

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 145 of 2014

M/S.AMKV-TECPRO Petitioner
Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr.Tarun Johri, Advocate.

versus

GAIL (INDIA) LIMITED & ANR. Respondents
Through: Mr. Ramji Srinivasan, Senior
Advocate with Ms.Deepika Tusir and
Mr.Ghanshyam Joshi, Advocates

AND

O.M.P. No.151 of 2014

M/S.AMKV-TECPRO Petitioner
Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr.Tarun Johri, Advocate.

versus

GAIL (INDIA) LIMITED & ANR. Respondents
Through: Mr. Ramji Srinivasan, Senior
Advocate with Ms.Deepika Tusir and
Mr.Ghanshyam Joshi, Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER
30.01.2015

1. These are two petitions under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') seeking interim reliefs.
2. The Petitioner M/s AMKV-TECPRO is a consortium of TECPRO Systems Limited which undertakes turnkey projects. Mecon Limited

(Respondent No.2), on behalf of Gail (India) Limited (Respondent No.1) floated an e-tender on 28th June, 2011 inviting bids on open international competition basis for laying of the Phase-II of the Kochi-Koottanad-Mangalore-Bangalore Pipeline Project (KKMBPP) which involved testing and commissioning of 884 Kms long steel pipeline for transportation and distribution of re-gasified Liquid Natural Gas (LNG) and associated facilities in the states of Kerala, Tamil Nadu and Karnataka from intermediate piping system (IPS) of Phase-I at FACT Udyogmandal to IPS of Phase-II at Kootanad and from there to Bangalore and Mangalore.

3. The Petitioner submitted two bids, one for Section-I and the other for Section-II. By separate letters dated 12th January 2012 Respondent No.1 intimated to the Petitioner the acceptance of both its above bids at the contract price of Rs.89,82,69,650/- and Rs.68,97,37,075/- respectively. The details of Section-I and Section-II awarded to the Petitioner were as under:

“Section-I 30” x 91km	<i>Pipeline from dispatch terminal at existing I.P. Station-I at FACT Udyogmandal of Phase-I at Ch.0.000Km to IP Station-1 of Phase-II at Approx. Ch. 90.615 Km at Kootanad including piping works at despatch terminal at existing IP Station-I, SV-1, SV-2, SV-3, SV-4 & SV-5 Stations and IP Station-I at Kootanad.”</i>
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“Section-II 24” x 114km	<i>Pipeline from IP Station-1 at Approx. Ch. 90.615 Km at Kootanad to IP Station-2 at Ch. 188.80 Km plus IP Station-1 (Ch 90.615) to SV-1M (Ch 15.99 Km on Mangalore spur line) including piping works at SV-1M, SV-6, SV-7, SV-8, SV-9 & SV-10 and IP Station-2.”</i>
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4. The work was to be completed and kept ready for commissioning within 12 months from the Fax of Acceptance (FOA) i.e. from 12th

January 2012. The commissioning of gas including all stations/terminals was to be effected within three months after mechanical completion. Respondent No.1 issued letters of acceptance in respect of both bids on 2nd February 2012. In respect of each of the sections a separate contract agreement dated 20th January 2012 was executed by the Petitioner and Respondent No.1.

5. In terms of Clause 37 of the instructions to bidders (ITB) read with Clause 11 of the Special Conditions of Contract (SCC) and Clause 24 of the General Conditions of Contract (GCC) the Petitioner had to furnish, in respect of each contract, Performance Bank Guarantee (PBG) for 10% of the contract price within 15 days of the receipt of the FOA which was to be valid till expiry of 90 days after the end of the defect liability period. Further in terms of Clause 26 of the SCC, the Petitioner was to furnish Advance Bank Guarantees (ABGs) for 11% of the contract price. In respect of both sections the Petitioner furnished to Respondent No.1 the following bank guarantees:

ADVANCE BANK GUARANTEE with IDBI BANK LTD CHENNAI

Sl.No.	BG No.	Expiry Date	Amt(Rs)	Section
1	1203801BGA00136	13.05.2015	49404721.00	I
2	1203801BGA00137	13.05.2015	49404721.00	I
3	1203801BGA00138	13.05.2015	37935539.00	II
4	1203801BGA00139	13.05.2015	37935539.00	II

PERFORMANCE BANK GUARANTEE with AXIS BANK CHENNAI

Sl.No.	BG No.	Expiry Date	Amt(Rs)	Section
1	11650100001747	31.07.2015	89826765.00	I
2	11650100001748	31.07.2015	68973708.00	II

6. Since the project involved laying, testing and commissioning of the

pipeline for transportation of long steel pipeline, Respondent No.1 had to acquire the Right of User (ROU) over the land through which the proposed pipeline was to be laid. According to the Petitioner, it was represented to it by Respondent No.1 that the said ROU had already been acquired.

