

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 1247/2014

Reserved on: 24th February 2015

Decision on: 27th February 2015

**PATNA WATER SUPPLY DISTRIBUTION
NETWORKS PVT. LTD.**

..... Petitioner

Through: Mr. S.D. Singh with Mr. Rahul K.
Singh and Mr. Jitender Singh, Advocate.

versus

UNITED BANK OF INDIA & ANR.

..... Respondents

Through: Mr. Pankul Nagpal, Advocate for R-1.
Ms. Shilpa Singh, Advocate for R-2.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

27.02.2015

Introduction

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') was originally filed by Geo Miller & Co. Pvt. Ltd. ('Geo Miller') describing itself as joint venture ('JV') partner of the Gammon-Geomiller Consortium. The prayer in the petition was to restrain the Bihar Urban Infrastructure Development Corporation Ltd. ('BUIDCO'), the Respondent No.2 herein, from invoking or encashing a bank guarantee ('BG') dated 15th September 2012 in the sum of Rs.2,48,00,950 issued by the United Bank of India ('UBI'), the Respondent No.1. At the hearing on 14th October 2014, the Court noticed that the said BG has been issued by the UBI

at the behest of the special purpose vehicle ('SPV') formed by the consortium i.e., Patna Water Supply Distribution Network Pvt. Ltd. ('PWSDNPL'). Accordingly, permission was granted to substitute or implead PWSDNPL as Petitioner.

2. The above order led to the Petitioner filing IA No. 20238 of 2014 which came to be allowed by order dated 15th October 2014, substituting PWSDNPL as Petitioner. On that date an interim order was granted directing status quo to be maintained in relation to the said BG subject to the substituted Petitioner keeping alive the BG till further orders.

Background facts

3. The background facts are that BUIDCO had invited bids for a project known as 'Design, Construction, Installation, Commissioning, Management, Operation and Maintenance of Intake, RWPH, 220 MLD Water Treatment Plant ('WTP') and Water Supply Distribution Network' in Patna, Bihar. under the Jawaharlal Nehru National Urban Renewal Mission ('JNNURM') scheme on a design, build and operate basis.

4. Geo Miller and Gammon India Ltd. ('Gammon') formed a consortium by entering into an *inter se* agreement on 12th January 2012. The relevant clauses regarding the joint and several liability as contained in the said agreement read as under:

“8.1 It is expressly and clearly understood and agreed by the Members hereto that they shall at all times, until completion of the Project, be liable jointly and severally for all obligations under the Project to the Employer.

8.2. Save as provided in Clause 6.1 above, all the Members shall be individually responsible for the performance of its scope of work and shall bear all technical, commercial and financial risk involved with the performance of its scope of the work."

5. The other part of the agreement which is relevant is regarding the equity participation in the proposed SPV which was as under:

Gammon (Lead Member): 74%

Geo Miller (Other Consortium Member): 26%

6. The consortium then bid for the project and its bid was accepted by the BUIDCO by a letter dated 27th February 2012 at the bid price of Rs.548,83,14,620. A tripartite agreement was entered into between the BUIDCO, the consortium and the Patna Nagar Nigam on 28th March 2012 whereby the consortium covenanted with BUIDCO "to design, execute and complete the works and remedy any defects therein, in conformity with the provisions of the Contract". In terms of the contract, the BGs were furnished up to the value of 10% of the contract.

The Bank Guarantee

7. In the preamble Clause B of a tripartite agreement dated 24th September 2012, between the BUIDCO, PWSDNPL and Patna Nagar Nigam ('PNN'), it was noted that the SPV had complied with the following pre-condition to the execution of the contract:

"Furnished an irrevocable, unconditional, first demand guarantee issued by Syndicate Bank, Prabhadevi Branch, Rajan House, Appasaheb Maratha Marg, Mumbai-400025 for an

amount equal to Rs. 7,05,87,320/- (Rs. Seven Crores Five Lacs Eighty Seven Thousand Three Hundred Twenty only) and by United Bank of India, Lajpatnagar Branch, C-40, Defence Colony, New Delhi-110024 for an amount equal to Rs. 2,48,00,950/- (Rs. Two Crores Forty Eight Lacs Nine Hundred Fifty only) total amounting to Rs. 9,53,88,270/-) Rs. Nine Crores Fifty Three Lacs Eighty Eight Thousand Two Hundred Seventy only), having validity upto the expiry of Defects Notifications Period as a guarantee for the performance by the Contractor of its obligations in relation to the Project during the Construction Period and Defects Notification Period (herein the 'Construction Security')

