

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CWP 21020 of 2016

Date of Decision: March 20, 2017

M/s Mohan Rail Components Pvt. Ltd. and anr.

.....Petitioners

Vs.

Union of India and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.Kanwaljyot Singh, Advocate
for the petitioners.

Mr. Chetan Mittal, Asstt. Solicitor General of India with
Mr. Vivek Singla, Advocate for respondents No.1 and 2.

Ms. Pinki Anand, Sr. Advocate with
Mr. Rajesh Ranjan, Advocate and
Ms.Meenakshi Dogra, Advocate for respondents No.4 and 5.

Mr. Rakesh Gupta, Advocate for respondent No.6.

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M.M.S. BEDI, J.

Petitioner No.1 is a registered Company and has deputed the
Director of the Company to file the petition claiming that it is engaged in the
business of supplying defence related and National R&D related equipments
as well as manufacturing integrated Rail Coach Compartments and is one of

the largest suppliers of various Research Based Equipments to Union of India and its subsidiaries Government run companies and is one of the largest contractor of Rail Coach as well as Research and Development related components supplying the same to subsidiary companies like DRDE, DRDO as well as the Indian Railways through the Integral Coach Factory, Chennai. It is one of the first companies who has supplied bio-digesters to the Indian Railways which has laid the incitation of greater sanitary cleanliness in the Indian Railways as a whole.

In the year 2011 vide annexure P-1, a request for proposal was raised by respondents 4 i.e. the Director Science and Technology, Administration of UT of Lakshadweep in a joint venture of DRDE – respondent No.2 whereby proposals for supplying Biodigester Sanitary Units was sought for from the Transfer of Technology Select Suppliers (approved by DRDO). The petitioner being the lowest bidder was awarded the contract vide letter annexure P-2 dated May 16, 2012 for supplying Biodigester Sanitary Units in the Islands of Lakshadweep and as per the terms of the contract petitioner No.1 was to be paid 10% advance payment of the project cost by giving a bank guarantee of 110% of the advance so paid. Vide letter annexure P-3 dated November 7, 2012, a further bank guarantee to the extent of 5% of the project cost as performance security was also sought. In pursuance of the requirements of bank guarantees, the petitioner No.1 provided bank guarantees of Rs.4,31,72,800/- as advance security as well as Rs.1,96,24,000/- as performance security. One such

guarantee was dated June 28, 2012. The process of supplying of biodigesters continued from 2012 to 2016 without any infringement of any terms of the contract. Respondent No.4 under usual standard procedure called for the petitioners via e-mail dated September 19, 2016 to renew his bank guarantee which was due to be renewed till September 30, 2016 thereby clearly showing that the regular contract proceedings were going on and there was no reason or instance of any cancellation of contract. On September 23, 2016 vide letter annexure P-6, only 4 days after the letter in normal due course signifying continuation of proceedings without any hitch whatsoever, respondent No.4 has cancelled the contract in favour of the petitioner No.1 unilaterally without giving any communication of the said cancellation. The validity of order annexure P-6 has been challenged through the present writ petition on the ground that no inquiry has been conducted and no decision has ever been communicated to the petitioner. The order annexure P-6 is alleged to have been passed on contravention of the rules of natural justice without giving any opportunity of hearing or hearing to the petitioners.

In the reply filed on behalf of respondents No.4 and 5, it has been observed that the writ petition is not maintainable and that the petitioners have not approached the Court with clean hands and have deliberately concealed the true facts. The territorial jurisdiction of this Court has also been challenged. It has been pleaded that respondent No.4 Union Territory of Lakshadweep is a small size of islands, where sewage disposal

