

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.02.2017

+ **O.M.P.(I) (COMM.) 405/2016 & IA No. 14449/2016**

ZILLION INFRAPROJECTS PVT. LTD.

..... Petitioner

versus

ALSTOM SYSTEMS INDIA (P) LIMITED & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Sakal Bhushan and Mr Naveem Sharma.

For the Respondents :Mr Amit Chadha, Senior Advocate with Mr Tejas Karia, Mr Akhil Anand, Mr Surjendk Sankar Das, Mr Siddhanth Kochhar, Ms Avlokita Tajul and Mr Sahil Mongia, Advocates for R-1. Mr Mayank Pandey, Advocate for R-3.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. 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') and respondent no.3 (hereafter 'ICICI Bank') from encashment of Bank Guarantee No. 0007BGR0083516 dated 18.02.2016 for an amount of ₹1,41,00,000/- till the adjudication of the disputes between the parties.

2. The aforesaid bank guarantee was submitted by the ZIPL against advances obtained from Alstom. The said advances were to be recovered from running account bills. However, the agreement pursuant to which the

bank guarantee had been furnished has been terminated. ZIPL alleges that the invocation of the Bank Guarantee is fraudulent and, therefore, ought to be interdicted.

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

3.1 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 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.

3.2 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 contract dated 21.07.2015 with DFCCIL were sub-contracted to ZIPL. ZIPL states that the scope of the works to be performed under the sub-contract were confined to execution of the civil works as well as their drawings and designs; however, the scope involving preparation of drawings and designs was withdrawn by Alstom by its letter dated 10.08.2016. Alstom, on the other hand, has stated that by a letter dated 24.05.2016, it had removed the work relating to; (i) design and drawings pertaining to Slice 101 and Slice 102 (excluding OCC in Allahabad); and (ii) the entire scope of Slice 101 including supply, construction and other related activities.

3.3 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 guarantee in question, were issued to secure the mobilisation advance advanced by Alstom to ZIPL.

3.4 Alstom alleges that ZIPL failed to perform the sub-contract and consequently, Alstom was constrained to terminate the sub-contract by its letter dated 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 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 reasons beyond the scope of the works sub-contracted to ZIPL.

3.5 Alstom has invoked the bank guarantee in question (Bank Guarantee No.0007BGR0083516 - hereafter 'the BG') by its letter dated 07.10.2016 and this invocation is the subject matter of challenge in these proceedings.

Submissions

4. Mr Sakal Bhushan, learned counsel appearing for ZIPL had earnestly contended that there has been no default on the part of ZIPL to perform the sub-contract. He drew the attention of this Court to letters dated 26.11.2015 and 18.03.2016 to contend that ZIPL had submitted the drawings as required under the sub-contract. He also drew the attention of this Court to the statements furnished by ZIPL indicating the utilisation of funds. He submitted that statement of utilisation of funds as on 18.03.2016 indicated that ZIPL had incurred expenditure of ₹738 lacs which had

further increased to ₹745 lacs as on 15.07.2016 and ₹1043 lacs as on 16.09.2016 (the date on which the sub-contract was terminated). He also drew the attention of this Court to the minutes of the meeting held on 08.08.2016 as well as on 15.09.2016 in support of the contention that there was no dispute that ZIPL had mobilised the sites. He submitted that in the circumstances, the termination of the sub-contract by Alstom was fraudulent and only with a view to cover Alstom's inefficiencies.

5. Mr Chadha, learned senior counsel appearing for Alstom countered the submissions made by Mr Bhushan. He referred to various letters sent by Alstom, which indicated that ZIPL had failed to perform its obligations within the time prescribed. He referred to the letter dated 05.05.2016 whereby Alstom had alleged that despite several instructions, ZIPL had failed to perform various basic activities under the sub-contract. It was further alleged that ZIPL had failed to cure the defaults in a time bound manner.