8. The present petition is concerned with the BG for a sum of Rs. 2,48,00,950 which was provided by Geo Miller and issued by UBI, Respondent No.1. The BG is addressed to the Managing Director BUIDCO. The preamble clauses of the BG note that it is being issued on behalf of the consortium (the 'Contractor') which has been selected for the project. The condition for the UBI (the Guarantor) honouring the BG reads as under:

“NOW THEREFORE, in consideration of the consideration payable by the Contractor to the Guarantor for issue of this Performance Security and your accepting the Guarantor's obligations herein contained in discharge of the Contractor's obligation to provide such Performance Security, the Guarantor hereby irrevocably and unconditionally agrees that:

1. Upon receipt by the Guarantor of a written demand or demands from you stating that an Contractor's Default and/or the Contractor is in has occurred prior to the termination of the Contract (a "Demand" or "Demands") complying with the provisions of paragraphs 2, 3 and 4 of this Performance Security from time to time or at any time, the Guarantor shall, without any proof or conditions and without demur, reservation, contest, recourse or protest and without any enquiry of you or the Contractor, pay you

forthwith and in full without any deductions or set offs or counterclaim whatsoever the sum claimed by you in such Demand, or such lesser sum which in aggregate with all sums previously paid hereunder shall not exceed an amount equivalent to the Performance Security Amount (as hereinafter defined). Subject to the terms of this Performance Security, you shall not be obliged to exercise any right or remedy which you may have before making a Demand under this Performance Security.”

9. There is nothing in the BG to indicate that it is restricted to only the portion of the project concerning the installation of the WTP. Clause 15 of the BG deals with governing laws and jurisdiction and reads as under:

“15. This Performance security shall be governed by and construed in accordance with the laws of the Republic of India and the parties to this Performance Security hereby submit to the jurisdiction of the courts of Patna for the purposes of settling any disputes or differences which may arise out of or in connection with this Performance Security, and for the purposes of enforcement under this Performance Security.”

The Supplementary Agreement

10. At this stage, it requires to be noticed that a Supplementary Agreement (SA) was entered into between the parties which contained a dispute resolution clause, a clause for arbitration and a separate clause regarding governing law and jurisdiction. In terms of the SA it was agreed that the arbitration was to be held in accordance with the rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi. The venue of the arbitration was Patna. Clause 24.1 provided for ‘governing law and jurisdiction’ and read as under:

“This Contract shall be construed and interpreted in accordance

with and governed by the laws of India, and the courts at Delhi shall have jurisdiction over matters arising out of or relating to this Contract.”

Invocation of the BG

11. On 23rd July 2014, BUIDCO wrote to the Chief Manager of UBI invoking the BG in question for a sum of Rs.2,48,00,950. The relevant portion of the said letter reads as under:

“Sir,

M/s. Patna Water Supply Distribution Network Pvt. Ltd. (the contractor) had not completed the awarded work (Patna Water Supply Project) as per LOA.

We are having one Bank Guarantee against Performance totally Rs. 2,48,00,950/- (Rs. Two Crore Forty Eight Lac Nine Hundred Fifty only) against Performance which was issued in favour of us by your Bank on behalf of them. The detail of Bank Guarantee is as below:

Sl.No	Bank Guarantee Number	Amount	Date of Expiry
1	053612ILPER0052	2,48,00,950.00	14-Jun-15
Total	(Two Crore Forty Eight Lac Nine Hundred Fifty Only)	2,48,00,950.00	

Hence now we are exercising our authority and decided to encash the above Bank Guarantee given by you. The Original Bank Guarantee will be submitted at your Bank by our authorized representative Mr. MD. Mahtab Alam (Manager Finance) whose signature has been attested below. He is also authorised to complete all the formalities regarding the encashment of the Bank Guarantee.

Kindly encash the above Bank Guarantee immediately on production of this letter along with Original Bank Guarantee at

your Bank and transfer the above amount in our Bank Account detailed as below.”