is one of the most serious environmental problems. The porous soil of Lakshadweep is not fit for soak pits and septic tanks as they effect the natural reserves of the sub-surface fresh water lying underneath which in turn limits the supply of drinking water to the people living in these islands. The Planning Commission had decided to install 12000 bio-digester toilets which are special types of eco-friendly sanitation system in 10 inhabited islands. The tender floated for the said bio-digesters was given to petitioner No.1 for fabrication and installation of bio toilets. Vide annexure P-1 dated March 27, 2012, it was specifically contemplated in the supply order that installation has to be completed in all respects on or before March 31, 2013. The supply order also contemplated that the petitioners would be given a mobilization amount and against the mobilization amount a bank guarantee and an agreement will be executed between the parties. It is admitted that agreement dated May 16, 2012 for fabrication, transportation, installation and maintenance of bio-toilets was entered into between the parties on May 16, 2012. Vide bank guarantee annexure R-2 (colly), the petitioners had received the mobilization amount of Rs.3,92,48,000/- against the unconditional bank guarantee but the petitioners grossly failed to adhere to the time schedule as agreed to between the parties inspite of receiving the amount or initiating the efforts required for fulfilling its contractual obligations as a result of which the respondents were constrained to write a letter dated February 1, 2013 requesting the petitioners to expedite the installation of bio-toilets and ensure the availability of sufficient quantity of

inoculums with the certification of DRDE, Gwalior. Despite letter dated February 1, 2013, the petitioners could not complete the installation of bio-toilets within the scheduled time. A review meeting was held on March 19, 2013 for taking stock of the situation regarding implementation of bio-toilets wherein road map was provided by petitioner No.2 by which he proposed to comply with his obligations. The Director of DRDE insisted that no batch of microbial inoculums be added in the bio-digester without testing for pH and bio gas production so that appropriate quantity of inoculums is assured. The petitioner agreed to provide a T-pipe instead of a straight pipe at the outlet of bio-digester for connecting to the soak pit in future installation. On account of continued delay on the part of the petitioners, the Secretary, Department of Science and Technology sent a letter dated June 29, 2013 asking the petitioners to submit justification for the delay and a road map for installation of bio-toilets. The petitioners again made a commitment to the respondents that the project will be completed in all respects by March 2014. In a review meeting held on September 6, 2013 to assess progress of installation of bio-toilets, on the request of the petitioners, the extension was granted. Despite the extension of the deadline, the installation and road map for Agatti, Adroth, Minicoy, Kalpeni and Kilthan islands were not adhered to. A review meeting was again held on October 9, 2013 to decide to ask the petitioner to increase the rate of installation of bio-toilets to 15-20 per day. Vide number of letters the petitioners were required to expedite the project and complete the same at the earliest. Copy of the letter dated September 4,

2014 has been appended as annexure R-3. The petitioners had again sought extension on May 30, 2015 but it was categorically informed by the Department that no such extension could be granted. The petitioner vide letter annexure R-4 dated September 11, 2014 admitted that they had failed to meet the extended deadline to complete the project and apologized and reiterated the assurance that the installation of bio-digester was being completed. Thereafter on June 23, 2015, a review meeting of the Monitoring Committee on Bio-toilets was held wherein the Secretary (Science and Technology) informed that the department had released 70% of all pending bills submitted by the petitioners and that the remaining 30% payment will be released immediately after analyzing effluent samples. It was also agreed to by the petitioner that an inoculums production centre would be set up at Androth Island to ensure faster installation of Bio-toilets and to ensure uninterrupted supply of desired quality of inoculums in bulk quantity but the said assurance was also not acted upon by the petitioners. On November 13, 2015, a letter was sent by the respondents informing the petitioners that out of 50 effluent samples which were tested, 19 samples were analyzed and out of these only 4 samples were found to have cleared all parameters. Vide annexure R-5, it was informed that remaining 30% of the balance amount will be cleared only after satisfactory performance report of the Bio-toilets. In review meeting held on February 18, 2016, it was found that there had been no new installations of bio-toilets. The petitioners also asked for the extension of the bank guarantee for another one year by

the 1st week of March 2016 and to submit a detailed action plan for fabrication, transportation and installation of bio-toilets in all Islands. Petitioner was informed that out of 12000 bio-digester toilets, 10382 bio-toilets were pending for installation as such the Department proposed to cancel the contract on account of interminable delay in the execution of the work. The petitioners were issued a letter annexure R-6 in this context. The petitioners on April 20, 2016 had written that a detailed plan would be presented at review meeting that was scheduled for April 22, 2016. Vide letter annexure R-7, a review meeting of the Monitoring Committee on Bio-toilets was held and it was noted in the minutes that the petitioners had not submitted any action plan for fabrication. On September 23, 2016, termination notice of the contract was issued to the petitioners, vide letter annexure R-8. On October 1, 2016, a suit was filed by the petitioners against the respondents in the Court of Civil Judge, (Junior Division), Kapurthala for setting aside the letter dated September 23, 2016 issued by the respondent – Manager Canara Bank, Kapurthala for liquidating the bank guarantees. The Court of Civil Judge, (Junior Division), Kapurthala vide order dated October 1, 2016 opted not to grant stay regarding the operation of the letter dated September 23, 2016. Respondents No.4 and 5 have placed on record the summons received in the suit as annexure R-9. On October 2, 2016, an appeal was filed by the petitioners against the said interim order dated October 1, 2016 vide memo of appeal annexure R-10.

