SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION (L) NO. 280 OF 2016

PBA Infrastructure Ltd & Anr ...Petitioners
Versus
Maharashtra Airport Development Company Ltd & Anr ...Respondents

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Mr M M Vashi, Senior Counsel, *with Ms Parthi Desai & Aparna Deokar i/b M/s. M.P. Vashi and Associates for the Petitioners.*
Mr Rahul Sinha, *with Ms Iti Agarwal i/b DSK Legal for the Respondents.*

CORAM: G.S. PATEL, J
DATED: 16th January 2017

PC:-

1. By consent, the Petition is taken up for hearing and final disposal. I have heard Mr Vashi for the Petitioner and Mr Sinha for Respondent No.1.

2. The facts lie are in a narrow compass. The two Petitioners, both public limited companies, formed a joint venture, PBA Sadbhav Joint Venture ("**the JV**"). The 1st Respondent is the Maharashtra Airport Development Company Limited (**"MADCL"**). It invited tenders for the construction of a road in the Multimodal International Hub Airport at Nagpur. The JV was the successful bidder. MADCL awarded the contract to the JV and an agreement dated 3rd February 2006 was signed. The contract value being over Rs. 10 crores, there was an arbitration clause in the agreement.

3. It is not necessary for the purposes of this Petition under Section 9 of the Arbitration and Conciliation Act, 1996, by which the Petitioners seek a restraint against MADCL from invoking two bank guarantees, and in the circumstances to which I will shortly turn, to more fully examine the contract itself. The contract also had a provision for retention money usual in such construction contracts. This was clause 14.3. It allowed MADCL to retain 5% of the contract value.

4. The JV commenced work on 25th April 2006. The projected completion date was 31st December 2010. The Petitioners say that construction was completed on schedule and in accordance with the tender specifications and compliance with the requisite standards. A completion certificate dated 4th February 2011 was issued by MADCL to the JV.

5. As I have noted, 5% of the contract value was retention money. The Petitioners requested MADCL to release a sum of Rs.2.5 Crores and Rs.45 lakhs from this retention amount. MADCL agreed to do so against separate bank guarantees against these amounts, i.e., for Rs. 2.5 Crores and Rs.45 lakhs, making a total of Rs.2.95 Crores. The Petitioners got the necessary bank guarantees issued through the 2nd Respondent, the Union Bank of India, Vikhroli Branch. Copies of these bank guarantees are annexed to the Petition.[1]

6. The two guarantees, although in different amounts, are otherwise identical in their terms. The bank guarantees are unconditional, but they are clearly in direct relation to the agreement between the Petitioners (or their JV) and MADCL. This is *inter alia* apparent from Clause 1 of the two bank guarantees:

> 1. Guarantee to the Maharashtra Airport Development Company Limited:
>
> a) Due performance and observance by the contractor of the terms, covenants and conditions on the part of the Contractor in the said Agreement.
>
> AND
>
> b) Due to punctual payment by the Contractor to the Maharashtra Airport Development Company Limited of all sums of money, losses, damages, costs, charges, penalties and expenses payable to the Maharashtra Airport Development Company Limited by the Contractor under or in respect of the said Agreement.

7. The defect liability period for the road construction project was for five years from the date of completion and thus ended on 31st December 2015. It seems not to be disputed that the Petitioners through their JV carried out all rectifications and cured all defects as

1Petition, Exhibits "C" and "D", *pp.*17–18 and 19-20 respectively.

required by MADCL. By a letter of 2nd January 2016,[2] the Petitioners through the JV *inter alia* noted that the defects were rectified and requested that the retention money be released. On 31st May 2016, the JV wrote to MADCL[3] *inter alia* pointing out that an amount of Rs.3,45,23,322.23 was payable by MADCL to the Petitioners' JV as retention, and that Rs.2.95 Crores having been earlier released against the two guarantees, after deducting an amount of Rs.44,44,521/- as interest at 9%, the balance Rs.50,78,801/- should now be released. On 16th September 2016, the Petitioners also asked MADCL to release the performance security and the two bank guarantees that are the subject matter of this arbitration Petition.[4] By a letter dated 28th October 2016,[5] the Petitioners agreed to MADCL's request to renew and extend the two bank guarantees in question regarding the retention money although not required to do so. The bank guarantees were thus validated till 1st December 2016.

