

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 17th April, 2014
Judgment Pronounced on: 01st July, 2014

O.M.P. 144/2014

UNITED TELECOMS LTD.

.....PETITIONER

Through: Mr. D. K. Malhotra with
Mr. Rajesh Kumar
Malhotra, Advocates

versus

IDBI BANK LTD & ANR

..... RESPONDENTS

Through Mr. Chetan Sharma, Senior
Advocate with Mr. Yaman
Kumar, Ms. Sudipa
Dasgupta, Advocates for
the Respondent No.2

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The Petitioner has filed the present Section 9 petition seeking a restraint against Respondent No. 2 from invoking/encashing the bank guarantee issued by Respondent No.1.
2. The case of the Petitioner is that Letter of Acceptance (LOA) dated 01.08.2012 was issued for supply of Dense Wave Division Multiplex (DWDM) equipment

with a capacity of 40 channels. Along with the Letter of Acceptance, a Bill of Material (BOM) was annexed specifying the quantity with costs of items to be supplied as part of the equipment. It is contended that the LOA was issued in pursuance to the bid submitted by the Petitioner for supply of equipment with 40 channels against the tender floated by Respondent No.2. On acceptance of the bid and issuance of Letter of Intent, the Petitioner submitted performance guarantee (Security Deposit) equivalent to 10% of the value of the contract for due performance of the LOA dated 01.08.2012.

3. It is the case of the Petitioner that Respondent No.2 illegally and unilaterally amended/modified the contract/terms of LOA by issuing corrigendum dated 30.01.2013 and the capacity of DWDM equipment was modified from 40 channels to 80 Channels. It is contended that by unilateral modification of the capacity of the DWDM Equipment from 40 channels to 80 channels, Respondent No.2 committed breach of the terms of Contract/LOA. It is contended that no reason was specified for the said amendment. It is contended that in the meeting convened on the request of the Petitioner, it was alleged that the contract/LOA was

modified as there was a typographical mistake. It is submitted that neither under law nor in terms of LOA, the Respondent could unilaterally amend the conditions of contract requiring the Petitioner to supply equipment with capacity of 80 channels though in terms of LOA, it was 40 channels.

4. It is contended that because of issuance of the corrigendum changing the scope of supply, disputes arose between the parties regarding the interpretation of the terms of LOA and Respondent No.2 threatened to invoke the bank guarantee.
5. The Petitioner filed OMP 434/2013 before this Court. Pending the said proceedings efforts were made to resolve the disputes amicably and after negotiations, Minutes of Meeting (MOM) dated 23.08.2013 were executed between the parties. It is contended that the Minutes of Meeting stipulated substitution of a new contract by abandoning/rescinding or altering the original agreement. It is contended that in view of the minutes of meeting, the original agreement was not required to be performed.
6. It is further contended that parties were to sign the agreement afresh after optimization of network

Design/BOM (Bill of Material). It is contended that there were material alterations in the terms of the original agreement which amounted to abandonment/rescinding of original contract or novation of agreement in terms of which original agreement need not be performed. It is contended that optimization of network design/BOM was not yet finalized by Respondent No.2 and as such the fresh agreement in terms of Minutes of Meeting could not be signed.

7. It is contended that as on the date of the filing of the petition there was no contract as the original agreement was abandoned/rescinded and the fresh agreement was not signed and, thus, Respondent No.2 had no right to invoke the bank guarantee executed/issued in terms of original agreement and the threat to invoke the bank guarantee amounted to fraud. It is contended that performance bank guarantee is issued against the original LOA that was abandoned by the Minutes of Meeting and as such invocation and an attempt to encash the bank guarantee was fraudulent on the face of such bank guarantee. In these circumstances, the Petitioner, filed the present petition seeking restraint

against Respondent No.2 from invoking/encashing bank guarantee.

8. When the matter came up for hearing for the first time before this Court on 04.02.2014, the Respondent No. 2 entered appearance and submitted that the Respondent had as of that date not initiated any proceedings for invocation of the bank guarantee and, accordingly, would hold back the same until the hearing of the matter.
9. Respondent No. 2 contended that on 05.12.2011, Respondent No.2 floated a tender and in terms of Clause 7, the period of completion was 40 days from the date of issuance of LOA. As per the Respondents, the period expired on 31.03.2012.
10. It is contended that a pre bid conference was held on 03.02.2012 with the prospective bidders and the Petitioner also participated in the said conference. In the pre bid conference the position as regards the type of equipment required to be supplied was explicitly made clear. Appropriate clarification was issued to the specific query raised by the Petitioner and based on the queries by the prospective bidders and the discussion held during the pre-bid conference, the corrigendum

was issued on 29.02.2012 containing necessary amendments to the tender Clause. In view of the corrigendum, there was no dispute that the type of equipment required to be supplied was DWDM with capacity of 80 channels from day one.

