(2017) 03 DEL CK 0131

In the Delhi High Court

Case No : O.M.P.(I) No. 2 of 2017

Wig Brothers Construction Private Limited APPELLANT

Vs

Indiabulls Constructions Limited RESPONDENT

Date of Decision : 07-03-2017

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

Citation : (2017) 3 ADDelhi 454 : (2017) 2 ArbiLR 268

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Jivesh Nagrath, Mr. Arjun Singh Bawa and Mr. Vishakha Gupta, Advocates, for the Petitioner; Mr. Dayan Krishnan, Senior Advocate with Ms. Malavika Lal, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J. IA No. 2485 of 2017 (for exemption)

Allowed, subject to just exceptions.

O.M.P.(I) 2 of 2017 & IA Nos. 2484 of 2017 and 2959 of 2017

2. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") seeking to restrain the Respondent, Indiabulls Constructions Limited ("ICL"), from invoking or encashing certain bank guarantees ("BGs"), the prayer being confined to BGs furnished towards the mobilisation advance.

3. On 23rd February, 2017, the petition was mentioned for urgent listing. In view of the urgency explained, it was directed by an order passed on that date that the 13 BGs mentioned in the petition would not be encashed by ICL till the next date i.e., 28th February, 2017.

4. On the next date, an application being IA No. 2959 of 2017 was filed by ICL seeking vacation of the interim order passed by the Court. Learned counsel for ICL informed the Court that three of the BGs, the encashment of which had been

stayed by the Court, had already been encashed by it even prior to the passing of the interim order on 23rd February, 2017.

5. Today, at the outset, Mr. Jivesh Nagrath, learned counsel appearing for the Petitioner clarified that of the 13 BGs mentioned as mobilisation advances BGs by the Petitioner, 2 of them in fact were retention amount BGs. He referred to an affidavit dated 25th February, 2017 filed by the Petitioner seeking to carry out the corresponding corrections in the petition. It is stated therein that the Petitioner had itself requested the State Bank of India ("SBI") by an email dated 23rd February, 2017 to release the monies as far as the retention amount BGs were concerned.

6. As of date, it appears that out of 16 BGs, in all 5 have already been encashed. The scope of the present petition therefore is confined to the following BGs:

(i) BG0005771

Rs. 25,00,000

(ii) BG0000582

Rs. 23,00,000

(iii) BG0000583

Rs. 21,00,000

(iv) BG0002701

Rs. 30,65,000

(v) BG0002703

Rs.25,00,000

(vi) BG0002706

Rs. 14,00,000

(vii) BG0002903

Rs. 2,58,490

(viii) BG0002911

Rs. 20,37,845

(ix) BG0002912

Rs. 12,50,465

(x) BG0003046

Rs. 4,00,000

(xi) BG0003262

Rs. 2,00,000

(xii) BG0002850

Rs. 21,73,000

(xiii) BG00002322

Rs. 1,42,00,000

7. The aggregate amount works out to Rs. 3.10 crores.

8. During todays'' hearing Mr Dayan Krishnan, learned Senior counsel for ICL, expressed an apprehension that two of the BGs which were to expire on 2nd March, 2017 may not have been renewed. However, Mr. Jeevesh Nagrath, learned counsel for the Petitioner assured the Court on instructions that the said two BGs, have on the express instructions of the Petitioner to the Bank concerned, been kept alive.

9. The facts in brief are that several work orders (WOs) were issued by ICL to the Petitioner by way of engaging it as a sub-contractor for the construction work at Centrum Park, Phase 2, Sector 103, Gurugram. The standard clauses in one of the WOs, relevant for the present petition read as under:

"(7) Payment terms a. Mobilization Advance: 10% of the Contract Price shall be paid as free Mobilization Advance against unconditional Bank Guarantee payable at Mumbai. This mobilization advance shall be released with issuance of work order/LOI against unconditional bank guarantee. The recovery of mobilization advance shall commence from 2nd RA bill and full recovery shall be made by the time 80% of the contract price is billed and paid."

(16) Risk &Compensation: In case of termination of the Work Order due to any reason (even if termination is due to non-performance or extra-ordinary delay by Sub-Contractor), the Sub-Contractor shall compensate the IC Limited for the loss suffered and for engaging another Sub-Contractor. However, the Sub-Contractor shall continue to be liable for all risks and costs and the IC Limited shall be entitled to adjust the cost against outstanding payments, is any payable to the Sub-Contractor.

