by the petitioner, which quantification the said respondent never produced.

8. Lastly, he submits that since the petitioner had already completed a major portion of the work required to be provided by him under the work orders

and the remaining work is likely to be completed within the extended period of the time, permitting the respondent no.1 to encash the bank guarantees

and withdraw from the work orders would cause great prejudice to the petitioner. To make matters worse, the respondent no.1 had, without any

reason, withheld its due payments despite the petitioner having submitted running account bills in accordance with the terms of the principal contract,

i.e., the Work Orders I and II, and has instead chosen to invoke the bank guarantees, which action was wholly fraudulent as it is the said respondent

itself who was solely at fault for the dispute between the parties. He, therefore, prays that the reliefs sought under the present petition be granted and

that the respondents be restrained from enforcing the subject bank guarantees.

9. Per contra, learned counsel for the respondent no. 1 while opposing the petition reiterates the settled legal position relating to bank guarantees to

submit that Courts should exercise caution while restraining any party from rightfully invoking bank guarantees in their favour, unless a case for

egregious fraud or irretrievable injury is made out by the party contesting the invocation. By placing reliance on the decisions of the Supreme Court in

Hindustan Construction Co. Vs. State of Bihar & Ors [(1999) 8 SCC 436]G, ujarat Maritime Board vs L&T Infrastructure Development Projects

Limited & Another[(2016) 10 SCC 46] and Standard Chartered Bank Vs Heavy Engineering Corporation Ltd. & Another [(2019) SCC Online SC

1638], he submits that a bank guarantee is an independent contract between the respondent nos. 1 & 2 and the petitioner cannot be permitted to

challenge the same or stall the encashment of the bank guarantees, unless he has successfully established fraud on the part of the respondent no.1.

10. He further submits that in the present case, the invocation letters clearly state that the respondent no. 1 had suffered losses due to the non-

fulfilment of obligations by the petitioner, including non-achievement of any target agreed upon by the parties, non-payment of dues to sub-vendors,

non-fulfilment of statutory requirements including payment of PF dues, ESI, GST, etc. He contends that there was absolutely no requirement to

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mention the quantum of losses in the invocation letter as the liability of the bank is only to the extent of the amount mentioned in the bank guarantee.

He, therefore, submits that the invocation of the bank guarantees has been duly carried out in terms of thereof and there is no reason for this court to

restrain the respondent no.1 from encashing the same. In these circumstances, he prays that the present petition be dismissed.

11. I have heard learned counsel for the parties and with their assistance, perused the record.

12. Before dealing with the rival contentions raised in the present petition, it would be apposite to refer to the prevailing position of law on the aspect

of invocation of bank guarantees. The Supreme Court, while recently dealing with this issue in Standard Chartered Bank Vs. Heavy Engineering

Corporation Ltd. & Anr. 2019 SCCOnline 1638 had once again summarised the legal position qua the scope of judicial interference in enforcement of

bank guarantees by holding as under:

19. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three-Judge

Bench of this Court in Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. held thus:-

â??4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not

qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee

was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable

issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at

whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken

in furtherance thereof. The bank conditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the

guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce

and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

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5.....The Court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where

fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the

parties.â??

13. Essentially the decision in Standard Chartered (Supra) affirms the position that a bank guarantee has a separate and independent existence as a

contract, as opposed to the principal contract which crystallises the relationship between the parties. In effect this means that while the duties,

obligations and considerations payable or receivable by both the parties are contained in the primary or principal contract between them, any disputes

arising therefrom cannot bear any impact on the encashment of the bank guarantee, which has its own independent and absolute existence as a

contract. When the bank guarantee is unconditional and unequivocal in nature, then its invocation cannot be prevented on the ground of any claims

arising out of the principal agreement between the applicant for the bank guarantee and the beneficiary thereof. In such disputes, the role of the bank

issuing the guarantee, is essentially to honour the payment to be made to the beneficiary without exception. While permitting the encashment of such

bank guarantee, neither the bank nor the Courts can embark on the task of determining whether any breach of the principal contract, as alleged by the

beneficiary, has actually taken place or not. To put it simply, payment must and ought to be made to the beneficiary of an unconditional bank

guarantee, on its invocation, provided such invocation is made in accordance with the terms of the guarantee itself. The only exceptions to this rule are

fraud and irretrievable injury in the event of encashment of the bank guarantees, which position has been summarised by the Supreme Court in

paragraph 14 of its decision in Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110

â??From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a

bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the

encashment of a bank guarantee or a letter of credit:

xxx

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(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary

seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of

the parties concerned.â??

