
(1996) 04 DEL CK 0004

In the Delhi High Court

Case No : Interim Application No. 12521 of 1992 and Suit No. 3885-A of 1992

Triveni Pool Intairdril Ltd.

APPELLANT

Vs

Oil and Natural Gas Commission

RESPONDENT

Date of Decision : 26-04-1996

Acts Referred:

Citation : (1996) 1 BC 617 : (1996) 62 DLT 613

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : Arun Jaitley, S. Mukherjee, B. Dutta, R.S. Prabhu and A. Jayram, for the Appellant;

Judgement

Devinder Gupta, J.

(1) In this application filed u/s 41 of the Arbitration Act read with land Schedule thereof and Section 151 of the Code of Civil Procedure, the petitioner has prayed for an order of injunction restraining the respondents from encashing the bank guarantee dated 28th March, 1990 for Rs. 20,53,125.00 issued by M/s. Standard Chartered Bank till the final disposal of the accompanying petition filed u/s 20 of the Arbitration Act, in which a prayer has been made for filing of the agreement entered into between the parties containing an arbitration clause and for reference of disputes to the Arbitrator, in terms of the arbitration agreement.

(2) The subject matter of the petition u/s 20 of the Arbitration Act pertain to contract No. MAT/DRL/CH/RIGS/140/TPIL/MP-1/89 dated 9th February, 1990 entered into between the parties for the charter hire of one land rig (Type-1 of 3600 mts capacity). The rig was required to be installed and operated at Madhya Pradesh project of the respondents called M.P.-I. The petitioner has referred to various details with respect to the charter hire of 4 rigs including the rig in question, for which a letter of intent was issued by the respondents. It is alleged that on 7th March, 1989, the respondents awarded a single conditional letter of intent in favor of the petitioner covering all the 4 rigs. On receipt of this

conditional letter of intent, the petitioner on 19th July, 1989 entered into purchase agreement with M/s.Delta Financial Services, Inc. of Houston U.S.A. for import of 4 rigs in advance. On 18th August, 1989, the petitioner applied to Government of India for permission to import 4 rigs and in the said application the petitioner mentioned that foreign exchange for the project would be arranged through I.C.I.C.I. for which an application had already been moved. On 20th November, 1989, the Secretariat for Industrial Approvals, which is the single window agency of the Government of India granted approval for the import of 4 rigs, including the rig forming subject matter of contract in question. Initially the Secretariat stipulated that the entire foreign exchange has to be met through external credit only i.e. by getting the foreign exchange from outside sources. On 6th December, 1989, the petitioner Vol. LXn Triveni Pool Intairdril v. Oil & Natural Gas 615 represented to the Government to allow import of all the 4 rigs against institutional line of credit to be provided by domestic financial institution. The Government reconsidered its decision and on 11th January, 1990 permitted U.S. \$ 7.66 million to be availed from the Institutional line of credit i.e. from I.C.I.C.I, I.D.B.I. or I.F.C.I. and the of U.S. \$ 5.2 million was asked to be generated by the petitioner from external sources on the conditions to be approved by the Ministry of Finance. It is alleged that on 9th February, 1990, a formal contract between the petitioner and the respondents was entered into contract in question for supply of I rig. In so far as the other 3 rigs are concerned, the supply has since been concluded and there is no dispute amongst the parties with respect to the other three rigs.

(3) It is alleged that on 12th February, 1990, Ministry of Finance conveyed an amendment to its previous approval, interms of which THE petitioner was permitted to avail of U.S. \$ 9.66 million from financial institutions in India, still leaving U.S. \$3.2million to bear ranged from external sources out side india. The amount of U.S. \$ 9.66 Million was just adequate for covering the import of 3 rigs out of 4 rigs. As such the petitioner on 21st May,1990 wrote to the respondents that it was shipping only three rigs, while the import license in respect of the 4th rig would be obtained only, if and when the Indian Financial Institutional Line-of Credit is extended to cover the entire amount in relation to all the 4 rigs.

