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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. (I) (COMM) 74/2017

ZILLION INFRAPROJECTS PVT. LTD. ..... Petitioner

Through: Mr Sakal Bhushan, Mr Naveen Sharma and Ms Swati Bhushan, Advocates.

versus

ALSTOM SYSTEMS INDIA (P) LTD. & ORS. ..... Respondents

Through: Mr Amit Chadha, Senior Advocate with Mr Akhil Anand, Mr Siddhanth Kochhar, Ms Avlokita Rajvi and Mr Sahil Mongia, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **09.02.2017**

VIBHU BAKHRU, J

IA Nos.1808-1809/2017

1. Allowed, subject to all just exceptions.

2. The applications are stand disposed of.

CAV No.134/2017

3. The learned counsel for the caveator/respondent has entered appearance. The caveat stands discharged.

O.M.P. (I) (COMM) 74/2017

4. Zillion Infraprojects Pvt. Ltd. (hereafter 'ZIPL') has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* praying for an injunction restraining respondent no.1 (hereafter 'Alstom') from encashment of the following Bank Guarantees till the adjudication of the disputes between the parties:-

Sl. No.	Bank	BG No.	Date of Issue	Amount (₹)
(i)	State Bank of India	0480315BG0001003	14.12.2015	2,00,00,000/-
(ii)	Punjab National Bank	1988ILG017115	14.12.2015	3,00,00,000/-
(iii)	HDFC Bank	003GT02153500013	16.12.2015	91,06,047/-

5. The aforesaid bank guarantees (hereafter 'BGs') were furnished by ZIPL for securing Alstom for due performance of the contract to indemnify Alstom from any loss or damage or any debt that is incurred/may be incurred by Alstom. Alstom has invoked the BGs and ZIPL claims that such invocation is fraudulent and contrary to the terms of the BGs.

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

6.1 Dedicated Freight Corridor Corporation of India Ltd. (hereafter 'DFCCIL'), a Public Sector Undertaking, had entered into a contract with Alstom on 21.07.2015, for performance of the works relating to design, construction, supply, installation, testing and commissioning of 2 x 25 KV AC 50 Hz electrification, signalling 7 telecommunication and associated works of double track railway lines under construction for Bhaupur-Khurja section of eastern dedicated freight corridor.

6.2 Alstom in turn entered into an agreement with ZIPL on 24.09.2015 (hereafter 'the sub-contract') whereby part of the works, agreed to be performed by Alstom under the contract dated 21.07.2015 with DFCCIL, were sub-contracted to ZIPL. The scope of the works to be performed under the sub-contract was subsequently reduced by Alstom and certain works earlier awarded to ZIPL, were withdrawn.

6.3 In terms of the sub-contract, ZIPL had submitted bank guarantees - 7 in number - for an aggregate sum of ₹11,82,12,094/-. Three bank guarantees were furnished as performance securities and four bank guarantees, including the bank guarantees in question, were issued to secure the mobilisation advance advanced by Alstom to ZIPL.

6.4 Alstom alleges that ZIPL failed to perform the sub-contract and consequently, Alstom was constrained to terminate the sub-contract on 16.09.2016. ZIPL claims the termination to be fraudulent and stoutly disputes that it was in breach of the obligations under the sub-contract. ZIPL claims that although the execution of the works involved had been delayed but the same were on account of lapses on the part of Alstom and/or for the hindrances, the removal of which was outside the scope of the works sub-contracted to ZIPL.

