
(1998) 10 DEL CK 0037

In the Delhi High Court

Case No : OMP No. 70/98

Saw Pipes Limited

APPELLANT

Vs

Gas Authority of India Ltd. and Another

RESPONDENT

Date of Decision : 16-10-1998

Acts Referred:

Citation : (1999) 49 DRJ 310

Hon'ble Judges : M.S.A. Siddiqui, J

Bench : Single Bench

Advocate : Mr. A.K. Verma, for the Appellant; Dr. A.M. Singhvi and Mr. Manish Kumar, for the Respondent

Judgement

M.S.A. Siddiqui, J.—The petitioner has filed this application u/s 9 of the Arbitration and Conciliation Act seeking to restrain the 1st respondent from encasing the bank guarantee dated 17th February, 1998 in the sum of US \$ 7784268.41 issued on behalf of the petitioner by ANZ Grindlays Bank Ltd. in favor of the 1st respondent.

2. The facts which are relevant for disposal of the present application are these: The petitioner had entered into contract on 31st October, 1994 pursuant to a tender submitted by it to supply polyethylene (PE) coated line pipes of 36" diameter for Gas Rehabilitation and Expansion Project of the 1st respondent for a total value of US \$ 155,685,368.20. The Purchase Order No. GAIL/ND/2986/GREP/LINE PIPE/94-95/C-53, dated 31st October, 1994 contains the terms and conditions of supply of line pipes and all terms and conditions mentioned in N.I.T. No. 1CB/2986/90.00-M.R.-0150/052 were made applicable except to the extent modified in the Purchase Order. The contract was to be completed by October 1995. In accordance with the terms of the contract, ANZ Grindlays Bank Ltd. gave unconditional performance-cum-equipment guarantee in favor of the 1st respondent for US \$ 7784268.41. The bank has also undertaken to make unconditional payment on demand, without delay, demur, protest, reservation and without reference to any dispute or difference between the purchaser and

seller. The bank guarantee was renewed from time to time and lastly on 17th February, 1998. The contract could not be completed within the time stipulated therein. The dispute arose between the petitioner and 1st respondent regarding performance of the contract resulting in a reference to arbitration. The reference is still pending. According to the petitioner, it had approached the International Chamber of Commerce for adjudication of dispute by the Arbitral Tribunal. Incensed by the said reference to arbitration, 1st respondent wrote the letter dated 11th April, 1998 to the Bank seeking encashment of the bank guarantee dated 17th February, 1998. It is alleged that the invocation of the bank guarantee is vitiated by fraud and further there would be irretrievable injustice to the petitioner if the bank guarantee is allowed to be encashed.

3. The 1st respondent denied the petitioner's case and alleged that the contract in question was not completed within the time schedule and performance of the contract was not up to the mark. It is alleged that the petitioner has failed to make out a case of established fraud or irretrievable injustice for grant of injunction sought in this case. It is also alleged that it is not open to the petitioner to drag the Court into the merits of the disputes arising from the underlying contract which is to be decided in other appropriate proceeding.

4. Admittedly the bank guarantee given by the bank on behalf of the petitioner is as under:

"In consideration of the GAS AUTHORITY OF INDIA LIMITED, New Delhi (India) (hereinafter referred to as the owner/PURCHASER which expression shall unless repugnant to the context or meaning thereof include. Successors, administrators, and assigns) having awarded to M/s. SAW Pipes Ltd., having Principal Office at 28, Najafgarh Road, New Delhi - 1100015 (hereinafter referred to as the "SELLER" which expression shall unless repugnant to the context or meaning thereof include their respective successors, administrators, executors and assigns) for the supply by issue of owner/PURCHASER'S Purchase. Order No. GAIL/ND/EP/GREP/LINE PIPE/94-95/C-53 dated 31.10.94 and the same having been accepted by SELLER resulting into CONTRACT for supplies of materials/equipments as above referred Purchase Order having a total value of US \$ 155,685,368.20. (US Dollars one hundred fifty five million six hundred eighty five thousand three hundred sixty eighty and twenty cents only) for the complete supply of materials/equipments and the SELLER having agreed to provide a Contract Performance and Warranty Guarantee for faithful performance of the aforementioned contract and warranty quality of the 3 LAYER POLYETHYLENE COATED PIPES TO owner/PURCHASER.

