
(2018) 03 DEL CK 0212

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 300 Of 2017

Vayam Technologies Limited

APPELLANT

Vs

Hewlett-Packard Financial Services (India) Private Limited

RESPONDENT

Date of Decision : 08-03-2018

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2018) 03 DEL CK 0212

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Sandeep Sethi, Amish Agarwal, Satyam Thareja, Shantanu Sagar, Anmol, Sushant Sharma, Aditya Shekhar, Arvind K.Nigam, Vikas Mehta, Mikhil Sharda, Mithun Rao, Mansi Kaku

Final Decision : Dismissed

Judgement

Jayant Nath, J

1. This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking a direction prohibiting the respondent from invoking the bank guarantees as detailed in Annexure P-2 to the present petition. Directions are also sought to the relevant banks not to enforce the bank guarantees as detailed in Annexure P-2 annexed with the present petition.

2. The case of the petitioner is that on 20.07.2012 a Master Rental and Financing Agreement (hereinafter referred to as the 'Master Agreement') was entered into between the petitioner and respondent. The Agreement provided the charging structure for the parties to enter into various lease schedules whereby rent was payable monthly in advance for equipment taken on lease by the petitioner from the respondent. There was an arbitration clause in the said Master Agreement. Pursuant to the Master Agreement, between 2012-2013, 35 loan financing schedules were entered into between the parties for taking on lease certain

equipments. Pursuant to the lease, payments were required to be made by the petitioner in agreed installments to repay the finance provided by the respondent. As a sequitur to the said Master Agreement and Loan Financing Schedules, the petitioner gave various bank guarantees in favour of the respondent from different banks, namely, Axis Bank Ltd., Dena Bank, IDBI Bank Ltd. and Canara Bank. The bank guarantees have been extended from time to time.

3. It is the case of the petitioner that it had continued to make various payments to the respondent pursuant to the Master Agreement and the Schedules. However, due to financial difficulties and hardship, the petitioner had not been able to repay the full amounts. Accordingly, on 22.07.2014, the parties entered into a Deed of Rescheduling to reschedule the financing provided by the respondent to the petitioner. Another Deed of Rescheduling to reschedule the financing was entered into on 29.10.2015. On 28.06.2017, the respondent sent a termination notice to the petitioner whereby it terminated the said agreements and pursuant to termination, claimed a sum of Rs. 75,31,56,758/- as outstanding dues. The bank guarantees were also sought to be invoked.

4. When this matter came up before this court on 11.08.2017, this court restrained the respondent from invoking/receiving payments pursuant to the bank guarantees as mentioned in Annexure P-2 to the petition.

5. The respondent have now filed their reply. They have objected to the petition on various grounds. It has been stated that the petitioner has failed to make out any ground for stalling the encashment of the unconditional and irrevocable bank guarantee issued in favour of the respondent and listed in Annexure P-2 of the petition amounting to Rs.44,83,32,540/-. It is also stated that the admitted liability of the petitioner towards the respondent is Rs.85,87,63,675/- as can be seen from the Deed of Rescheduling dated 29.10.2015 and e-mails dated 26.10.2015, 26.12.2016 and 29.12.2016 addressed by the petitioner to the respondent. Hence, the amount due and payable by the petitioner is much more than the amount of the unconditional and irrevocable bank guarantees invoked by the respondent on 09.08.2017. It has been stated that on 18.11.2016, the respondent issued a demand notice. Thereafter, on 28.06.2017, the respondent terminated the 34 original lease and loan schedules which were rescheduled vide Deed of Rescheduling dated 22.7.2014 and Deed of Rescheduling dated 29.10.2015 resulting in all the dues becoming payable under the said Master Agreement.

6. It has also been pointed out that on 26.12.2016, the petitioner had addressed an e-mail to the respondent admitting its liability and stating that one time settlement for Rs.61 crores can be accepted by the respondent against the petitioner's entire outstanding dues and that the said sum of Rs.61 crores would be paid by the petitioner in three installments from January to March 2017. Similarly, on 29.12.2016, the petitioner addressed an e-mail requesting for an One Time Settlement (OTS) of Rs.62 cores against the petitioner's entire

outstanding dues. Hence, it is reiterated that there are no grounds made out for this court to pass an interim order to restrain invocation of the bank guarantees.