7. In respect of both contracts, Respondent No.1 released the mobilisation advance on 20th July (5%) and 17th October 2012 (the balance 5%). The Petitioner claims that once the work commenced, it was realised that the process of acquiring ROU over the lands through which the pipeline had to pass had not been completed by Respondent No.1. For that purpose notices had to be issued under Section 3 of the Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962. After hearing objections to the notice under Section 3(1) of the Act, a declaration under Section 6(1) by means of a notification in the official gazette had to be issued and this had to be followed by payment of compensation to the concerned land owners.

8. It is claimed by the Petitioner that the details of the gazette notifications were forwarded to Respondent No.1 for the first time almost eight and a half months after the commencement of the project. Further, the declaration under Section 6(1) of the Act was not for the entire stretches of land through which the proposed pipeline had to pass but for different parcels. The Petitioner further claims that even in respect of these parcels there were encumbrances and land owners continue to occupy the lands with their cultivations and/or permanent structures. This compelled the Petitioner to refrain from carrying out any construction activities on these stretches till the paddy harvesting was completed by the end of December 2012. It is

then stated that due to non-settlement of compensation some of the farmers/land owners protested and declared that they would not hand over possession of the land or allow any pipeline to pass through it.

9. According to the Petitioner, as on the date of the FOA, 12th January 2012, in respect of Section-I out of the entire stretch of 91 kms, only 11.339 kms of ROU had been provided. In respect of Section-II, out of the entire stretch of 114 kms, only 0.375 kms of ROU was provided. As on that date of the filing of the petitions, in respect of Section-I, only 65 kms was available. As far as Section-II is concerned, only about 15 kms is made available on that date and that too in instalments. It is stated that the acquisitions of the ROUs continued well after the stipulated date of completion of the contract. It is claimed that correspondence was exchanged between the parties in relation to such delay and stoppage of work. Reference is made to a writ petition filed in High Court of Kerala by some of the land owners and an interim order passed therein by the High Court on 13th February 2013 directing status quo to be maintained till such time adequate compensation was not paid for the standing crops and the land at market value to the Petitioners. It is further claimed that the Petitioner's workforce was beaten up by mobs and activists claiming to safeguard the interests of the landowners. In the meanwhile, Respondent No.1 was asked by the Government of Kerala to enhance the compensation and sometimes reroute the pipeline. According to the Petitioner, this completely altered the scope of the work.

10. The Petitioner states that in the above circumstances, it was constrained to seek provisional extension of time up to 11th October 2013 for completion of the balance activities. It kept extending the

PBGs and ABGs. The Petitioner contends that Respondent No.1 made a false and misleading representation to the Petitioner at the time of the issuance of bid documents, and even at the time of execution of the contracts, that it had already acquired the requisite ROUs whereas it had not even initiated the process of acquisition. This is claimed to be an egregious fraud that vitiates both contracts. It is further pleaded that in the circumstances any attempt by the Respondent No.1 to invoke the afore-mentioned PBGs and ABGs at this stage would be impermissible in law. It is pleaded that unless the Respondent No.1 is restrained from doing so, irretrievable injury or irretrievable injustice would be caused to the Petitioner. It is claimed that Rs.4 crores approximately in respect of the bills of the Petitioner for each of the sections has been withheld by Respondents 1 and 2.

11. This Court on 4th February 2014 passed an interim order restraining the Respondents to invoke the aforementioned PBGs and AVGs subject to the Petitioner keeping them alive.

12. It is pointed out by Mr. Sudhir Nandrajog, learned Senior counsel for the Petitioner, that an arbitral tribunal (AT) has since been constituted and the interim orders passed by the Court should continue during the pendency of the arbitral proceedings.

13. Mr. Ramji Srinivasan, learned Senior counsel appearing for GAIL (India) Limited, vehemently opposed the above plea. He submitted that the plea that ROUs were not acquired for the work to commence was wholly incorrect. He referred to a chart (Annexure R-1/24) enclosed with the reply filed in OMP No. 151/2014 showing 'ROU availability vs. Work completion'. He submitted that as far as

Section-I was concerned of the 91 kms stretch, 49.4 kms was available as on 12th January 2013 whereas work was completed only to the extent of 0.51 kms. Likewise as regards Section-II of the 114 kms, ROU in respect of 78.096 kms was available and no work had been completed till then. It is submitted that while the question of invocation of PBGs would depend upon the outcome of the arbitral proceedings and that may be kept alive by the petition during the pendency of the arbitral proceedings, there was no justification whatsoever for restraining the encashment of the ABGs. According to the Petitioner, despite disbursement of over Rs. 9.88 crores for Section-I and over Rs.7.58 crores for Section-II as mobilisation advance, there was very little work completed and, therefore, Respondent No.1 is entitled to seek encashment of the ABGs. He submitted that this was not a case where any fraud was played on the Petitioner by Respondent No.1 which is a public sector undertaking. He relied upon the judgment of the Supreme Court in ***UP State Sugar Corporation vs. Sumac International Ltd. (1997) 1 SCC 568*** to state that only in exceptional circumstances would the Court interdict the invocation and encashment of bank guarantees. He submitted that the Petitioner has failed to make out a such case for such interdiction.

