

(2016) 11 DEL CK 0038

In the Delhi High Court

Case No : O.M.P.(I) (COMM.) 417 of 2016 and IA 13113 of 2016

Transstroy Obedullaganj

APPELLANT

Vs

National Highways Authority of India

RESPONDENT

Date of Decision : 02-11-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2016) 234 DLT 698

Hon'ble Judges : Mr. Vibhu Bakhru, J.

Bench : Single Bench

Advocate : Mr. Anil Airi, Sr Advocate with Mr. M.Y. Deshmukh, Mr. Ravi Krishan Chandna and Mr. Ch. Srinivasrao, Advocates, for the Petitioner; Mr. Vinay Sharma, Advocate, for the Respondent No. 2; Mr. Jos Chirmel, Mr. Abu John Mathew, Ms. Atishaya Kaushal, and Mr. U

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J. - Transstroy Obedullaganj - Betul Tollway Private Limited (hereafter "TOBT") has filed the present petition under section 9 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act"), inter alia, praying as under:-

"(A) Restrain the Respondent No. 1 from invoking/ encashing the following Bank Guarantees till the time of adjudication of dispute between the parties -

(i) Central Bank (BG): 0381512BG0000384 dated 25.10.2012 Rs. 13,68,00,000 valid till 24.10.2016 PBG

(ii) Allahabad Bank (BG): 0021812IPG000013 dated 25.10.2012 Rs. 31,92,00,000 valid till 24.10.2016 PBG

(B) Restrain the Respondent no. 2 Central Bank of India and Respondent No.3 Allahabad Bank from making any payment in any manner in respect of the Bank Guarantees mentioned in prayer clause (A) above till the time of adjudication of dispute between the parties;"

2. TOBT is a company inter alia, engaged in general construction work in different branches. NHAI awarded the work of augmenting of the existing road of Obedullaganj Betul Section of NH-69 from km 2.800 to km 8.300 and from km 20.700 to km 137.000 (approx length km 121.36) (excluding wild life sanctuary from km 8.300 to km 20.700) (Except Bypass 28.000 to km 61.500 as Two Lane with paved shoulder) (hereafter "the project") in the state of Madhya Pradesh to the consortium comprising Transstroy (India) Ltd. and Corporation Transstroy OJSC (collectively the "Consortium") by a letter of Acceptance (LOA) dated 06.02.2012. Thereafter, the Consortium promoted TOBT as a special purpose vehicle (SPV) and requested NHAI to accept TOBT as the entity which shall undertake and perform the obligations of the Consortium under the LOA.

3. NHAI and TOBT entered into a Concession Agreement dated 30.04.2012 (hereafter "the Agreement"). On 25.10.2012, TOBT submitted two bank guarantees towards performance security (hereafter "the BGs")? one issued by the Central Bank of India and the other issued by the Allahabad Bank ? aggregating in the sum of Rs. 45.60 crores; both valid for a period of one year and six months. The BGs were further extended upto 24.10.2016.

4. It is not in dispute that the execution of the works have been inordinately delayed. However, NHAI asserts that TOBT is in default of its obligations; TOBT disputes the same and claims that the delay caused is on account of failure on the part of NHAI to perform its obligations.

5. TOBT states that the Ministry of Environment and Forest (hereafter "MOEF") gave its final approval on 23.07.2014. It contends that the Reserve Forest land area comprising 153.45 hectares was to be handed over to TOBT only after NHAI took the necessary action for diversion of 306.90 hectares of land including arranging for the cutting of trees from the Reserve Forest area. Further, TOBT claims that it had done demarcation for the 45m wide Right of Way (ROW) as well as 35m wide strip for cutting of trees as per the condition laid down at Sl. No.7 of MOEF approval letter dated 23.07.2014. TOBT requested NHAI vide letters dated 24.03.2015 and 29.09.2016 to issue the necessary letter for counting of trees in the width of 35m wide strip without which the Forest Authorities were not allowing TOBT to enter forest land, however, no such letter was issued.

6. TOBT further claims that revenue land totalling to a length of 12.41 km has also not been handed over by NHAI to TOBT as the owners have not vacated the land under their possession due to non receipt of compensation towards their lands. It is the case of TOBT that NHAI has failed to handover 100% encumbrance free Row in accordance with the Agreement, thereby, committing serious default as per clause 10.3.2 and 10.3.4 of the Agreement.

7. TOBT claims that the progress of the project was also delayed as the necessary approvals to implement the project during elections in Madhya Pradesh were not made available on time. Further, it is submitted that the advancement

of the project was retarded due to Madhya Pradesh Road Development Corporation Limited's actions towards widening and improvements on the stretch of the existing NH-69 highway from 24.400km to 63.000km, a competing road to the Project road.

8. NHAI issued a Cure Period Notice dated 07.02.2015, followed up with an intention to terminate the Agreement on 20.06.2015. Thereafter, a meeting took place between the parties on 01.02.2016, wherein, it was decided to keep the termination notice in suspension. Thereafter, on a further occasion, termination notice was issued again, however, the same was kept in abeyance. On 08.10.2016, TOBT represented to NHAI to expeditiously hand over 100% encumbrance free ROW in order to achieve the completion of project within 20 months from the date of handing over of 100% free ROW. However, on 18.10.2016, NHAI issued a notice terminating the Agreement and further informed NHAI's intention to appropriate the performance security.

9. TOBT contends that the termination notice dated 18.10.2016 is illegal as it is NHAI who is in default of clauses 10.3.2, 10.3.4 and 10.4 of the Agreement. TOBT submits that it sent a letter dated 21.10.2016 to NHAI for holding a meeting of Consortium Lenders, thereby, making it clear that there is no notice of invocation of BGs received by it. It is also the case of TOBT that the project could not be completed within the stipulated time period due to adverse site conditions beyond its control. TOBT asserts that since the delay is wholly attributable to NHAI, it has no right to encash the BGs and must be restrained from doing so.

