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

+ O.M.P. Nos. 119-20/2011

ERA BUILDSYS LIMITED

..... Petitioner

Through: Mr. Manoj K. Singh, Adv.

versus

AHLUWALIA CONTRACTS (INDIA) LTD & ANR Respondents

Through: Mr. Ashish Bhagat, Adv. for the
Respondent No. 1.

Mr. Jitendra Kumar, Adv. for the
Respondent No. 2 in O.M.P. No.
119/2011.

Mr. Sanjiv Kakra, Adv. for
Respondent No. 2/State Bank of
Patiala in O.M.P. No. 119/2011

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
23.03.2011

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1. These two petitions have been preferred under Section 9 of the Arbitration & Conciliation Act, 1996 to seek a restraint against the encashment of Bank Guarantees details whereof are as follows:

O.M.P. No.	Bank Guarantee No.	Bank
119/2011	BG No. 4041510 BG 0000006	State Bank of Mysore
120/2011	BG No. 5079410 BG 0000163	State Bank of Patiala

2. The Bank Guarantee to which O.M.P. No.119/2011 relates was furnished by the State Bank of Mysore for Rs.71,60,000/- to secure the advance of an equivalent amount released by respondent No. 1 to the

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O.M.P. Nos. 119-20/2011

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petitioner in relation to the work order placed by the respondent No. 1 upon the petitioner. The Bank Guarantee to which O.M.P. No. 120/2011 relates was furnished by the State Bank of Patiala for the amount of Rs.1,79,00,000/- to ensure performance of the contract by the petitioner as awarded by respondent No. 1.

3. Respondent No. 1 is the prime contractor appointed by the Bangalore Metro Rail Corporation Limited (BMRCL) for construction of Metro system in Bangalore. The value of the said contract is to the tune of Rs.116 Crores. A part of the work involved in the said contract relating to Pre-Engineered Buildings (PEB) was sub-contracted by respondent No. 1 to the petitioner vide a work order dated 26.03.2010. In terms of the said work order, the aforesaid Bank Guarantees have been furnished. As aforesaid, advance mobilization amount to the extent of Rs.71,60,000/- was advanced by respondent No. 1 to the petitioner to carry out the PEB works at Peenya Depot.

4. The petitioner has itself placed on record the communication issued by BMRCL dated 03.02.2011 addressed to respondent No. 1 and the subsequent e-mail communication dated 04.02.2011 issued by respondent No. 1 to the petitioner. From the communication of BMRCL, it appears that a specific reference has been made to the PEB contract and it is recorded that the progress of the said work is inadequate. In the said communication BMRCL has stated as follows:

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"3. The progress of PEB structures is as below:

Sl.No.	Building Name	Present Status	% progress (Financial)
1	Stabling shed	154 footing completed. Pedestal concreting work is in progress and it is in foundation stage only.	5%
2	Emergency re-calling shed	Seven footings are completed out of 21 and it is in foundation stage only.	5%
3	ETU workshop	RCC pedestals of 36 Nos. completed and plinth beam excavation is in progress and it is foundation stage only.	3%
4	Repair bay	Footing excavation completed, leveling course is in progress and it is in foundation stage only.	0%
5	Covered car parking shed	Foundation yet to be started	0%
6	Inspection bay for six car workshops	Foundation yet to be started	0%
7	Pit wheel lathe	Foundation yet to be started	0%

4. The foundation works of stabling shed is affected due to inadequate quantity of anchor bolts and its testing. The GFC drawings for the foundation works for the PEB structures have been issued and the progress is very slow and it is not comparable with the planned target.

- i) Stabling shed
- ii) ETU workshop
- iii) Emergency re-ralling shed
- iv) Car parking shed
- v) Repair bay workshop.

The drawings of the following PEB structures are still pending with you (ACIL/ERA Build Sys Ltd.)

5. DPP/BMRCL had inspected the site and reviewed the

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progress of work on 27/10/2010 and expressed his unhappiness on slow progress. During the inspection your representatives had assured to complete the PEB structures of stabling shed by April 2011 and all other structures of May 2011.

