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

+ **O.M.P.(I) (COMM.) 185/2017**

ERA INFRA ENGINEERING LTD.

..... Petitioner

Through: Mr Suhail Sehgal and
Mr Purushottam, Advocates.

versus

**CENTRAL PUBLIC WORKS DEPARTMENT
& ANR.**

.... Respondents

Through: Mr Manish Mohan, CGSC with
Ms Priyansha Sinha, Ms Sanjana and
Mr Manish Saroha, Advocates for R-1.
Mr Ashish Rana, Advocate for R-2

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER
11.05.2017**

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IA No.5746/2017

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

O.M.P.(I) (COMM.) 185/2017 & IA No.5745/2017

3. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* seeking several reliefs. However, the only relief pressed by the learned counsel for the petitioner is for staying the invocation / encashment of the performance bank guarantee (the bank guarantee) issued by Bank of India (respondent No. 2) at the instance of the petitioner.

4. The petitioner had participated in a tender floated by the respondent for construction of an office building and guest house for A.G. (U.P.) at Gomti Nagar, Lucknow. The petitioner's bid was accepted and work order was issued by respondent No.1 (hereafter 'the work order'). The contractual value of the work was ₹45,23,76,050/- and the works were to be completed within a period of 16 months. The scheduled date of commencement was 20.10.2010. However, execution of the works was delayed and the petitioner claims that it was completed on 16.11.2015.

5. One of the disputes between the parties relates to the delay in execution of the works. Whilst, the petitioner claims that the delays were all attributable to respondent No.1, the same is disputed by respondent No.1.

6. The agreement in question provides for levy of compensation on account of delay in execution of the works. Respondent No. 1 has determined that a delay of 447 days in completion of the works is attributable to the petitioner and intends to recover the compensation for the same. This has led the petitioner to file the present petition.

7. Mr Suhail Sehgal, learned counsel appearing for the petitioner had contended that in terms of agreement between the parties (the agreement), the bank guarantee could be invoked only on account of any sum to which the President of India was entitled to. He submitted that since the respondent was seeking to invoke the bank guarantee on account of unadjudicated damages for delay, the invocation was contrary to the terms of the agreement and, therefore, respondent No.1 was liable to be restrained from invoking the bank guarantee and respondent No.2 was liable to be restrained from encashing the same.

8. Mr Sehgal relied on the decisions of the Supreme Court in *Union of India (UOI) v. Raman Iron Foundry: (1974) 2 SCC 231* and *Gangotri Enterprises Ltd. v. Union of India (UOI) and Ors: (2016) 11 SCC 720* in support of his contention that an unadjudicated claim for compensation could not be considered as an amount “due” and, therefore, respondent No.1 was not entitled to invoke the bank guarantee. He also referred to the decision of this Court in *Tower Vision India Pvt. Ltd. v. Procall Pvt. Ltd.: (2013) 112 CLA 364 (Delhi)* in support of his contention that an unadjudicated claim for damages would not qualify as a “debt”.

9. Mr Manish Mohan, learned counsel for respondent No.1 has raised the preliminary objection as to jurisdiction of this Court to entertain the present petition.

10. He submitted that the tenders in question were floated by respondent No.1 in Lucknow (U.P.); the tenders (including that of the petitioner) were submitted at Lucknow; the contract was finalised in Lucknow; and the works were to be executed at Lucknow. The petitioner was also located in the State of UP and no part of cause of action had arisen within the territorial jurisdiction of this Court. Mr Mohan also handed over a communication sent by Superintendent Engineer of respondent No.1 on 24.04.2017, wherein the Superintendent Engineer had expressly stated that in exercise of powers conferred in Clause 2 of the agreement, a sum of ₹4,52,37,605/- had been determined as compensation payable under clause 2 of the agreement.

11. Mr Sehgal countered the aforesaid submissions and contended that a determination by the Superintendent Engineer could not be considered as a determination in the eyes of law; a claim for damages was required to be

determined in a Court of law and not unilaterally by any of the parties. On the question of jurisdiction, he submitted that this Court would have jurisdiction as respondent No.2's office was located in Delhi and the bank guarantee had been issued from New Delhi. He relied upon the decision of this Court in *Milkfood Ltd. v. Union Bank of India: 2007 (2) CTLJ 362 (Del)* in support of this contention.

12. This Court is not persuaded to hold that it has jurisdiction to entertain the present application. The question of jurisdiction of a court, in the context of Section 9 of the Act, has to be determined by reference to Section 2(1)(e) of the Act, which defines "Court" as under:-

"1 (e) "Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

13. In view of the above, the question to be addressed is whether this Court would have the jurisdiction to entertain the suit in relation to the subject matter of arbitration, if there was no arbitration agreement between

the parties. In the present case, the disputes between the petitioner and respondent No.1 have arisen in connection with a contract which was entered into at Lucknow and was to be performed in Lucknow. The entire subject matter of disputes between the petitioner and respondent no.1 has, plainly, arisen at Lucknow. The fact that the contract required a bank guarantee to be furnished by the petitioner, which was issued by a bank (respondent No. 2) in Delhi would not extend the jurisdiction of this Court over the subject matter of arbitration.

14. The decision in the case of *Milkfood Limited* (supra) is of little assistance to the petitioner. In that case, the subject disputes were between the plaintiff and the defendant bank which had issued bank guarantees but had failed to honour the same. It is settled law that a bank guarantee is an independent contract. In that case, the Court held that the bank guarantees did not specify any place for payment and the letters invoking the bank guarantees were written by the plaintiff from Delhi and the defendant also had a zonal office at Delhi. In the present case, the arbitration agreement (clause) between the petitioner and respondent No.1 was entered into at Lucknow for works to be performed at Lucknow and, thus, the subject matter of the contract falls within the jurisdiction of the courts at Lucknow and not in Delhi.

