

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.09.2016

+ **O.M.P.(I) (COMM.) 254/2016**

ARIO INFRASTRUCTURE PRIVATE LIMITED Petitioner

versus

GAIL GAS LIMITED & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Abhinav Sharma, Advocate.

For the Respondents : Ms Purnima Maheshwari, Advocate with
Ms Vandana Mishra, Manager (Law).

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner, M/s ARIO Infrastructure Private Limited (hereinafter 'ARIO') has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), *inter alia*, seeking stay of invocation of the bank guarantees issued for securing the mobilization advance - Bank Guarantee No.0188IGPERO07614 (hereinafter the Mobilization BG) - for the sum of ₹82,12,450/- and for due performance of the Contract - Performance Bank Guarantee No.0188IGPERO07714 (hereinafter the Performance BG) - for the sum of ₹1,49,31,728/-.

2. At the outset, the learned counsel for respondent no.1 (hereafter 'GGL') submitted that insofar as Performance BG is concerned, its invocation will not be pressed till ARIO has had an opportunity to seek relief from the Arbitral Tribunal, which would be constituted shortly. In view of the aforesaid submission, GGL is restrained from invocation of the Performance BG till ARIO's application under Section 17 of the Act - which the learned counsel for ARIO states will be filed as soon as the Arbitral Tribunal is constituted - is disposed of by the Arbitral Tribunal. This direction is conditional upon ARIO filing an appropriate application under Section 17 of the Act within a period of two weeks of the Arbitral Tribunal being constituted.

3. Insofar as the present petition is concerned, the controversy is now limited to invocation of the Mobilization BG to the extent of ₹77,32,154/- (as on 02.06.2016). The mobilization advance provided by GGL was to be recovered from amount payable for the work contracted to ARIO. It is ARIO's case that since GGL had failed to provide the necessary work fronts, ARIO could not perform the work as contracted and, therefore, GGL cannot recover the unadjusted mobilization advance. ARIO further states that it had mobilized all resources for execution of the LMC Contract and

had utilized the mobilization advance for the said purpose; but, as work fronts were not available, it had raised bills for idling of labour and machinery. According to ARIO, the mobilization advance was liable to be adjusted against the said bills. ARIO had further pleaded that GGL had perpetuated a fraud by informing ARIO in the kick-off meeting held on 12.08.2014 that 38 consumers had clearances from Agra Marketing and gas connections were to be connected at the earliest. It is claimed that on the basis of the said representation, ARIO had mobilized the requisite resources but had later found that necessary clearances for providing connectivity to the 38 consumers were not in place.

4. The only question to be addressed is whether ARIO has made out the necessary grounds for grant of interim stay on invocation of the Mobilization BG.

5. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

5.1 GAIL Gas Limited (GGL) is a subsidiary of a Public Sector Enterprise, GAIL (India) Ltd. GGL invited bids for Industrial Consumer Connectivity, laying of steel pipeline network and associated works for

CNG and City Gas Distribution project at Taj Trapezium Zone (hereinafter referred to as 'the LMC Contract'). The scope of work consisted of laying, testing and commissioning of 18 kms. (approximately) of pipe line for various industrial consumers, and associated facilities for transportation of natural gas in the geographical area of Taj Trapezium Zone, Firozabad. The work was divided into four phases and each phase consisted of providing connectivity to 30 consumers. The first phase was to be completed within four months from the date of Fax of Intent (hereafter 'FOI').

5.2 ARIO was successful in securing the LMC Contract and on 04.08.2014, GGL issued FOI in favour of ARIO and awarded the LMC Contract at an estimated value of ₹14,95,24,102/-. This was followed by a kick-off meeting held on 12.08.2014 to discuss the schedule of works. Thereafter, on 20.08.2014, ARIO acknowledged the receipt of FOI. GGL issued a Letter of Acceptance (hereafter 'LOA') on 25.08.2014.

5.3 In terms of the LMC Contract, ARIO was entitled to mobilization advance to the extent of 5% of the contract value subject to the same being secured by way of a bank guarantee. ARIO availed of the said facility and furnished the Mobilization BG.

5.4 It is ARIO's case that although it was to be provided a work front of 19,000 mtrs (18 kms. approximately) for execution of the LMC contract but was provided only 996 mtrs. It is also claimed that GGL did not have the necessary permission for execution of the entire work and, therefore, ARIO could execute works only in respect of 18 customers.

