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(2011) 08 DEL CK 0382

In the Delhi High Court

Case No : O.M.P. 735 of 2010

V.K. Sood Engineers and Contractors DDS JV — APPELLANT

Vs

Punjab National Bank and Others — RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2011) 08 DEL CK 0382

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Vishnu Mehra and Sakshi Gupta, for the Appellant; M.U. Khan, for R1 and Arun Khosla and Shreeanka Kakkar, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This petition has been preferred u/s 9 of the Arbitration and Conciliation Act to seek a restraint against the encashment of various bank guarantees furnished at the instance of the Petitioner by Punjab National Bank - Respondent No. 1 in favour of Respondent No. 2, Ircon International Ltd.

2. When the matter was taken up by this Court on 10.12.2010, a detailed ex-parte order came to be passed recording the reasons for granting ad-interim measures. The said order reads as follows:

Issue notice to the Respondents, returnable on 28.03.2011.

My attention is drawn to Clause 9 of the GCC which reads as follows:

9.0 PERFORMANCE BANK GUARANTEE

Within 28 days from the date of issue of Acceptance Letter by IRCON but before signing of the agreement, the contractor shall submit a Performance Bank Guarantee to IRCON for 3% value of the contract sum issued by Nationalized/ Scheduled Bank on a format issued/approved by IRCON. The Performance Bank Guarantee shall be kept valid for the entire contract period which shall be the duration of the execution of the contract works. Thus the validity period of Performance Bank Guarantee shall be until issue of completion certificate by the Engineer-in-charge. The contractor shall revalidate, if needed, the Performance Bank Guarantee to cover the period until issue of completion certificate.

Learned Counsel for the Petitioner has referred to the completion certificate issued by Respondent No. 2 dated 26.10.2009, according to which, the date of actual completion of work in respect of the three projects namely, Zone Br.17A, Zone Br.17B and Zone Br.17A (Additional) is stated to be 31.03.2009, 28.02.2007 and 31.3.2009 respectively. It is also stated in the certificate that the extension of time has been granted on administrative grounds, and not on the contractor''s account. The certificate also records that the work stands completed satisfactorily. It is, therefore, argued that in terms of Clause 9 of the GCC, the Petitioner, after completion of the works on the aforesaid dates was not obliged to keep the performance bank guarantees alive. The Petitioner seeks restraint against invocation of the following bank guarantees:

S. No

B.G.No

Zone/ Package

Purpose

Date of issue

Amount (Rs.)

Extended upto

1

ILG-203

BR-17A

Performance

18.08.2003

5,00,000/-

13.08.2008

2

ILG-303

BR-17B

Performance

16.08.2003

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5,00,000/-

13.08.2008

3

ILG-503

BR-17A

Performance

27.12.2003

39,83,363/-

25.12.2008

4

ILG-904

BR-17A

Security

02.06.2004

61,38,938/-

25.12.2008

5

ILG-1005

BR-17A

Security

09.11.2005

65,00,000/-

07.11.2008

6

ILG-505

BR-17A

Mobilization

18.05.2005

64,96,517/-

17.11.2008

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7

ILG-605

BR-17A

Mobilization

18.05.2005

64,96,517/-

17.11.2008

8

ILG-705

BR-17A

Mobilization

18.05.2005

64,96,517/-

17.11.2008

9

ILG-805

BR-17A

Mobilization

18.05.2005

64,96,517/-

17.11.2008

10

ILG-807

BR-17B

Performance

20.08.2007

78,87,173/-

19.08.2008

11

ILG-807

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BR-17B

Performance

21.08.2007

30,10,967/-

20.11.2008

12

ILG-1507

BR-17B

Performance

24.12.2007

45,18,277/-

23.09.2008

My attention is also drawn to three awards made by the learned Arbitral Tribunal in respect of each of the aforesaid contracts. The Respondent IRCON International Ltd. had preferred counter claims before the Arbitral Tribunal. The counter claims preferred in relation to Contract No. Zone Br.17B have been adjusted in the final award. In respect of the awards arising out of contract No. 17A and 17A (Addl.), none of the counter claim of the Respondent was allowed. My attention is also drawn to order dated 4.8.2010 passed in OMP No. 425/2010, OMP No. 426/2010 and OMP No. 427/2010 (these objections were preferred by the Petitioner). However, No. objections were preferred to the three awards. On the contrary, on 04.08.2010, the Respondent had made a statement that the Respondent had accepted the awards and that they would be making payment of the awarded amounts within 15 days.

In view of the aforesaid position, in my view, to permit invocation of the aforesaid bank guarantees at this stage would be wholly improper and may amount to a fraud upon the Petitioner and the issuing Bank. Accordingly, the invocation of the aforesaid bank guarantees shall remain stayed till the next date. DASTI.

