(2021) 02 DEL CK 0066

In the Delhi High Court

Case No : Original Miscellaneous Petition (I)(COMM.) No. 430 Of 2020, Miscellaneous Application No. 1604 Of 2021

Shapoorji Pallonji & Co. Pvt. Ltd. APPELLANT

Vs

Indure Private Limited & Anr RESPONDENT

Date of Decision : 08-02-2021

Acts Referred:
Code Of Civil Procedure, 1908 — Order 38 Rule 5
Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2021) 02 DEL CK 0066

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Manik Dogra, Animesh Sinha, Omung Gupta, Siddharth Dey, Dhruv Pande, Prashant Mehta, Varun Gupta, Simran Wason, Divita Vyas

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter â??the A&C Actâ?), inter alia,

praying that direction be issued to respondent no.1 (hereafter â??Indureâ?) to return the original Advance cum Performance Bank Guarantee No.

171020261470-AA, dated 04.02.2010 (hereafter â??the PBGâ?) as extended from time to time. The petitioner also seeks an order restraining Indure

from invoking and encashing the said bank guarantee. It is further prayed that respondent no.2 (Standard Chartered Bank â?" hereafter â??the

Bankâ??) be restrained from acting on any letter seeking extension or encashing the PBG.

2. The disputes between the parties arose in connection with a Work Order dated 20.11.2009, issued by Indure to complete the civil work at

RRVUNL- Chhabra T.P.P - 2 x 250 MW-Unit# 4, CHP & BOP (hereafter â??the Contractâ??) .

3. It is Indureâ?s case that the petitioner neglected to perform the Contract and failed to complete the work within the stipulated time. Indure further

claims that it had from time to time highlighted the slow progress of work performance on part of the petitioner, however, the petitioner had completed

only a small fraction of the Contract awarded to it. Indure claims that as a consequence of the petitionerâ?s deficiency in performing the contract, it

had to incur extra cost to complete the work. Indure claims that the petitioner must bear the additional costs in terms of the Contract. Indure further

claims that it is also entitled to recover damages on account of breach on the part of the petitioner in performing the Contract.

4. Mr Mehta, the learned counsel appearing for the respondents referred to a letter dated 20.12.2017, whereby Indure had made claims aggregating ☐

35,63,92,989.44 and called upon the petitioner to pay the same within a period of seven days from the date of receipt of the said notice.

5. Mr. Dogra, learned counsel appearing for the petitioner, submits that the claims made by Indure are unsustainable apart from being barred by

limitation. He submits that even without going into the merits of the claims made by Indure, it is apparent that the PBG has been invoked only on the

basis that it was not being extended. And, the said premise is wholly erroneous.

6. Mr Dogra referred a letter dated 01.12.2020 addressed by Indure to the Bank stating that the said letter be treated as a notice for invocation of the

PBG. However, the said letter also states that in the event, PBG is extended for six months and the Original Bank Guarantee Extension Advice is

received by the Bank, the claim may be treated as withdrawn, otherwise its claim stands and the amount equivalent to ☐ 4 crores be remitted in favour

of Indure. He states that the petitioner complied with the said demand and by a letter dated 19.12.2020 â?" which was prior to the expiry of the term

of the PBG confirmed the extension as demanded by Indure. He submits that since the petitioner had complied with the demand of extension made by

the Indure, it is not open for the respondent to insist that PBG be encashed.

7. Mr Mehta countered the aforesaid submissions. He states that the letter dated 01.12.2020 was issued as a matter of usual procedure followed by

Indure. He states that as a matter of practice, Indure issues such letters in respect of all bank guarantees, at the beginning of the month in which the

bank guarantees are to expire. He states that since PBG was valid till 31.12.2020, Indure sent a letter dated 01.12.2020 seeking extension of the PBG.

He submits that the said demand was not complied with and the Bank did not send the Original Bank Guarantee Extension Advice immediately, as

requested by Indure. In the circumstances, Indure, after examining the matter, invoked the PBG by a letter dated 16.12.2020. He points out that the

extension advice was furnished only after the PBG was invoked.