We ANZ GRINDLAYS BANK incorporated in the State of Victoria Australia having its Registered Office at level 2, 100 Queen Street Melbourne Victoria 3000, Australia having their Head/Registered/Central Office at 90 M.G. Road and Fort Mumbai 400001 and having a Branch Office at H-BLOCK, CONNAUGHT CIRCUS NEW DELHI-110 001 (hereinafter referred to as the Bank which expression shall unless repugnant to the context or meaning thereof include successors

administrators executors and assigns do hereby guarantee to undertake to pay the owner/PURCHASER on demand any and all moneys payable by the seller to the extent of 5% (five per cent) of the Contract Price i.e. US \$ 7,784,268.41 (US DOLLARS SEVEN MILLION SEVEN EIGHTY FOUR THOUSAND TWO HUNDRED SIXTY EIGHT AND FORTY ONE CENTS ONLY) as aforesaid at any time up to 30.4.98 without delay demar protest, the SELLER. Any such demand made by owner/PURCHASER on the Bank shall be conclusive and binding notwithstanding any dispute or difference between owner/PURCHASER and SELLER or any dispute pending before any Court Tribunal Arbitrator or any other authority.

The Bank undertakes not to revoke this guarantee during its currency without previous consent of owner/PURCHASER and further agrees that the guarantee herein contained shall continue to be enforceable till the owner/PURCHASER discharges this guarantee. owner/PURCHASER shall have the fullest liberty without affecting in any way the liability of the BANK under this guarantee from time to time to extend the time for performance by SELLER of the aforementioned CONTRACT. owner/PURCHASER shall have the fullest liberty without affecting this guarantee to postpone from time to time the exercise of any powers vested in them or of any right which they might have against SELLER and to exercise the same at any time in any manner and either to enforce to forebear to enforce any covenants contained or implied in the aforementioned CONTRACT between owner/PURCHASER and SELLER or any other course of or remedy or security available to owner/PURCHASER. The Bank shall not be released of its obligations under these presents by any exercise by owner/PURCHASER of its liability with reference to the matters aforesaid or any of them or by reason or any other acts of commission and commission on the part of owner/PURCHASER or any other indulgence shown by owner/PURCHASER or by any other matter or thing whatsoever which under law would but for this provision having the effect of relieving the Bank.

That Bank also agrees that owner/PURCHASER at its option shall be entitled to enforce this Guarantee against the Bank as a Principal Debtor in the first instance without proceeding against SELLER and notwithstanding any security other guarantee that owner/PURCHASER may have in relation to the SELLER liabilities. Should there be any delay in releasing the amount demanded under this guarantee the Bank under takes to pay interest @ 24% P.A.

This bank guarantee is issued in lieu of Bank Guarantee No. 243/94 dated 1.11.94 issued by Canara Bank, Janpath, New Delhi for US \$ 7784268.41.

Notwithstanding anything contained herein before our liability under this Guarantee is restricted to US \$ 7,784,268.41 (US Dollar Seven Million Seven Hundred Eighty Four Thousand Two Hundred Sixty Eight and Forty one Cents only) and the same shall be in force till 30.4.98. Unless a claim in writing is made upon us to enforce the guarantee on or before/within NIL months from the above date all your rights under the above guarantee shall be forfeited and we shall be relieved and discharged from all liabilities there under.

5. The principles to be borne in mind by the Court in the matter of grant of injunction against enforcement of Bank guarantee/irrevocable letter of credit have been laid down in the decisions of the Supreme Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, ; National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, AIR 1997 1644 (SC) Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, and may be summarised as under:-

(i) A bank guarantee is an independent and distinct contract between the beneficiary and the bank and the rights and obligations therein are to be determined on its own terms;

(ii) A bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The bank is not concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee;

(iii) Commitments of the banks must be honoured free from interference by the Courts. Otherwise trust in commerce internal and international would be irreparably damaged;

(iv) An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of established fraud of an egregious nature as to vitiate the entire underlying contract; or in case of special equities in the form of preventing irretrievable injustice between the parties as noticed in the case of Itek Corporation Vs. The First National Bank of Boston etc. (566 Fed. Supp. 1210). Allegations of irretrievable injustice must be genuine and immediate as well as irreversible.

6. Bearing in mind the said principles, I will now proceed to consider the question whether the petitioner has made out any case of irretrievable viable injustice by proof of special equity or fraud so as to invoke the jurisdiction of this Court by way of injunction to restrain the first respondent from encasing the bank guarantee. Learned counsel for the petitioner contended that the bank guarantee has been fraudulently and dishonestly invoked by the 1st respondent. In order to appreciate the said contention, it would be useful to reproduce para No. 17 and ground (c) of the petition containing the plea of the alleged fraud.

