
(1996) 08 DEL CK 0021

In the Delhi High Court

Case No : I.A. No. 8932 of 1992 in Suit No. 2195 of 1992

Walchandnagar Industries Ltd.

APPELLANT

Vs

Cement Corporation of India and another

RESPONDENT

Date of Decision : 07-08-1996

Acts Referred:

Citation : (1997) 88 CompCas 205

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : Arun Bhardwaj, for the Appellant; R. K. Jain Anand Banerjee and Sanjeev Saraswat, for the Respondent

Judgement

Anil Dev Singh, J.—This is an application whereby the petitioner prays for grant of an interim injunction restraining the second respondent from releasing the payments of bank guarantees, bearing Nos. G-76/1337 and G-78/448, dated December 6, 1982, and April 9, 1984, respectively. The facts giving rise to this application are as follows :

The first respondent floated tenders inviting quotations from various engineering houses regarding supply and supervision of erection and commissioning of two numbers of cement mills at Tandur, State of Andhra Pradesh. Ultimately, after considering the tenders submitted by various concerns, the first respondent issued letter of intent dated November 9, 1982, in favor of the petitioner for supply and supervision of erection and commissioning of two cement plants. According to the letter of intent, a formal contract covering terms and conditions was to be signed within three months from the date of the acceptance of the letter of intent. It is the common case of both the parties that even after acceptance of the letter of intent by the petitioner, no formal contract was executed between them. Clause 2.0.0 of the letter of intent gives the scope of work. This clause, inter alia, provides for the work to be performed by the petitioner. In order to appreciate the nature of the work which was required to be performed by the petitioner, it will be necessary to extract some of the sub-

clauses thereof. These read as follows :

"2.1.0 The scope of work for two numbers 10,000 kph open circuit cement mill, i.e., clinker grinding package shall be as defined in the purchaser's tender documents and as modified and agreed to subsequently.

2.1.1 Engineering as specified in the tender enquiry and subsequent modifications as agreed.

2.1.2 Supply of equipment at site from cement mill hoppers to cement transport to silo excluding certain equipments forming purchaser's scope of supply and civil works as defined in purchaser's tender document. List of major process equipment is detailed in annexure "B".

2.1.3 Supervision of erection and commissioning of clinker grinding plant.

2.1.4 Giving performance test and guarantees for the entire section as well as individual equipment.

2.2.0 The scope of the supplier also includes co-ordination with inter-linking area as defined in the scope in Chapter II of technical volume of purchaser's tender documents.

2.3.0 Supplier will get their system design and other relevant parameters checked by reputed machinery manufacturer/supplier of equivalent capacity cement grinding plant in India or abroad.

2.4.0 In case ESP do not perform to the required specification, the supplier will rectify the same to bring the performance, i.e., dust concentration at outlet to 150 mg/Nm³ at no extra cost to the purchaser.

2.5.0 The guaranteed power figure of 38.32 kwh per tonne of cement (OPC) ground, represents the actual power consumption of the electric motor at metering points of load centre for the cement grinding packaging purchaser's bought out items provided these are purchased as per specifications/recommendations of the supplier . . ."

2. The letter of intent further stipulated that the performance test was to be performed for a period of 4 days at 20 hours continuous operation/per day for the whole section and the final performance test was required to be completed within four months of the first performance test which in turn was to start immediately after full load commissioning of the cement grinding section. It may also be mentioned that the work was to be completed within 30 months from the effective date of the contract. According to the case of the petitioner, both the mills went into operation in the month of May, 1986, and since then the same are running satisfactorily but despite this the first respondent vide letter dated April 8, 1992, to the second respondent invoked the bank guarantees. Thereafter, the invocation of bank guarantee was followed by reminders to the second respondent Bank of India dated April 21, 1992, and May 26, 1992. In the reminders it was stated that the petitioner failed to fulfill the contractual

obligations despite the first respondent having made protracted correspondence with the former from time to time. The petitioner feeling aggrieved of the invocation of the bank guarantees by the first respondent filed the present petition u/s 20 of the Arbitration Act, being Suit No. 2192-A of 1992. Along with the suit, the instant application was also moved. On June 15, 1992, the court restrained the second respondent from encashing the bank guarantees. The matter has now come up for confirmation of that order and final hearing of the application.

