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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: August 19, 2009
Date of Order: September 08, 2009

+OMP 220/2009

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M/s Jialall Kishorilall Pvt. Ltd.
Through: Mr. D. Moitra, Advocate

08.09.2009
...Petitioner

Versus

Municipal Corporation of Delhi
Through: Ms. Mini Pushkarna, Advocate

...Respondent

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

1. This petition under Section 9 of Arbitration & Conciliation Act, 1996 ("the Act", for short) has been preferred by the petitioner with a prayer that this Court should restrain respondent MCD from invoking mobilization bank guarantee notice of which has been given by respondent vide letter dated 30th March 2009. The petitioner also made a prayer that this Court should direct respondent to discharge the bank guarantee for a sum of Rs.46,30,000/- issued by the petitioner against mobilization advance.

2. The respondent in this case has contended that there was no arbitration agreement between the parties. Clause No.25 on which the petitioner /contractor was relying upon had been deleted from the contract. However, this contention is refuted by the petitioner. In OMP 330 of 2009 between the same parties, I have considered the plea of the petitioner and left this question open for the arbitrator to decide, since in my view, the

question whether there was an arbitration clause between the parties or not in this case can be decided only after recording evidence of the parties and, cross examination of witnesses and cannot be decided merely on the basis of affidavits.

3. On facts, the contention of the petitioner is that the petitioner had issued a bank guarantee against mobilization advance of Rs.1, 46,30,000/-. The mobilization advance was recovered from the petitioner from running bills together with interest. Since the purpose of bank guarantee stood fulfilled, the respondent had no right to invoke the bank guarantee, more so when the entire amount with interest has been recovered.

4. On the other hand, it is submitted by counsel for respondent that the contract was awarded to the petitioner on a lumpsum basis for an amount of Rs.4,63,00,000/-. Till the four running account bills the contractor had executed only 22.33% of the total work. The monetary value of this work comes to Rs.1,17,27,790/-. While making running account bills, entries with respect to all payments made previously by MCD are reflected. Thus, in the four running account bills, the amount already paid towards mobilization amount advance was also reflected. No recovery was made from the contractor. This was done solely for the purpose of showing payment already made to the contractor. Thus, the receipt of Rs.1,17,27,790/- (value of work executed) was added to Rs.46,30,000 (mobilization advance) which amount came to Rs.1,63,57,790/-. The recoveries deducted from the bills were on account of security deposit, TDS, Surcharge on income tax, education tax, work tax and labour cess. The petitioner was liable to pay interest on mobilization amount and the interest of Rs.8,33,400/- was deducted being

interest on mobilization amount up to four running bills, mobilization amount was not recovered. The mobilization advance was not recovered since the total amount payable to the petitioner as per the work done amounted to only Rs.1,17,27,790/- whereas the total payment so far made was Rs.1,63,57,790/, which included the mobilization amount. Only interest had been recovered from the petitioner. The plea of the petitioner that mobilization amount had already been recovered, was therefore, a false plea. It is submitted that since the contract has been terminated, and the MCD had to recover huge mobilization amount of Rs.46,30,000/-, MCD was within its rights to invoke the bank guarantee.

5. It is settled law that the bank guarantee is a separate and independent contract between the bank and the beneficiary and the bank is bound by the contract between itself and the beneficiary. This contract cannot be put at stay at the instance of the customer of the bank unless and until it is shown to the Court that the bank guarantee was got issued by playing a fraud upon the petitioner or that the encashment of the bank guarantee shall amount to irretrievable injustice. Courts time and again have observed that they need not interfere into the commercial transactions/ documents entered into by the bank with beneficiary unless the bank guarantee itself provides that there has to be a reference to the customer at whose instance the bank guarantee was provided, before invocation. The plea taken by the petitioner that the entire amount has been recovered by respondent is not convincing.

6. It is not the case of the petitioner that a fraud was played upon the petitioner in obtaining bank guarantee. The case of the petitioner as pleaded and argued is that the irretrievable injustice would be caused to the

petitioner. I consider that it is not a case of irretrievable injustice. In U.P. Cooperative Federation Limited v. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174, Supreme Court observed that an allegedly maltreated party can sue the appellant for damages where there is apprehension for damages or injustice to be caused. In absence of special equity arisen for particular situation which may entitle the party on whose behalf guarantee is given to an injunction, the bank must pay to the party in whose favour the guarantee is given, on demand. Supreme Court categorically observed that it is only in exceptional cases that the Court should issue injunctions against invocation of bank guarantees.

7. In *United Commercial Bank v Bank of India and Ors.* AIR 1981 SC 1426, the Supreme Court held, *"Courts ought not to grant injunctions restraining the performance of the contractual obligations flowing out of a Letter of Credit or a Bank Guarantee between one bank and another.* The Supreme Court further observed, *"The banker owes a duty to the buyer to ensure that the documents tendered by the sellers under a credit are complied with those for which the credit calls and which are embodied in terms of paying of negotiating bank and the bank issuing or confirming a letter of credit is not concerned with the underlying contract between buyer and the seller".*

8. In view of my foregoing discussion, I find that this petition is not maintainable and is hereby dismissed.

September 08, 2009
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SHIV NARAYAN DHINGRA J.