6. Mr Chadha also referred to letters dated 09.05.2016, 24.05.2016 and 27.05.2016, which were to the similar effect. Mr Chadha also referred to ZIPL's letter dated 26.05.2016 sent in response to Alstom's letter dated 24.05.2016 and pointed out that ZIPL had not denied the contents of the letter dated 24.05.2016 but had assured Alstom that it would adhere to the revised time schedule as agreed. ZIPL had also assured Alstom that the revised schedule of activities would be submitted by 30.05.2016.

7. Next, Mr Chadha argued that ZIPL had played a fraud on Alstom and had not utilised the entire amounts advanced for mobilisation at site but had utilised bulk of the funds for other purposes. He referred to the utilisation certificate as on 18.03.2016 which indicated that ₹198 lacs was

paid as margin money to the bank for Bank Guarantees; ₹108 lacs was paid as Bank Guarantee commission to the bank; and ₹36 lacs was paid as bank charges for the above limits. He submitted that only ₹56 lacs was shown as site office establishment and rent and ₹14 lacs was shown as spent on office equipment. He stated that for the aforesaid reason, Alstom had not released the second tranche of the advance.

8. Next, Mr Chadha referred to clause 15.4 of the general conditions of the main contract, which expressly provided that Bank Guarantees for advance payment would be encashed to recover the outstanding amount on termination of the contract. He also referred to clause 2.2 of annexure 2 to the sub-contract as well as clause 14 of the general conditions of the main contract in support of his contention that Alstom was entitled to recover the outstanding advance by encashment of the bank guarantees.

Reasoning and conclusion

9. Before proceeding further it is relevant to mention that ZIPL had filed a similar petition [being OMP(I)(COMM) 377/2016], *inter alia*, seeking an order restraining invocation of the seven Bank Guarantees furnished by ZIPL pursuant to the sub-contract including the BG in question. The said petition was heard on 21.09.2016 and was dismissed on 21.09.2016. This Court had specifically held that even if it is assumed that ZIPL had mobilised its resources, the fact that the sub-contract had been terminated would entitle Alstom to recover the advances provided by Alstom by invoking the Bank Guarantees. The aforesaid 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. In its order, the Division Bench of this Court had, *inter alia*, observed that the performance

bank guarantees were conditional and in absence of the guarantees being invoked, the Court would have no means to ascertaining whether the bank guarantees had been invoked in their terms. However, as regards guarantees furnished by ZIPL for securing the mobilisation advance, the Division Bench of this Court had observed as under:-

“.... As regards the other guarantees to secure the mobilization advanced, noting that the guarantees are unconditional, should the guarantees be invoked, keeping in view the language of the letters invoking the guarantees the issue would be decided with reference to the claim of the appellant that it is armed with a document containing an admission by the respondent No.1 that the appellant had mobilized the site and thus there is fraud.”

10. It is also relevant to state that Alstom had also filed an application (being CM 41413/2016 in FAO(OS)(COMM) 83/2016) seeking a clarification regarding the aforesaid order. The said application was disposed of by an order dated 25.11.2016 whereby, the Division Bench had clarified as under:-

“9. Thus, we dispose of the application observing that the learned Single Judge shall decide OMP (I) (COMM) 405/2016 keeping in view the letter(s) invoking the bank guarantees, and we are told at the bar by learned senior counsel for respondent No.1 that the said respondent has invoked the guarantees to secure the advance payment and case of said respondent is that the fraud, if any, has been played by the appellant inasmuch as the said money was used as margin money with the bank for issuance of the bank guarantees. We do not comment on this because the learned Single Judge has yet to take a call. Needless to state, the law concerning invocation of the bank guarantees, including issues of fraud (of an egregious nature) and irretrievable injury, if raised, would be decided by the learned Single Judge. We reiterate, our decision only held

that the performance guarantees were prima-facie not unconditional. The learned Single Judge shall decide the application in light of the pleadings of the parties, the letters invoking the bank guarantees and needless to state the terms of the bank guarantees.”