3. The Respondents have filed their reply, and the matter has been heard at considerable length.

4. The Respondent Nos. 2 and 3 have vehemently argued that the Petitioner is guilty of gross suppression and mis-statement of relevant facts. It is stated that during the execution of the works under the three contracts in question, the Petitioner faced acute shortage of funds and repeatedly sought financial help of the said Respondents. At the instance of the Petitioner, Respondent No. 1 Punjab National Bank issued three communications, two dated 23.02.2007 in relation to

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bank guarantee No. 5/05 dated 18.05.2005 and bank guarantee No. 6/05 dated 18.05.2005 stating that, at the request of the Petitioner, an amount of Rs. 64,96,517/- (in respect of each of the aforesaid two guarantees) is covered for the recovery of steel purchase from SAIL. Another letter was issued by the bank in relation to bank guarantee No. 7/05 dated 18.05.2005 stating that the bank covers security deposit up to the amount of Rs. 64,96,517/- for fabrication as per contract dated 10.05.2005 and LOI dated 05.12.2003.

5. The Petitioner once again approached Respondent No. 2 to seek further assistance to complete the balance supply of steel of Qty. 2500 MTS. To provide comfort to the said Respondents, and secure the advances made by them to SAIL for purchase of steel, the Petitioner issued a communication dated 07.08.2007, inter alia, stating as follows:

5. As also discussed in the meeting at Corporate Office with higher IRCON management on 6.8.2007 we will extend and cover BGs total amount of advance taken in the form of steel advance which is presently Rs. 3.27 crores plus interest accrued.

6. We will also extend the performance bond for BR-17A & BR-17A (Addl.) in operation as per conditions of the contract.

If the above help is given to us we undertake to complete the entire work of fabricating girders by 31.10.2007 and supply within November, 2007.

We shall keep the BGs alive/extended for the equivalent amount of steel advance given to us for recovery if any. At the close of contract, adjustment of advances shall be made from the payments due to us including the payable payments of extra/NS items. Balance, if any, shall be adjusted against the BGs after giving us a notice period of 15 days to arrange the funds and clear the advances.

(emphasis supplied)

6. On 29.09.2007, the Petitioner issued another communication to Respondent No. 2 stating that they had completed the work relating to contract BR 17-B, i.e. fabrication and supply of steel Girders for various Bridges under on Qazigund-Baramulla section of Kashmir Rail (J&K), and also received the final payment. It was stated that the bank guarantee No. ILG 303 for Rs. 5,00,000/-, bank guarantee No. ILG 804 for Rs. 45,18,277/- and bank guarantee No. ILG 807 for Rs. 30,10,967/-, which stands released, are offered for recovery of steel advance given to the Petitioner against contract No. BR 17A and BR 17A (Additional).

7. On 30.10.2007, the Petitioner issued yet another communication to Respondent No. 2 inviting the Respondents attention towards condition No. 4 sub para (vi) of allotment letter dated 10.05.2005, wherein it was provided that adjustment of bank guarantee from earlier works may be considered towards enhanced scope of work. As order for additional girders on emergent basis had been placed on the Petitioner vide letter dated 22.10.2007, the Petitioners submitted the bank guarantees lying with the Respondent in relation to the

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virtually completed work under BR 17A, for adjustments against material advances of BR 17A (Additional) to cover the advance payment for purchase of materials for additional girders from SAIL on emergent basis.

8. Mr. Khosla submits that none of the aforesaid documents were produced by the Petitioner before this Court at the time of filing of the petition. It is also submitted that on 18.07.2008, the Respondent IRCON had demanded an amount of Rs. 4,57,41,310/- as the amount outstanding against steel advances for package 17A and 17A (Additional). The Petitioner was called upon to deposit the amount by 26.07.2008. Along with this communication, the Respondent annexed the breakup of the amount claimed by it in the said communication.

9. The Petitioner sent it is reply to this communication on 01.08.2008 stating that they need time for making arrangement of funds. They further stated that they are regularly paying interest on all advances and "our Bank Guarantees are valid and we will extend these guarantees further". The Petitioner sought three months extension for payment of advances and also requested the Respondent "not to insist on encashment of BGs at this stage which will make our account NPA with the Bank and cause major upset to us in our future business with our clients, including Railways and IRCON".

10. The Respondent issued another communication on 03.03.2009 raising a demand of Rs. 6,21,88,361.44/-. With this communication as well, the summary of recovery of dues from the Petitioner was enclosed which also gave computation of the steel advances paid to the Petitioner. As per the said statement, Rs. 3,05,19,835/- was the balance recoverable on account of steel recovery, and Rs. 51,11,530/- was recoverable on account of balance of Rivets advance. These documents were also not placed before the Court by the Petitioner.

11. Mr. Mehra, learned Counsel for the Petitioner submits that there was No. concealment made by the Petitioner inasmuch, as, in para 21 and 22 of the petition, the Petitioner had made the following averments:

21. That as per terms and conditions of the Contract, the Petitioner had to purchase Steel from Steel Authority of India in respect of Zone BR-17A and Zone BR-17A (Additional). However, due to financial difficulties created by the Respondent No. 2, the Petitioner by their letter dated 07.08.2007, requested for financial help from the Respondent No. 2 for purchase of the steel from Steel Authority of India. The request of the Petitioner was accepted by the Respondent No. 2. The steel purchased was paid for by the Respondent No. 2 which was treated as Steel Advance by the Respondent No. 2 and it was agreed that the payment made had to be adjusted against the final bill of the Petitioner in respect of Zone BR-17A and Zone BR-17A (Additional). It may be clarified that there was No. such clause either in the tender documents or in the Allotment/ Acceptance Letter or even in the Contract Agreement.

