

(2015) 01 DEL CK 0013
In the Delhi High Court
Case No : O.M.P. 529/2014

UTC Fire and Security India Ltd.

APPELLANT

Vs

Bhartiya Rail Bijlee Company Limited and Others

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2015) 2 AD 324

Hon'ble Judges : Deepa Sharma, J.

Bench : Single Bench

Advocate : Jasleen K. Oberoi and Surbhi Mehta, for the Appellant; S.K. Taneja, Senior Advocate, Shishir Mathur, Sheel Vardhan and S.K. Masuria along with AR of BRBCL, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Deepa Sharma, J.—The petitioner has invoked the jurisdiction of this Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") with the prayer that respondent Nos.1 and 2 be restrained from taking any action in respect of letter dated 05.05.2014 of invocation of bank guarantee. The admitted facts of the case are that:-

2. The petitioner and the respondent had entered into two composite Contract No. CS-0270-151-2-FC-NOA-BRCBL/Nabinagar/10-11/22A dated 21.07.2010 relating to design, engineering, manufacturing etc. for the complete Fire Detection and Protection System for Nabinagar Thermal Power Project and Contract No. CS-0270-151-2-SC-COA- BRCBL/Nabinagar/10-11/22B dated 21.07.2010 for the work of providing all services in the said Thermal Power Project. Both the contracts were collectively called as the "Contracts" and were interlinked and overlapping and were essentially in the nature of one contract governed by the same General Conditions of Contracts. In due compliance of the provisions of the contract, the petitioner has submitted three bank guarantees. Two bank guarantees were in the nature of performance bank guarantees, the

details of which are as under:-

i. Supply contract-Bank Guarantee No. 5520225509 dated 13.08.2010 for Rs. 1,81,57,388/-, the validity of the same is up to 10.01.2015.

ii. Erection contract-Bank Guarantee No. 5520225510 dated 13.08.2010 for Rs. 38,64,761/-. The validity of this bank guarantee was till 10.01.2015.

3. The petitioner also submitted a bank guarantee No. 5520225508 dated 13.08.2010 for Rs. 2,62,63,710, valid up to 10.07.2013 as security against advance in respect of supply contract.

4. The case of the petitioner is that time was not the essence of contract and the respondent had been extending the time for supply of the equipments. It is submitted that delay in completing the contracts had occurred on account of breaches on behalf of respondent No. 1 as there was delay in giving inputs on design of the equipment to be supplied under the supply contract. It is further contended that the respondent No. 1 had also failed to handover any front or site to the petitioner, as per the obligations under the contract. Out of total 54 work sites to be handed over, the respondent No. 1 had offered only four other work sites. Under the contract, the respondent was required to handover 54 work sites/ front by 04.11.2011. It is submitted that the act of the respondent towards invoking the bank guarantee is tainted by fraud as the same has been done with the sole agenda and intent to avoid performance of its obligation under the contract and to penalize the petitioner in exercise of its contractual rights. The invocation has been done with the sole ulterior motive of profiteering at the cost and prejudice to the petitioner. The petitioner had been prevented from performing its obligation on account of the breach of material conditions of the contract by the respondent No. 1. It is submitted that such means of profiteering specially by public sector undertaking are not only fraudulent, but also inequitable and frowned upon and deprecated by Courts of Law and does not behove an esteemed organisation, especially a public sector undertaking and for this reason alone, invocation of the bank guarantee needs to be stayed. It is further submitted that invocation is contrary to the letter and spirit of the contract for the same reason that it is the respondent No. 1 who had failed to fulfil the obligations under the contract. It is submitted that the petitioner is not responsible for failure of performance under the contract which had occurred due to the act of respondent No. 1.

5. The respondent, on the other hand, has stated that present petition is not maintainable. It is submitted that all the three bank guarantees were unconditional bank guarantees and payable on demand by respondent Nos.2 to respondent No. 1. It is submitted that bank guarantees is an independent agreement between respondent No. 1 and respondent No. 2 and the Court can interfere only when it is shown that the bank guarantee has been obtained by respondent No. 1 in a fraudulent manner and the fraud is of egregious nature. It is submitted that the petitioner has not pleaded any grounds which can show

that a fraud has been committed upon them while obtaining the unconditional bank guarantee. It is further submitted that the petitioners have also failed to show that they shall suffer any irreparable loss and injury if the bank guarantee is not stayed. It is argued that respondent is a public sector undertaking and, therefore, quite capable of compensating the petitioner in case they succeed. It is denied that respondent No. 1 is responsible for the delay in fulfilment of the contract or that they have failed to supply the site to the petitioners. It is submitted that it was the petitioners who had not fulfilled their part of the commitment under the agreement and, therefore, the respondent had extended the period of completion of the contract from time to time. It is submitted that the pendency of any arbitral dispute between the parties is not a ground to stay the invocation of bank guarantee. It is submitted that petition is liable to be dismissed. Reliance has been placed by the respondents on the findings in the case of BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, and Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, .

6. The petitioner in the rejoinder has submitted that this is one of the rare cases wherein the respondent No. 1's conduct is so egregiously fraudulent and lacking in bona fide that it vitiates the entire underlying transaction and, therefore, their case falls within the exception to the rule of non-intervention as laid down by Supreme Court in the cases of BSES Ltd. (supra) and Vinitec Electronics Private Limited (supra) . It is submitted that the respondent No. 1 had wrongly induced the petitioner to submit three bank guarantees, despite being fully aware that it was not in a position to release front/sites, thereby preventing the petitioner from discharging its obligation.