7. I have heard learned senior counsel for the parties.

8. Learned senior counsel appearing for the respondent has submitted that 35 loan financing schedules were entered into between the parties and equipment worth Rs.90 crores have been re-financed. Default had occurred in 2014 and hence, the restructuring and rescheduling was done on two different occasions. First one was carried out on 22.07.2014 and the second one was carried out on 29.10.2015. It is reiterated that the dues are admitted by the petitioner and the petitioner is in default not only of the original loan financing schedules but even of the two subsequent deeds of rescheduling.

9. Learned senior counsel for the petitioner submits as follows:-

a. He states that the respondent have wrongly terminated the agreement and preponed the payment of dues. It is stated that as per the deed of Rescheduling of 2015, the last installment was payable in 31.01.2019.

b. It is urged that the respondent have wrongfully terminated the said agreement and sought to recover the entire dues including the amount which were payable in 2018 and 2019.

c. It is further stated that the letter of invocation is not in accordance with the terms of the bank guarantees. Hence, it is urged that the letter of invocation being illegal, the bank guarantees cannot be encashed.

d. Reliance is placed on the judgment of the Supreme Court in the Hindustan Construction Company Ltd. vs. State of Bihar & Ors., (1999) 8 SCC 436 and judgment of this court in Puri International Pvt. Ltd. vs. NBCC, 1997 (41) DRJ 592 to support the submissions.

10. In reply, learned senior counsel for the respondent has pointed out that the respondent has a right to terminate the Master Agreement in case of default. Reliance is placed on clause 18 and 19 of the Master Agreement to contend that in case of default, the respondent can terminate the Agreement.

11. It is settled law that while dealing with invocation of a Bank Guarantee issued by a Bank its encashment cannot be prevented by the party at whose instance the guarantee was issued except in cases of fraud or irreparable injustice. Fraud must be of "egregious nature" so as to vitiate the entire underlying transaction. Irretrievable injustice should be of the kind arising in an irretrievable situation where an irreparable and irretrievable harm would be caused to the party seeking injunction. These principles have been laid down and reiterated by the Supreme Court in (1988) 1 SCC 174 titled as U.P. Cooperative Federation Ltd. - vs- Singh Consultants and Engineers (P) Ltd. and (1994) 1 SCC 502 titled as Svenska Handelsbanken -vs- Indian Charge Chrome and various other judgments.

12. Reference may also be had to the judgment of the Supreme Court in United Commercial Bank -vs- Bank of India and others, AIR 1981 SC 1426 wherein the Hon'ble Supreme Court held as follows:-

"The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

13. There is not much dispute on the facts. The parties entered into a Master Agreement dated 20.07.2012. Thereafter separate 34 schedules were entered into. The petitioner was in default and hence, a Deed of Rescheduling was executed on 22.07.2014. Despite the rescheduling deeds, the petitioner continued to be in default. Hence, another Deed of Rescheduling deed 29.10.2015 was entered into.

14. The first grievance of the petitioner is that the respondent have wrongfully terminated these agreements and are seeking the entire sum payable upfront which is illegal.

15. There is no clarity in the petition as to how much amount is in default by the petitioner. It is also an admitted fact that the petitioner have not at any stage offered up to date payments as per the revised schedule. They continue to be in default. As rightly pointed out by the learned senior counsel for the respondent that there is an admission in para 12 of the petition that the petitioner was not in a position to repay the full amount of the dues of the respondent. Deed of rescheduling dated 29.10.2015 also admits the outstanding dues. Vide E-mails dated 26.12.2016 and 29.12.2016, the petitioner have also acknowledged the debt of the petitioner payable to the respondent. Hence, the plea of the petitioner that the agreement has been wrongly terminated is meaningless inasmuch as the petitioner is in default.

