

+ OMP 329/2009

TIME BROADBAND SERVICES PVT LTD ...Petitioner

Versus

BHARAT SANCHAR NIGAM LTD Respondent

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The petition under Section 9 of the Arbitration Act 1996 for restraining the respondent from encashing the bank guarantees in the total sum of Rs5.50 crores furnished by the State Bank of Travancore at the instance of the petitioner and pursuant to the agreement dated 24th July, 2008 between the parties, is for consideration. The agreement dated 24th July, 2008 between the parties was inter alia for the petitioner providing services like IP/broadcast TV channels, Video on Demand, interactive gaming etc through its content delivery network to BSNL's customers on non-exclusive, revenue sharing and franchise basis.

2. The bank guarantees, 20 in number are identical in language.
- The consideration therefor as stated therein is, by way of security for

rolling out the services as per the agreed service rollout schedule. The bank, under the guarantees, has guaranteed to the respondent that the petitioner shall render all the necessary and efficient services which may be required to be rendered by it in connection with rolling out of the services in terms of the agreement and/or for the performance of the agreement and further guaranteed that the services to be provided by the petitioner shall be actually performed in terms of the agreement. The bank has undertaken to pay to the respondent the amount of the guarantee against any loss or damage caused to/or suffered or would be caused to / or suffered by the respondent by reason of any breach or non-observance or non-performance by the petitioner of any of the terms of the said agreement including failure to rollout the services as per the schedule to the agreement. The bank in each of the guarantees has absolutely, irrevocably and unconditionally guaranteed as primary obligor and not merely as a surety against the payment of the amount of each guarantee to the respondent, to secure due and faithful observance and performance by the petitioner of all its obligations. The bank has undertaken to pay the amount of the guarantee without any demur, merely on a demand from the respondent stating that the amount claimed is due by way of loss or damage caused or would be caused to or suffered by the respondent by reason of breach or non-observance or non-performance by the petitioner of the terms and conditions of the agreement. It is also a term of the guarantee that the decision of the respondent as to whether the petitioner has failed to or neglected to perform its part of the agreement shall be final and binding on the bank.

3. The law with respect to the interference by the courts in bank guarantees is now well settled and need not be restated. Reference

may, however, be made to **M/s Vinitec Electronics Private Ltd Vs HCL Infosystems Ltd** (2008) 1 SCC 544, **Chola Turbo Machinery International Pvt Ltd Vs Development Credit Bank** 149 (2008) DLT 313 and **Jasmine & Company Vs State of Nagaland** 157 (2009) DLT 509 relied upon by the counsel for the respondent.

4. There are only two exceptions to the general rule of the courts not interfering with the operation/engagement of the bank guarantee. The first is a clear fraud of the beneficiary from which it seeks to benefit and of which the bank has notice. A fraud must be of an egregious nature as to vitiate the underlying transaction. The second is of any special equities in favour of granting injunction. Else the beneficiary must be permitted to realise the bank guarantee in its terms, irrespective of any pending disputes upon the construction or performance of the contract. The fraud has to be such which would sully the foundation of the guarantee. Injustice has to be such which would make it impossible for the guarantor or the person at whose instance the guarantee has been issued to be compensated later or result in irretrievable harm.

5. A perusal of the petition in the present case shows a total lack of pleadings justifying either of the two aforesaid established grounds on a plea whereof only injunction against encashment of bank guarantee can be claimed. The petition is drafted, treating the dispute to be an ordinary commercial dispute and treating the principles applicable to injunctions in case of bank guarantees to be the same as applicable to injunctions in ordinary matters.

6. It is the case of the petitioner that inspite of the petitioner being ready and willing to perform its part of the agreement, the respondent failed to perform its reciprocal obligations leading the

petitioner to on 28th May, 2009 terminate the agreement with the respondent. The petitioner has sought stay of encashment of bank guarantee on the allegation that since, according to the petitioner, the admitted non-commissioning of the services which the petitioner was to provide under the agreement is attributable to the respondent, the respondent is not entitled to encash the bank guarantee.

7. However, such disputes, if any, between the parties are not to be the basis for this court to interfere in a bank guarantee. In the absence of any pleas of fraud of an egregious nature or of irretrievable injury, this court on the mere allegation of the respondent being in breach is not to even return the finding of prima facie view on the same.

8. The petition is thus to be summarily rejected on this ground itself. Mention must however be made that it was the case of the respondent that the respondent, owing to breach by the petitioner has not been able to rollout the services which the petitioner as the franchisee of the respondent was to rollout. It was stated that the respondent was desirous of immediate provision of the said services. The respondent has, during the hearing, also offered that the respondent was willing to give further time to the petitioner to perform its obligations. The proceedings were adjourned to enable the senior counsel for the petitioner to take instructions. However, today it was informed that the petitioner is not able to take up the said offer of the respondent.

9. The petitioner has alongwith its IA.No.9634/2009 filed a copy of the letter dated 28th July, 2009 of the respondent to the bank invoking the bank guarantee. In the said letter it is stated that the

petitioner has failed to fulfill its obligations contained in the agreement and hence decision had been taken to encash the bank guarantees and the bank has been requested to remit the amount thereof to the petitioner. The said invocation is found to be in terms of the bank guarantee.

10. Before parting with this file, mention must also be made of an affidavit dated 18th June, 2009 of the petitioner accompanying the additional documents. Though the same uses the word “fraudulently” which even is missing in the main petition, but the same is used in connection with the encashment of the bank guarantee. There is no averment of fraud vitiating the transaction, as is required for seeking an injunction against encashment of the bank guarantee.

11. Resultantly the petition is dismissed with costs of Rs 35,000/- to the counsel for the respondent.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 3, 2009
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