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

\+ O.M.P.(I) (COMM.) 164/2017

JPC INFRASTRUCTURE AND CONSTRUCTIONS PVT. LTD. ..... Petitioner

Through: Mr Chandan Kumar and Mr Rahul Kumar, Advocates.

versus

ALSTOM SYSTEMS INDIA PVT. LTD. ..... Respondent

Through: Mr Milanka Chaudhury and Ms Abhilasha Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 21.04.2017

VIBHU BAKHRU, J

IA No.4823/2017

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

O.M.P.(I) (COMM.) 164/2017 & IA No.4824/2017

3. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia*, praying as under:-

> " a) Grant an injunction restraining the Respondent from invoking and encashing Bank Guarantee bearing no. 542501GL0001616 issued by Union Bank of India, Hanuman Nagar, Vaishali Nagar, Jaipur Branch;
>
> b) Grant an ex parte ad interim order of injunction in terms

of prayer (a) above;

c) May direct Respondent to conduct joint measurement of work done and taken over, materials and other objects necessary for work execution brought on site and taken over by the Respondent;"

4. The respondent was awarded the contract for execution of works of Design, Construction, Supply, Installation, Testing and Commissioning of 2X25KV AC 50Hz Electrification, Signalling & Telecommunication and associated works of double track railway lines under construction for Bhaupur-Khurja section of eastern dedicated freight corridor, by Dedicated Freight Corridor Corporation of India. The respondent was desirous of sub-contracting a part of the works and thus, invited offers from sub-contractors. The petitioner submitted a bid for part of the works, which was accepted by the respondent. By a letter of acceptance dated 04.12.2015, the petitioner was awarded the works relating to "Building & Structure including E&M Works". Thereafter the parties entered into an agreement (hereafter 'the sub-contract'). The works were to be executed at three locations, namely, Daudkhan, Hathras and Khurja.

5. In terms of the sub-contract, the petitioner had submitted a performance bank guarantee dated 28.03.2016 (hereafter 'the Performance Bank Guarantee'), which was subsequently amended to restrict the same to - ₹1,70,47,905/-. The said Performance Bank Guarantee is subsisting and valid till 28.12.2019.

6. The respondent withdrew the work of Drawing and Design in terms of clause 27.5 of the sub-contract, from the petitioner's scope of works under

the sub-contract by its letter dated 16.08.2016. The respondent alleged that there were continuous defaults committed by the petitioner. The petitioner disputed the allegations made by the respondent and by its letter dated 03.01.2017, listed out various reasons for the delay. This was followed by another letter dated 29.01.2017, whereby the petitioner reiterated the reasons for delay and lack of significant progress and further called upon the respondent to pay compensation aggregating to ₹5,79,60,274/-.

7. The respondent disputed the claims made by the petitioner and alleged that the petitioner was responsible for the lack of performance.

8. Subsequently, by its letter dated 18.03.2017, the respondent also removed the works to be executed at the Hathras and Khurja locations, from the petitioner's scope of works under the sub-contract. Further, the respondent called upon the petitioner to undertake the work at the Daudkhan section with immediate effect and also put the petitioner to notice that if the petitioner failed to demonstrate any progress within 15 days, the sub-contract would be terminated in accordance with clause 27.1 of the sub-contract.

9. The petitioner disputed the allegations made in the said letter and reiterated that the delay in execution of works is wholly attributable to the respondent and for reasons beyond the control of the petitioner.

10. The petitioner alleges that although by notice dated 18.03.2017, the petitioner was granted 15 days time to show the requisite progress but the respondent had already introduced a new contractor at Daudkhan station and this was reported to the petitioner on 30.03.2017.

11. The learned counsel for the petitioner contended that the intention of the respondent to terminate the agreement was clear from its conduct.

12. In the given circumstances, the petitioner issued a letter dated 01.04.2017 raising several disputes. The petitioner *inter alia* claimed that it had sought permission and approvals from the respondent but the respondent did not communicate any decision; it neither approved nor rejected the approvals sought. It was further claimed that the petitioner was approved as a sub-contractor on 04.07.2016, much after the contract was entered into; that the respondent acted in an unprofessional manner; and that the reduction of work from the petitioner's scope of works was without seven days notice as required under the contract between the parties. In view of the above, the petitioner has sought reference of the disputes for conciliation in terms of Clause 29.2.1 and 29.2.1 of the sub-contract.

13. The petitioner apprehends that the respondent would invoke the Performance Bank Guarantee, which would result in further loss to the petitioner and, therefore has filed the present petition.