6.5 ZIPL apprehended that Alstom would invoke the seven bank guarantees furnished by it and approached this Court by way of an application under Section 9 of the Act [OMP(I)(COMM) 377/2016], *inter alia,* praying that Alstom be restrained from invoking the seven Bank Guarantees furnished by ZIPL, pursuant to the sub-contract. This Court dismissed the said petition by an order passed on 21.09.2016. The said order was carried in appeal before the Division Bench - in FAO(OS)(COMM) 83/2016 - which was disposed of by the order dated 27.09.2016. By way of the said order, the Division Bench clarified that the performance bank guarantees (BGs) were not unconditional bank guarantees and to that extent, the order dated 21.09.2016 passed by this Court was held to be erroneous. Subsequently, ZIPL approached this Court once again under Section 9 of the Act seeking interdiction of one of the bank guarantees issued against mobilization advance being OMP(I)(COMM) 405/2016. The said petition was dismissed by an order dated 07.02.2017. In addition, ZIPL also filed two other petitions under Section 9 of the Act being OMP(I)(COMM)73/2017 and OMP(I)(COMM) 64/2017 seeking interdiction of the other two bank guarantees submitted against mobilization advance; these petitions were also dismissed following the decision dated 07.02.2017 rendered in OMP(I)(COMM) 405/2016.

7. Mr Bhushan, the learned counsel appearing for ZIPL sought to assail the invocation of the BGs on the ground that the letter of invocation was not in terms of the BGs. He also referred to the decision of a coordinate Bench of this Court in ***ABIR Infrastructure Pvt. Ltd. v. Teestavalley Power Transmission Limited & Ors.***: **214 (2014) DLT 235** in support of his

contention that the encashment of a bank guarantee can be interdicted if the invocation is not in terms of the bank guarantee. He submitted that although in the present case, Alstom had invoked the BGs on the basis of loss allegedly suffered by it but it had failed to indicate as to how, it could have possibly incurred any loss. He submitted that Alstom had already invoked the guarantees against mobilization advance to the extent of ₹591 lacs approximately and has thus, recovered the entire mobilisation advance. In addition, he contended that Alstom also has the immediate benefit of the work already done and the sites mobilised by ZIPL for which ZIPL has not been paid. He submitted that in the circumstances, Alstom’s invocation of the BGs is fraudulent and is only with a view to unjustly enrich itself.

8. Alstom terminated the sub-contract on 16.09.2016. In its letter of 16.09.2016, Alstom alleged that ZIPL had failed to perform the contract satisfactorily and had also violated the code of ethics as it was alleged that ZIPL had offered an unethical inducement to the deputy team leader. ZIPL contests the aforesaid allegations.

9. The allegation that a representative of ZIPL had offered an unethical inducement to the team leader does not hold good as the enquiry instituted for examining the said allegation has exonerated ZIPL's representative of that charge. However, the question whether ZIPL had delayed the execution of the sub-contract is a contentious issue, which requires to be adjudicated. Indisputably, the execution of the works had been delayed and the progress of the works was not as per the agreed schedule. ZIPL alleges that the same was for reasons beyond its control and for reasons attributable to Alstom. Alstom disputes the same and contends otherwise. At this stage, it is not

possible to accept that the allegations made by Alstom are a part of an elaborate fraud. At this stage, it is not possible to accept that ZIPL has, *prima facie*, established that the sub-contract was vitiated or affected by any fraud on the part of Alstom. The dispute as to whether ZIPL is responsible for the delays in execution of the works or whether the delays are attributable to Alstom, are disputed issues and can be addressed only after the parties have led evidence. This Court is unable to readily accept that the invocation of the performance Bank Guarantees are fraudulent or that the performance Bank Guarantees should be interdicted on the ground of an egregious fraud. In the circumstances, the only question that remains to be considered is whether the invocation of the BGs is not in its terms.

10. Before proceeding to address the controversy, it would be relevant to refer to the terms of the BGs. All the three BGs are more or less similarly worded. It would, therefore, suffice to refer to the relevant passage of the Bank Guarantee dated 14.12.2015 issued by the State Bank of India in the sum of ₹2,00,00,000/-. The relevant extract of the said Bank Guarantee is set out below:-

> "Now we the undersigned State Bank of India, constituted under the State Bank of India Act, 1955 and having its Corporate Centre at Nariman Point, Mumbai and amongst other places an Overseas Branch, 8th Floor, Jawahar Vyapar Bhawan, 1 Tolstoy Marg, New Delhi 110001 being fully authorized to sign and to incur obligations for and on behalf of and in the name of (STATE BANK OF INDIA), hereby declare that the said bank will guarantee the Contractor the full amount of Rs. 2,00,00,000/- (Rupees Two Crore Only).
>
> After the Subcontractor has signed the aforementioned Subcontract with the Contractor, the Bank is engaged to pay