22. That it may stated here that though after the completion of work in respect

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of Zone BR-17B, the Guarantees stood released. However, at the request of the Respondent No. 2, the Petitioner by their letter dated 29.09.2007 offered only the 3 Bank Guarantees, namely ILG-303, ILG-807 and ILG-804 submitted for the said Zone BR-17B. The remaining 9 Bank Guarantees were, however, not offered.

12. Mr. Mehra submits that the advance granted for procurement of steel is not covered by the contracts in question. The said arrangement was a separate arrangement. He submits that the letters of invocation of the said bank guarantees issued by the Respondent did not even make a reference to the alleged recovery sought to be made on account of advances for steel. The letters of invocation alleged that the Petitioner has failed to fulfill its contractual obligations. He submits that this statement of the Respondent IRCON, in the various letters of invocation, is patently false in the face of the completion certificate issued by the Respondent on 26.10.2009 in relation to all the three packages. He, therefore, submits that there is No. concealment of any material or fact by the Petitioner from this Court while filing this petition.

13. Having heard learned Counsels for the parties, I am of the view that the Petitioner has indeed sought to misled this Court into passing the ex-parte order of injunction, by not placing before this Court the complete scenario and the correspondence exchanged between the parties in relation to advances for steel and the Petitioners own representation that the said advances would be secured by the bank guarantees furnished at the instance of the Petitioner by the Respondent bank in relation to the three contracts.

14. From the correspondence placed on record by the Respondent, it is evident that the Petitioner was in urgent need of funds. Since the Petitioner could not procure the steel required to execute the works under the contracts, the Petitioner requested the Respondent to pay for the same. Firstly, at the instance of the Petitioner, the Punjab National Bank issued express communications on 23.02.2007 and 05.03.2007 in relation to bank guarantee Nos. 5/05 and 6/05 and 7/05 all dated 18.05.2005 extending the scope of these bank guarantees to cover the recovery of steel purchased for the Petitioner from SAIL, and to cover for security deposit for fabrication as per contract dated 10.05.2005 and LOA dated 05.12.2003. Secondly, to provide comfort to the Respondent, on 07.08.2007, the Petitioner even assured that the bank guarantees furnished by the Petitioner under the contracts, which by then had been released on account of completion of some of the works, would be kept alive to secure the amounts advanced by the Respondent for the purchase of steel.

15. When the Respondent raised its demand vide letter dated 18.07.2008, on 01.08.2008 the Petitioner pleaded the Respondent not to encase the bank guarantees as the said bank guarantees were being extended, and the interest was being paid on all advances.

16. The averments made in the petition, as extracted above, conceal more than what they disclose. Without the relevant documents being placed on record, the

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purport of the said averments could possibly not have been fully appreciated. Moreover, the averment that only three bank guarantees bearing Nos. ILG 303, 807 and 804 were offered (without stating what they were offered for), and that the remaining nine bank guarantees were not offered is also not a completely accurate statement, inasmuch, as, the Petitioner in its communications dated 07.08.2007, 30.10.2007 and 01.08.2008 clearly represented to the Respondent that all its bank guarantees given under the contracts in question were valid and extended to cover the Respondents dues for advances for steel.

17. It is not in dispute that the aspect of advances for steel was not the subject matter of any of the arbitration proceedings, and the said dues are not covered by three arbitration awards passed in favour of the Petitioner. The said amounts stand admitted by the Petitioner in its communication dated 07.08.2007, and the computation furnished by the Respondent IRCON has not been denied in the subsequent communication dated 01.08.2008.

18. The Petitioner has filed this petition to invoke the discretionary jurisdiction of this Court. The Petitioner was expected to come with clean hands, and to make a full and complete disclosure of facts and circumstances which may have a bearing on the decision of the Court. By merely stating that only three bank guarantees had been offered (presumably to cover advances on steel), and by stating that the invocation of the bank guarantee has been made on the basis that the works under the contract are not complete (which is stated to be factually not true), the Petitioner has concealed from this Court the aforesaid relevant and material facts and circumstances. Had a complete disclosure been made and full picture presented before the Court at the time when the petition was taken up for ex-parte hearing, this Court certainly would not have granted the injunction as it did, considering the fact that there are admittedly very large liability owed by the Petitioner to the Respondent, and the Petitioner had repeatedly represented to the Respondent that the said liabilities are covered by the various bank guarantees offered under the three contracts.

19. I am, therefore, not inclined to continue the interim order any further. I vacate the same and dismiss this petition.

20. Considering the conduct of the Petitioner, I subject the Petitioner to costs quantified at Rs. 3 lacs. Costs be paid within two weeks.

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