14. In the light of the settled legal position, it would be appropriate to now examine the two bank guarantees forming the subject matter of the present

dispute. Since both the bank guarantees are similar in substance and spirit, for the sake of convenience only the second bank guarantee dated

12.12.2018 has been reproduced for the purpose of this discussion:

Bank Guarantee No. 01501181F6,008192 dated 12.12.2018

1. In consideration of your Jindal Urban Waste Management (Guntur) Limited having its Registered Office at A-1 UPSIDC Industrial Area

Kosi Kalan, Mathura (UP), India (hereafter called â??The Purchaserâ? which expression shall unless repugnant to the subject or context

include its administrators, successors) having entered into a Contract vide Ref. No.4500018309 dt.27.11.2018 with M/s Power Max (India)

Pvt. Ltd. having its registered office at â??Stephen Courtâ?, 4th & 5th Floor, 18A, Park Street, Kolkata-700 071 (hereinafter referred to as

â??The Supplierâ?, which expression shall unless repugnant to the administrators, executors and permitted assigns) for the MSW & TG

building Structural Fabrication & Election Works at JUWMGL, Guntur (which contract is hereinafter referred to as â??the Contractâ?)

and the supplier having agreed to provide a Guarantee in terms of the Contract in the Form of Bank Guarantee, we, Allahabad Bank,

Industrial Finance Branch, 17, R.N. Mukherjee Road, Kolkata-700 001 (hereinafter referred to as â??The Bankâ? include its successors,

administrators, executors and assigns) do hereby unconditionally and irrevocably Guarantee and undertake to indemnify and keep

indemnified the Purchaser to the extent of Rs.8,65,500.00 (Rupees Eight Lac Sixty Five Thousand Five Hundred only) at any time against

any loss, damage, costs, charges caused to â??The Purchaserâ? (due to non-fulfilment of obligations by the Seller) on its mere written

demand and without any demur reservations, recourse, contest or protest and

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without any reference to the â??the Supplierâ? to the extent

aforesaid.

2. We â??the said Bankâ? further agree that â??the Purchaserâ? shall be the sole judge of and as to whether â??the said supplierâ? has

committed any breach or breaches of any of the terms and conditions of the Contract.

xxx

15. Reference may now also be made to the invocation letter dated 27.01.2020 issued by the respondent in respect of the first Bank Guarantee which

reads as under:

xxx

Dear Sir,

We wish to state that the captioned Bank Guarantee of Rs.5,785,089/- was issued by you on behalf of Power (Max) India Pvt. Ltd. in favour

of our Company on 25th July, 2018 and valid till 31st January, 2020 with claim period 31st January, 2021.

Kindly note that Power (Max) India Pvt. Ltd. has failed to perform its obligation as per the agreement entered with us which has caused

huge loss, additional costs and charge to us. We, therefore, request you to kindly treat this letter as a written notice of demand or invocation

of the above Bank Guarantee in terms thereof and call upon you to encash the same for Rs.5,785,089/- (Rupees Fifty Seven lakh Eighty

Five Thousand Eighty Nine Only) in favour of our Company namely, Jindal Urban Waste Management (Guntur) Ltd., and remit the fund

immediately to Indusind Bank Limited as per below bank details:

xxx

16. A perusal of the terms of the bank guarantee shows that firstly, the bank guarantee is unconditional and irrevocable; secondly, the respondent no.

2 undertook to release the bank guarantee in favour of the respondent no.1, without any demur, provided a written invocation was made to that effect

by the respondent no.1, and finally, the guarantee contains an explicit stipulation that the sole judge of any breach alleged to be arising out of the

principal contract, i.e., the two work orders, shall be the respondent no.1. Thus, the terms of the subject bank guarantees clearly indicate that, for the

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purpose of their invocation, 'breach' of the principal contract shall be determined solely by the respondent no.1 and a perusal of the letter of invocation

reveals that this requirement was met when the respondent no.1 clearly stated that it had determined the petitioner to be in breach of the terms of the

principal contract thereby causing it huge losses, additional costs and charges.