10. Mr. Airi, learned Senior Advocate appearing on behalf of TOBT advanced two contentions in support of TOBT's prayer for restraining NHAI from invoking the BGs. First of all, he contended that the BGs were furnished towards performance security in terms of Article 9 of the Agreement and in terms of paragraph 9.3 of Article 9, the performance guarantees were to be released once the concessionaire had expended 20% of the total project cost on project construction. He submitted that in the present case, the concessionaire had already invested Rs. 146 crores in equity and had further availed loans in excess of Rs. 290 crores which had been used towards execution of the project. He earnestly contended that in the circumstances, the BGs furnished to NHAI were to be released and could not be encashed. Secondly, he submitted that BGs submitted were conditional and were valid and enforceable only till TOBT expended 20% of the project cost. He pointed out that the BGs also contained a clause which was similarly worded as paragraph 9.3 of the Agreement.

11. In addition to the above, Mr. Airi also submitted that NHAI could not issue Cure Notices and keep the same in suspension as there was no provision for the same. He submitted that NHAI had issued a Cure Period Notice on 07.02.2015 and thereafter issued an Intention to Terminate Notice on 22.06.2015. These notices had been kept in abeyance. TOBT had thereafter executed substantial works and, therefore, it was not open for NHAI to now revive the said notices. He

submitted that the BGs are being invoked only pursuant to the notice of termination dated 18.10.2016 and since the said notice is illegal, it was also not open for NHAH to invoke the BGs in question.

12. Mr. Chirmel appearing for NHAH stoutly disputed the contentions advanced by Mr. Airi. He submitted that despite several opportunities, TOBT had not maintained the progress of the works. He referred to the letter of termination dated 18.10.2016 to point out the alleged breaches committed by TOBT. He emphasised that TOBT had achieved only 1.27% of the total physical progress till September 2016. He submitted that in the circumstances, NHAH was entitled to invoke the BGs.

13. I have heard the learned counsel for the parties.

14. A plain reading of the termination notice dated 18.10.2016 indicates that there are several disputes between the parties. NHAH claims that TOBT had abandoned the project. It is asserted by NHAH that it had handed over 74.60% of the total land to TOBT before 20.01.2014; however, despite TOBT agreeing to proceed with the works, only 1.1% of the works had been completed upto February; resultantly, the first three milestones of the Concession Agreement had not been achieved.

15. At this stage, it is not relevant to examine the merits of the controversy between the parties. However, it is clear that there are substantial disputes between the parties in relation to TOBT's performance of its obligations under the Agreement. It is trite law that invocation of BGs cannot be interdicted on account of contractual disputes. In *Hindustan Construction Co. Ltd. v. State of Bihar*: (1999) 8 SCC 436, the Supreme Court held as under:

"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 "advance", the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions.

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9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

16. In the present case, the BGs clearly state as under:-

"1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Concessionaire's obligations during the Construction Period, under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Concessionaire, such sum or sums upto an aggregate sum of Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

2. A letter from the Authority, under the hand of an Officer not below the rank of General Manager in the National Highways Authority of India, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reasons whatsoever."

Therefore, notwithstanding any dispute or controversy regarding whether TOBT has committed any breach of the Agreement, NHAI's assertion that TOBT has committed default in performance of its obligations under the Agreement would be conclusive as far as encashment of BGs is concerned.

17. The contention that BGs submitted by TOBT were required to be released in terms of paragraph 9.3 of the Agreement is also not sustainable. The said paragraph reads as under:-

"9.3 Release of Performance Security - The Performance Security shall remain in force and effect for a period of one year from the Appointed Date, but shall be released earlier upon the Concessionaire expending on Project construction an

aggregate sum that is not less than 20% (twenty per cent) of the Total Project Cost; provided, however, that the Performance Security shall not be released if the Concessionaire is in breach of this Agreement. Upon request made by the Concessionaire for release of the Performance Security along with the particulars which establish satisfaction of the requirements specified under this Clause 9.3, the Authority shall release the Performance Security forthwith."

18. It is clear from the plain language of paragraph 9.3 of the Agreement that the BGs were liable to be released on TOBT expending 20% of the total project cost. However, the release is subject to the proviso which clearly indicates that there ought not to have been any breach on the part of the concessionaire. In the present case, NHAH claims that TOBT has breached the terms of the Agreement as it failed to meet the milestones as specified in the Agreement. The question whether TOBT is in breach of the terms of the Agreement or not is a matter to be adjudicated by the Arbitral Tribunal as and when constituted. The BGs also contains a clause similar to paragraph 9.3 of the Agreement wherein it is stated that the BGs would cease to be valid if TOBT had expended 20% of the total project cost. However, this condition is also hedged by the proviso that TOBT must not be in breach of the Agreement.

19. It is well settled that BGs cannot be interdicted unless the parties seeking such injunction establishes a prima facie case of fraud and irretrievable injustice.

20. In *Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others*: (1994) 1 SCC 502, the Supreme Court had held as under:-

"...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...

?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?

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...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."

21. The aforesaid view was reiterated by the Supreme Court in *Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others*: (1995) 6 SCC 68.

22. In *U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.*: 1988 (1) SCC 174, the Supreme Court had held as under:

"The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

23. In the present case, TOBT has been unable to establish a "prima facie" case of egregious fraud on the part of NHA I or a case of irretrievable injustice.

24. In these circumstances, NHA I cannot be restrained from invoking the BGs. The petition and the pending application are accordingly, dismissed.