

(2015) 09 BOM CK 0223
In the Bombay High Court
Case No : Appeal (L) No. 720 of 2015

VKE Plumbing Private Limited	Vs	APPELLANT
Blue Ridge hotels Private Limited and Others		RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2015) 09 BOM CK 0223

Hon'ble Judges : V.M. Kanade and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : Zal Andhyarujina and S.V. Mehta I/by Malvi Ranchoddas and Co., for the Appellant; Sharan Jagtiani and Ashish Gatagat I/by Vidhi Partners, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Kanade, J.—By consent the appeal is heard finally at the stage of admission.

2. Heard learned counsel for the appellant and respondent.

3. Respondent No. 1 has invited tenders for plumbing and fire fighting works for their proposed hotel project in Andheri (E), Mumbai.

4. The tender given by the appellant was accepted and two letters regarding award of contract were issued on 3.1.2014. The appellant also executed two bank guarantees; one in respect of mobilisation bank guarantee and second in respect of performance of works.

5. There was a dispute between the parties and on 26th May 2015, contract was terminated by respondent No. 1 and thereafter the bank guarantee was invoked sometime on 10th September, 2015. Being aggrieved by the said invocation of bank guarantee which was invoked by a written notice to the bank, the appellant filed Arbitration Petition in this Court under Section 9 of the Arbitration and Conciliation Act, 1996.

6. It is contended firstly that mobilisation bank guarantee was conditional and therefore the learned Single Judge has erred in coming to the conclusion that the bank guarantee was unconditional. Secondly, it is submitted that the bank had specifically pleaded case of fraud in the Arbitration Petition, more particularly in paragraph Nos. 16 and 17 of the said petition. Paragraph Nos. 16 and 17 of the Arbitration Petition reads thus :

"16. That in view of the aforesaid it is evident that any attempt on the part of Respondent No. 1 to encash the Mobilisation bank Guarantee when it owes monies to the Petitioner under the Contracts amounts to perpetuating fraud upon the petitioner.

17. That the Respondent No. 1 is perpetuating fraud upon the Petitioner, in complete disregard of the fact that the Petitioner has discharged its obligations under the Tender as is evident from the return of the Performance Guarantees as referred to above. Hence, the Petitioner cannot be made to suffer a loss by encashment of Mobilisation Bank Guarantee when it has dutifully performed its obligations under the contract and is liable to receive the contracted amount in respect thereof".

7. It is submitted that without taking into consideration these facts, the impugned order was passed. Perusal of the said paragraphs clearly indicate that the allegation of fraud has been made on the basis that though respondent No. 1 owes monies to the appellant, respondent No. 1 had invoked the bank guarantee. In our view, invocation of bank guarantee on the alleged reason of monetary dues being liable to be paid by the respondent No. 1 to appellant cannot be said to be allegation of fraud. We are, therefore, not inclined to accept the said submission.

8. Shri. Zal Andhyarujina, learned counsel appearing on behalf of appellant invited our attention, firstly to clause No. 28.1 of the tender document. It is submitted that the said clause in terms provided that repayment of mobilisation advance was made from first running account bill on pro rata percentage basis to the value of work done. It is also submitted that by virtue of said clause, the payment of the mobilisation advance was made conditional and it become payable only after performance of the contract. He has invited our attention to wording of the bank guarantee. It is submitted that in clause (1), it was specifically mentioned that respondent No. 1 had agreed to advance money for mobilisation in accordance with the terms and conditions as set out in the aforesaid document and also contract executed by and between the parties. It is submitted that in view of specific provision in clause (1) of the bank guarantee, it was incumbent on the learned Single Judge to consider clause in the tender document under the contract. He invited our attention to the judgment of Apex Court in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, and submitted that in the said case also the bank guarantee which was given for mobilisation advance was invoked and the Apex Court after interpreting the terms and conditions of the contract held that it was a conditional guarantee and

not unconditional, despite the fact, it used expression, "agree unconditionally and irrevocably" to guarantee payment.