"17. That it is pertinent to state here that although at the time of getting the latest bank guarantee issued, the petitioner was aware of the fact that even according to the respondent No. 1, the price Reduction Clause had been applied

by the respondent No. 1 as per the reply filed before the Arbitral Tribunal, yet the petitioner did not object to issuing the bank guarantee to avoid any further complication and litigation in the matter, since the matter was pending before the Arbitral Tribunal. The contents of the letter issued by the respondent No. 1 seeking extension of the bank guarantee did not in any manner show any intention of the respondent No. 1 to encash the same in a fraudulent and mala fide manner as is being done by the respondent No. 1. Keeping in mind the status of respondent No. 1 being a Public Sector Giant of the Government of India, the petitioner, had no doubt on the fairness and integrity of the respondent No. 1. Even in the reply filed by respondent No. 1 before the Arbitral Tribunal, it has been categorically stated that out of the options available to the respondent No. 1, instead of enforcing the performance guarantee, they had made necessary deductions from the bills of the petitioner."

Ground C:- "Because the respondent No. 1 on its own has admitted to have chosen to exercise. The opinion of making recoveries by deductions from the bills and not by encashment of bank guarantee. Now after the invitation of the arbitration proceedings, when the matter is subjudice, the act of the respondent No. 1, seeking encashment of the bank guarantee is fitted to deceive the petitioner as well as the respondent No. 2. This act also constitutes a clear fraud committed by the respondent No. 1."

7. Needless to repeat that in order to restrain the operation of either irrevocable bank guarantee or irrevocable letter of credit, the petitioner must establish a strong prima facie case of fraud of an egregious nature committed in the execution of the contract. It has to be borne in mind that the plea of fraud must be established beyond reasonable doubt, and a finding of fraud cannot be based on suspicion and conjecture. It is significant that the petition contains no facts or particulars in support of the allegation of fraud. It was nowhere pleaded that the petitioner was fraudulently led into entering of contract with the 1st respondent. The main contract, pursuant to which the bank guarantee was issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was because any fraud had been played by the 1st respondent. When the learned counsel for the 1st respondent raised an objection that the bald assertion of fraud has been made with a view to obtain an order of injunction against encashment of the bank guarantee, the petitioner filed an application (IA No. 8246/98) under Order 6 Rule 17 CPC seeking/ leave to amend the petition by adding following paragraphs:-

17-A. That the respondent No. 1 demanded extension of the bank guarantee issued by Canara Bank on 31.1.98. The said extension was sought till 30.4.98. being the validity date. It is pertinent to state here that as per Article 18 of the Contract, the bank guarantee, for the purpose of warranty/guarantee was to be kept alive till three months after the expiry of the defect liability period. The said period, according to the respondent No. 1, expired on 30th January, 1998 and as such the bank guarantee in question was to be kept alive for the purpose of

warranty/guarantee till 30th April, 1998. It was clearly agreed and understood between the parties that the bank guarantee was required for the purpose of covering any quality failures that may occur during the defect liability period. In these circumstances, the bank guarantee issued by respondent No. 2 on behalf of the petitioner was only for the purpose of warranty/guarantee as far as quality of the pipes was concerned. However, the respondent No. 1 did not permit the petitioner to make any, changes in the original bank guarantee except those contained in Annexure P-3, annexed herewith. These facts were clearly stated in the letter dated 18.2.98, written by the petitioner to the respondent No. 1.

22-A. That the fraud committed by the respondent No. 1 came to light only when a demand for invocation of the bank guarantee was made by it. The first intentional fraudulent act committed by the respondent No. 1 was when it demanded for extension of the bank guarantee till 30th April, 1998 for the purpose of warranty guarantee to cover the defect liability period, when in fact its sole motive was to somehow encash the bank guarantee towards the frivolous counter claims it preferred against the petitioner. The fraudulent intention of the respondent No. 1 to deceive the petitioner and induce it to give the bank guarantee in question is clear from the fact that the respondent No. 1 had no intention to genuinely have the bank guarantee for the purpose of covering any losses if suffered by it, due to the failure of the pipes supplied by the petitioner. This clearly means that the bank guarantee in question was fraudulently obtained by the respondent No. 1 from the petitioner. However, a grave fraud was committed by the respondent No. 1 by seeking encashment of bank guarantee for a purpose totally different from the purpose for which the bank guarantee was intended and given by the petitioner to the respondent No. 1. The bank guarantee in question is not being invoked as a result of any warranty failure on part of the petitioner but is being encashed for some alleged failure and neglect to perform the contract by petitioner to the satisfaction of the respondent No. 1.

Ground D. Because, the letter of invocation of the bank guarantee is not as per the mutually agreed and intended purpose for which the bank guarantee was submitted by the petitioner. The invocation as such is not as per the terms of the bank guarantee. The entire action of the respondent No. 1 seeking encashment of the bank guarantee undermines the entire underlying transaction between the parties, besides being contrary to the purpose and stipulations in the contract of bank guarantee.