11. In view of the above, it is clear that issues to be considered in this petition are limited; the principal controversy to be addressed is whether ZIPL has established a *prima facie* case of fraud warranting an order interdicting invocation and/or encashment of the BG and whether the letter invoking the BG is in terms of the BG.

12. The BG has been invoked by a letter dated 07.10.2016. In the said letter, Alstom has stated that the sub-contract was cancelled as ZIPL had failed to perform its obligations under the sub-contract and further failed to judiciously utilise the advance provided by Alstom.

13. A plain reading of the BG indicates that it is an unconditional bank guarantee as is plainly evident from its language. The relevant extract of the BG is set out below:-

“Now, We the undersigned, ICICI Bank Limited, being fully authorized to sign and to incur obligations and hereby declare that the said Bank will guarantee the Contractor the full amount of Rs. 1,41,00,000/- (Rupees One Crore Forty One Lakhs Only). We, ICICI Bank Limited, do hereby unconditionally, irrevocably and without demur guarantee and undertake to pay the contractor immediately on demand any or all monies payable by the Sub Contractor to the extent of Rs. 1,41,00,000/- (Rupees One Crore Forty One Lakhs Only) and as aforesaid without any demur, reservation, context, recourse or protest and/or without any reference to the Sub Contractor. Any such demand made by the Contractor on the Bank shall be conclusive and binding notwithstanding any difference between the Contractor and

the Sub Contractor on any dispute pending before any court, Tribunal, Arbitrator or any other authority. We agree that the guarantee herein contained shall be irrevocable and shall continue to be enforceable till the Contractor discharges this guarantee.”

14. The documents placed on record and referred to by Mr Bhushan *prima facie* indicates that ZIPL had mobilised the sites in question. It also appears that ZIPL had carried out excavations at a few sites. The minutes of the meeting held on 15.09.2016 under the Chairmanship of Director of DFCCIL also indicates that the sites had been mobilised. The relevant extract of the said minutes relied upon by ZIPL reads as under:-

“Question was put up to ASIPL representative by Director (DFCCIL) for the delay in the Design & drawings submission to SAI TYP SA and discussed regarding the progress of Slice 101, Slice 102 and Slice 103 and replied by ASIPL that they have completed the excavation work at Khurja, Daud Khan, Hathras, Bhadan and Layout at Makhanpur and Bhaupur has been done and excavation will be started at these stations by 19th September, he also confirmed that all the three slices are mobilized and already for starting the construction as soon as the drawings are finalized. SAI TYP SA also stated that they have already cleared the excavation drawings submitted by ASIPL for Khurja, Daud Khan, Hathras, Bhadan, Makhanpur, Kanchausi & Bhaupur. ASIPL also confirmed that they are starting the PCC at Bhadan Crossing Station on 17.09.16.

ASPIIL also confirmed that Architectural Drawing for OCC Site is ready for submitting and they will submit the same to SAI TYP SA on 15.09.16 and complete set with CD on 19.09.16.”

15. It is apparent from the above that Alstom had confirmed that the sites were mobilized and were ready for commencing construction.

16. It is also not disputed that ZIPL had also issued certificates as to expenses incurred and funds utilised from time to time. The initial statement issued indicates that bulk of the funds were utilized in providing margin money, bank commission and other charges and there is much merit in the contention that the said expenses could not be considered as having been utilised for mobilisation of sites. However, the statement of utilization of funds as on 16.09.2016 does indicate that sums in excess of the advance provided by Alstom had been spent on mobilisation of sites. Having stated the above, it is also necessary to state that there are disputes as to the utilization of funds as it has been earnestly contended on behalf of Alstom that the requisite infrastructure for carrying out the works was not set up at the sites. At this stage, it is not necessary to examine at length whether, in fact, the necessary infrastructure had been set up at sites and it would be safe to proceed on the basis that ZIPL had mobilised the sites to some extent and had also carried out some limited works.