6. In view of the above non-performance and slow progress of works, you had been advised to deploy adequate manpower and resources to speed up the work so as to adhere to the target date, vide this office letter no.BMRCL/CE/Respondent No. 3/ACIL/Progress/2010-11/YPR/399 dated 06/01/2011.

In addition to this, the meeting was held on 08/01/2011 under the Chairmanship of DPP/BMRCL where Shri Shobhit Uppal, DMD/ACIL and his team were present. DPP expressed his disappointment over the poor progress of the works in Peenya Depot by M/s ACIL. DPP had explained about the commissioning of Peenya Depot for opening of North corridor of Bangalore Metro Rail Project by the end of this year.

After detailed discussion, you had agreed to supply 1st consignment of 100MT of PEB steel for stabling shed before 25/01/2011. DPP had also informed that in case of failure to supply this quantity by 25/01/2011, action will be initiated to get the PEB works in whole or part by engaging another agency treating it as the failure of the contractor as per the contract provisions and the same has been recorded in minutes of the meeting held on 08/01/2011.

It is regretted to inform you that you have failed to supply this quantity of 100MT of PEB steel for stabling shed before 25/01/2011 at Peenya Depot and till now nothing has been received. GC/BMRCL representative had inspected your fabrication site at Nagpur and reported that about 50 MT PEB steel is under fabrication and not yet dispatched. However, as committed by you 100 MT PBE has not been received at Peenya Depot till date.

Sufficient opportunities have been given to you for improvement of the progress, but the same has not been achieved by you.

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7. The above details clearly indicate that you have not deployed adequate resources, manpower, machinery, plant and equipments, technical input and above all willingness and desire to pull up and complete and backlog as committed by you. You have failed to honour your commitments given in meeting held on 08/01/2011. The shortfall on resources are affecting badly the progress and there is no improvement in progress of work and mobilization of resources.

8. We have noted that

i.) You have failed to adhere to the agreed program of work by margin of 10% and failed to complete the works or unlikely to complete the whole works or part thereof within time because of poor record of progress.

ii) You have failed to take steps to mobilize adequate resources men, materials, tools, plants, equipments and machinery etc.

Thus you have caused the breach of contract. Therefore, BMRCL shall be entitled to rescind the contract in part or as a whole as per clause 60.1 of General Conditions of Contract in view of the following conditions which are leading to termination of the contract.

i) **Clause 60.1(h) GCC:** Falls to adhere to the agreed program of work by margin of 10% of the stipulated period or 21 days, whichever is earlier, or fails to complete the works or parts of the works within the stipulated or extended period of completion, or is unlikely to complete the whole work or part thereof within time because of poor record of progress.

ii) **Clause 60.1 (i) GCC:** Fails to take steps to mobilize adequate resources, employ competent key personnel and/or competent additional staff and labour.

In view of the above reasons, the Employer BMRCL is giving hereby 7 days notice to make good the default within 7 days time, failing which the contract shall be rescinded in part (i.e., PEB works- Pre Engineered buildings under section 9 of structural works of BOQ)

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under clause 60.1 of General conditions of Contract of Contract Agreement under reference no.1 after giving 48 hours notice.

At the expiry of notice period, BMRCL shall get the works completed at the risk and cost of M/s Ahluwalia Contracts (India) Limited through another agency."

5. Respondent No. 1 in its communication dated 04.02.2011 addressed to the petitioner has inter alia stated as follows:

"Although at the time of awarding the contract, you had represented and made tall claims of achievement, however, progress in the work from the very inception of the contract was unsatisfactory. Despite several meetings being held and correspondence being exchanged with you, wherein we repeatedly implored you to adopt a professional attitude and execute the work, progress in the project remained dismal. This, despite the fact that it was well within your knowledge that the project is time bound, any delay inviting penalty with LD Clauses. Time and again your management confessed that efforts on your part have been lagging and promised to make amends, but all in vain. Owing to your lackadaisical attitude and negligible progress in the execution of work, BMRC has got issued a letter informing thereby that progress in the work awarded by you is negligible and the letter categorically dictated that the said part of the contract awarded would be rescinded, if the same is not performed within seven days. Please find attached a copy of the said letter for your reference and compliance.