3. Learned counsel appearing for the petitioner submitted that the first respondent was asked to conduct the final performance test but the same was not carried out for mala fide reasons. He also submitted that this court must interfere with the invocation of bank guarantee as the first respondent has committed fraud which vitiates the underlying contract and in case the restraint order is not confirmed, the petitioner will suffer irreparable damage and injury.

4. On the other hand, learned senior counsel for the first respondent submitted that a mere look at the bank guarantees would show that the same are confirmed, irrevocable and unconditional bank guarantees and this court can only interfere in case it is established that the first respondent committed fraud which vitiated the underlying contract and if a restraint order is not given the petitioner would suffer irretrievable and irreparable damage and injury. Learned counsel contends that the petitioner has failed to establish the existence of any of these conditions and, Therefore, the application is liable to be dismissed.

5. I have considered the submissions of learned counsel for the parties. It is well settled that invocation of a confirmed, irrevocable and unconditional bank guarantee should not be interfered with unless there is an established fraud of such magnitude that it vitiates the underlying contract and it involves irretrievable injury to the party at whose instance the bank guarantee is furnished. (see Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., and Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others,).

6. At this stage, it will be convenient to quote relevant portions of one of the bank guarantees :

"In terms of the above said contract, the purchaser has agreed to make 5 per cent. payment of each consignment against dispatch documents through a bank, provided the supplier furnishes a bank guarantee to the purchaser for 5 per cent. of the value of the contract towards satisfactory performance guarantee tests stipulated in the contract. The bank hereby guarantees to the purchaser that the supplier shall satisfactorily fulfill the performance guarantee tests and replace or repair or rectify free of cost any equipment or part thereof supplied by them if it is found to be defective and not fulfilling the guaranteed output/performance of individual equipment and/or department, due to faulty design, material or workmanship. The bank guarantees to the purchaser that if the supplier fails to

carry out the above mentioned obligations within a reasonable time from the date of receipt of notice therefore, the bank undertakes to indemnify and keep the purchaser indemnified and pay on the first demand, without demur and delay to the extent of Rs. 32,39,000 (rupees thirty-two lakhs thirty-nine thousand only) against any loss, damage or expenses incurred for removing the defects in the work by the purchaser including the supply of the material, required for the removal of defects, or by reason of any breach of any of the terms and conditions of the said contract on the part of the supplier.

The bank further agrees that the purchaser shall be the sole judge to decide whether the supplier has committed any breach or breaches of any of the terms and conditions of the said contract and the extent of the loss, damage, cost, charges and expenses suffered . . .

The bank further agrees with the purchaser that the purchaser shall have the fullest liberty without the bank's consent and without affecting in any manner the bank's obligations hereunder to vary any of the terms and conditions of the said contract or to extend from time to time or to postpone for any time or from time to time any of the powers exercisable by the purchaser against the supplier and to forbear or enforce any of the terms and conditions relating to said contract and the bank shall not be relieved from its liability by reason of any such variation or extension being granted to the supplier or for any forbearance."

7. A perusal of the aforesaid part of the bank guarantee clearly shows that the bank had unconditionally and irrevocably agreed to undertake to pay to the respondent on demand the sums of money specified in the bank guarantee without protest or demur. The bank guarantee further provides that the first respondent will be the sole judge to decide whether the petitioner has committed any breach of the terms and conditions of the principal contract and the extent of loss, damage suffered by it as a result of the breach. To the same effect is the other bank guarantee as well. Learned counsel for the petitioner invited my attention to the letter of the petitioner dated June 23, 1987, in which it was inter alia stated that "Mill No. 1 was running quite satisfactorily with rated output". Learned counsel for the petitioner submitted that after this letter, there was no response from the first respondent. He also invited my attention to the letter of the petitioner dated July 6, 1981. He laid emphasis on the following part of the said letter :

"In the circumstances we presume that CCI is not interested to make arrangements for carrying out the performance test of Mill No. 2 and hence it is deemed that the performance test of Mill No. 2 is now not required."

8. In view of the aforesaid two letters, it was submitted that the mill was performing satisfactorily and the first respondent did not have any complaints whatsoever. On the other hand, learned senior counsel for the first respondent invited my attention to the minutes of the meeting held between the parties on September 14, 1987, and the various other letters and submitted that the first

respondent had been, from time to time, requesting the petitioner to remove the defects but the requests were not acceded to and the defects persisted with the result that the first respondent was left with no option except to invoke the bank guarantees.

