

§~

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

+ OMP No. 594/2013 & IA Nos.9910-9911/2013

VMC SYSTEMS LTD.

.... PETITIONER

Through: Mr. Harish Malhotra and Mr.Rana
S.Biswas, Sr.Advs. with Mr.Vikram,
Mr.Sunil Sharma and Mr.Sumir
J.Hazarika, Adv.

versus

BHARAT SANCHAR NIGAM LIMITED RESPONDENTS

Through: Mr.Dinesh Agnani, Sr.Adv. with
Ms.Leena Tuteja, Adv.

AND

+ OMP No. 595/2013 & IA Nos.9911-9912/2013

M/S.PRITHVI INFORMATION SOLUTIONS LTD.

.... PETITIONER

Through: Mr. Harish Malhotra and Mr.Rana
S.Biswas, Sr.Advs. with Mr.Vikram,
Mr.Sunil Sharma and Mr.Sumir
J.Hazarika, Adv.

versus

BHARAT SANCHAR NIGAM LIMITED RESPONDENTS

Through: Mr.Dinesh Agnani, Sr.Adv. with
Ms.Leena Tuteja, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **11.06.2013**

The aforesaid petitions under Section 9 of the Arbitration and Conciliation Act, 1996 have been filed based on somewhat similar facts. The facts of OMP No.595/2013 are that on 10th August, 2010 respondent invited parties to bid for tender for running professionally managed Contact Centres Services for its customers of Wireline service including Broadband and Value added services associated with wire-line. The tenders were

4

invited from Indian Companies on zonal basis. The successful bidder was to set-up, operate and maintain the contact centres including agents at CCSP premises. The petitioner states that on representation extended by the respondent it filed its tender for South and West zones. Petitioner was issued Advance Work Order dated 05.12.2011 separately for south and west zones. In terms of the Advance work Orders the petitioner submitted the Performance Bank Guarantee. Upon acceptance of the same, the respondent issued the Work Order dated 30.12.2011 separately for the zones.

On 21.05.2013 the respondent issued a show cause notice to the petitioner listing out various alleged illegal acts done by the petitioner and pointing out that the Contract is liable to be terminated due to non-performance. Explanation was sought within 14 days as to why the contract be not terminated and the Performance Bank Guarantee totalling Rs.5.5 crores may not be forfeited. The present petition has been filed seeking an order of injunction restraining the respondent from taking any coercive steps in terms of the show cause notice dated 21.5.2013 and to restrain the respondent from forfeiting the Performance Bank Guarantee.

It is the contention of the learned senior counsel appearing for the petitioner that in terms of Clause 16.2 the performance bank guarantee was based on 5% of the expected total value of billing for 3 years. It is stated that in terms of the said clause the value of the Performance Bank Guarantee would be reduced based on invoice value of first six months. It is contended that as the initial requirement was to submit the Performance Bank Guarantee of Rs.3.5 crores for Project No.1 to Rs.2 crores, for Project No.3 i.e. a total of Rs.5.5 crores, the expected turnover as per the respondent was Rs.110 crores for three years. Hence for per month the expected turn

5

over was Rs.3 crores but in contrast the average has worked out to only Rs.16.38 lacs per month. It is contended that hence the respondents have misled the petitioner by giving wrong projection of expected business volumes. It is further submitted that in terms of Clause 16.2 of the Agreement the respondent was obliged to reduce the value of the Bank Guarantee in consonance with the billing being generated in the first six months. Reliance has been placed on a letter dated 21.3.2013 sent by AGM, CCAP, H, HTD, Hyderabad.

Learned senior counsel for the petitioner also relies upon a judgment of the Division Bench of this Court in *173(2010) DLT 8 (DB)* titled as *Humboldt Wedag India Pvt.Ltd. versus Dalmia Cement Ventures Ltd.* whereof he relies upon paragraph 18 which holds that a demand by a beneficiary under the Bank Guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the contract but it may become so because of subsequent events or circumstances. Hence, the Court can restrain a person from making such a fraudulent demand from the Bank Guarantee. It was further contended that there has been huge defaults in payment by the respondent and against an outstanding billing of Rs.88.92 lacs, it is stated that the respondent has only paid Rs.7.25 lacs.

Learned senior counsel for the respondent has relied upon the Show Cause Notice dated 21.05.2013 to contend that the petitioner is guilty of having performed a very poor job. Complaints were being received from various contact centres regarding power failure insufficient numbers of CSA deployment. It is also stated that the petitioner has suspended operation of five call centres out of six in the South and West zones and despite request to restart the call centres no action has been taken. Hence, it is contended by

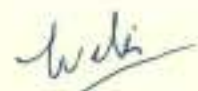
the learned senior counsel for the respondent that the action of the respondent is legal and valid. Counsel for the respondent also submits that in view of non-functioning of call centres and the huge amount of liquidated damages the petitioner is liable to make the payments which have been delayed by the respondent.

It is settled law that while dealing with invocation of a Performance Guarantee issued by a Bank its encashment cannot be prevented by the party at whose instance the guarantee was issued except in cases of fraud or irreparable injustice. Fraud must be of "egregious nature" so as to vitiate the entire underlying transaction. Irretrievable injustice should be of the kind arising in an irretrievable situation where an irreparable and irretrievable harm would be caused to the party seeking injunction. The principles have been laid down and reiterated in (1988) 1 SCC 174 titled as *U.P. Cooperative Federation Ltd. -vs- Singh Consultants and Engineers (P) Ltd.* and (1994) 1 SCC 502 titled as *Svenska Handelsbanken -vs- Indian Charge Chrome* and various other judgments.

In view of the said legal position, no case is made out for passing any injunction orders regarding the performance Bank Guarantee against the respondent. The contentions of the Petitioner about non-reduction of value of the Performance Guarantee in terms of Clause 16.2 of the Agreement or delay in release of payments cannot be said to constitute a fraud that vitiates the transaction. At best it would be a breach of contract. Nothing is placed on record to show irretrievable injustice. The present petition is dismissed. It is, however, clarified that in case the respondent seeks to encash the Bank Guarantee, any such encashment will be subject to outcome of the arbitration proceedings that may be initiated by the petitioner.

7

In view of the above order passed in OMP No. 595/2013 the OMP No.594/2013 also stands dismissed accordingly.



JAYANT NATH
(VACATION JUDGE)

JUNE 11, 2013
nt