

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

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OMP.No.614/2008

%26.03.2009

Date of decision: 26th March, 2009

GREEN DELHI BQS LTD

.... Petitioner

Through: Mr Rajiv Nayar, Sr Advocate with
Shally B Maheshwari, Ms Megna
Mukerjee and Mr Satya Saharawat,
Advocates

Versus

DELHI TRANSPORT CORPORATION Respondent

Through: Mr Avnish Ahlawat with Ms Latika
Chaudhury and Mr Saurabh Chadda,
Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The petitioner seeks interim measure of restraining the respondent from encashing the bank guarantee furnished by M/s Yes Bank Limited 48, Nyaya Marg, Chanakya Puri, New Delhi which was originally impleaded as respondent No.2, in favour of the respondent – Delhi Transport Corporation (DTC) in terms of a Concession Agreement dated 6th June, 2008 between the petitioner and the respondent. Vide ex parte order dated 18th November, 2008, Yes Bank Limited being admittedly not a party to the arbitration agreement was deleted from the array of defendants and on the argument of the petitioner that a fraud had been committed, the encashment of the bank guarantee, being bank guarantee No.003GM01081540002 for Rs 2 crores valid from 2nd June, 2008 to

1st June, 2009 was restrained subject to the petitioner filing an undertaking that in the event of the petitioner ultimately failing in this petition, the petitioner shall pay interest at such rate for the delay in payment as may be awarded by this court. No payment under the bank guarantee has been made till date. The petitioner has filed an affidavit dated 24th November, 2008 of its Manager, (F&A) of undertaking to pay interest for the delay in payment under the bank guarantee, in the event of the petitioner failing in this petition.

2. The existence of the arbitration agreement is not disputed.

3. It is, inter alia, the case of the petitioner that the respondent invited the tenders for construction, operation and maintenance of 400 Bus Queue Shelter (BQS) on Built Operation and Transfer (BOT) basis. The petitioner's bid was accepted and the concession agreement dated 6th June, 2008 was executed between the parties and in terms thereof the bank guarantee by way of performance security for construction was furnished.

4. Under the aforesaid Concession Agreement, the petitioner was to construct and operate the 400 BQSS and to pay Rs 4.09 crores per month to the respondent. The petitioner was entitled to earn revenue from advertisements displayed at the BQSS. The petitioner sought interim measure on two grounds. Firstly, it was contended that the petitioner had been performing its obligation and the default was on the part of the respondent in handing over the BQSS to the petitioner and there was thus no default in performance by the petitioner and the invocation of the bank guarantee by the respondent was thus contrary to the record. Secondly, it was contended that the respondent had suppressed material facts from the petitioner, thereby destroying the substratum of the Concession

Agreement. It was pleaded that the Apex Court in 1997 barred many forms of outdoor advertisements and as a result whereof the avenues of outdoor media advertisement were scarce, thereby increasing manifold the commercial viability of the permitted avenues of outdoor media advertisement. It is submitted that the petitioner had submitted the bid on the said basis; however the petitioner prior to the institution of the petition learnt that the MCD had given proposal for a new Outdoor Advertising Policy whereby many new avenues for outdoor media advertisement were proposed to be opened up and all of which would lead to fall in the revenues which could be earned from advertising on the BQs subject matter of the Concession Agreement. It was pleaded that the respondent was at all material times aware of the proposal for the new avenues of outdoor media advertising policy inasmuch as the MCD and the respondent are both Government agencies and the MCD also had a share in the revenue to be earned by the respondent from the petitioner under the Concession Agreement.

5. As far as the first ground aforesaid is concerned, there is no need to enter into that controversy inasmuch as it is the stand of the petitioner in the petition itself that owing to the second ground aforesaid, the Concession Agreement is no longer legal, valid or binding on the petitioner. In fact, the petitioner in its letter dated 24th October, 2008 to the respondent, prior to the institution of the petition clearly stated that the aforesaid event of new avenues of outdoor advertisements having been introduced was preventing the petitioner from performing its obligations under the agreement. Even during the hearing the counsel for the respondent had stated that the new BQs were urgently required for the purposes of Commonwealth Games, 2010 and the respondent without prejudice

to its rights and contentions and notwithstanding the default by the petitioner, was willing to go ahead with the petitioner under the Concession Agreement already executed with the petitioner, if the petitioner was so willing and in which event the invocation of the bank guarantee would also be withdrawn. The hearing was adjourned to enable the senior counsel for the petitioner to take instructions on the said aspect. However, on the subsequent date it was informed by the counsel for the petitioner that the agreement as it is stood was unviable for the petitioner and the petitioner was willing to go ahead only if the respondent renegotiated the commercial terms. This was not acceptable to the counsel for the respondent.