(4) The petitioner's case is that having allocated foreign exchange for import of three out of four rigs, the Government of India, Ministry of Finance in its wisdom and upon consideration of the totality of the matter in the national interest, decided not to allocate any further foreign exchange from Indian sources for the import of the 4th rig. The respondent did not convey or made any representation to Government of India to the effect that import of three rigs out of four was not sufficient for its purpose, rather the respondent acquiesced and accepted in the said situation and thereby is to be deemed to have consented and agreed to the position that the adverse balance of payment position and the foreign exchange crunch had resulted in the contract for the supply of the 4th rig, being rendered incapable of being performed.

(5) It is also the petitioner's case that Government of India, Ministry of Finance was creating problems in relation to the availing of foreign exchange from external sources. The external sources from outside were demanding terms and conditions, which were not congenial or convenient to the interests of the Indian economy. government of india had stipulated that the terms and conditions of each and every credit/loan obtained from external sources, would have to receive the prior concurrence of the Ministry of Finance. Therefore, even if the loan was obtained by the petitioner from external sources, the terms and conditions, such as time. for repayment, rate of interest, exchange fluctuation etc. were all very material consideration weighing with the Government in its exercise of sovereign function of deciding the matter in the light of the over-riding public and national interest.

(6) The petitioner has alleged that notwithstanding the difficulties, the petitioner was facing, it went on making every effort to secure and avail a loan from external sources, for which purpose, an application was made to the International Finance Coporation. On 3rd July, 1990, the International Finance Corporation, Washington indicated their intent for providing the petitioner with loan for U.S.\$ 3.8 million, which was conditional upon two further aspects, the first being that I.F.C.Washington's final confirmation would be granted only after the same is approved by its Board of Directors. Secondly, that the petitioner-Company should obtain all types of prior approval from Ministry of Finance, Government of India. Despite petitioner's best efforts and having followed up the matter with the Ministry of Finance, the matter remained delayed and was not finalised. In the meanwhile, gulf war broke out and the Board of Directors of I.F.C.Washington did not accord any final concurrence to the disbursement of the said loan.

(7) On 1st April, 1991, the petitioner in the circumstances approached the respondent and requested it to official by waive off the contractual obligation.

(8) On 19th September, 1991, I.C.I.C.L, which is a public institution providing foreign exchange in the institutional line of credit also wrote a letter that the petitioner despite best efforts has not been able to procure foreign exchange and gave its opinion to the respondent that the petitioner should not be penalised for any contractual default with respect to the contract in question, since the situation was totally out of its control. It is also alleged that the petitioner could not perform its part of the contract on account of the change in Government's Policy and on account of foreign exchange crises. It was in these circumstances that on 1st April, 1991, the petitioner had written to the respondent calling upon it to waive off the contractual obligations.

(9) The petitioner has alleged that the respondent accepted and acquiesced in petitioner's request for waiving of contractual obligations, since the respondent did not, for several months sent any reply or rebuttal, either calling upon the petitioner to perform its part of the contract or to supply the fourth rig. It is also stated that there has been complete revision in the respondent's programme, as

a result of which the respondent decided not to drill at M.P.-I Project at all .It is also alleged that the respondent not only declined to waive off the contractual obligations, rather the respondent through letter dated 4th December, 1992 informed that matters consequential to waiver of contractual liability, release of performance guarantee, liquidated damages etc. were under consideration. In the meanwhile, on 17th July, 1992, a letter of encashment of Bank guarantee was sent by the respondent to the Bank in question, which letter subsequently was withdrawn. But now it is alleged that the respondent had decided to invoke the Bank guarantee and the respondent was thus acting in fraudulent and colourable exercise of its powers under the Bank guarantee, which intention of the respondent became clear when a caveat was filed in this Court on 29th September, 1992.