> the Contractor, any amount up to and inclusive of the aforementioned full amount of the Performance Security upon written order from the Contractor to indemnify the Contractor for any liability of damage resulting from any defects or shortcomings of the Subcontractor or the debts he may have incurred to any parties involved in the Works under the Subcontract mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The Bank will deliver the money required by the Contractor immediately on demand without delay and demur and without reference to the Subcontractor and without the necessity of a previous notice or of judicial; or administrative procedures and without it being necessary to prove to the Bank the liability or damages resulting from any defects or shortcomings or debts of the Subcontractor. The Bank shall pay to the Employer any money i.e. upto Rs 2,00,00,000/- (Rupees Two Crores Only), so demanded notwithstanding any dispute/disputes raised by the Subcontractor in any suit or proceedings pending before any court, Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal."

11. It is apparent from the plain language that the BGs in question are to indemnify Alstom against, (i) any liability of damage resulting from any defects or shortcomings of the sub-contractor; or (ii) the debts that the sub-contractor may have incurred to any parties involved in the works under the sub-contract.

12. The BGs were invoked by similarly worded letters - all dated 08.02.2017. The relevant extract of the letter addressed to HDFC Bank Limited, reads as under:-

> "We inform you that ZIPL has failed to perform its obligations as per the terms and conditions of the Sub

> Contract Agreement dated 24th September 2015 entered between ASIPL and ZIPL ("Sub-Contract"), resulting in a liability of damages incurred and to be incurred by ASIPL on account of the defects and shortcomings in the works of ZIPL under the Sub Contract *inter alia* failure to work systematically and in accordance with the schedule, continuous default and delay in performance under the provisions of Sub-contract, Eventually, the Sub-Contract Agreement has been terminated by ASIPL on 16 September 2016 vide Notice of Termination, a copy of which is also enclosed herewith."

13. It is apparent from the above that Alstom has alleged that failure of ZIPL to execute the sub-contract in accordance with the schedule, resulting in termination of the sub-contract, has resulted in damages incurred or to be incurred by Alstom on account of defects and shortcomings in the works. It is plainly evident from the language of the letters that the same are in conformity with the terms of the BGs. The question whether in fact Alstom had suffered any damages or is likely to suffer any damages, cannot be evaluated at this stage. However, it is apparent that BGs have been invoked in terms of the BGs.

14. The reliance placed by Mr Bhushan on the decision in ***ABIR Infrastructure Pvt. Ltd.*** (*supra*) is misplaced. In that case, the terms of the bank guarantees in question expressly included the condition of failure on the part of the contractor to fulfil its obligation and in the event of such failure, refusal to pay all or part of the advance due to the employer. Although the letter invoking the Bank Guarantees had alleged that the contractor had failed to fulfil its obligation but it was alleged that on such

failure, the contractor had refused to repay all or part of the payment. In that context, this Court had observed as under:-

> "On the other hand, the wordings of the clauses of the guarantee documents provide the objective criteria for enabling the bank to honour the guarantee and repay the advance which is that by first looking into the contractors failure to perform the obligation and refusal to repay the advanced sum and thereafter further taking into consideration the payments already made by the contractor by looking into the payment certificates. In such circumstances, it cannot be readily inferred that the two Bank Guarantees are totally unconditional in nature which can be honoured on mere demand which does not fulfil the criteria for invocation as per the terms of the Bank Guarantee."

15. In the present case, this Court is unable to accept that Alstom has not complied with the conditions for invocation of the BGs; the letters invoking the BGs are in terms of the BGs in question and, therefore, the encashment of the BGs cannot be interdicted.

16. For the reasons stated above, the petition is dismissed.

17. Order be given *dasti* under signature of Court Master.

VIBHU BAKHRU, J

FEBRUARY 09, 2017
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