14. Mr Chandan Kumar, the learned counsel for the petitioner contended that in terms of clause 27.2 of the sub-contract, the respondent would not be "*liable to pay to the Subcontractor* [the petitioner] *any money on account of the Subcontract until the Substantial Completion of the whole of the Subcontract Works and, thereafter, until the costs of Final Completion, damages or delay in completion (if any), and all other expenses incurred by the Contractor* [the respondent] *have been ascertained*." He submitted that in terms of the aforesaid clause, the question of any damage or loss being

incurred by the respondent could only be ascertained at the final stage of completion of the works. He contended that in absence of final determination of the loss or damage incurred to the respondent, if at all, the Performance Bank Guarantee could not be invoked. He submitted that the Performance Bank Guarantee was submitted only to indemnify the respondent from any loss or damage and in absence of the same being assessed and determined, there could be no cause for the respondent to invoke the said bank guarantee. He also referred to the decision of the Supreme Court in ***Union of India v. Raman Iron Foundry*** : **(1974) 2 SCC 231** and ***Gangotri Enterprises Ltd. v. Union of India & Ors*****: (2016) 11 SCC 720** to contend that unless a claim for damages had been assessed and quantified, no recoveries could be made.

15. The learned counsel for the petitioner further submitted that the respondent was also required to undertake joint measurements to avoid any further dispute with regard to the quantum of work done by the petitioner.

16. I have heard the learned counsel for the parties.

17. At the outset, it is necessary to refer to terms of the Performance Bank Guarantee. The relevant extract of which is as under:-

> "After the Sub Contractor has signed the aforementioned contract 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 Sub Contractor or the debts he may have incurred to any parties involved in the works under

> the Sub Contract 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 Sub Contractor and without the necessary 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 Sub Contractor. The Bank shall pay to the Contractor any money so demanded notwithstanding any dispute/disputes raised by the Sub Contractor in any suit or proceedings pending before any court, Tribunal or Arbitrator/s relating thereto and liability under this guarantee shall be absolute and unequivocal."

18. A plain reading of the Performance Bank Guarantee indicates that the bank had undertaken to pay the amount guaranteed on account of any defects or shortcomings of the sub-contractor or the debts incurred by the sub-contractor to any other parties involved in the works, irrespective of whether the defects or shortcomings were "*actual or estimated or expected*". It is apparent from the plain language that it is not necessary for the respondent to finally ascertain the exact quantum of damages or loss suffered by it and the Performance Bank Guarantee could also be invoked on account of expected or estimated loss on account of any defect or shortcomings in the performance of works by the petitioner. It is trite law that bank guarantee is an independent contract.

19. In the facts of the present case, there are allegations and counter allegations of breach of the sub-contract by the parties. It is apparent that there are serious disputes between the parties as to which party is

responsible for delay in execution of the works.

20. It is well settled that bank guarantees cannot be interdicted except on the grounds of *fraud*, *irretrievable injury* or *special equity*. In the present case, the petitioner has not established any case of fraud or irretrievable injury. The case set up by the petitioner mainly indicates that there are contractual disputes between the parties, each alleging that other is responsible for the delays in execution of the works. Accordingly, this Court finds no reason to interdict the Performance Bank Guarantee.

21. The reliance placed by the petitioner on the decisions of the Supreme Court in ***Raman Iron Foundry*** (*supra*) and ***Gangotri Enterprises Ltd.*** (*supra*) is also misplaced. In ***Gangotri Enterprises Ltd.*** (*supra*), the relevant clause of the contract entitled the employer to deduct the amounts to be forfeited or recovered from any money, which was *then due or which at any time thereafter may become due to the contractor under the contract or any other contract.* In that context, the Court observed that the sum claimed by the employer was in the nature of damages and had not been adjudicated. The Court held that the sum claimed was "*neither the sum due in praesenti nor the sum payable*" and therefore, did not permit the recovery of the said sum by invoking the bank guarantee. It is also relevant to mention that there were also other reasons for restraining the respondents from encashing the bank guarantee. First of all, that the amount claimed by the respondents (therein) was not in relation to the contract in respect of which the performance bank guarantee had been furnished. Secondly, the works in relation to which the performance bank guarantee was furnished, had been completed to the satisfaction of the respondents.

22. In the present case, the Performance Bank Guarantee expressly provides for its encashment on account of any defects or shortcomings of the sub-contractor, whether *actual, estimated* or *expected*. In view of the express language of the bank guarantee in question, the contention that its encashment must be interdicted till the final damages are quantified and adjudicated, is unmerited.

23. In view of the above, this Court is unable to accede to the petitioner's prayer for interdicting the encashment of the Performance Bank Guarantee.

24. Insofar as the petitioner's prayer to direct joint measurement of work is concerned, the learned counsel for the petitioner states, on instructions, that the representative of the petitioner shall visit the site on 08.05.2017 for commencing the exercise of undertaking joint measurement. The learned counsel for the respondent also assures the Court that the respondent would fully cooperate in ensuring that the exercise of taking joint measurements is commenced on 08.05.2017 and is completed as expeditiously as possible. The respondent is bound down to the aforesaid statement.

25. The petition and the pending application are disposed of with the aforesaid observations.

VIBHU BAKHRU, J

APRIL 21, 2017
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