Please be informed that in the event BMRCL rescinds this part of the work/contract, it would entail great loss for us, including but not restricted to monetary losses as well as loss of reputation and future prospects with BMRCL.

Such rescission of contract by BMRCL would be for reasons directly attributable to you and thus you shall be solely and squarely liable to compensate us for any loss or damage suffered by us as a result of such rescission.

Please note that as the work awarded to us by BMRCL and the work awarded to you by us is on a back basis, rescinding of the contract by BMRCL, will not only entail

rescission of the work order awarded to you but also force us to take all remedial steps to protect our interests in the project.

You are requested to strictly comply and meet the requirements of the attached letter sent by BMRCL within the stipulated time limit with a compliance report to us, failing which we shall be constrained to take action as prescribed under the contract along with other remedies available to us under law."

6. It appears that after filing of these petitions, the respondent No. 1 has terminated the contract of the petitioner on 21.02.2011. A copy of the said communication has been filed on record in O.M.P. No. 120/2011 along with an additional affidavit.
7. The submission of learned counsel for the petitioner is that the respondent is unjustly putting the blame on the petitioner for failure to carry out the work under the contract. Learned counsel for the petitioner submits that the quantity of steel involved in carrying out the work has undergone a substantial upward revision and it is not clear whether the petitioner would be paid for the same or not. In support of this submission, he places reliance on the minutes of the meeting held on 08.01.2011. This meeting was held between the officer of BMRCL, the petitioner and the respondent No. 1. It was the case of respondent No. 1 that there was increase of tonnage of steel required for the PEB structures as compared to the tender estimates. This was mainly due to the changes made in the design as insisted by the DDC, i.e, the Consultant. In fact, it was the case of the respondent

No. 1 that the changes are made beyond the Codal/Tender provisions and hence there should be compensation paid for the increase. The stand of the DDC on the other hand is that the payment for PEB items are based on the area of building and not by tonnage of steel used and it would not be possible perse to entertain any compensation due to increase in the quantity of steel. However, the details submitted to the BMRCL were agreed to be examined by the Project Manager/Joint Consultant of the BMRCL and it was recorded that if it was found that the increase in the Tonnage is due to any additional requirement over and above codal provisions from, the same would be looked into.

8. Learned counsel submits that on account of change in the specifications/conditions which had financial implications on the petitioner, the petitioner was not obliged to undertake the work till the petitioner is assured of being adequately compensated for increased consumption of steel. In these circumstances, even the Bank Guarantees issued at the petitioner's instance could not be invoked. In support of his submission the learned counsel for the petitioner has relied on a decision of this court in **Victor Cables Industries Ltd. Vs. Engineering Projects (I) Ltd. and Anr.**, 1995 II AD (Delhi) 43, wherein the court has held as follows:

"(14) After hearing the Counsel for the parties and perusing the documentary evidence, at least one thing which clearly emerge is that after placing the order for supply of cables, the Epi changed the conditions qua the

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excise duty and the term of payments. Admittedly in the telex message dated 30/03/1993 vide which order was placed it had been mentioned that detailed order shall be released later on, but that by itself would not give any right to the Epi to alter the essential terms of the agreement which had a financial ramifications. No new term could be added unilaterally. As already observed above, the petitioner had quoted the rates keeping in view that the price shall not include the component of excise duty on finished products. If by specific order, the respondent changed the condition it naturally worked out to be a financial detriment to the petitioner. To my mind, petitioner has made out a prima fade case of special equity in his favor. It amounts to special equity because no essential term of the tender document could be changed unilaterally particularly when it had financial repercussions. Even the queries raised by the petitioner as quoted above were never replied by the respondent. For the delay in the approval of the technical data sheet the period of delivery had also not been extended, which request was repeatedly made by the petitioner. Therefore, keeping all these factors in view, I am of the considered view that prima fade case of special equity has been made out by the petitioner. Accordingly the respondent cannot be allowed to encash the bank guarantee. It is a fit case where the bank can be injuncted and restrained from encashing the performance guarantee bearing No. BG-53/93 for Rs. 7,70,500.00 dated 17/05/1993 subject of course to the condition that petitioner shall keep this bank guarantee alive till the disposal of the suit. With these observations, the application stands disposed of."