11. It is contended that in terms of Clause 1.2 of the Instructions to Tenderers and Conditions of Tendering, the corrigendum dated 29.02.2012 formed part of the tender papers and the tendering document dated 15.12.2011 had to be read along with the corrigendum.
12. It is contended that the Petitioner submitted its bid/offer for the said tender on 10.04.2012 after issuance of the corrigendum dated 29.02.2012. It is submitted that in the bid offer dated 10.04.2012 the Petitioner had restricted the bid to 40 channels in three sub-paras however in two sub-paras had mentioned 80 channels.
13. It is contended that this was not accepted by the Respondent No. 2 and, therefore, on 25.07.2012, the Respondent No.2 issued a counter offer and letter of intent to the Petitioner. The counter offer and letter of intent referred to the corrigendum and events that had taken place prior to submission of offers/bid by the Petitioner on 10.4.2012. The Respondent No. 2 by the

said counter offer and letter of intent asked the Petitioner for unqualified and unconditional acceptance of the contents of the counter offer that stipulated supply of 80 channels equipment. The Petitioners by letter dated 27.07.2012 unconditionally and unequivocally accepted the counter offer and letter of intent. It is contended that it was only after the unconditional and unqualified acceptance by the Petitioner that the Respondent issued a letter of acceptance to the Petitioner on 1.08.2012.

14. The Respondents have relied on the proceedings of the first round of litigation initiated by the Petitioner to contend that the stand of the Petitioner contending that what was agreed in the initial contract was 40 channels equipment was incorrect. Learned counsel for Respondent No.2 relied on the statement of Mr. Romi Sharma (Head Marketing of the Petitioner), who was examined on oath under Section 165 of the Indian Evidence Act recorded in the first round of litigation between the parties. Learned counsel for Respondent No.2 relied on the said statement wherein it is recorded by the Court that a question was posed to the said representative of the Petitioner as to when the Petitioner agreed to provide 80 channels and the said

representative did not answer the question despite the question being put to him number of times.

15. It is contended by Respondent No.2 that the corrigendum was issued prior to the submission of the bid by the Petitioner and there was no unilateral amendment made by the Respondents. It is contended that corrigendum dated 30.01.2013 was only clarificatory to amend the wordings 40 channels to 80 channels in the annexure of Letter of Acceptance.
16. It is further contended that the falsity of the case of the Petitioner is further evident from the fact that the Petitioner had placed order on its consortium partner for an equipment with 80 channels.
17. It is contended that the lapse of non-performance on the part of the Petitioner was evident as the Petitioner had not complied with the guidelines agreed to. It is contended that there was no progress from the Petitioner's side and the Petitioner had defaulted to carry out its contractual obligations.
18. It is contended that the stand of the Petitioner that the original agreement/Letter of Acceptance was abandoned/rescinded is entirely wrong and frivolous. It

is contended that the bank guarantee is absolute and unequivocal and the allegation of the Petitioner that the invocation and attempt to encash the bank guarantee is blatantly fraudulent is incorrect. It is contended that no case of fraud is made out and no irretrievable injury is likely to be suffered by the Petitioner.

19. It is contended that the Petitioner is taking contradictory stands. On the one hand, the Petitioner has contended that the Minutes of Meeting dated 23.08.2013 rescinded the original agreement and on the other hand, the Petitioner has invoked the provisions of the Arbitration & Conciliation Act, 1996 in terms of the clause contained in the original agreement.
20. Respondent has further contend that bank guarantee itself stipulates that the Respondent No.2 shall have fullest liberty to vary any of the terms & conditions of the agreement and the bank shall not be relieved from their liability from any such variation.
21. The law in respect of enforcement of bank guarantee and with regard to the grant of injunction in respect of invocation of bank guarantees has been settled by the Supreme Court of India in catena of judgments.

22. The Supreme Court in the case of ***U.P. COOP. FEDERATION LTD. V. SINGH CONSULTANTS AND ENGINEERS (P) LTD. 1988 (1) SCC 174*** has laid down that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of Bank Guarantee, there should be a serious dispute and there should be a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of Bank Guarantees would be negated and the fabric of trading operation will get jeopardised. The court further held that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, that the court should interfere.

23. The Supreme Court in the case of ***U.P. STATE SUGAR CORPN. V. SUMAC INTERNATIONAL LTD., (1997) 1 SCC 568*** further laid down that when in the course of commercial dealings an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee in terms thereof

irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a Bank Guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a Bank Guarantee. The courts have carved out only two exceptions. A fraud in connection with such a Bank Guarantee would vitiate the very foundation of such a Bank Guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two

grounds are not necessarily connected, though both may coexist in some cases.

24. The Supreme Court further in the case of *U.P. STATE SUGAR CORPN. (SUPRA)* held that there are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee. The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time that must elapse between the granting of such an injunction and an application by the bank to have it charged. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional Bank Guarantees are sought to be

realised the Supreme Court held that to avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank Guarantees. There must be a fraud in connection with the Bank Guarantee.