8. He further submitted that the invocation of the PBG was deferred as the parties were attempting to resolve the disputes amicably but such

endeavours have failed.

9. Mr. Dogra has relied on the decision of this Court in Hindustan Construction Co. Ltd. and Ors. v. Satluj Jal Vidyut Nigam Ltd.: 2006 (1) Arb. LR

16 (Del); whereby a Coordinate Bench of this Court had observed that the expression â??extraordinary special equity or irretrievable injustice /injury'

are not defined expressions. They must be interpreted in the manner justified with reference to the facts and circumstances of each case. He

submitted that in the said case, the Court made an observation that seeking repeated extensions and encashment of bank guarantees may be onerous

and harsh. He submits that in the present case, the PBG was extended since the year 2010 onwards and encashing the same at this stage is harsh.

10. At the outset it is relevant to note that there is no dispute that the PBG is an unconditional bank guarantee. Thus, the principal question to be

examined in the present case is whether the order interdicting encashment of an unconditional bank guarantee is warranted in the facts and

circumstances of this case.

11. The law with regard to interdicting unconditional bank guarantees is far too well settled. A bank guarantee is a separate contract and is required to

be performed on its own terms. An injunction restraining the encashment of a bank guarantee can be passed in exceptional cases of egregious fraud,

irretrievable injustice and considering special equities.

12. The Supreme Court in the case of Svenska Handelsbanken v. Indian Charge Chrome: (1994) 1 SCC 502, had explained as under:

â??..in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud â?¦

â?¦ irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its

terms...

â?¦there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere

irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.â??

13. In Larson & Toubro Ltd. v. Maharashtra SEB: (1995) 6 SCC 68, the Supreme Court reiterated the aforesaid view.

14. Plainly, invocation of a bank guarantee cannot be injuncted merely on the ground that disputes are pending between the parties.

15. In Hindustan Construction Co. Ltd. v State of Bihar & Ors.: (1999) 8 SCC 436, the Supreme Court observed as under:

â??8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee,

is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose

behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure,

as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made

to the contractor as ""Advance"" from time to time during the course of the contract as also to secure performance of the work entrusted under the

contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to

the Government â??Advanceâ??, the Guarantee is invoked and the amount is recovered from the Bank.â??

16. In U.P State Sugar Corporation v Sumac International Limited: AIR 1997 SC 1644, the Supreme Court had held that:

â??12. 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.â??

17. In this case, none of the above grounds for interjecting the Bank Guarantee are established. There is no allegation of egregious fraud much less

the fraud that vitiates the underlying transaction.

18. This Court is of the view that even if the condition of irretrievable injustice / injury and special equities are considered, disjunct from the condition

of egregious fraud, no such conditions are also established in this regard.

19. Reliance placed by the petitioner in the case of Hindustan Construction Co. Ltd. and Ors. v. Satluj Jal Vidyut Nigam Ltd.(supra), is also of little

assistance to the petitioner. The said decision has been rendered in the peculiar facts of that case as the court found merit that the respondent was not

adhering to the determination arrived at in terms of the agreed adjudicative process.

20. In view of the above, an order restraining the encashment of the PBG cannot be granted.

21. The petitioner also prays that an order be passed restraining the respondent from transferring, alienating or dealing with, creating third party rights

in any manner or encumbering its assets till such time, Indure does not discharge its entire liability. It is averred that Indure may not be in a position to

repay any of its debts considering its financial condition. However, it is seen that the necessary pleadings required for seeking an order in the nature of

attachment before judgement, as contemplated under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908, are absent. Thus, insofar as the

aforesaid prayer is concerned, this Court considers it apposite to grant liberty to the petitioner to approach the Arbitral Tribunal for such relief or any

further interim measures as the petitioner considers expedient. Needless to state that all rights and contentions of the parties are reserved and if any

such application is made, the same shall be considered on its own merits.

22. The petition is disposed of in the aforesaid terms. The pending application also stands disposed of.