12. This was followed by another letter dated 30th July 2014 in which BUIDCO stated that it was withholding the instructions issued by its letter dated 23rd July 2014. However, subsequently BUIDCO by letter dated 23rd September 2014 conveyed to UBI that it was withdrawing the withholding instructions and requested UBI to proceed to encash the BG. However, with the UBI not encashing the BG, another letter was sent to it by BUIDCO on 9th October 2014. For some reason, however, UBI still did not encash the BG.

The present petition

13. Meanwhile, as already noticed, the present petition was filed and this Court granted a status quo order qua the BG on 15th October 2014. The case of the Petitioner PWSDNPL is that the location of the WTP had to be shifted from Digha due to the non-availability of a no-objection certificate (‘NOC’) from the PNN. Further a soil test report prepared by an expert body on 15th February 2104 showed that the land earmarked for the WTP was unsuitable. According to the Petitioner the response of the BUIDCO to the said report was received only in July 2014, i.e. beyond the scheduled date of completion of the project.

14. The case of the BUIDCO, on the other hand, is that the work involves not just the installation of the WTP but other works including the intake well, RWPH, 72 overhead storage reservoirs (‘OHSR’), transmission main

and distribution CV for 76 zones. The case of the BUIDCO is that not even 15% of the works (other than the WTP) was able to be completed by the Petitioner. It is further pointed out that the Petitioner's grievance regarding the quality of the soil was examined by a Technical Committee of BUIDCO who concluded that 'deep foundation for the WTP in component structures is a viable option.' The Petitioner was accordingly advised by BUIDCO by a letter dated 19th June 2014.

15. In response to the petition, reply has been filed by the BUIDCO raising a preliminary objection as to the jurisdiction of this Court to entertain the petition. It is pointed out that Clause 15 of the BG states that the jurisdiction in respect of any of the disputes arising under the BG would of the Courts at Patna. It is further pointed out that in any event the entire project was to be executed at Patna. The tripartite agreement was signed at Patna.

16. On merits it is submitted by BUIDCO that there was a failure on the part of the Petitioner to execute a majority of the works comprising the entire project. It is pointed out that the letter invoking the BG does mention about the failure of the Petitioner to "complete the awarded work" and therefore satisfies the requirement for encashment of the BG. It is submitted that no case has been made out to restrain BUIDCO from invoking the BG.

Submissions of counsel

17. Mr. S.D. Singh, learned counsel for the Petitioner, maintained that in terms of Clause 24.1 of the SA this Court had jurisdiction to entertain the petition. He submitted that BUIDCO's letter dated 23rd July 2014 to UBI

invoking the BG did not point out any default committed by the Petitioner, which was a condition precedent for invoking the BG. Mr. Singh referred extensively to the clause of the tripartite agreement, as well as the correspondence between the parties to show that there was a failure to hand over the land at the site originally earmarked for the WTP at Digha. There was delay in BUIDCO handing over several other sites for the project work to begin. Due to absence of NOC from PNN there had to be a change of location of the WTP from the original site at Digha. He referred to a letter dated 24th April 2103 from the Petitioner to BUIDCO requesting that alternative land for the WTP be made available without delay.

18. Mr. Singh submitted that Geo Miller's share of liability was only 26% in terms of the consortium agreement and it was responsible for the component of the project involving the erection of the WTP. The BG in question was also in regard to that liability. Inasmuch as the WTP work could not progress due to the inability of BUIDCO to provide suitable land within a reasonable time, there was no justification for BUIDCO to encash the BG provided by Geo Miller. To permit BUIDCO in the circumstances to encash the BG would result in irretrievable injustice to the Petitioner.

19. In reply it is submitted by Ms. Shilpa Singh, learned counsel for BUIDCO, that the BG itself clarifies that it is only the Courts at Patna that would have jurisdiction in relation to disputes arising out of the BG. According to her Clause 24.1 of the SA was a typographical mistake. She stated that BUIDCO was prepared to file an affidavit to state that the corresponding clause of some other agreement was mechanically lifted and

made part of the SA. According to her, the parties never intended that the Courts in Delhi would have the jurisdiction particularly since the entire contract was to be performed in Patna. Even the arbitration was to take place at Patna.