16. Even otherwise the reference may be had to Clause 19 of the Master Agreement which reads as follows:-

"19. Remedies

If a Renter Default occurs, you will be deemed to have breached a fundamental term of this agreement and any lease and any financing and you are deemed to have repudiated this agreement, any lease and any financing. We shall give you

a written notice of such Renter Default and give you 15 days period within which to cure the Renter Default failing which we may execute one or more of the following remedies.

- (a) terminate this agreement of any lease or financing;
- (b) declare all amounts due under any lease or any financing to be immediately due and payable;
- (c) enter into any premises and take possession of any equipment without demand or notice to you (and we shall not be liable for any damage which may be caused by any such removal or detachment of equipment);
- (d) require you to deliver the equipment to a location in India specified by us, and if you fail to deliver such Equipment to us within 5 days of our request, declare an amount equal to the equipment value of the equipment not delivered by you to be immediately due and payable as liquidated damages for loss of bargain and not as a penalty;
- (e) Declare the present value as of the date of the Renter Default (discounted at the rate of 5% per annum (compounded monthly)) of all Rent payments for any leases of Financing payable after the date of the relevant Renter Default through to the scheduled date of expiration of the Then Applicable Term to be due and payable as liquidated damages for loss of a bargain and not as a penalty; and
- (f) Exercise any other right of remedy available to us at law or in equity.

Nothing in this clause permits us to claim from you the same amount twice under sub-clauses (o)(i). Our rights, remedies and power under this agreement are cumulative and in addition to (and not in derogation of) every other right, remedy or power provided by law or equity."

17. The above clause clearly provides that in case of default the agreement may be terminated. Hence, the respondent could terminate the Master Agreement. There is no merit in the plea of the petitioner that the termination of the Master Agreement is illegal.

18. The next plea raised by the petitioner is that the invocation of the bank guarantees is not in terms of the bank guarantees. Relevant portion of one of the bank guarantees may be referred to. The same reads as follows:-

"

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Dt.26.07.2012

Bank Guarantee

To:

Hewlett Packard Financial Services (India) Pvt Ltd 24, Salarpuria Arena, Hosur

Main Road, Adugod, Bangalorc- 560030

Whereas you have agreed to lease to M/s Vayam Technologies Limited, a company incorporated under Companies Act, 1956, having its registered office at Thapar House, 124, Jan path, New Delhi-110001 ("the Customer"), equipment for the term and at the rent and upon and subject to the terms and conditions contained in the Master Rent and Financing Agreement/ Master Lease Agreement No.364 (the "Master Agreement") and the schedules thereto executed or to be executed between the Customer and yourselves. Now in consideration of the above and your requirement for security on the value of the lease, we, AXIS Bank Limited, incorporated under the Companies Act 1956 and carrying on the business of banking under the Banking Regulation Act 1949, having its registered office at 3rd Floor, Trishul, Opp. Samartheshwar temple, Law Garden, Ellis Bridge, Ahmedabad-380006 and one of its branch office at Statesman House 13th Floor, 148, Barakhamba Road, New Delhi-110001 ("the Bank") hereby irrevocably and unconditionally undertake to pay you, upon receipt of your written demand the whole of any sum which you may require from the Customer for the payment of rental or any other amounts payable to you with respect to Schedule(s) NO. under the Master Agreement and all future Schedules to be executed by yourself and the Customer under the Master Agreement during the term of this Guarantee. PROVIDED that the total amount recoverable from us under this Guarantee shall not exceed . Rs.74,00,000/- (Rupees Seventy Four Lac Only) in aggregate.

Such payment shall be made 'by direct transfer to an account in your name at such bank in such place as you shall direct or by way of an irrevocable bank draft.

A written demand made by you shall, as between ourselves, be conclusive evidence of the amount due and owing to you from the Customer and without prejudice to the provisions of this Guarantee, we shall effect payment to you immediately, without protest or question, after our receipt of such written demand on or before 24.04.016 and without the need for you to take any legal action against or to obtain the consent of Customer and notwithstanding any objection of the Customer and without any proof of your claim or entitlement to it or conditions whatsoever and without any right of set-off or counterclaim of whatever nature. Such payment shall be made by direct transfer to an account in your name at such bank and in such place as you shall direct or by way of an irrevocable bank draft.

