(2013) 03 DEL CK 0282

In the Delhi High Court

Case No : O.M.P. 29 of 2013

R.R. Foundation Engineers (Pvt.) Ltd. APPELLANT

Vs

New Delhi Municipal Corporation RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:

Citation : (2013) 3 AD 633

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Anusuya Salwan with Mr. Vikas Sood, for the Appellant;

Judgement

Manmohan Singh, J.—Despite of service, no one appears on behalf of respondent. Learned counsel for the petitioner has made her submission on merit. The petitioner sought the relief in the petition that the respondent be restrained from invoking the performance bank guarantee No. 0034309BG0008335 dated 12th June, 2009 amounting to Rs. 38,78,361/- and the original bank guarantee be returned to the petitioner.

2. The respondent, NDMC invited tenders for the work of "Preservation/ Restoration of building in NDMC Area, Gole Market". The petitioner tendered for the said work and being the lowest, the work was awarded in his favour vide Agreement No. EE(Spl-Proj.)/5/2009-2010 for an amount of Rs. 7,75,67,214/-. The stipulated date of start of work was 1st July, 2009 and the work was to be completed on 8th August, 2010 and the time allowed to complete the work was 58 weeks.

3. The petitioner furnished the performance guarantee for an amount of Rs. 38,78,361/- (mentioned at page 9 of the documents). Under Clause-8 of the guarantee, it was agreed as under:

(i) The liability under this guarantee is restricted to Rs. 38,78,361/- (Rupees Thirty Eight Lakhs Seventy Eight Thousand Three Hundred and Sixty One Only).

(ii) This guarantee shall be valid till 4th September, 2010 unless extended on demand by the NDMC and the contractor simultaneously.

(iii) Unless a claim in writing is lodged with us within six months of the date of expiry i.e. 4th March, 2011 or the extended date of expiry of this guarantee all our liabilities under this guarantee shall stand discharged.

4. The case of the petitioner is that the petitioner made all arrangements for labour, staff, machinery etc. for completing the work well within the stipulated time. Four blocks had to be executed as per the schedule of the agreement repair work had to be executed in block numbers 1 and 2. Work at Block No. 3 comprising of seven shops in Gole Market had to be relocated. And in Block No. 4 in the Main Gole Market, the outside facade had to be kept intact and three storeyed structure was to be built after demolishing the inner part. It is alleged that the petitioner made all arrangements to complete the work at site but the petitioner found that the fraud had been committed upon him as the site was not available due to litigation between respondent and the shopkeepers. Sites for blocks 3 and 4 where the work had to be executed were not available.

5. The Notice Inviting Tender (page 9 of the documents filed on 23rd January, 2003) under Clause-4 clearly stated that the site for the work is available as specified below i.e. "Preservation/Restoration of building in NDMC Area, Gole Market."

SH: (a) Implementation of signage and Street Furniture.

(b) Facade restoration of Gole Market and surrounding building.

(c) Restoration with rehabilitation of structure services interior.

6. Admittedly as per the scheduled agreement repair work had to be executed in Block Nos. 1 and 2, the repair work was duly executed and a bill for an amount of 70 lakhs was submitted against which a payment of Rs. 42 lakhs was paid. In Block 3, seven shops in Gole Market had to be relocated. The respondent had passed a resolution in August, 2009 to relocate the said block and dismantle the said block but neither the shops were relocated nor the shops were dismantled and the site was not handed over to the petitioner. In Block-4 30 units were vacated and out of the said 30 units 20 had filed writ petitions before this Court which were pending since 2009 and finally a judgment was pronounced in Writ Petition No. 12945/2009 tiled "Ajay Kumar Vs. NDMC on 5th March, 2012. By the said judgment, the Court was pleased to disposed off the writ petition with a liberty to the petitioner to seek relocation with the NDMC within a period of two weeks and if it is so done, then it is expected that the respondent, NDMC would take decision thereon within a period of four weeks. In the meantime, the execution of the vacation order be kept in abeyance by respondent, NDMC till the respondent NDMC received applications from the petitioner and dealt with them.

7. Till date the parties have not been evicted and site has not been handed over to the petitioner. The petitioner wrote numerous letters to the respondent calling

upon them to take decision as the petitioner was suffering irreparable loss but no action was taken. The stipulated date of completion was over on 5th August, 2010, the respondent suo-moto extended the time on 9th August, 2010 w.e.f. 9th August, 2010 to 8th November, 2010. Thereafter, again vide letter dated 4th November, 2010 the respondent personally extended the time for completion of the work up to 8th February, 2011.

8. The petitioner invoked the Arbitration Clause calling upon the respondent to appoint an Arbitrator vide letter dated 16th April, 2011. On 25th November, 2011 the respondent appointed Mr. A.K. Joshi Additional Chief Engineer (Elect.) as the Sole Arbitrator.

9. The respondent on 16th February, 2012 vide their internal note had admitted that the work could not be taken up due to, non-availability of site and a decision for dosing the contract is pending before the competent authority.

10. On 4th May, 2012 the petitioner had a meeting in the office of the Chairperson of the NDMC in the presence of Secretary for release of his performance guarantee and earnest money. In view of the pending court cases the petitioner was assured that the bank guarantee would be released. The petitioner vide letter dated 17th May, 2012 confirmed the meeting.

11. On 3rd January, 2013 the petitioner received a letter from the respondent stating therein that the performance guarantee was going to expire on 9th January, 2013 and since the contractual liability was still not fulfilled, the performance guarantee could not be renewed.

12. The respondent further directed that the petitioner had to enter into a fresh bank guarantee bound w.e.f. 9th January, 2013 to 8th January, 2014 otherwise the respondent NDMC would get the amount against the bank guarantee discharged.

13. After hearing considered the entire matter on this aspect, this Court is at the view that the action of the respondent encashing the bank guarantee would caused irreparable injuries to the petitioner on the reason that the notice inviting tender clearly stipulated that the site was available. Nowhere did the respondent intimate the petitioner that the site was under litigation since the year 2009 and the shopkeepers at Gole Market had filed cases against the eviction order. The petitioner became aware of the litigation at a much later stage in the year 2010 just prior to the completion of the work.

14. The respondent themselves in the meeting held in the office of the Chairperson confirmed that the bank guarantee would be returned as the site was not being made available to the petitioner. This was confirmed by the letter dated 12th August, 2010. Letter dated 17th May, 2012 written by the petitioner confirming the meeting held in the office of the Chairperson, NDMC.

15. Under Clause-8 dearly stipulated that the bank guarantee could be extended only when demanded by the respondent and the contractor simultaneously. In

the present case the contractor i.e. the petitioner never requested for bank guarantee to be extended. Under Clause-8 (3) a claim had to be lodged within six months of the date of expiry of the bank guarantee or the date of expiry of this guarantee. The extended date of the expiry of the guarantee was 9th January, 2013. No claim was lodged six months prior to 9th January, 2013 but a letter was written only on 3rd January, 2013 to the petitioner requesting him to issue a fresh bank guarantee. The invocation of the bank guarantee was not in terms of the Clause-8 of the guarantee bond. In view of the above, the prayer made in the petition is allowed, the respondent is restrained from encashing the bank guarantee. The same is directed to be refunded to the petitioner within four weeks from today. The petition is disposed of. Dasti.