17. The petitionerâ??s primary challenge to the subject bank guarantees is on the ground that these guarantees, contrary to the submissions of the

respondents, are not unconditional but are, infact, qualified and could be invoked only in the event that loss to the respondent no.1 on account of any

breach on the part of the petitioner, was established. I am unable to agree with this contention as I find that the language of the bank guarantees is

plain and simple and incorporates a single qualification for invocation thereof - the assessment of breach of the principal contract by the respondent

no.1, there is no further condition present in the bank guarantee.

18. The petitioner has also pleaded that the bank guarantees empower the respondent no.1 to determine 'breach', not the 'loss' occasioned to the said

respondent which implies that no payment can be released to the respondent no.1 until the loss is determined and quantified by a competent authority.

I find that even this contention cannot be accepted as the same would amount to incorporating a condition in the bank guarantee which does not exist

in it. The term 'breach' employed in Paragraph 2 of these bank guarantees cannot be interpreted to mean that the alleged breach ought to first be

established by an arbitrator who will then proceed to quantify the losses arising from the said breach, if the same stands proved. Lending this

interpretation to the bank guarantees would be akin to modifying the terms thereof and adding words to the original contract of the bank guarantee. If

the parties had envisaged the invocation of these bank guarantees to be subject to the determination of loss, a stipulation to that effect would have

been incorporated into the guarantees. Once the language of the bank guarantees is plain and simple, and specifically stipulates that the respondent

no.1 would be the sole judge of the breach it claims to have suffered, there is no room to interpret it any further or add an additional requirement of

having such breach determined by a competent authority, especially when the intent of this stipulation is to bestow upon the respondent no.1 the sole

discretion to claim that the breach has in fact occurred, for the purpose of

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invoking the bank guarantees. I have no hesitation in holding that with the

exception of the subjective satisfaction of the respondent no.1 regarding the breach of the work orders by the petitioner, the subject bank guarantees

are unconditional and irrevocable.

19. It has further been contended that the bank guarantees are actually letters of indemnity on account of the fact that they employ the term

'indemnify' and, therefore, these guarantees do not provide for the respondent Bank to 'pay' the respondent no.1, but instead seeks to 'indemnify' it. I

am unable to agree with this contention. It is the settled legal position that the mere use of one word cannot be determinative, in any manner, about the

nature of the document. In the present case I find that the bank guarantee was made with the intent of being unconditional and unequivocal and

clearly envisaged the encashment thereof by the respondent no. 2 on its invocation by the respondent no.1.

20. The Courts have repeatedly asserted the importance of strictly interpreting the terms of a bank guarantee and of being circumspect while

restraining their realisation, for the purpose of ensuring minimal judicial interference in the free flow of commercial transactions. Suffice to say that

constant and unfettered judicial interference in the implementation and enforcement of bank guarantees can only lead to deterioration of public trust

and faith in instruments of this nature and will halt the healthy economic functioning of the nation. In the present case, the bank guarantees, being

unconditional and irrevocable, had been duly invoked by the respondent no.1 by assessing the petitioner to be in breach of the principal contract; since

one of the two fundamental ingredients for making payments under the bank guarantee had been met, the only thing which remained to be done was

for the respondent no.2 to comply with the letter of invocation and release the amount in favour of the respondent no.1 without any demur or protest.

21. The exceptions to this rule are either fraud attributable to the party invoking the bank guarantee or irretrievable harm or injustice to any of the

parties. In the present case, the petitioner has neither been able to substantiate any fraud on the part of the respondents nor has it been able to

establish that encashment of the guarantees would cause any irretrievable harm or injustice to it. The pleas taken by the petitioner that the respondent

no.1 owes huge amounts to it and has illegally now terminated the contract are

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issues which stem entirely out of its grievances against the respondent

no.1â??s conduct under the principal contract, i.e., the two work orders executed in its favour by the respondent no.1. These issues are beyond the

scope of the present petition and may be raised by the petitioner in arbitration proceedings which, if so advised, it may choose to initiate.

22. In these circumstances, I find no merit in the present petition which is dismissed with no order as to costs.

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