

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 31.3.2009
Date of Order: 2nd April, 2009

OMP No. 166/2009

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02.04.2009

Energio Engineering Projects Ltd.

... Petitioner

Through: Mr. Jayant Nath, Sr. Advocate with
Mr. Anil Rakhra, Advocate

Versus

**Gujarat State Electricity Corporation Ltd.
& Anr.**

... Respondents

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

The petitioner has filed this application/petition under Section 9 of the Arbitration & Conciliation Act, 1996 seeking an interim injunction that the respondents be restrained from acting upon letter of invocation of bank guarantee no. 1529 ILG005507 dated 28.2.2007.

2. The respondent no.1 in this case is Gujarat State Electricity Corporation Ltd. The petitioner was a successful bidder for providing design, manufacture, supply, erection, testing and one year of operation and maintenance of dry fly ash collection system with two nos. 500 MT RCC Silo each at Unit No. 3 & 4 of the Gandhinagar Thermal Power Station. It is submitted by the petitioner that according to this contract, the petitioner was to construct Silo at 'first field'. He submitted that a meeting had taken place between the respondent and the bidders on 11.11.2003 and following decisions were taken in this meeting:

1. A common PLC for both the units 3&4 with hot redundant standby is to be provided for alternative offer of single silo in place of independent provided in the main offer.
2. The location of the Silo shall be decided by the bidder in consultation with GEB preferably lying with first field hoppers.

3. In terms of the tender document and minutes of the meeting, the contract dated 13.3.2006 was awarded to the petitioner for constructions of silo. In terms of this contract, the petitioner gave a bank guarantee against security deposit and for performance of the 10% of the quoted price valid for one year from the date of commission of fly ash collecting system. The petitioner's case is that the silo was to be constructed at first field only but respondent later on changed the site of the silo and vide letter dated 10.5.2006 informed the

petitioner that the location of construction of 02 nos. of silo shall be considered as discussed and shown at site on 29.4.2006 and also provided that two silos should be interconnected. The petitioner informed the respondent that as per minutes of the meeting, the location of silos were finalized closer to 'first field' and lay out was prepared, keeping in view the minimum transport distance of 'first field hoper' and the proposed revised location close to 3rd/ 7th field would involve substantial increase in the ash/vacuum conveying pipe loop length by 50% approximately resulting into change in lay out plan and cost.

4. The correspondence of parties shows that thereafter a meeting was held on 7.8.2006 for finalizing the location of silo and it was decided that the location of silo shall be after third field of ESP (Electro Static Precipitator) towards chimney. The petitioner however, did not undertake the work on the ground that location of silo was contrary to initial tender and that there were several discrepancies in the contract which have not been removed by an amendment. It was contended that initial layout of system was finalized on 30.12.2005 but later on a change was suggested which carried huge techno-commercial implications. It was also stated that there was unprecedented appreciation in the prices of raw material, labour and other basic inputs, therefore, this contract required modification and the petitioner, therefore, abandoned the site and did not start the work resulting into invocation of bank guarantee by the respondent.

5. On abandonment of site by the petitioner, the respondent exercised its right of invocation of bank guarantee in terms of the contract. The petitioner had given this performance guarantee in 2007 after awarding of contract. The tender process had started in 2003, the petitioner was very well aware that the contract was being awarded to him after about 03 years of the tender process and the rates of different inputs had varied in these three years. If the petitioner was not willing to accept the contract, the petitioner was at liberty to do so. Once the petitioner had accepted the contract and given performance guarantee its abandonment of the site and not even starting the work could be considered as breach of contract. The petitioner cannot seek a relief from the Court that the respondent should be restrained from invoking the bank guarantee.

6. It is settled law that the contract of bank guarantee is an independent contract. Supreme Court in U.P.Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988)1 SCC 174 had ruled that a bank guarantee must be honoured in accordance with its terms as the bank which gives the guarantee is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. The bank must pay according to the tenor of its guarantee, on demand without proof or condition. This law has been reiterated by Supreme Court in several subsequent judgments including Mahatma Gandhi Sahakra Sakkare Karkhane v. National

Heavy Engineering Coop. Ltd. (2007) 6 SCC 470 and Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 8 SCC 110. I, therefore, consider that the present petition filed by the petitioner seeking restraint against invocation of bank guarantee is not maintainable is liable to be dismissed. The petition is hereby dismissed. No costs.

April 02, 2009
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SHIV NARAYAN DHINGRA, J.