17. Mr Chadha's contention that fraud had been played by ZIPL on Alstom by misutilizing the funds advanced is not persuasive. This is so because indisputably, the utilization statement had been furnished to Alstom as early as on 31.03.2016 and no objection appears to have been voiced by Alstom at the material time. Alstom objected to the utilisation of funds by its letter dated 26.08.2016 whereby, apparently, for the first time, it alleged that the initial mobilisation advance had not been utilized judiciously and, therefore, did not accede to ZIPL's request for release of the second instalment and called upon ZIPL to re-submit the request after incorporating the necessary correction and supporting documents.

18. However, notwithstanding the above, this Court is unable to readily accept that Alstom has played a fraud of an egregious nature as alleged. Notwithstanding that ZIPL may have mobilised the sites, it is not disputed that there has been a delay in execution of the works. The question whether the delay has been caused due to default on the part of Alstom or for the reasons beyond the control of ZIPL is a contentious one, which can only be decided after the parties have led their evidence.

19. There are several letters on record where Alstom had pointed out that ZIPL had delayed execution of the works. In its letter dated 24.05.2016, Alstom had referred to several earlier letters regarding non-performance of ZIPL's obligation under the sub-contract. Alstom had unequivocally alleged that ZIPL had failed to comply with the time schedule of the sub-contract as well as instruction issued under various notices. Alstom also alleged that ZIPL had failed to provide a catch up plan, which was the bare minimum requirement to demonstrate its intention to make good the delay. For the aforesaid reasons, Alstom had removed certain works from the scope of works awarded to ZIPL. It is material to note that ZIPL responded to the said letter on 26.05.2016 and did not controvert any of the allegations made by Alstom. At this stage, it is neither possible nor necessary to determine whether the allegations made by Alstom were correct or not but it is plainly apparent that there are disputes between the parties in relation to delayed performance of the sub-contract. It is possible that in the arbitral proceedings, ZIPL may be able to establish that delays were not on its part and the allegations made by Alstom are unwarranted; however, at this stage, it is not possible to accept that Alstom's claim that ZIPL was responsible for delays is in furtherance

of an elaborate fraud and the same has been raised for some ulterior motives.

20. Alstom terminated the sub-contract by its letter dated 16.09.2016. In that letter, Alstom referred to its earlier communications regarding delays and indicated that the sub-contract was terminated principally for two reasons: first, that ZIPL had failed to perform the contract satisfactorily and second that it had violated the code of ethics as it was alleged that ZIPL had offered an unethical inducement to the deputy team leader. ZIPL had refuted both the aforesaid allegations.

21. Mr Bhushan had also pointed out that subsequently the enquiry instituted with regard to the allegation of offering of unethical inducement, had exonerated ZIPL's representative of that charge. Therefore, the only question that remains is whether there were any delays on the part of ZIPL. As pointed out earlier, this is a contentious issue, which would require to be adjudicated in the arbitral proceedings.

22. At this stage, it is also relevant to refer to the contractual provisions. Clause 2.2 of annexure 2 to the sub-contract provides for advance payment, the relevant extract of which reads as under:-

“Advance Payment

- (i) The Contractor shall pay on written request by the Sub-contractor as Mobilization advance up to 10 (Ten) Percent of the contract price. The mobilization advance shall be released in two installment as under:
 - a) Up to (five) 5 percent on submission of performance security and commencement on mobilization process, and

- b) Up to (Five) 5 percent: On submission of details utilization of initial mobilization advance of 5% to the satisfaction of contractor.
- c) The Advance payment will be released submission of unconditional Advance Bank Guarantee for the amount equivalent to the component of advance payment requested by the Sub-contractor.
- d. Advance payment recovery: The advance shall be repaid through percentage deductions from subcontractor invoices. Deduction shall commence in the invoice in which the total of all certified payment (excluding the advance payment and deductions and repayments of retention) exceeds ten percent (10%) of the Subcontract amount. Deduction shall be made at amortisation rate of one quarter (25%) of the amount of each payment certificate (excluding the advance payment and deduction and repayments of retention) until such time as the advance payment has been repaid.
- (ii) The Subcontractor shall submit a Statement in 6 copies by the 25th of each month in accordance GC 14.3 of the Main Contract together with supporting documents which shall include the relevant report on progress in accordance with GC 4.21 of the Main Contract.
- (iii) The main contract includes a Schedule of Payments and the Subcontract price will be paid in accordance with GC 14.4. The Price Schedules relevant to the Subcontract are :
- Price Schedule 2.4 for Building Works and
 - Price Schedule 2.1.7 for E&M Works