6. The aforesaid averments and conduct shows that there is no need for this court to investigate as to whether there was any default by the petitioner in performance to entitle the respondent to invoke the bank guarantee, inasmuch as the petitioner has unequivocally shown its unwillingness to perform its part of the agreement.

7. That brings me to the second ground on which arguments have been primarily addressed by the senior counsel for the petitioner. The contention has already been noted hereinabove.

8. For appreciation of the said contention, a perusal of the various clauses of the Concession Agreement is relevant and is succinctly stated hereinbelow:

- (i) clause F of the Concession Agreement records that the petitioner after “**due diligence**” accepts the concession granted and “undertakes to implement the project in terms of this Concession Agreement”.
- (ii) Article 1.1 defines applicable laws as meaning “all laws, promulgated or brought into force and effect and all Rules and Regulations made and all notifications and guidelines issued there under by the Government of India, Government of NCT of Dehi, MCD, DTC, Statutory

authorities and other local bodies including all judgments, decrees, injunctions, writs and **orders of any court of record**, as may be in force and effect during the subsistence of this Agreement.” The same article defines **“change in law”** as meaning the occurrence, the enactment of any new Indian Law, re-enactment of any existing law, the commencement of any Indian law which has not entered into effect until the date of agreement, a change **in the interpretation or application** of any Indian law by a court of record as compared to such interpretation or application by a court of record prior to the date of the agreement and any change in the rates of any of the taxes, happening after the date of the agreement.

- (iii) Article 2 contains the assurances and representations made by the respondent to the petitioner. The respondent under the said agreement granted and authorized the petitioner, inter alia, to design, construct, operate and maintain the BQs and to exercise and/or enjoy the rights to collect revenue from displaying advertisements at earmarked locations on BQs. **The said Article does not contain any assurance or representation by the respondent to the petitioner with respect to the advertising policy or any change thereof.** Article 2.6 is titled “Information About The Project Site” and refers to schedule “A” which has not been appended to the agreement. The only inference possible is that the same does not contain any representation qua the advertising avenues or outdoor media advertising policy.
- (iv) Article 4.1(iii) provides **“even if any permitted advertisement space remains unutilized, no reduction/rebate in the Concession Fee payable to DTC will be allowed under any circumstances.”**
- (v) Article 4.2 provides that the petitioner shall familiarize itself with and be solely responsible for compliance of all applicable laws including specifically in respect of display of advertisements. Similarly, Article 11.2 provides that **“concessionaire specifically agrees that the concession fee shall be paid notwithstanding any cause whatsoever and shall not be withheld on any ground whatsoever.”**
- (vi) Article 5.1(viii) also requires the petitioner to adhere to the provisions of all laws of the land including municipal laws and byelaws and rules in connection with display of advertisements on BQs and also makes the petitioner liable for payment of advertisement tax, service tax and other taxes in respect of the advertisements displayed on the BQs. IN fact, it is expressly provided therein that the petitioner **“shall also adhere to the rulings of the High Court and the Supreme Court in this regard”.**
- (vii) Article 5.2 deals with the obligations of the respondent and nowhere places any obligation on the respondent as to the outdoor advertisement policy from time to time.

- (viii) Article 15 deals with force majeure which includes occurrence of a political event which in Article 15.4 has been defined as change in law only when provisions of Article 17 cannot be applied.
- (ix) Article 17.1 provides that **the agreement shall be in force and binding on the parties till the expiry of the Concession Agreement and no change in law or other circumstances shall affect the respective right and obligations of the parties and no claim of whatsoever nature shall be made by one party on the other on account of any change in law or other circumstances.**

9. The aforesaid clauses of agreement leave no manner of doubt that not only was there no representative on the part of the respondent as to the outdoor media advertising policy as in force on that date continuing during the term of the contract but on the contrary it was expressly made known that the agreement was subject to any such change in the policy and the petitioner had bound itself to the agreement notwithstanding such change. The petitioner had gone to the extent of agreeing that even if it was unable to earn any advertising revenue from the BQs it shall continue to perform its part of the agreement and continue to pay the concession fee agreed with the respondent. In the face of the aforesaid submission of agreement between the parties, it can, by no stretch of imagination, be said that the agreement suffers from any fraud lest egregious fraud of any nature whatsoever so as to fall in the class of cases in which alone interference with the bank guarantee is permissible.