5.5 It is stated that ARIO sent several letters informing GGL as to the lack of work fronts and on 21.05.2015, sent a letter informing GGL that it would be demobilizing from the site from 30.05.2015. At the material time, ARIO had issued only RA Bills aggregating a sum of ₹13,73,856/-. On 08.06.2015, ARIO submitted a claim of ₹74,69,110/- for idling of manpower and machinery due to non-availability of the work fronts. It is stated that, thereafter by an email dated 16.10.2014, GGL called upon ARIO to lay a pipe line from GAIL terminal inside Mathura Refinery to CNG Station being developed Opposite IOCL Mathura Refinery. The said pipeline was for a length of approximately 2.5 kms. According to ARIO, this work was miniscule and ARIO declined to take up the said work unless the balance work fronts were also made available. It is stated that, thereafter, a meeting took place between ARIO and GGL on 12.04.2016 wherein ARIO was called upon to perform the work of laying pipe line of

approximately 20 kms. in Shihana – Chatikara – Vrindavan Sector of the Taj Trapezium Zone. ARIO states that although the same was not a part of the LMC Contract, it nonetheless agreed to mobilize resources and commence the works. However, according to ARIO, the said works could also not be taken up as the proposed pipelines fell within a forest area and the requisite permission from the concerned authorities was not available. It is stated that ARIO informed the same to GGL by an email dated 14.05.2016. Thereafter, GGL terminated the LMC Contract by a letter dated 26.05.2016 which ARIO contends is illegal.

6. According to GGL, the fundamental assumption that it had the permissions to execute the LMC Contract is misconceived and the scope of work awarded to ARIO included getting permissions for laying the pipeline from various statutory authorities. It is pleaded that ARIO was called upon to start connectivity work for 15 Nos of Industrial Consumers which were to be connected by 30.09.2014. However, ARIO could complete the installation for only four industrial consumers and even in respect of those connections, the works/jobs such as installation of warning/route markers, chain link fencing and CP works remained incomplete. It is further stated

that from 01.12.2014 to 02.06.2015, ARIO took up the work for eleven other industrial consumers but that too were not completed.

7. GGL has further averred that TTZ Commissioner had issued orders for stoppage of work and GGL had assigned the work for laying of 4" pipe line of 2.5 kilometers length in Mathura and also requested ARIO to carry out the following jobs:-

- "(i) Sihana - Vrindavan - Goverdhan section
 - A) 6" X 17 Km pipeline
 - B) 4" X 25 Km pipeline
- (ii) Meerut
 - A) Hot tapping of size 8"X 4" and 10" X 6"
 - B) Laying of 4" X 150 mtr pipeline.
 - C) Installation of inlet & outlet connection of 2 nos. DRS for supplying gas to consumers.
 - D) Railway crossing work by HDD/boring method."

8. GGL states that all necessary permissions - except from forest authorities - from the authorities such as NHAI, Irrigation, PWD were provided to ARIO and it was ARIO's responsibility to liaison for obtaining the necessary forest permissions.

Submissions

9. Mr Abhinav Sharma, learned counsel appearing for ARIO contended that GGL had perpetuated a fraud on ARIO and had invited bids and awarded works without obtaining the necessary permissions. He referred to the minutes of the kick-off meeting held on 12.08.2014 and drew the attention of the Court to the following statement recorded therein:-

"Total 38 Industrial customers who have submitted the security Deposit and have clearance from Agra marketing are to be connected at the earliest.

A list of 38 such consumers was handed over by Agra Mktg to M/s Ario and 17 are to be connected on priority.

M/s ARIO to complete the field survey of all the 38 industries and submit the BOM for the Last mile connectivity for the same.

OIC-GAIL GAS Agra emphasised that the tapping from the existing underground P/L will be done with Hot tapping and the same may be reviewed while submitting the report by the team."

10. He submitted that GGL's aforesaid representation made on 12.08.2014 was patently misleading as GGL admittedly did not have the requisite clearances and, therefore, could not provide the necessary work fronts for ARIO to execute the works. He submitted that ARIO mobilized its resources to carry out the works on the basis that the work fronts were

available but, subsequently, became aware that the requisite permissions were not available with GGL.

11. Next, Mr Sharma referred to clause 26 of the Special Conditions of the Contract and submitted that mobilization advance provided by GGL was to be recovered from the running bills and ARIO could not be called upon to refund the same. However, since GGL failed to provide the work fronts, the said amount could not be adjusted. He submitted that ARIO cannot be called upon to refund the mobilization amount as it had already utilized the same for mobilization of the resources, and there was no provision to recover the amount except from the consideration payable for execution of the LMC Contract.

12. Mr Sharma further submitted that GGL also did not have the requisite permissions in respect of alternate works that were allocated to ARIO. He referred to the minutes of the meeting held on 12.04.2016 which indicated that permissions from the Forest Department were not available and ARIO was asked to pursue with the concerned department for obtaining the said permission. On the said date, ARIO had agreed to pursue with the concerned authorities along with GGL. He submitted that in the

aforesaid circumstances, there was no occasion for GGL to invoke the Mobilization BG.