25. The Supreme Court in the case of ***I.T.C. LTD. v. DEBTS RECOVERY APPELLATE TRIBUNAL***, (1998) 2 SCC 70 has laid down as under:

22. What is necessary for the Bank to refuse payment is a case of clear “fraud” and the Bank's knowledge as to such fraud (*Bolivinter Oil S.A. v. Chase Manhattan Bank N.A.*) [(1984) 1 LLR 392] . As pointed by Lord Denning and Lord Lane in *Edward Owen* [(1978) 1 All ER 976 : 1978 QB 159 : (1977) 3 WLR 764, CA], the Bank cannot refuse payment merely because according to it the claim was “dishonest” or “suspicious” or it appeared to be a sharp practice but it must be established as “fraud”. Lord Ackner in *United Trading Corpn. S.A. & Murray Clayton Ltd. v. Allied Arab Bank Ltd.*

[(1985) 2 LLR 554, CA] held that the Bank could object to pay not because the demand was not “honestly” made but was made fraudulently. Waller, J. in *Turkiye v. Bank of China* [(1996) 2 LLR 611] [LLR pp. (617-618)] said that the question was whether the demand for payment was “fraudulent”. Mere allegations and counter-allegations between the parties as to breach of contract, non-payment of advances or non-supply of machinery did not amount to fraud.

26. The Supreme Court further in the case of ***HIMADRI CHEMICALS INDUSTRIES LTD. V. COAL TAR REFINING CO., (2007) 8 SCC 110*** after considering the law as laid down by the Supreme Court in various decisions laid down the following principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a letter of credit:

- (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any

dispute raised by its customer.

- (iii) The courts should be slow in granting an order of injunction to restrain the realisation of a Bank Guarantee or a letter of credit.
- (iv) Since a Bank Guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or letters of credit.
- (v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.
- (vi) Allowing encashment of an unconditional Bank Guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.

27. Keeping these principles in mind and applying the same on the facts of this case, the conclusion that can be drawn is that no good ground has been made out by the Petitioner for grant of an order of injunction.

28. From the various documents and the pleadings filed by the parties the prima facie facts that emerge are that on 05.12.2011 the Respondent No. 2 floated the tender. A pre bid conference was held on 03.02.2012 with the

prospective bidders and the Petitioner also participated in the said conference. In the pre bid conference the position as regards the type of equipment required to be supplied is stated to have been explicitly made clear. The corrigendum was issued on 29.02.2012 containing necessary amendments to the tender Clause. The corrigendum clearly stipulates that the type of equipment required to be supplied was DWDM with capacity of 80 channels.

29. In terms of Clause 1.2 of the Instructions to Tenderers and Conditions of Tendering, the corrigendum dated 29.02.2012 formed part of the tender papers and the tendering document dated 15.12.2011 had to be read along with the corrigendum.
30. The Petitioner submitted its bid/offer for the said tender on 10.04.2012 after issuance of the corrigendum dated 29.02.2012. In the bid offer dated 10.04.2012 the Petitioner apart from mentioning 40 channels in three sub-paras in two sub-paras had mentioned 80 channels. The Petitioner had placed order on its consortium partner for an equipment with 80 channels.
31. The Bid of offer dated 10.04.2012 of the Petitioner was not accepted by the Respondent No. 2 and on

25.07.2012, the Respondent No. 2 issued a counter offer and letter of intent to the Petitioner. The counter offer and letter of intent referring to the corrigendum asked the Petitioner for unqualified and unconditional acceptance of the contents of the counter offer that stipulated supply of 80 channels equipment. The Petitioners by letter dated 27.07.2012 unconditionally and unequivocally accepted the counter offer and letter of intent. Thereafter the Respondent issued a letter of acceptance to the Petitioner on 01.08.2012. Once the Petitioner has unconditionally and unequivocally accepted the contents of the counter offer, the Petitioner cannot be permitted to contend that the Respondent unilaterally changed the terms of the scope of supply.

32. The demeanour of Mr. Romi Sharma (Head Marketing of the Petitioner), and his failure to answer the specific question posed by the court prima facie does not lend credit to the case set up by the Petitioner.
33. The bank guarantee is absolute and unequivocal. It itself stipulates that Respondent No. 2 shall have fullest liberty to vary any of the terms & conditions of the agreement and the bank shall not be relieved from their liability from any such variation.

34. In my opinion no case of fraud or irretrievable injury is made out. The Petitioner has failed to sufficiently plead or establish the plea of fraud or irretrievable injury. The Petitioner has failed to plead and establish that the fraud is of an egregious nature so as to vitiate the entire underlying transaction. There is nothing to show that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. Existence of exceptional circumstances, that make it impossible for the Petitioner to reimburse itself if it ultimately succeeds, is not even sufficiently pleaded by the Petitioner leave alone decisively establishing it.
35. In view of the above, I find no merit in the Petition. The Petition is accordingly dismissed. Nothing stated herein would amount to an expression of opinion on the merits of the case of either party.

SANJEEV SACHDEVA, J

July 01, 2014

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