7. I have heard the arguments and have perused the relevant record.

8. The present dispute relates to the release of the bank guarantees. The nature and purpose of the bank guarantees had been discussed by the Supreme Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, . The relevant paragraphs 8 and 9 of the said judgment are reproduced 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 excusable 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. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others*, ; *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, ; *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, ; *National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another*, ; *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, ; *Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another*, as also in *U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd.*, , the same principle has been laid down and reiterated.

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."

Accordingly, the Courts are required to see the nature of the bank guarantee furnished by the petitioner. No dispute to the fact that the petitioner had furnished three bank guarantees to respondent No. 1. Two were of the nature of performance bank guarantees and the other bank guarantee is a security bank guarantee against the advance. The copies of all the three bank guarantees have been placed on record by the petitioner. All the bank guarantees were payable on demand by respondent No. 2. Para 2 in all the three bank guarantees provides that "We Citibank,.....do hereby guarantee and undertake to pay the Employer immediately on demand any or, all monies payable by the Contract, without any demur, reservation, contest, recourse, or protest and /or without any reference to the Contract. Any such demand made by the Employer and the Contractor or any dispute pending notwithstanding any difference between the Employer and the Contract 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 the Employer and further agrees that the guarantee herein contained shall be enforceable till ninety (90) days after expiry

of its validity".

9. From the language of these bank guarantees, it is apparent that these bank guarantees are unconditional bank guarantees. Since in the case of Hindustan Construction (supra) , the Supreme Court has held that bank guarantees are independent contracts between the beneficiary and the bank and since these bank guarantees are unconditional bank guarantees, the contract between the beneficiary and the bank has to be honoured and the Courts cannot restrain the two contracting parties to honour their agreement unless except on two grounds, i.e., an egregious nature of fraud has been played upon the petitioner or that he shall suffer an irretrievable loss.

10. Injunction has been sought on the ground of fraud. The expression "fraud" has been defined in the case of Meghmala and Others Vs. G. Narasimha Reddy and Others, , wherein the expression "fraud" has been defined and the Courts are advised to take the element of fraud seriously and the Court has held that any act which is tainted by fraud should not be condoned and sustained. The Court has also relied while defining the fraud on the findings in Lazarus Estate Ltd. Vs. Besalay (1956) 1 QB 702: (1956) 2 WLR 502, Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, and State of Maharashtra and Others Vs. Prabhu, .

In para 33, the Court has observed as under:-

"Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla Vs. Delhi Administration, ; Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., ; The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, ; K.D. Sharma Vs. Steel Authority of India Ltd. and Others, ; and Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir and Others, ."

11. The petitioner has contended that the bank guarantees have been obtained by fraud because the respondent No. 1 was aware from the very beginning that it would not be able to handover the vacant possession of the site and since it has failed to handover the vacant possession of the site, the petitioner could not complete his part of obligation under the contract. The respondent, on the contrary, has alleged that it was the petitioner who had defaulted in performance and had not fulfilled his part of the contract. Hence, the dispute has arisen between the parties regarding the fulfilment of the obligations under the contract by both the parties and this has arisen during performance of the contract. The bank guarantees, on the other hand, were submitted at the initial stage at the time of entering the contract. It is not shown by the petitioner that it was at that time that any fraud of egregious nature had been played upon him. The petitioner had entered into the contract on its own free will and has not alleged

that it was forced into this contract. It has been admitted on behalf of the petitioner that before bidding, the petitioner was required to do the site inspection and the same was done. It, therefore, cannot be said that any fraud, what to say of egregious nature, had been played upon it, at the time of execution of the present bank guarantees.

12. Moreover, this Court in a recent judgment Consortium of Deepak Cable India Limited vs. Teestavalley Power Transmission Limited, FAO (OS) 397 and 398/2014, has held that the existence or pendency of dispute relating to the violation of terms of contract is no ground to grant injunction to invocation of Bank Guarantee. The relevant para is reproduced as under:-

"145.....Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties."

13. The petitioner has also contended that since the intention of the respondent in invoking the bank guarantee is to enrich itself and this not only is a fraudulent act on its part, but also inequitable. As discussed above, the fraud of egregious nature played upon the petitioner has to be fraud which has been played upon the petitioner at the time when the bank guarantees were executed by him. The fraud should be of such a nature which shows that the petitioner was deceptively asked to issue the bank guarantees. As discussed above, in the present case, the petitioner has neither pleaded nor has shown on record any facts which can show that a fraud had been played upon it at the time when the bank guarantees were executed by it. It has also been held by this Court in Consortium of Deepak Cable India Limited (supra) that Courts are precluded from considering the disputes

between the parties arising out of the main contract, while dealing with the matters relating to the encashment of the bank guarantees. The existence of a dispute between the parties on account of failure of the terms of the contract does not in any way affect the right of the beneficiary to encash the bank guarantee. The petitioner has also failed to show that he shall suffer an irretrievable injury if the stay is not granted to it.

14. For the foregoing reasons, I find that there exists no ground to restrain the beneficiary from invoking the bank guarantee. The petition has no merit and the same is dismissed. The stay granted by this Court on 09.05.2014 stands vacated.