13. Mr Sharma earnestly contended that GGL had perpetuated a fraud and invocation of the Mobilization BG was wholly unwarranted. He further contended in the facts of the case that irretrievable damage would be caused to ARIO if the Mobilization BG was invoked as it would bring ARIO's business to a complete halt. He further submitted that balance of convenience also lies squarely in favour of ARIO.

14. He further relied upon the decision of the Supreme Court in the case of **Hindustan Construction Co. Ltd. v. State of Bihar and Ors.**: (1999) 8 SCC 436 in support of his contention that bank guarantees issued for securing mobilization advance could be invoked only if the contractor had failed to fulfill its obligations giving rights to the employer to recover whole or part of the mobilization advance. He also referred to the decision of this Court in **P.D. Alkarma Pvt. Ltd. v. Canara Bank and Anr.**: 1998 (73) DLT 147 and on the strength of the said decision submitted that GGL was liable to be restrained from invoking the mobilization BG as ARIO had utilized the mobilization advance for mobilizing the necessary resources. He contended that ARIO had made a claim on account of idle labour and

machinery and the mobilization advance could be recovered against the claims already made by ARIO.

15. The learned counsel for GGL countered the submissions made on behalf of ARIO. She submitted that in terms of Schedule of Rates, GGL was only to reimburse the costs for obtaining the permissions and it was within ARIO's scope of work to obtain the necessary permissions. She submitted that ARIO was required to conduct a survey and obtain the necessary permissions. She submitted that in the circumstances, GGL could not be faulted for non-provision of the work fronts. She fairly submitted that the works as originally contemplated could not be executed because TTZ Commissioner had issued the order for stoppage of the work. However, she contended that GGL had provided substantial alternate works which could be pursued by ARIO.

16. She further countered the submission that ARIO had mobilized the necessary resources. She submitted that ARIO was executing another contract in the vicinity and had used the resources from those works and, therefore, ARIO's claim that it had utilized the mobilization advance for mobilizing the resources for the LMC Contract cannot be accepted. She further contended that ARIO was always aware of the permissions that

were available and those that were not as in terms of the LMC Contract, ARIO was required to survey the site and appraise itself of the situation on ground. She submitted that in the circumstances, GGL was entitled to recover the outstanding mobilization advance along with interest.

Reasoning and conclusion

17. It is apparent from the pleadings and the submissions made that there are serious disputes between the parties in relation to the LMC Contract. According to GGL, ARIO's work progress was slow. This is not disputed by ARIO. But, it is contended that the works suffered on account of lack of permissions, which - according to ARIO - were to be obtained by GGL. This is disputed by GGL.

18. Clause 24 of the Schedule of Rates which specifically provides for the following item:-

"Pipeline Laying Liasioning (including Crossings) and getting permission from the statutory authorities.

Applying permission, follow up, and getting permission from the statutory authorities including NHAI, PWD, Railways, Irrigation, Forest, Municipal Corporation etc. Obtaining work permits/NOC from various statutory authorities having jurisdiction before execution of the work and complying with

all stipulations/conditions/recommendations of the said authorities. Only R.R Charges shall be paid by the owner."

19. In view of the above, GGL's contention that ARIO had to pursue with the statutory authorities for obtaining the necessary permissions cannot be rejected at the threshold.

20. There is also a dispute as to whether ARIO had mobilised the necessary resources at site as is claimed by ARIO. According to GGL, ARIO had merely drawn the resources from another contract/site that was being executed by ARIO at the material time.

21. Although there are disputes between the parties as to which party is in breach of the terms of the LMC Contract, there is no dispute that the mobilization advance provided to ARIO has not been recovered. This is so because only a small fraction of the work as contracted has been completed and, therefore, ARIO has been unable to raise bills and, consequently, GGL has been unable to adjust the mobilization advance from the running bills as agreed.

22. Thus, the only question that is to be answered is whether GGL should be interdicted from invoking the mobilization BG only on the basis of the aforesaid disputes between the parties.

23. It is the ARIO's case that GGL has played a fraud inasmuch as it had represented that 38 industrial customers had clearances from Agra Marketing and were to be connected at the earliest. ARIO had contended that it was implicit in the aforesaid representation that all clearances for execution of the works in relation to the 38 industrial customers was available while, in fact, the necessary clearances were not available on the date of the kick off meeting (that is, 12.08.2014) when such representation was made.

24. In *Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others*: (1994) 1 SCC 502, the Supreme Court had held as under:-

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...

...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.”