20. On merits Ms. Singh referred to a letter dated 7th May 2013 written by BUIDCO to the Petitioner pointing out that alternative land had already been made available and that it should start the work without any delay. She submitted that the BG was not confined to the work involving the WTP but to the entire project. Not even 15% of the other works including the OSHR, intake well transmission and mains distribution was completed. The liability of the members of the consortium was joint and several. The Petitioner was liable for the breaches by the consortium members of the tripartite agreement. No ground was made out for interdicting the encashment of the BG.

Issue of jurisdiction

21. The Court first takes up the issue of jurisdiction. Although it is submitted by BUIDCO that Clause 24.1 of the SA is a "typographical mistake", there was no attempt made by BUIDCO subsequent to the signing of the SA to either correct the so called typographical error or write to the Petitioner in that regard. The SA has been signed by the consortium members, BUIDCO and PNN and yet barring BUIDCO it is not the case of the others that it was a typographical error. It is also seen that there are several other clauses inserted by way of the SA. It is inconceivable that only the clause concerning jurisdiction would have been inserted as a result of a

typographical error. It is also not permissible in law for a party to seek to amend a clause in a contract by filing an affidavit in Court after the said clause is relied upon by one of the parties to the contract.

22. The BG does have a clause stating that the courts at Patna would have jurisdiction relating to any dispute arising out of the BG. Yet, the Court cannot possibly overlook Clause 24.1 of the SA signed by the parties which states that in relation to disputes arising out of the contract the Courts at Delhi which would have jurisdiction. Although, the relief sought in the petition pertains to the BG, it is in the background of disputes between the parties arising out the contract. The parties having agreed under Clause 24.1 of the SA that the courts in Delhi would have jurisdiction, that clause should be held to be binding on the parties and must be given full effect. Consequently, the Court rejects the preliminary objection of BUIDCO that this Court lacks jurisdiction to entertain the petition.

No case for restraining encashment of the BG

23. Turning to the merits, the Court finds that the agreement dated 12th January 2012 between the Geo Miller and the Gammon categorically states in Clause 8.1 that until the completion of the project both the members of the consortium shall be jointly and severally liable for all obligations under the contract to the employer i.e. BUIDCO. No doubt Clause 8.2 states that the members shall be individually responsible for the performance of their respective scope of work. However that by no means absolves either member of the consortium from the joint and several liability under Clause 8.1.

24. The Court is not impressed by the submission of Mr. Singh that the BG in question is restricted to the obligation of Geo Miller regarding the WTP> While it is possible that the BG in question is one of the BGs required to be furnished by the consortium in terms of the tripartite agreement, and has been provided by Geo Miller, the wording of the BG does not suggest that it is restricted to the liability of Geo Miller in relation to the WTP. It talks of the joint and several liability of the consortium for performance of the entire project include the intake, the OSHR, the WTP and the transmission and distribution network.

25. The correspondence placed on record reveals that each party is blaming the other for the slow progress of the work. It reveals that substantial part of the project remains incomplete. It is not possible at this stage to conclude that the delays are only due to one or the other party. This would require evidence to be led and examined in the arbitral proceedings. Suffice it to say that the Court is not *prima facie* satisfied that the two exceptional circumstances for interfering with the right of BUIDCO to encash the BG in question - viz., egregious fraud practised by BUIDCO on the Petitioner or the Petitioner being subject to irretrievable injustice in the event of encashment of the BG - have been shown to exist.

26. The Court is unable to agree with the submission of the Petitioner that BUIDCO's letter dated 23rd July 2014 to the UBI invoking the BG does not talk of the failure of the Petitioner to comply with its obligations under the contract. The opening line of the letter states that the Petitioner “had not completed the awarded work (Patna Water Supply Project) as per LOA”.

This, in the considered view of the Court, is sufficient compliance with the pre-condition for invoking the BG.

Conclusion

27. Consequently, the Court is not prepared to continue the interim order passed by this Court on 15th October 2014 restraining the invocation and the encashment of the BG in question by BUIDCO. The said interim order is accordingly vacated. The petition is dismissed.

28. It is clarified that the observations in this order on the merits are only *prima facie*. All the contentions of the parties on merits will be decided in the arbitral proceedings in accordance with law uninfluenced by this order.

S. MURALIDHAR, J.

FEBRUARY 27, 2015

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