14. Mr. Sudhir Nandrajog, in rejoinder, seriously disputed the correctness of the chart at Annexure R-1/24 enclosed with the reply of the Respondent. He has referred to documents placed on record which showed that notifications were being issued under Section 6 of the Act for certain stretches of lands even as late as in August 2013. He has pointed out that where a continuous stretch was not available, it would be impossible to lay any pipeline. Also in several instances the actual handing over of the land was yet to take place and this could be

established only in arbitral proceedings.

15. The above submissions have been considered. The first factor to consider is whether the Petitioner has a *prima facie* case in its favour. Clauses 5 and 35 of the ITB require the bidders to visit and examine the site of work and the pipeline route. Clause 5.1 states “Claims and objections due to ignorance of existing conditions will not be considered after submissions of the bid and during implementation.” Clause 26 specifies the conditions for *Force Majeure*. Clause 29.1 states that if the contractor refuses or fails to execute the work the employer i.e., Respondent No.1 can determine the contract or take over any part of the work.

16. Clause 28.1 of the SCC which is relevant to the disputes between the parties reads as under:

“28.1 Company has acquired the ROU free of any encroachments/temporary/permanent structures under P&MP act in general. Acquiring of ROU means publishing of 3(1) and 6(1) Gazette notification under P&MP Act 1962.

Contractor shall open the ROU with revenue team of competent authority appointed by GAIL and start the construction activities. Opening of ROU to start for construction and related activities & maintaining of ROU during entire period of construction shall be the responsibility of contractor. In case any obstruction by landowner(s)/farmers or encroachments or structures are encountered during execution, the same shall be got removed by the contractor. All costs towards such activities shall be to Contractor’s account. Necessary compensations applicable under P&MP act shall be paid by Company.”

17. Clause 28.6 states that in case of any detour from the acquired ROU due to constructability problems or otherwise, the contractor would be permitted to do so after approval of Respondent No.1. It

further states as under:

“28.6However, such activity shall not affect the construction schedule and overall completion period. In case of local detour due to non availability of Legal ROU, contractor has to negotiate and arrange the ROU for laying of pipe line without affecting the schedule. Compensation payable under P&MP act shall be paid by GAIL. All other costs if any shall be to the contractors account. Company shall proceed with regular notifications etc. In due course for the detoured portion.”

18. Respondent No.1 has with its reply annexed document R-1/17 giving details of acquisition as on 8th August 2013. This makes it clear that entire stretch in respect of both projects had not been acquired as on the date of the contract and this was completed in instalments after that date. Even if the site had been inspected by the Petitioner, that may not have revealed the fact which was exclusively in the knowledge of Respondent No.1. However, these are aspects for which evidence have to be led by both parties. The above observations of the Court at this stage are only of a *prima facie* nature. The stand of the Respondent “It is not mandatory that the entire ROU is made available to the Petitioner at the very beginning” will have to be established in the arbitral proceedings. To what extent the Petitioner failed in commencing and completing work on stretches made available to it from time to time will also be a matter of evidence and examined in the arbitral proceedings. However it does appear to the Court that question whether the Petitioner failed to perform its obligations under contract or whether the Respondent No.1 failed to make available the land necessary for performance of such work cannot be conclusively determined at this stage. However it does appear that the Petitioner has made out a *prima facie* case in its favour as far as restraining Respondent No.1 from invoking and

encashing the PBGs is concerned.

19. As regards the ABGs, it is not the case of Respondent No.1 no manpower and machinery had been deployed of the Petitioner. Even as per the chart produced to Respondent No.1 some amount of work has already commenced and has been completed by the Petitioner. In other words, it is not as if the mobilisation advance released to the Petitioner has not been utilised by it. In the circumstances, at this stage to permit encashment of the ABGs would definitely cause irretrievable injustice to the Petitioner since the Petitioner also has its claims against the Respondent No.1 in respect of the work already done by it.

20. According to the Petitioner, for the work completed by it, it has incurred amounts far in excess of the mobilisation advance released in respect of both Sections I and II. In the considered view of the Court, therefore, apart from a prima facie case in favour of the Petitioner, the balance of convenience is also in its favour at this stage in restraining the Respondent invoking and encashing the ABGs.

21. In the circumstances, the Court directs that the interim order passed on 4th February 2014 in both petitions will continue during the pendency of the arbitral proceedings subject to the Petitioner keeping alive the PBGs and ABGs during the pendency of the arbitral proceedings.

22. The petitions are disposed of in the above terms.

S. MURALIDHAR, J

JANUARY 30, 2015/mb