This Court, vide order dated October 5, 2016 stayed the liquidation of the bank guarantee vide letter dated September 23, 2016.

The grievance of the respondents is that the petitioners have been able to obtain the interim order from this Court by concealing the fact that the petitioners had availed the remedy of filing a suit in the Court of Civil Judge (Junior Division), Kapurthala wherein the interim relief had already been declined. It has also been averred in the reply that unless fraud or special equity exists, indicating prima facie strong evidence of a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, has been arisen in performance of the contract or execution of the works undertaken in furtherance thereof.

By filing a rejoinder, the plea of want of territorial jurisdiction has been contradicted by the petitioners but the factum of petitioners having earlier filed suit has not been controverted.

I have considered the facts and circumstances of the present case and I am of the opinion that the present petition deserves to be dismissed on the ground of concealment of facts and availability of alternative remedy to the petitioners and that alternative remedy having already been availed of by the petitioners. The circumstances to cancel the direction for encashment of bank guarantee do not exist as per the settled principles of law. It is basic principle of law as laid down in **K.D. Sharma**

Vs. Steel Authority of India Limited and others, (2008) 12 SCC 481 that a party who invokes extraordinary jurisdiction of High Court under Article 226 of the Constitution of India or under Article 32 of the Supreme Court is supposed to be truthful and frank and who does not approach the Court with clean hands is not entitled to the discretionary relief.

Since the petitioners have concealed the material fact of having filed a civil suit and having not been able to get an interim order, the writ petition is not maintainable. It is a case where the petitioners have already availed the alternative remedy of approaching the civil Court. They have approached this Court during the pendency of the civil suit as such no extraordinary exceptional circumstances exist to exercise jurisdiction in favour of the petitioners.

So far as encashment of bank guarantee is concerned, the work of installation of bio-toilets was required to be completed by the petitioners on or before March 31, 2013. The petitioners having grossly failed to honour the terms and adhere the time schedule despite repeated extensions, cannot seek an injunction against the encashment of bank guarantee. The encashment of bank guarantee is governed by Section 126 of the Indian Contract Act, 1892 which reads as follows:-

“Section 126:- ‘Contract of guarantee’, ‘surety’, ‘principal debtor’ and ‘creditor’—A ‘contract of guarantee’ is a contract to perform the promise, or discharge the liability, of a third person in case of his

default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

The bank guarantee is an independent and distinct contract between the bank and the beneficiary and it is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. For holding the said opinion, I draw support from the following judgments:-

- i) **Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and anr.** (1996) 5 SCC 450;
- ii) **U.P. State Sugar Corporation Vs. M/s Sumac International Ltd.** (1997) 1 SCC 568;
- iii) **Vinitec Electronics Pvt. Ltd. Vs. HCL Infosystems,** (2008) 1 SCC 544;
- iv) **Vang Infrastructure Pvt. Ltd. Vs. State of Haryana and others,** (2016) 182 PLR 378; and
- v) **Torque Cars Pvt. Ltd. (TCPL) Chandigarh Vs. Punjab and Sind Bank and others,** MANU/PH/0779/2016.

As per ratio of the above said judgments, unless or until a fraud or special equity exists and the same is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract or execution of the works undertaken in furtherance thereof.

In view of the above said judgments, the petitioners are not entitled to seek the restraint order regarding bank guarantee.

The writ petition, is therefore, dismissed without prejudice to the rights of the petitioners in any arbitration proceedings already initiated or likely to be initiated by the parties in future.

March 20, 2017
sanjay

(M.M.S.BEDI)
JUDGE

Whether speaking/ reasoned:	Yes/ No.
Whether reportable:	Yes/No.