(10) The petitioner has alleged that it had requested the respondent for waiver of contractual obligation. The respondent acquiesced in the said request and did not send any reply or rebuttal to the contrary. The respondent also received a communication from Icacep endorsing the stand of the petitioner that it was not due to any default on the part of the petitioner that it has not been possible for the petitioner to perform its part of the contract. The respondent had also revised its programme and decided nM to drill the project M.P.-I. As such, no prejudice or harm or loss has occasioned to the respondent due to non-supply of the 4th rig by the petitioner. Thus the act of the respondent in encashing the Bank guarantee is an act of irretrievable injustice, hardship and unjust enrichment, if not fraudulent Vol. Lxh Triveni Pool Intairdril v. Oil & Natural Gas 617 also and in colourable exercise of powers. In this background the petitioner has prayed that disputes have arisen amongst the parties, which are enumerated in para-52 of the petition, which according to the petitioner deserves to be referred for adjudication by an Arbitrator and till the matter is decided, the respondent deserves to be restrained from invoking the Bank guarantee.

(11) The respondent in answer to the application for grant of interim relief has specifically denied the allegations that the type of rigs, which were contracted to be supplied by the petitioner were not being manufactured and/or available in India. According to the respondent such rigs are manufactured and supplied by Bhel, a Government of India Undertaking. Respondent's case is that the contracts were not awarded to the petitioner with the expectation or on stipulation that complete foreign exchange credit would be provided by the Financial Institutions. Such an assumption on the part of the petitioner is baseless and misconceived. The generation of necessary financial resources was the sole responsibility of the petitioner and the contract in question was awarded to the petitioner on the unequivocal representation of the petitioner that it had the necessary financial resources to import/buy the rigs in question. It was a global tender. It was not the concern or responsibility of the respondent to find out from which source the petitioner would generate the finances for due performance of the contract. Performance of the contract, within the time stipulated, in accordance with the terms thereof was the sole responsibility of the

petitioner. The respondent had no obligation whatsoever to ensure the grant of foreign exchange credit through Government Institutions for performance of the contract by the petitioner. The pre-supposition of the petitioner that it would get the foreign exchange credit through Government Institutions is without any basis. The respondent had never agreed that it would get the foreign exchange credit through Government Institutions to the successful bidder.

(12) The respondent contends that the petitioner failed to perform its contractual obligation for no fault of the respondent. The respondent has denied that it had acquiesced or thought of waiving of the contractual obligation. The petitioner's letter dated 1st April, 1991 was duly replied by the respondent on 21st May, 1991. The petitioner was specifically informed that the circumstances stated in the letter dated 1st April, 1991 and 3rd April, 1991 did not constitute Force Majeure under Article 25 of the Contract and that the performance of the contract was not suspendable and the petitioner would be liable for liquidated damages for failure to get the drilling unit ready for scudding within the stipulated period and the respondent would exercise its rights, including invocation of Bank guarantee. The respondent has specifically denied each and every averment of the petitioner, which are contrary to the terms of agreement. The respondent has alleged that the revision of drilling programme was an internal matter of the respondent and the same would not absolve the petitioner from discharging its contractual obligations. The respondent required the 4th rig, which it was the duty of the petitioner to have supplied to the respondent and since the petitioner had failed to do so, for no fault of the respondent the respondent was within its right to invoke the Bank guarantee.

(13) Having considered the submissions made at the bar, the question that would require to be answered would be that whether a good prima-facie case for grant of injunction has or has not been made out by the petitioner, restraining the respondent from encashing the Bank guarantee. In other words, whether a case has been made out by which the Bank be called upon not to perform its obligation. In the matters governing grant of injunction in such like matters, the Court should prima-facie be satisfied that there is a triable issue, strong prima-facie case of fraud or irreparable injury and the balance of convenience is in favor of issuing injunction to prevent irretrievable injury. In *Syndicate Bank v. Vijay Kumar and Others* (1992) 2 S.C.C. 339, it has been held that grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract by which, the Bank undertakes unconditionally and unequivocally, to abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal and international trade or business. It creates irrevocable obligation to perform the contract in terms thereof. On the occurrence of events mentioned therein, the Bank guarantee becomes enforceable. Subsequent disputes in the performance of the contract does not give rise to a cause, nor the Court is justified on that basis to issue an injunction from enforcing the contract, namely, the Bank guarantee. The parties are not left with no remedy, in the event of disputes, in the main

contract. Remedy of the party is the entitlement of damages or other consequential reliefs.