(17) Bank Guarantees/Indemnity Bond and Post Dated Cheque (PDC):

(a) For the due performance of the works by the Sub-Contractor, the Sub-Contractor shall if required by the IC Limited, furnish an irrevocable and unconditional Bank Guarantee of an International/Nationalized/Scheduled bank, having a branch at Mumbai, payable on demand, or Indemnity Bond and the PDCs equivalent to the amount of Performance guarantee that may be specified by the IC Limited. The terms of the said bank guarantee/Indemnity bond and PDC shall be on the format and as per the terms specified by the IC Limited. The obtaining of such bank guarantee/indemnity bond and PDC shall be at the expense of the Sub-Contractor.

(b) In case the Sub-Contractor is required to be paid any advance amount the same shall be paid as per the mutual Agreement by the parties subject to furnishing by the Sub-Contractor of an unconditional and irrevocable Bank Guarantee of an International/Nationalized/Scheduled bank, having a branch at Mumbai, payable on demand, for a sum that may be specified by the IC Limited. The terms of the said bank guarantee shall be on the format and as per the terms specified by the IC Limited. The obtaining of such bank guarantee shall be at the expense of the Sub-Contractor. The Bank Guarantee shall be valid for the entire duration of this Contract. The bank guarantee shall be released on the written request of the sub-Contractor and after the complete recovery or adjustment of such advance.

(c) Release Of Guarantee The Bank Guarantee for mobilization shall be returned to the Sub-Contractor only on fulfilling the Work Order terms and submission of work completion certificate to the extent of advance."

10. Since the present case pertains to mobilisation advance BGs, it is relevant that under Clause 17 (b), the BGs are termed as "unconditional and irrevocable". Further, the BGs shall be released on the written request of the sub-contractor and "after the complete recovery or adjustment of such advance." Clause 17 (c) further makes it clear that BG for mobilisation shall be returned to the sub-contractor "only on fulfilling the work order terms and submission of work completion certificate to the extent of advance."

11. As far as the terms of the BGs themselves are concerned, reference requires to be made illustratively to only two of them. BG No. BG0005771 dated 21st October, 2013 states that the SBI at the request of the Petitioner undertakes "to pay ICL an amount not exceeding Rs. 25,00,000/- against the refund of the advance paid by ICL by reason of any breach by M/s. Wig Brothers Construction Pvt. Ltd., of any of the terms and conditions contained in the said agreement." It further states that SBI would pay "the amount due and payable under this guarantee without any demur, merely on a written demand from ICL stating that the amount claimed, is due by way of refund of the advance paid by ICL, by reason of breach by M/s. Wig Brothers Construction Pvt. Ltd., of any of the terms or conditions contained in the said Agreement." It is further stated that "any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee."

12. BG No. BG00002322 dated 16th September, 2014 states that the Bank "undertakes to unconditionally and irrevocably pay to Owner immediately on demand, without any protest, contest or demur, and without any recourse to the Contractor, a sum not exceeding Rs. 1,42,00,000." It further states that "any such payment made by the Owner on the Bank shall be conclusive and binding." Further, "the Owner shall be the sole Judge as regards the performance of the contract and the Bank shall neither question the judgment or declaration of the Owner nor ask for any evidence on any account whatsoever."

13. The unconditional nature of both BGs is, therefore, apparent. As far as the bank is concerned, it is bound to honour its commitment to make payment on a mere demand being made by ICL for encashment.

14. What is not in dispute between the parties is that ICL has terminated the sub-contract and has engaged another vendor to complete the work at the risk and costs of the Petitioner. It is also not in dispute that the parties are in the process of settling their accounts but as of date, the work has not been completed even by the substituted vendor.

15. Mr. Nagrath, conscious of the legal position as regards interference by the Court with the encashment of BGs, seeks to bring the present case within the two exceptions viz., (a) fraud of egregious nature; and (b) irretrievable harm or injustice resulting from the encashment of the BG. He sought to place reliance on Bhasin Associates Limited v. Hyundai Heavy Industries Company Ltd. (decision dated 4th April, 1991 in Leave Application No. 11649 of 1990 and Suit No. 3908 of 1990) and Yog Systems India Ltd. v. S. Su-Kam Power Systems Ltd. 2007 X AD (Del) 608. His contention was that from the bills raised by the Petitioner, it was apparent that one part of the mobilisation advance already stood adjusted against the bills submitted in the past. The entire mobilisation advance has now been recovered from the current bills. Therefore, nothing remains to be recovered from the Petitioner. According to him, the Respondent''s action in proceeding to encash the BGs for mobilisation advance despite recovering the entire advance is "fraudulent", thereby attracting the first exception to the general rule as stipulated by the Supreme Court. He also refers to the decision of the Supreme Court in Gangotri Enterprises Limited v. Union of India 2016 (6) SCALE 664 and submits that the facts of the present case are similar to the facts of the said case where the Supreme Court had injuncted the encashment of a BG.