Our obligations hereunder shall not be affected by any act, omission, matter or thing which but for this provision might operate to release or otherwise exonerate us from our obligations hereunder in whole or in part, including without limitation and whether or not known to us or you, any time, indulgence, waiver or consent at any time give to Customer or the taking, variation, compromise, renewal or release of or refusal or neglect to perfect or enforce any rights, remedies or securities against the Customer, any variation, amendment, increase or decrease to the credit facility granted to the Customer or any legal

limitation, unenforceability, invalidity or frustration of any obligation of the Customer.

This guarantee shall come into force on 26.07.2012 and shall expire at this office at 5pm on 24.04.2016, India time save that such expiration does not apply in respect of any written claims you make that are received by us at the address specified above no later than ninety (90) days following such expiry date i.e. 23.07.2016 (Claim Date).

Save for claims made by you no later than ninety (90) days following expiry date, upon expiry this guarantee shall become null and void, this original letter of guarantee shall be returned to us for cancellation, and any claim or statement received after the expiry of the ninety (90) days period mentioned above shall be ineffective.

....."

19. Hence, the only requirement for encashment stated in the bank guarantees is receipt of a written demand that the whole or any sum which the respondent may require from the customer for payment of rental or any other amount payable under the Master Agreement etc. Similarly, the bank guarantee further states that the written demand made shall be conclusive evidence of the amount due and owing to the respondent from the customer.

20. A perusal of the letters sent by the respondent to different banks dated 08.08.2017 shows that encashment has been made as follows:-

"Bank Guarantee: Encashment of BG No-0844131GFIN0015 Dated-14-06-2013

We refer to the above bank guarantee Number 0844131GFIN0015 for an amount of Rs. 1,33,95,690/- (Rupees One Crore Thirty Three Lakh Ninety Five Thousand Six Hundred Ninety Only) original of which is attached here with.

In accordance with our rights under the bank guarantee. We HEREBY DEMAND that the said bank guarantee for an amount of INR 1,33,95,690.00 (Rupees One Crore Thirty Three Lakh Ninety Five Thousand Six Hundred Ninety Only) to be paid to us immediately under the said bank guarantee to Hewlett Packard Financial Services India Ltd."

21. I may look at the legal position regarding the letter of encashment. In Hindustan Construction Co. Ltd. vs. State of Bihar & Ors. (supra), the Supreme Court held as follows:-

"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. In *U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd.*, the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank*, 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 v. Indian Charge Chrome*, *Larsen & Toubro Ltd. v. Maharashtra State Electricity Board*; *Hindustan Steel Works Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.*; *National Thermal Power Corporation Ltd. v. Flowmore (P) Ltd.*; *State of Maharashtra v. National Construction Co.*; *Hindustan Steel Works Construction Ltd. v. Tarapore & Co.* as also in *U.P. State Sugar Corporation v. 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."

22. The factual background of the above judgment would show that two separate bank guarantees had been made in favour of the respondent. One bank guarantee was against "mobilization advance" and other being the "performance bank guarantee". The Supreme Court held the bank guarantee to be qualified bank guarantee and could be enforced only in the circumstances referred to. The bank guarantee was held not to be unconditioned or unequivocal.

23. In the present case, the communications on record clearly shows that there is a default in repayment. Admittedly, deeds of rescheduling have taken place and thereafter there was cancellation of the contract. There is nothing to show that the invocation of the bank guarantee as done by the respondent is not in terms of the bank guarantee or an amount not on account of default in refund of

the dues is claimed. Matter can be looked at another way. It is a re-financing of equipment whereby the petitioner was to pay the value of the equipment in installments. The petitioner has defaulted despite two separate deeds of rescheduling being executed. Other than reiteration of the amount in the letter of invocation as stated in deed of rescheduling, no other amount is being claimed from the petitioner.

24. Hence, the above judgment would be of no help to the petitioner.

25. Similar would be position regarding judgment of this court in the case of Puri International Pvt. Ltd. Vs. NBCC (supra). There is no merit in the said submissions of the petitioner.

26. There is no merit in the present petition and the same is dismissed.

27. All interim orders stand vacated.