IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No. 3667 of 2015 (O/M)
Date of decision : 25.5.2015

IBM India Private Ltd. ..... Appellant

Versus

Trident Ltd. and others ...... Respondents

CORAM: HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. R.S. Rai, Senior Advocate, with,
Mr. Ashim Aggarwal and Mr. Rajesh Sood, Advocates,
for the appellant.

Mr. Ashok Aggarwal, Senior Advocate, with,
Mr. Shekhar Verma, Advocate,
for caveators/respondents No. 1 and 2.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

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KULDIP SINGH, J. (ORAL)

Mr. Ashok Aggarwal, Senior Advocate, has put in appearance for caveators/respondents No. 1 and 2.

Preliminary arguments heard. I have also examined the Court file and the documents produced therewith.

Challenged in the present appeal is the order dated 15.5.2015, passed by the learned Additional District Judge, Chandigarh, vide which the application of the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'the

Arbitration Act, 1996') was rejected/returned. In the said application, the appellant (petitioner before the lower Court) had sought interim injunction against the respondents No. 1 and 2 from invoking bank guarantees.

Suffice to say that the appellant/petitioner and respondent-Company had entered into supply agreement on 14.3.2014, wherein the appellant/petitioner had agreed to supply certain equipments as set up in the said agreement. Subsequently, vide addendum dated 25.3.2014, certain amendments were made. The contract price was to be paid by the respondent/purchaser 100% in advance against advance bank guarantee and the payment was to be released by the respondent-Company within 10 days of receipt of original advance bank guarantee. Accordingly, a bank guarantee dated 30.4.2014 of Rs. 9,09,85,877/- was issued on behalf of the appellant/petitioner by HSBC in favour of respondent-Company. The bank guarantee was initially valid till 29.10.2014 and subsequently extended till 30.4.2015. All the materials are stated to have been supplied. The service agreement dated 14.3.2014 was also entered into between the appellant/petitioner and respondent-Company to install and commission of the equipment specified in Annexure-II of the supply agreement. The services were to be provided at various places including Chandigarh. The contract value of installation and commissioning was Rs. 1,18,52,013/-, while support services were valued at Rs. 92,50,000/-. As per the terms of Annexure-V of service agreement, the payment was supposed to be made by the respondent-Company within ten days of the appellant/petitioner furnishing an advance bank guarantee to the respondent-Company for an equivalent amount. Subsequently, on 17.7.2014, the appellant/petitioner issued a bank guarantee through its banker viz. Deutsche Bank AG amounting to Rs. 1,18,52,013/- initially valid till 17.1.2015, which was extended till 30.4.2015. It is stated that respondent-Company has not paid anything and it wants to encash the bank guarantee. Suffice to say, thereafter some dispute arose between the parties.

Learned senior counsel for the appellant/petitioner has argued that his petition under Section 9 of the Arbitration Act, 1996 has been dismissed on the ground that Chandigarh Courts have got no jurisdiction and only the Barnala Courts have got the jurisdiction. It has been averred that the said findings are wrong. The learned senior counsel for the appellant/petitioner has made reference to the supply and service agreements, wherein it is mentioned that the supervisory jurisdiction for any dispute arising under this agreement shall be at Chandigarh, India. Therefore, it has been argued that Chandigarh Courts have got the jurisdiction. On merits, it has been argued that nothing has been paid to the appellant/petitioner and that the respondent-Company cannot invoke the bank guarantee.

This contention of the learned senior counsel for the appellant/petitioner has been vehemently opposed by Mr. Ashok

Aggarwal, learned senior counsel for caveator/respondent-Company. He has drawn the attention of the Court towards Clauses 1, 2 and 7 of the advance bank guarantee, which are reproduced as under :-

> "1. The Bank hereby irrevocably and unconditionally undertakes and guarantees to Purchaser that if the supplier fails to supply the goods in conformity with the terms of the Agreement for any reason whatsoever, the Bank shall merely on written demand and without demur pay to Purchaser all and any sum up to a maximum of Rs. 9,09,85,877/- (Rupees Nine Cores Nine Lacs Eighty Five Thousand Eight Hundred and Seventy Seven only) without any reference to the supplier and without questioning the claim provided such demand under this guarantee is received by the bank on or before 29 October 2014.
>
> 2. The Bank further agrees that the Purchaser shall be the sole judge as to whether the Supplier has failed to abide by the terms of the said Agreement or has failed to perform as per the said Agreement in any respect of the whole or part of the payment made by the Purchaser. Any such demand made on the Bank by the Purchaser shall be conclusive and binding upon the Bank. The Bank shall pay forthwith the amount demanded by the Purchaser notwithstanding any dispute, if any, between the Purchaser and the Supplier, however the amount shall not exceed Rs. 9,09,85,877/- (Rupees Nine Crores Nine Lacs Eighty Five Thousand Eight Hundred and Seventy Seven only) in aggregate.
>
> 3. to 6. xxxxxx xxxxxx xxxxxx
>
> 7. The Bank further agrees that any legal action or proceedings arising out of this Guarantee shall be

brought in the courts or tribunals at Barnala in India and irrevocably submit themselves to the jurisdiction of such courts and tribunals."

Therefore, it has been argued that in case of dispute regarding the bank guarantee, the Barnala Courts will have the jurisdiction. It has been further argued that admittedly in this case, a dispute has arisen between the parties regarding some matters covered by the supply and service agreements (Annexures-A-1 and A-7).

Learned senior counsel for the appellant/petitioner claims that he has issued a notice for appointment of the Arbitrator and that the other party is yet to respond. In this way, the arbitration proceedings are yet to commence.

Now, coming to the merits of the case, I am of the view that the clauses of the advance bank guarantee, reproduced above, clearly show that the purchaser shall be the sole judge as to whether the supplier has failed to abide by the terms of said agreement or has failed to perform as per the said agreement. The advance bank guarantee was issued and the bank is bound to honour the same merely on the written demand and without demur pay to the purchaser all the sums mentioned therein. The terms and conditions of the bank guarantee show that the purchaser could at any time invoke the bank guarantee. The question as to whether the Court could grant injunction in case of other party invoking the bank guarantee was considered by the Hon'ble Supreme Court in *Vinitec Electronics Private Limited Versus HCL Infosystems Limited,* 2008 (1) Apex Court Judgments (SC) 193. The Apex Court referred to its earlier judgment in *Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Company,* 2007 (3) RCR (Civil) 768, wherein it was observed as under :-

> "13. In Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company , this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :
>
> > "14.. . . . .
> >
> > (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 realize 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 realization 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."

In this way, it is clear that the advance bank guarantee is being invoked by the respondent-Company as per the terms and conditions of the bank guarantee. If the appellant/petitioner feels that he has suffered any injury, he can seek appropriate relief before the Arbitrator. However, respondent-Company cannot be restrained from exercising its legal right under the contract nor the bank can be directed not to honour its commitment. It being so, even on merits, the appellant/petitioner has no case. Thus, the question of jurisdiction of Chandigarh or Barnala Courts becomes irrelevant.

Accordingly, the present appeal is dismissed.

(KULDIP SINGH)
JUDGE

25.5.2015
sjks