16. Mr. Dayan Krishnan, learned Senior counsel appearing for the Respondent, on the other hand, refers to the fact that the stage for return of the advance of the BG towards the mobilisation advance has not been reached as of date since even the work has not been completed. He pointed out that the Petitioner was aware of the sub-contract having been terminated and a new vendor having been appointed to complete the unfinished work. Referring to a series of the decisions of the Supreme Court including BSES Limited v. Fenner India Limited. (2006) 2 SCC 728, Vinitec Electronics Private Limited v. HCL Infosystems Limited (2008) 1 SCC 544 and Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited v. Teestavalley Power Transmission Limited (2014) 215 DLT 246 (DB), he submitted that the two exceptions carved out by the Supreme Court are not attracted in the present case. He emphasised that both BGs were unconditional and the question of the bank declining to honour its commitment upon invocation by ICL did not arise.

17. The legal position as regards the power of the Court to interdict the encashment of the BG is settled. It has been neatly summarised in the decision of the Division Bench (DB) of this Court in Consortium of Deepak Cable India

Limited & Abir Infrastructure Private Limited v. Teestavalley Power Transmission Limited (supra) as under:

"145. ... 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 recognised 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.

146. The irretrievable harm or injustice of an irreversible kind must relate to a situation akin to the one found in Itek Corporation''s case (supra) or of the kind or in Elian''s case (supra).

147. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation."

18. In Himadri Chemicals Industries Limited v. Coal Tar Refining Company (2007) 8 SCC 110, the principles for grant of refusal to grant of injunction to restrain the enforcement of the BG or LC were summarised as under:

"14. ... (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

19. In Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Coop. Ltd. (2007) 6 SCC 470, it is explained as under:

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

20. In the considered view of the Court, the mere fact that ICL may have proceeded to invoke the mobilisation advance BGs in the present case would not amount to ICL practising an ''egregious fraud'' on the Petitioner as envisaged in the above decisions of the Supreme Court. As explained in U.P. State Sugar Corporation v. Sumac International Limited (1997) 1 SCC 568 which has been followed in a large number of decisions thereafter, "fraud must be of an egregious nature so as to vitiate the entire underlying transaction." The Court envisaged "a clear fraud of which the bank has notice." In this context, the Supreme Court referred to the following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984) [1] All ER 351 at 352):

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank''s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank''s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."

21. From the facts pleaded in the present petition, it could at the highest bring the case of the Petitioner under the category of a wrong invocation of a BG for which the remedy lies in claiming damages. The Court is also not satisfied that the facts of the present case are similar to the facts in Gangotri Enterprises Limited v. Union of India (supra) where, in para 42, the Supreme Court highlighted the circumstances that persuaded it to proceed to grant an injunction.

22. The wording of the BGs in the present case is unambiguous. The bank has no option but to honour the BGs upon invocation in terms thereof by ICL. In General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd. (1991) 4 SCC 230 and as reiterated in BSES Limited v. Fenner India Limited & Anr. (supra), "the liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of (the Beneficiary) to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee."

23. Recently, in TRF Ltd. v. Energo Engineering Projects Ltd. & Anr. (decision dated 17th February, 2017 in OMP (I) (Comm.) 66/2017), this Court observed as under:

"50. ... the fact that the beneficiary may have already recovered much of the amounts secured by the BG are not relevant in deciding whether an injunction should be granted against invocation of such BG, particularly when it is unconditional. In other words, an unconditional BG has always been considered on a different footing by the Court. Even where a BG is wrongly invoked and encashed by a party, the remedy for the other party where the BG is unconditional is only to seek to make a claim against such allegedly unlawful invocation and encashment of the BG. It may not be a good ground to require the Court to injunct the encashment of the BG."

24. The Court is also not satisfied that there are any special equities in favour of the Petitioner at this stage which could persuade the Court to hold that irretrievable injustice would be caused to the Petitioner if BGs in question were permitted to be encashed by ICL.

25. For the aforementioned reasons, the Court finds no reason to continue the interim order passed by it on 23rd February, 2017. The said interim order is hereby vacated.

26. It is clarified that the observations in this order are for the limited purpose of deciding the grant of interim relief under Section 9 of the Act and are not intended to influence the final decision on merits in the arbitral proceedings.

27. The petition is dismissed. The applications are disposed of.

28. A copy of this order be given dasti under the signature of Court Master.