10. It is also recorded in the agreement that the petitioner had done due diligence prior to entering into the agreement. Thus, it cannot be said that any misrepresentation was done by the respondent in the matter of entering into the agreement or that contract suffered from *suppressio veri and suggestio falsi* or that the

action of the respondent was unfair even though the respondent was in a dominant position in terms of the provision of the contract as recently laid down by the Apex Court in **Karnataka State Forest Industries Corporation Vs Indian Rocks** MANU/SC/4771/2008.

11. The petition was entertained and the ex parte stay granted on the plea of the petitioner of fraud. However, the contention of the petitioner of fraud is not borne out from the agreement between the parties. There is not a whisper in the agreement of any representation by the respondent to the petitioner of continuance of the advertising policy then in force and the performance of the contract by the petitioner was not dependent upon the petitioner earning any revenues. If there were any such representations or had fraud been committed, the parties would not have agreed that the agreement would not be varied on account of any change in law and which included also the orders of the Apex Court and the High Courts in this regard. It is also significant that ordinarily such clauses do not include the orders of the court. However, since the entire matter pertaining to outdoor policy was seized of by the Apex Court, the parties deemed it appropriate to insert the said clause. The petitioner took the commercial risk of the courts which were seized of the matter either restricting the outdoor advertising policy further may be also by restricting the advertisements on the BQS or of liberalizing the same. It cannot be said that had the policy or the orders of the court further restricted outdoor policy to confine it to the BQSS only resulting in higher profits for the petitioner, the petitioner would have paid a higher concession fee to the respondent. The petitioner took a business decision and merely because the said decision/risk has not resulted in more profits and may be resulted in lesser profits for the petitioner does not

tantamount to a fraud of the nature so as to vitiate the entire contract.

12. In order to restrain encashment of bank guarantee on the ground of fraud, it is necessary to establish both fraud and knowledge of the bank about fraud at any time before payment. Though bank guarantee is an independent contract, even if bank had knowledge of the concession agreement and terms thereof, on the aforesaid terms of the agreement, the bank could not have any knowledge of any fraud practiced by respondent in the matter of Advertising Policy. No case of fraud of egregious nature vitiating the underlying transaction is made out. In fact there are no proper allegations even of fraud, in reference to the agreement in writing between the parties.

13. The law with respect to bank guarantee need not be restated. The bank guarantee in the present case is otherwise unconditional where the bank has undertaken to pay without any demur and merely on receipt of a written demand from respondent stating that the petitioner has failed to meet its performance obligations under the agreement. The bank had further undertaken not to go into the veracity of the demand made by the respondent and notwithstanding any dispute whatsoever raised by the petitioner.

14. The parties are also at variance as to whether there has been any change in the policy or not. However, in the light of the above, I do not deem it appropriate to enter into that controversy or to return any finding with respect thereto.

15. The petition is therefore liable to be dismissed. However, owing to the filing of the petition and the ex parte order made by this court at the instance of the petitioner, the receipt of money under the bank guarantee by the respondent has been delayed since 18th November, 2008 till now.

16. The Apex Court recently in **Abhimanyoo Ram Vs State of U.P.** 2009 III AD SC 41 has upheld the order of the High Court holding that the petitioner cannot be permitted to draw the benefit of interim order when petition is finally dismissed. At the time of grant of ex parte order an undertaking was obtained from the petitioner to pay interest to the respondent for the delay, if any, in payment of the amount of the bank guarantee, in the event of the petitioner ultimately failing. The petitioner has undertaken to pay interest at such rate as may be ordered by this court. I find imposition of interest at 9% per annum i.e., the rate at which interest is paid by nationalized banks on deposits of one year. Accordingly while dismissing the petition, the petitioner is directed to in compliance of its undertaking to this court also pay to the respondent interest on the amount of the bank guarantee from 18th November, 2008 till the date of payment of the amount to the respondent at a simple rate of interest at 9% per annum.

17. Needless to say that any observations made herein are on a prima facie view of the matter and shall not come in the way of the arbitrators returning a finding on action of the respondent of invoking the bank guarantee. Since the respondent has been allowed interest, this order shall come into effect w.e.f. seven days hereafter.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 26, 2009
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