The instalments quoted in the above mentioned schedules shall be the estimated subcontract values for the purposes of subparagraph (a) of GC 14.3 of the Main Contract.”

23. Clause 14.2 of the general conditions of the contract as applicable to the main contract also expressly provides that “*if the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure] (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer.*”

24. It was contended on behalf of ZIPL that clause 14.2 of the General Conditions of the main contract was not applicable as it was not specifically referred to in Annexure 2 to the Sub-contract and therefore, the bank guarantees furnished for securing the advance for mobilisation could not be recovered except by adjustment from interim payments. This contention is inconsiderable, first of all for the reason that the scheme of providing advance against securities as agreed in clause 14 of the main contract between Alstom and DFCCIL was incorporated in the Sub-contract; thus even though clause 14.2 is not specifically mentioned, the same would be implicit in the Sub-contract. More importantly, the entire purpose of releasing the advance against bank guarantees was to secure Alstom against non recovery of the said advance. Therefore to suggest that the bank guarantees cannot be invoked, even though the Sub-contract has been terminated and the question recovery by adjustment from interim payments does not arise, would render the provision of the said security illusory.

25. In the present case, the sub-contract has been terminated and, therefore, the question of Alstom recovering advances by deduction from interim payments does not arise.

26. In the aforesaid circumstances, Alstom has invoked the BG by its letter dated 07.10.2016. In its letter, Alstom had alleged that ZIPL had failed to perform its obligations as per the terms of the conditions of LOA dated 21.09.2015 and the sub-contract dated 24.09.2015 and the contract has been terminated. Alstom had further alleged that ZIPL had failed to judiciously utilise the amount advanced and had called upon ICICI Bank to encash the BG. As pointed out earlier, the BG is an unconditional one. The law relating to interdiction of Bank Guarantees is well settled and the BGs can only be interdicted in exceptional circumstances such as egregious fraud, special equities and irretrievable injury (See: **Svenska Handelsbanken v. M/s Indian Charge Chrome and Others**: (1994) 1 SCC 502, **Larsen & Toubro Limited v Maharashtra State Electricity Board and Others**: (1995) 6 SCC 68, **U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.**: 1988 (1) SCC 174 and **Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.**: AIR 1996 SC 2268).

27. Admittedly, the advance payment has not been recovered by adjustment against interim payments and even though ZIPL has, prima facie, established that it had mobilised the sites, Alstom cannot be interdicted from invoking the BG.

28. It is also well settled that invocation of Bank Guarantees cannot be interdicted solely on the ground that there are contractual disputes between the parties (See: **U.P. State Sugar Corporation v Sumac International**

Limited: AIR 1997 SC 1644, **Hindustan Construction Co. Ltd. v. State of Bihar & Ors.**: (1999) 8 SCC 436 and **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**: (2007) 8 SCC 110).

29. It is not necessary to re-visit the law regarding interdiction of Bank Guarantees as the same was discussed while disposing of ZIPL's petition in the earlier round- **Zillion Infraprojects Pvt. Ltd. v. Alstom Systems India (P) Limited and Anr.**: OMP(I)(COMM) 377/2016, decided on 21.09.2016.

30. In view of the above, the present petition and the pending application are dismissed. Interim order stands vacated. The parties are left to bear their own costs.

FEBRUARY 07, 2017
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VIBHU BAKHRU, J