Ground D 1. Because, the respondent No. 1 has committed as grave fraud both at the time of obtaining the bank guarantee as well as at the time of seeking the encashment thereof. The fraud committed by the respondent No. 1 is of an egregious nature and is capable of shaking the conscience of any right minded person, especially when the respondent No. 1 is a business giant enjoying the status of a Navratna Company of the Government of India.

8. Thus the amendment seeks to introduce a plea that the 1st respondent fraudulently persuaded the petitioner to renew the warranty/guarantee till

30.4.1998 to cover the defect liability period, when in fact its sole motive was to encash the bank guarantee towards the frivolous counter-claim it preferred before the Arbitral Tribunal. In my opinion, even the aforesaid facts do not constitute a fraud of an egregious nature as to vitiate the entire underlying contract. It is worth mentioning that at the time of the fresh bank guarantee dated 17.2.1998 being issued, the petitioner had already approached the International Chamber of Commerce for adjudication of the dispute by arbitration. Moreover, the petitioner had furnished the bank guarantee in accordance with the terms of the contract. It follows that it is not a case of fraud but one of acting in the terms of the contract. I am, Therefore, of the opinion that the amendment sought is not necessary for a decision of the real dispute between the parties. Consequently, the petitioner's application under Order 6 Rule 17 CPC is disallowed. On the facts, I do not find that any case of fraud has been made out. In the absence of established fraud, the 1st respondent cannot be restrained from encasing the bank guarantee.

9. Coming to the allegation of irretrievable injustice between the parties, learned counsel for the petitioner contended that the petitioner has already been derived of the huge amount of Rs. 25 crores approximately by way of illegal deductions made from the bills of the petitioner, on account of delay in performance of the contract and for the same reason, 1st respondent is again trying to unjustly enrich itself by invoking the bank guarantee for an amount which has already been recovered by it. He further contended that a further recovery by way of encashment of the bank guarantee would put the petitioner company in an irretrievable financial position.

10. Highlighting the alleged special circumstances and/or Special equities of the present case, learned counsel for the petitioner has strenuously urged that there is a serious dispute on the question as to who has committed breach of the contract or delayed the performance thereof; that the 1st respondent has a counter-claim against the petitioner; that the disputes between the parties have been referred to the arbitrator; and that no amount can be said to be due and payable by the petitioner to the 1st respondent till the arbitrators make their award. In my opinion, these facts are not sufficient to make this case as exceptional case justifying interference by way of injunction.

11. In order to bring the case within the ambit of special equities in the form of preventing irretrievable injustice, it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. Admittedly, the dispute between the parties arose as to the supply of line pipes and performance of the contract. It is a common ground that the arbitration proceedings for resolving the dispute between the parties are pending before the arbitrators. The parties are at issue as to whether the performance of the contract was completed in time or was delayed. They are blaming each other for the delay. Whether and if so, what is the amount due to the 1st respondent is to be adjudged in the arbitration

proceedings. In this view of the matter, the mere allegation that the 1st respondent is attempting to encash the bank guarantee for an amount, which has already been recovered by it, is not sufficient to bring the case within the ambit of the irretrievable injustice exception. This is not a situation of the kind envisaged in the case of Itek Corporation, where on account of the revolution in Iran, the American Government had cancelled all export contracts to Iran and had blocked all Iranian assets within the jurisdiction of the United States. Fifty two Americans had been taken hostages in Iran. In this situation, the Court felt that the plaintiff had no remedy at all and the harm to him would be irreparable. This kind of a situation is not a likely situation. Thus, there is no case of any irretrievable injury of the type as held in the case of Itek Corporation (supra) as there is no difficulty in the judgment o2:18 AM 6/9/20092:18 AM 6/9/2009` `f the court being executable in our country.

12. On a perusal of the para No. 2 of the bank guarantee, it is evident that the Bank has unconditionally and irrevocably agreed and under taken to pay to the 1st respondent on demand the sums specified therein. It is further provided that the amount should be paid forthwith notwithstanding any disputes between the parties. The bank guarantee further provides that "any such demand made by the owner/purchaser on the bank shall be conclusive and binding, notwithstanding any dispute or difference between owner/purchaser and seller or any dispute pending before any Court, Tribunal, Arbitrators or any other authority". This clearly shows that 1st respondent was the code Judge for deciding whether the petitioner has fulfilled the terms of the contract or not. The bank guarantee was thus undisputedly irrevocable with absolute discretion for 1st respondent to invoke the same. In this view of the matter, the bank cannot be restrained from honoring its commitment under the bank guarantee.

13. In the result, I do not find any merit in the petition. The same is accordingly dismissed with costs, quantified at Rs. 5,000. Before I part with this order, I would like to make it clear that nothing stated herein shall affect the claims/ rights of the parties that are being agitated in the Arbitral Tribunal.