15. Having stated the above, this Court is also not persuaded to accept that any order interdicting the bank guarantee ought to be issued in the facts of the present case. The disputes between the petitioner and respondent No.1 as to which party is responsible for the delay in execution of the works and is in breach of the contract, are contractual disputes, which do not warrant

interdiction of the bank guarantee. The law on interdicting the bank guarantees is well settled and has been reiterated by courts in numerous decisions. A bank guarantee can be interdicted only in cases of egregious fraud or special equities (See: *U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.*: (1988) 1 SCC 174, *Svenska Handelsbanken v. M/s Indian Charge Chrome and Others*: (1994) 1 SCC 502 and *Larsen & Toubro Limited v Maharashtra State Electricity Board and Others*: (1995) 6 SCC 68).

16. *Prima facie*, the contention that invocation is contrary to the terms of clause 1 of the agreement, also cannot be readily accepted. Clause 1 of the agreement is set out below:-

"CLAUSE 1

- (i) The contractor shall submit an irrevocable Performance Guarantee of 5% (Five percent) of the tendered amount in addition to other deposits mentioned elsewhere in the contract for his proper performance of the contract agreement, (not withstanding and/or without prejudice to any other provisions in the contract) within period specified in Schedule 'F' from the date of issue of letter of acceptance. This period can be further extended by the Engineer-in-Charge upto a maximum period as specified in schedule 'F' on written request of the contractor stating the reason for delays in procuring the Performance Guarantee, to the satisfaction of the Engineer-in-Charge. This guarantee shall be in the form of Cash (in case guarantee amount is less than Rs. 10,000/-) or Deposit at Call receipt of any scheduled bank/Banker's Cheque of any scheduled bank/Demand Draft of any scheduled bank/Pay Order of any scheduled bank (in case guarantee amount is

less than Rs. 1,00,000/-) or Government Securities or Fixed Deposit Receipts or Guarantee Bonds of any Scheduled Bank or the State Bank of India in accordance with the form annexed hereto. In case a fixed deposit receipt of any Bank is furnished by the contractor to the Government as part of the performance guarantee and the Bank is unable to make payment against the said fixed deposit receipt, the loss caused thereby shall fall on the contractor and the contractor shall forthwith on demand furnish additional security to make good the deficit.

- (ii) The Performance Guarantee shall be initially valid upto the stipulated date of completion plus 60 days beyond that. In case the time for completion of work gets enlarged, the contractor shall get the validity of Performance Guarantee extended to cover such enlarged time for completion of work. After recording of the completion certificate for the work by the competent authority, the performance guarantee shall be returned to the contractor without any interest.
- (iii) The Engineer-in-Charge shall not make a claim under the performance guarantee except for amounts to which the President of India is entitled under the contract (not withstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:
 - (a) Failure by the contract to extend the validity of the Performance Guarantee as described herein above, in which event the Engineer-in-Charge may claim the full amount of the Performance Guarantee.
 - (b) Failure by the contractor to pay President of India any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement within 30 days of the service of notice to this effect by Engineer-in-

Charge

- (iv) In the event of the contract being determined or rescinded under provision of any of the Clause/Condition of the agreement, the performance guarantee shall stand forfeited in full and shall be absolutely at the disposal of the President of India."

17. Sub-clause 1(iii)(b) of the agreement expressly provides that the Engineer In-Charge shall not make a claim under the performance guarantees except on failure of the contractor to pay any amount due, either as agreed or determined, under any of the clauses / conditions of the agreement. This Sub-clause does not proscribe the Engineer In-charge from invoking the bank guarantee for recovery of any sum determined under clause 2 of the agreement.

18. The relevant extract of clause 2 of the agreement reads as under:-

"CLAUSE 2

Compensation for Delay

If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete

This will also apply to items or group of items for which a separate period of completion has been specified.

- (i) Compensation for delay of work @ 1.5% per month of delay to be computed on per day basis

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s), in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. Withholding of this amount on failure to achieve a milestone, shall be automatic without any notice to be contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount."

19. It is expressly provided that the decision of the authority specified in Schedule 'F' shall be final and binding. In the present case, the petitioner was issued a show cause notice on 26.12.2016 as to why compensation chargeable under Clause 2 not be imposed. The petitioner responded to the said show-cause notice by a letter dated 06.01.2017. The Superintendent

Engineer thereafter determined that the petitioner was responsible for 447 days delay and imposed a compensation of ₹4,52,37,605/-. The aforesaid determination would, *prima facie*, fall within clause 1(iii)(b) of the agreement.

20. Indisputably, the petitioner would have recourse to challenge the aforesaid determination. *Prima facie*, the question whether any compensation was at all payable under clause 2, could be a subject matter of arbitration; however, the quantification of the compensation appears to be an excepted matter.

21. The decision in the case of ***Gangotri Enterprises Ltd.*** (*supra*) is inapplicable to the facts of the present case. In that case, the respondent had sought to invoke the performance bank guarantee against its claims in another contract. The Supreme Court had *inter alia* noted that the bank guarantee in question was in the nature of a performance bank guarantee furnished for execution of works, which admittedly, were completed to the satisfaction of the respondent. The Court had also explained that a claim for damages in relation to another contract which was pending adjudication in an arbitration proceeding could not be considered as amount “due” to the respondent therein.

22. In the facts of the present case, the execution of the works has been delayed and thus, there is a dispute as to whether the petitioner has performed the works in terms of the agreement. It is well settled that unconditional bank guarantees cannot be interdicted on account of existence of disputes.

23. In view of the above, the present petition and the pending application are dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 11, 2017
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