(14) It has been reiterated by the Apex Court that the Courts should normally insist upon enforcement of the Bank guarantee and should not interfere with the enforcement thereof unless there is a strong case of fraud or special equities. It is not necessary to refer to the decisions except mentioning the latest cases on the point, namely. The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, ; Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, and Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., , which reiterate the legal proposition that in case of confirmed guarantee/irrevocable letter of credit, the Court will not interfere with the same unless there is a strong case of fraud or irretrievable injustice.

(15) The Bank guarantee in the instant case is unconditional and irrevocable. Clause (5) of the same reads:

"(5)We further agree that as between us and Ongc for the purpose of this Guarantee any notice given to us by Ongc that the money is payable by the contractor and any amount claimed in such notice by Ongc shall be conclusive and binding on us notwithstanding any difference between Ongc and the contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. We further agree that this guarantee shall not be affected/discharged by any change in our constitution, in the constitution of Ongc or that of the contractor. We also undertake not to revoke this guarantee during its currency. This guarantee shall not be determined, discharged or affected by the liquidator, winding up, dissolution or insolvent, of the contractor and shall remain valid binding and operative against the Bank."

(16) The Bank unequivocally agreed to pay on demand the amount to the Vol. Lxn Triveni Pool Intairdril v. Oil & Natural Gas 619 respondent without any protest, or demur and without any reference to the petitioner, irrespective of any dispute amongst the parties.

(17) The petitioner has tried to make it a case of frustration of the contract due to force majeure, alleging that the contract entered into with the respondent was conditional on approval of Central Government relating to the raising of the finances, which according to learned Counsel for the petitioner makes it to be a good prima-facie case in petitioner's favor and that it is also a case of undue enrichment to the respondent.

(18) In case reference is made to various clauses of the contract, it will be noticed that there is absolutely no case what to say a strong prima-facie case in petitioner's favor for grant of injunction. Article 29 of the contract is with respect to performance bond. Clause 29.1 required the petitioner to furnish to the respondent an irrevocable and unconditional performance bond in the enclosed proforma, which was required to be kept valid by the petitioner for period of

three months beyond the expiry of the contract. Clause 22.2 says that in the event of the contractor failing to honour any of the commitments entered into under the contract and or in respect of the amount due from the contractor, the respondent shall have an unconditional option under the guarantee to invoke the performance bond and claim the amount from the Bank. Clause 22 of Part II of the tender document informed the petitioner that customs duty, industrial licence, R.B.I. Clearance etc. to be the sole responsibility of the Contractor, to approach the authorities concerned, to get the requisite clearance licence/permission respondent however, promised assistance, on request of the Contractor, to provide necessary certificates, required to enable the contractor to approach the authorities concerned for getting clearance. It is not the case of the petitioner that it had asked the respondent to issue necessary certificate to enable it to approach the authorities concerned for any financial assistance.

(19) The plea of implied waiver, which has been tried to be raised in the petition also do not make out any prima facie case for grant of injunction, in view of the bare reading of Article 16.1 of the contract. It says that none of the terms and conditions of the contract shall be deemed waived by either party, unless such waiver is executed in writing by a duly authorised agent or representative of both the parties. Failure of either party to execute also shall not act as a waiver of any right of such party, provided in the contract. It is not the case of petitioner that the respondent through any authorised agent or representative waived off any of the conditions - of the contract. The argument that respondent abandoned the programme of operating the rig at the site in question also cannot be taken to be an act of waiver of any of the terms of the contract by which the petitioner was required to set up the rig at the site in question. The Respondent at point of time asked the petitioner not to supply the 4th rig or not to install the same at the site in question.

(20) Even the plea of force majeure in Article 25 is of no consequence. The term "force majeure" for the purpose of contract, as per Clause 25.1.2 means acts of God, War, Civil Riots, Fire, Flood, Acts and Regulations of respective Government of the two parties, namely. Operator (ONGC) and the Contractor (Petitioner) directly affecting the performance of the contract. The petitioner contends that it was due to the act of Government of India, Ministry of Finance in not agreeing to provide to the petitioner the facility of raising the requisite finances from domestic sources, because of which the petitioner was prevented from importing the rig in question since, the petitioner was asked to raise finances from foreign sources, for which Government of India did not grant permission. This clause of Force Majeure has to be read with the other clauses in the contract, which stipulated that the obtaining of requisite permission from the Government to be the sole responsibility of the petitioner and it nowhere provides that the non grant of permission will absolve the petitioner of its obligation to perform its part of the contract. In case necessary permission could not be obtained by petitioner from Government of India, nothing prevented the petitioner from complying with the terms of the contract by generating necessary finances of its own. To