9. The next submission of the learned counsel for the petitioner is that under the terms of the work order the same could be terminated by giving ten days notice in writing. He submits that respondent No. 1 has not given the said ten days notice to the petitioner. Learned counsel for the petitioner submits that the respondents have not issued the drawings on the basis of which the petitioner could have

fabricated the steel structures and constructed the same.

10. The petition is opposed by the learned counsel for the respondent No. 1. He submits that the petitioner miserably failed to carry out the contractual work as is evident from the communication issued by the BMRCL extracted above and by the respondent's communication issued to the petitioner also extracted above. He submits that repeated opportunities were given to the petitioner to carry out the work, but to no avail. On account of the petitioner's conduct, the PEB work is in danger of being rescinded by BMRCL. Respondent No. 1 has also been exposed to a prospect of suffering damages as BMRCL has threatened that the PEB works would be got carried out at the risk and costs of respondent No. 1. Mr. Bhagat submits that the Bank Guarantees in question are unconditional and are liable to be honoured without protest or demur. He submits that the petitioner has not made out a case of fraud of an egregious nature or irretrievable justice in the invocation of the Guarantees.

11. When the matter was taken up for hearing at the ex-parte stage on 08.02.2011, upon the offer of the petitioner being made that the petitioner shall deposit in this court the amount for which the Bank Guarantees have been issued, this court had stayed the invocation of Guarantees, subject to the condition being complied with by the next day. The petitioner has already deposited in this court the amounts

covered by the two Bank Guarantees in question.

12. After considering the submissions made by the learned counsels, and after perusing the record, in the light of the established clear position that contracts of Bank Guarantee are independent contracts between the bank and the beneficiary, and that they should not normally be interfered with except in exceptional cases involving fraud of an egregious nature or special equities of the kind existing in the case of ***Itek Corporation Vs. First National Bank of Boston*** [566 Fed. Supp. 1210] (see ***U.P. State Sugar Corporation Vs. Sumac International Ltd.***, (1997) 1 SCC 568.

13. From the aforesaid, it is clear that even according to the petitioner, the disputes which have arisen between the parties pertain to the performance/non-performance of the contract by the petitioner and the reasons therefor. The bank is not concerned with the allegations and counter-allegations of the parties with regard to the breach of the contract, and the bank does not have to determine before honouring the Guarantees, as to who is in default or breach of the contract. The Bank Guarantees being unconditional and absolute in their nature are bound to be honoured by the bank once they are invoked by the beneficiary in terms of the Guarantee. The submission that the drawings have not been submitted by respondent No. 1 is, again, not an aspect which can be gone into by the issuing bank. The

said issue again pertains to the aspect of breach of contract with which the bank is not concerned.

14. So far as the submission of the learned counsel for the petitioner that the contractual terms have been mutually altered is concerned, I may note that a mere change in the quantities of the raw materials required for execution of the contract on account of a change in the design does not tantamount to a change in the contractual terms. If the claim on account of higher tonnage could not be entertained under the contractual terms, then the petitioner could not have refused to carry out the work only on account of having to incur a larger expense in providing higher quantities of steel. Even if the petitioner was entitled to maintain a claim due to higher consumption of steel, that claim could have been raised after performing the contract. However, it cannot be said that the underlying contract gets vitiated on that account.

15. For all the aforesaid reasons, I find no merit in these petitions and dismiss the same. The amounts deposited by the petitioner in this court shall be released in favour of the respondent No. 1 forthwith along with up-to-date interest. Upon release of the said amounts, the claim of the respondent No. 1 founded upon the Bank Guarantees issued by the aforesaid banks in favour of respondent No. 1 at the behest of the petitioner shall stand discharged. The petitions stand

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disposed of.

16. Dasti.



VIPIN SANGHI, J

MARCH 23, 2011
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