25. The aforesaid view was reiterated by the Supreme Court in **Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others:** (1995) 6 SCC 68.

26. In **U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.:** 1988 (1) SCC 174, the Supreme Court had held as under:

“The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.”

27. *Prima facie*, even if it is accepted that ARIO was given an incorrect impression that all clearances are available, it is difficult to accept that that would amount to a fraud of an egregious nature, which would warrant interference with invocation of the bank guarantee. It is also relevant to bear in mind that ARIO had furnished the Mobilization BG to secure recovery of the advances, admittedly, provided by GGL. These advances were provided in terms of clause 4.1 of the LOA, which reads as under:-

"4 MOBILISATION ADVANCE:

4.1 If required, recoverable interest bearing Mobilization Advance upto a maximum of 10% of estimated contract price shall be paid against submission of Bank Guarantee (BG) of

amount equivalent to 11% of awarded contract (this BG shall be in addition to CPBG) as per terms & conditions specified under clause 26 of Special Condition of Contract, Volume I of II of tender document.”

28. As is apparent from above, the mobilization advance was to be provided in terms of clause 26 of the Special Conditions of the Contract, the relevant extract of which reads as under:-

“26.0 **MOBILIZATION ADVANCE**

Contractor, if requested, shall be paid recoverable interest bearing Mobilization Advance up to a maximum of 10% (Ten Percent) of awarded Contract Value. The mobilization advance will attract an interest rate (medium term) at base rate charged by SBI (applicable on the date of disbursement of mobilization advance) plus 6.25% p.a on reducing balance basis.

Mobilization Advance shall be paid to the Contractor in two instalments after signing the contract agreement and submission of initial security deposit, in the following manner.”

29. It is apparent from the above that mobilization advance provided were in the nature of loan and, admittedly, GGL is entitled to recover the same.

30. The question whether ARIO is entitled to retain the advances and adjust the same against its claim is the subject matter of disputes between the parties. The terms of the Mobilization BG expressly provide as under:

“The right of the OWNER to recover the outstanding sum of advance upto Rs.82,12,450/- (Rupees Eighty Two Lakhs Twelve Thousands Four Hundred Fifty Only) from the BANK in the manner aforesaid will not be affected or suspended by reason of the fact that any dispute or disputes has or have been raised by the CONTRACTOR and/or that any dispute or disputes is or are pending before any officer, tribunal or court and any demand made by OWNER on the BANK shall be conclusive and binding.”

31. The aforesaid terms make it amply clear that GGL is entitled to recover the same notwithstanding the disputes between the parties. Indisputably, the purpose of Mobilization BG is to secure GGL in recovery of mobilization advance. The entire purpose for securing the mobilization advance by a bank guarantee would be frustrated if the invocation of the bank guarantee is interdicted till the adjudication of the disputes.

32. In ***U.P State Sugar Corporation v. Sumac International Limited:*** (1997) 1 SCC 568, the Supreme Court had held that:

"12. The law relating to invocation of such bank guarantees is by now well settled. 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.”

33. The decision of the Supreme Court in the case of ***Hindustan Construction Co. Ltd.*** (*supra*) relied upon by Mr. Sharma does not assist ARIO. In that case, the Supreme Court was of the opinion that lapses were on the part of the defendant (beneficiary of the bank guarantee) who were not possessed of the sufficient funds for completion of the works. The Court further *prima facie* found that the allegation that the appellant therein had abandoned the work also did not appear to be correct. However, the following observations made by the Supreme Court in that case are relevant:

“8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, *is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary.* In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the

work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "Advance", the Guarantee is invoked and the amount is recovered from the Bank."

[Italics for emphasis]

34. In the present case, the bank guarantee in question expressly provides that "*we undertake to pay you, upon your first written demand declaring the Contractor to be in default under the contract and without caveat or argument, any sum or sums within the limits of (amount of guarantee) as aforesaid, without your needing to prove or show grounds or reasons for your demand or the sum specified therein.*" Thus, the bank guarantee in the present case is clearly an unconditional one. And, in terms of the bank guarantee, GGL is not required to provide any reasons or to show that ARIO is in breach of the terms of the contract.

35. The decision of this Court in the case of ***P.D. Alkarma*** (*supra*) is also not applicable in the facts of the present case. In that case, the petitioner had utilised the mobilization advance for purchase of material, which was incorporated in the works and in the facts of that case, the

Supreme Court found that there were certain special equities in favour of the petitioner. The facts of the present case are materially different.

36. In view of the above, the invocation of Mobilization BG cannot be interdicted. The petition is disposed of.

SEPTEMBER 27, 2016
RK/MK

VIBHU BAKHRU, J