9. On the other hand, learned counsel appearing on behalf of respondent submitted that the bank guarantee being an independent contract, it was not necessary to refer to the tender document or contract between the parties. It is submitted that the contract having been terminated on account of clause 10(2) which gave unconditional right to the respondent to terminate the contract at any time, question of payment of mobilisation advance from the running bills did not arise. He then invited our attention to clauses 2 and 3 of the bank guarantee. Said clauses clearly mention that notwithstanding what is contained in clause (1) of the bank guarantee, respondent No. 1 at it's sole discretion at any time can invoke the bank guarantee. He also invited our attention to clause 3(a), (c) and (d) of the bank guarantee. He also relied upon the judgment of Supreme Court in U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd., and unreported judgment of this Court in ITD Cementation India Limited -vs- Reliance Infrastructure Limited and ors, in Appeal (L) No. 64 of 2014.

10. Having heard and having perused the impugned order passed by the learned Single Judge, we are of the view that no interference is called for in the order passed by the learned Single Judge. So far as submission of learned counsel Shri. Zal Andhyarujina, appearing for the appellant is concerned, we are of the view that the said submission cannot be accepted. The Apex Court in the case of Hindustan Construction Co. Ltd. (supra), after perusing clauses in the contract came to conclusion that the bank guarantee which was given towards mobilisation bank guarantee was conditional guarantee and was not unconditional. The Hon"ble Supreme Court in para 13 has observed thus :-

"13. The bank, in the above guarantee, no doubt, has used the expression, "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:

".....in the event that the obligations expressed in the said clause of the above mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract".

It was under these circumstances, the Apex Court confirmed the order passed by the learned Single Judge of High Court and set aside the order of the Division Bench.

11. In the present case clause 28(1) of the tender document has to be read in the context of the other clauses of the document of contract which was awarded to the appellant. Clause 10(2) of the contract which was awarded, clearly gives right to respondent No. 1 to terminate the contract at any time without assigning any reason. Respondent No. 1 had accordingly terminated the contract on 26.5.2015 itself.

12. Secondly, even the bank has clearly provided in clause Nos (2) and sub clauses (a), (c) and (d) of clause (3) about invocation of bank guarantee. The clause Nos. 2 and 3 reads thus :-

"2. It is agreed that notwithstanding what is contained here in above, BRHL shall entitled to invoke this Bank Guarantee in its sole discretion, at any time, by a written invocation Notice to the Guarantor and such invocation shall not be called in question by the Guarantor in any manner whatsoever.

3. The Guarantor hereby further covenants that -

a) The Guarantor shall pay the aforesaid sum on demand made in writing by BRHPL without demur or protest and without any reference to the Contractor or anybody else and not withstanding any dispute or difference that may exist or arise between BRHPL and the Contractor.

b) xxx xxx xxx

c) The notice of demand in writing used by BRHPL shall be conclusive proof as regards to the amount due and payable to BRHPL and it shall not be disputed by the Guarantor either inside or outside the Court, tribunal, arbitration or other authority;

(d)The decision of BRHPL on the breach of any of the terms and conditions of the Contract/tender by the Contractor or his /its failure to perform his /their obligations or discharge his/their duties under the Tender Document shall be final and binding on the Guarantor and shall not be disputed by the Guarantor inside or outside the Court, tribunal, arbitration or other authority.

13. From the conjoint reading of above clauses, in our view, it is apparent that it was expressly made clear in the bank guarantee that bank guarantee could be invoked by the respondent No. 1 upon a written notice being issued. Clause (d) also specifies that the decision of respondent No. 1 on the breach of any of the terms and conditions of the contract would be final and binding on the guarantor. In view of this specific clause in the said bank guarantee and also from reading clauses 28(1), 10(2) and other clauses of the contract, we have no hesitation in coming to the conclusion that the said bank guarantee was unconditional bank guarantee. Apart from that, since the contract itself was terminated, the appellant cannot take recourse to clause 28(1) of tender document for the purpose of what is not contained in it. We do not find that the finding of the learned Single Judge is either perverse or not in accordance with law. Therefore, we do not intend to interfere with the said order. The appeal is dismissed.

14. At this stage, learned counsel appearing on behalf of the appellant seeks continuation of ad-interim stay granted by this Court. On the other hand, learned counsel appearing on behalf of the respondent submits that learned Single Judge had not granted ad-interim stay and heard the Arbitration Petition finally and this Court granted ad-interim stay only till hearing of the present appeal. We are of the view that since the learned Single Judge had also not granted ad-interim stay

and since we have granted ad-interim stay for a couple of days and heard the appeal finally at the stage of admission, we are not inclined to continue the stay granted by this Court.