generate financial resources was also the sole responsibility of the petitioner and the contract was awarded to it on the petitioner's representation that it had the necessary financial resources to import/ buy rigs in question. It is also not shown that it was the responsibility of the respondent to find out a source for the petitioner from which the petitioner would generate the finances for the due performance of the contract. It is also not shown that the respondent at any point of time held out to the bidders that the successful bidder would be entitled to any foreign exchange credit through Government Institutions.

(21) The recommendation by I.C.I.C.I. in petitioner's favor is also of no help to the petitioner, since the respondent was not obliged to accept the recommendation contrary to the terms of the contract. It is not in dispute that the petitioner had represented the respondent through its bid that in the event of the contract being awarded to the petitioner for Charter Hire of Land Drilling Rigs against the tender, the petitioner will purchase Land Drilling Rigs, either from a foreign company or from Indian company for rendering drilling services to the respondent. In the bid the petitioner gave bid, both on the basis of rigs purchased from foreign company as well as rigs purchased from Indian company.

(22) On the question of irreparable injury or undue enrichment also, the petitioner has no case. The circumstance that respondent himself abandoned its idea, as is alleged by the petitioner and denied by the respondent by revising its programme and deciding not to drill MP-I Project at all, would not be a ground to absolve the petitioner from its liability to comply with the terms of the contract. Irretrievable injustice, hardship and undue enrichment must be of the kind arising in an irretrievable situation.

(23) The instant case cannot be said to be a case of undue enrichment at all, in which the respondent wanted four rigs for which global tenders were floated. The petitioner being the successful and highest bidder failed to supply one of the rigs. The plea is that the respondent abandoned the idea of not drilling at MP-I Project and thus by not supplying the 4th rig, no loss and harm is caused to the respondent or that in case the guarantee is allowed to be revoked it would amount to undue enrichment to the respondent. It was not one of the terms of the contract that in case due to alteration in the programme, at one particular site, rig is not be supplied or that due to this the bidder would stand absolved of its liability to supply. The petitioner was not told by the respondent that the respondent was not interested in the supply of the rig in question. In case of non-supply by the petitioner, it is not open for the petitioner to contend that no prejudice or harm is likely to be caused to the respondent due to non-supply of the rig since there has been change in the programme of the respondent. Change of programme may be due to petitioner's act of non-supplying the rig in question at a particular location/site. Irretrievable harm is one, which cannot be speculated. It should be genuine and immediate as well as irreversible, a kind of situation, which existed in the case of *item Corporation v. title First National Bank of Boston* etc. 566 Fed.Supp. 1210, 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 background the Court felt that the plaintiff had no remedy at all and the harm to him would be irreparable. It is not a case in which the petitioner is left with no remedy. The petitioner has got a remedy in arbitration proceedings.

(24) Considering the terms of the Bank guarantee and the terms of the contract, it cannot be said that there is any prima-facie case in favor of the petitioner for grant of temporary injunction. Loss or injury, if any, likely to be caused to the petitioner in the event of the respondent invoking the Bank guarantee would be such which, if proved, can very well be compensated in terms of money in arbitration proceedings. The petitioner cannot claim injunction on the ground that till such period the disputes are decided, respondents be restrained from invoking the Bank guarantee. The diction in *National Telegram Power Corporation Ltd.v. M/s. Flowmore Private Ltd.,*)T. 1995(5) S.C. 591 : (1995) Dlt 333 (SC), may be referred on the question of the Courts interference with a performance of guarantee bond that there should not be any interference unless there is fraud on the part of beneficiary and not of somebody else, which is not there in this case. In view of the above, the application merits dismissal and is dismissed as such. Interim order is vacated. Be it stated that observations made herein are meant only for the purposes of deciding this application and will not prejudice the case of the parties on merits.