9. The minutes of the meeting held on September 14, 1987, are significant. They reveal that certain defects were pointed out to the plaintiff and the performance test was also performed which started on September 10, 1987, and was completed on September 13, 1987. At this stage, it would be worth while to extract the minutes of the meeting to the extent they are relevant :

"1. The performance test was started on September 10, 1987, at 10.30 a.m. and completed on September 13, 1987, at 5.45 p.m. due to the clinker extraction problem because of low stock and sudden kiln brick lining work from CCI end.

2. Three HP motor provided earlier for gear box lubrication pump were found under capacity by will and CCI and hence will fixed one higher capacity of five HP motor for one gear box lubrication pump. For balance seven numbers motors will will take necessary action from their end for replacement. Existing three HP motors shall be returned to will after getting five HP motors.

3. will will arrange for Commissioning Engineer from Protos on chargeable basis for checking of gypsum weight feeder calibration on load.

4. Dust collector at mill inlet and blower for mill outlet water spray was not in operation so power consumption for that load had not been taken into account in summary sheet and works out to be 8 kw and specific power consumption shall increase by 0.077 kws per hour per tonne.

5. Electro pneumatic valve at the bottom of V.P. conveyer has not been commissioned yet. will will suggest necessary remedy for this.

6. During the trial run of cement Mill No. 1 outlet water spray had not run and due to that temperature of cement had remained 65 Degree c. Performance of the water spray at mill outlet will be demonstrated separately by will to the satisfaction of CCI.

7. As the sampler have not been working, the sample has been taken on hourly basis from the main air slide going to the air lift. In this regard will expressed that it was jointly agreed, in case sample has not been taken from the rotary sample, it will be taken from air slide going to the air lift as CCI could not attend the auto sampler, the motor of which was found burnt.

8. Performance trial of ESP of the cement mill will be conducted separately."

10. On November 12, 1987, the first respondent brought to the notice of the petitioner that there were a lot of pitting on girth gear as well as pinion teeth. The petitioner was requested to depute its engineer to go into the details of the problem. In that letter, it was pointed out that there was continuous spillage of cement along with nibs from the vibrating screen nib discharge chute. By

communication dated January 6, 1988, the first respondent again pointed out a number of defects and deficiencies. The relevant portion of the letter reads as follows :

"After conducting the performance trial for Cement Mill No. 1 number of defects/deficiencies were pointed out to you. We regret to inform you that so far none of these have been attended to by you. Positive attitude towards attending the defects has not been taken by WIL. In view of the above, performance trial of the Cement Mill No. II cannot be offered unless the following defects/deficiencies are attended to by you.

1. R/mA converters of modulating motors for water spray system which had been sent to you for modification has not been returned. In the absence of this water spray system can not function effectively which is imperative before any performance trial is taken. Trial run for water spray system has not been taken by you so far.

2. Motors for gear box lubrication system have to be replaced by 5 HP motor.

3. Kwh meter for MCC on permanent basis to be provided for measuring of energy.

4. Automatic sampler to be commissioned.

5. Electro pneumatic damper at VP conveyor inlet to be commissioned.

6. The bad filters provided in the circuit are not working effectively.

7. Mill lining plate bolts specially in first chamber is breaking frequently which needs replacement in toto.

8. Counter-shaft bearing towards Mill No. 1 non-drive side is getting heated up very fast. This needs to be attended to.

9. Leakage of oil from main gear box and counter-shaft bearing to be attended to.

10. It has been observed that cement comes out along with nibs at the mill discharge chute. This problem is also to be attended to."

11. There are several other letters of the first respondent to the petitioner regarding the defects and deficiencies in the work executed under the supervision of the petitioner.

12. Having regard to the aforesaid discussion and keeping in view the judgments of the Supreme Court, I am of the opinion that the bank guarantee invoked by the first respondent cannot be interfered with. The petitioner has failed to establish fraud and has also not been able to make out a case of irretrievable loss and injury. Accordingly, order dated June 15, 1992, is vacated. The application is dismissed.

13. Learned senior counsel for the first respondent stated that in case the

petitioner succeeds in any litigation instituted by it for recovery of the amount represented by the bank guarantees, the first respondent will pay the amount directed to be paid by the court without demur. Dasti.