8. Paragraph 10 the Petition sets out that when the 1st Petitioners' representatives met their counterparts at MADCL, they were informed that there was a 'possibility' of a claim from Central Excise and that therefore, MADCL had invoked the bank guarantees by writing to Union Bank of India, the 2nd Respondent. The Petitioners were not informed of any such letter. The statement in the Petition is that there is no tenable or valid claim against the Petitioners from Central Excise; all excise dues have been paid.

2Petition, Exhibit "E", *p.*21.

3Petition, Exhibit "F", *pp.*22–23.

4Petition, Exhibit "G", *p.* 24.

5Petition, Exhibit "H", *p.*25

9. It was on these facts that when this matter was first filed and moved, this Court (SJ Kathawalla J) granted ad-interim reliefs on 29th November 2016 restraining the 2nd Respondent from making payment under the subject bank guarantee. This order was continued *inter alia* by a subsequent order of 14th December 2016.

10. Even today, there is no case before me that there is in fact any claim or demand from Central Excise that can be said to be covered by the two bank guarantees. Even if it is MADCL's case that such a claim could be covered by the bank guarantees for Rs.2.95 Crores, that is a submission that would have to be rejected out of hand on a plain reading of the two guarantees. It is well settled that a bank guarantee is an independent contract. It must, therefore, be interpreted on the plain meaning of the terms as they appear on the face of the document. It is not possible in law to impute any additional words or meanings where the words of the contractual document are unambiguous. Even a cursory look at the two bank guarantees makes it clear that these covered only claims as between MADCL and the Petitioners' JV. It could not possibly extend to any claims from the exchequer, whether in direct or indirect taxation.

11. There is also the other aspect of the matter, viz., that these guarantees were intended to be issued not strictly speaking under the contract itself but because of a specific request made by the Petitioners to release certain amounts from the retention money. Clearly, therefore, these bank guarantees were meant to cover any shortfall or claim between MADCL and the Petitioners and their JV in relation to the defects during the defect liability period. The bank guarantees cannot, therefore, extend to extraneous claims beyond this.

12. This matter can also be viewed from another perspective. Had the Petitioners not requested for a premature release of amounts out of the retention money, these two banks guarantees would never have been issued in the first place. The Excise Department could never have proceeded against the retention money in the hands of MADCL. The issuance of the bank guarantees cannot give the Excise Department any higher or greater claim or widen the compass. MADCL for its part is not entitled as a matter of law to expand the scope and ambit of the two guarantees, nor is it at liberty to offer these amounts to Central Excise in satisfaction of any claim that Central Excise may have. If the Excise department has any claim against the Petitioners or their Joint Venture, it has an entirely separate and dedicated statute under which it can adopt whatever remedies are available to it in law. It certainly is not entitled to look to MADCL and to try and sequester from it any amount that was earmarked for a defined purpose or a reason.

13. I would ordinarily have had no hesitation in making this Petition absolute in terms of prayer clauses (a) and (b) had there been any disputes as between MADCL and the Petitioners, or if MADCL had shown from correspondence prior to this Petition that there were any outstanding or pending issues regarding the defects or the Petitioners' liability. There are no disputes to be taken to arbitration simply because there are no disputes that can be said legitimately to arise as between the Petitioners and Respondent No.1.

14. In my view, these two bank guarantees cannot be invoked on account of the claim of the Central Excise. Given the fact that there is no claim by MADCL against the Petitioners or their JV for any defects during the five-year defect liability period, the two bank guarantees are liable to be discharged forthwith, and the balance retention amount refunded to the Petitioners or their JV. There is no question of invoking these bank guarantees to satisfy any excise claim. This is of course without prejudice to the claim of the excise authorities to proceed independently and separately against the Petitioners or the JV without recourse to the bank guarantees.

15. The Petition is disposed of with these observations, with no orders as to costs.

(G. S. PATEL, J.)