psv

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L.) NO.1465 OF 2018

TATA Projects Ltd. ..Petitioner
Vs.
Hazel International FZE & Ors. ..Respondents

Mr.Gaurav Joshi, Senior Advocate, Mr.Rohan Cama, Mr.Kaustav Talukdar, Mr.Kazan Shroff, with Mr.Vikash Kumar, and Mr.Bipin Mehta i/b. M/s.Lex Legal & Partners for Petitioner.
Mr.Vivek Kantawala with Mr.Amey Patil, Ms.Hetal Jobanpura i/b. M/s.Vivek Kantawala & Co. for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 21st NOVEMBER, 2018

P.C.:

Leave to amend to insert prayer clause (a-1). Amendment be carried out during the course of the day.

2. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") has been filed by the petitioner-Tata Projects Ltd. praying for the following reliefs:-

> "(a) that this Hon'ble Court be pleased to pass an Order of temporary injunction restraining the Respondent No.1 and/ or their officers, agents, servants, etc. from invoking the Performance Bank Guarantee bearing No.9004 IGPER002414 which is valid upto 19th April 2018 issued by the Respondent No.2 for an amount of Rs.44 Cr.
> (a-1) That this Hon'ble Court be pleased to pass an Order of temporary injunction restraining the Respondent No.1, its officers/agents/servants, etc. from encashing and/or acting

in furtherance of the invocation of the Bank Guarantee bearing no.9004IGPER002414 valid upto 19th April 2019.

(b) in the alternative to prayer (a) above, this Hon'ble Court be pleased to restrain the Respondent Nos.2 and 3 and/or their officers, agents, servants, etc. from making payments to the Respondent No.1 under the Performance Bank Guarantee bearing No. 9004 IGPER002414 which is valid upto 19th April 2018 for an amount of Rs.44 Cr.”

3. The petitioner was awarded a contract for construction of Chemical Storage Terminal at Hamriyah Free Zone, Sharjah, UAE, by the respondent No.1 on 20th February 2014. A contract document dated 2nd June 2014 was entered into between the parties. One of the conditions of the contract as contained in Clause 11.1 was requiring the petitioner to furnish a Performance Bank Guarantee equivalent to 10% of the contract price within 28 days from the signing of the contract. It is not in dispute that the petitioner had accordingly furnished a performance bank guarantee of the respondent No.2-Bank of Baroda dated 11 August 2014 for amount of US $ 6,500,000. It would be appropriate to note the relevant clause in the bank guarantee which provided for its invocation in case of default by the contractor. The said clause reads thus:-

> “In consideration thereof, we Bank of Baroda, Sharjah, Crystal Plaza Building, PO Box 1671, Sharjah, UAE hereinafter referred to as the Guarantor Bank <u>hereby irrevocably and unconditionally guarantee to pay to you on your written demand and without demur such</u> amount or amounts not exceeding the sum of USD 6,500,000 (US Dollars Six Million Five Hundred Thousand Only) 10 percent of Contract Price of USD 65,000,000 <u>on receipt of your written demand within 3 working days, stating that the Contractor defaulted the conditions of the Contract</u>.”
>
> (emphasis supplied)

4. It is not in dispute that as per the terms of the contract the petitioner was required to complete the contractual work within two years of the execution of the said contract. It is also not in dispute that there are already two extensions of one year each as granted by the respondent to enable the petitioner to complete the contractual work. A final extension was granted upto September 2018 which has expired. From the correspondence which is placed on record in the compilations submitted on behalf of the petitioner and the respondent No.1, it clearly appears that there were issues between the parties in regard to the contractual work in the context of completion of the project and the delay on the part of the applicant in completion of the work.

5. The case of the respondent no.1 is that there was a default on the part of the petitioner in completing the contractual work within the stipulated time. The respondent No.1 by its letter dated 17 November 2018 addressed to the respondent No.2 in terms of the relevant clause of the Performance Guarantee invoked the Performance Guarantee. The invocation letter addressed by respondent no.1 to respondent no.2-bank reads thus:-

> "This is with reference to the Performance Bank Guarantee No. 9004IGPER002414 (hereinafter "Bank Guarantee") dated August 11, 2014 for USD 6.50 Million and subsequent amendments thereafter issued in favor of Hazel International FZE. The validity of the Bank Guarantee is up to April 14, 2019.

> As Tata Projects Limited ("Contractor") have not fully complied with the terms of Contract Agreement dated June 2, 2014 and performance is not as Contracted. Therefore, pursuant to the term of the bank guarantee, we invoke the guarantee amount in full and hereby demand you to credit the said amount immediately in the below mentioned Bank account.
>
> Beneficiary.: Hazel International FZE
> Bank.: National bank of Fujairah
> Bank Address.: Duabi, UAD
> USD Account No.: 012000852927
> IBAN.: AE600380000012000852927
> SWIFT.: NBFUAEAF"

6. This petition was urgently moved before this court on 19 November 2018 at 03.00 p.m.. At the said hearing respondent No.1 through the Counsel on telephonic notice made an appearance. A copy of the petition was yet to be served on respondent No.1. In the circumstances, the Court directed the parties to maintain status quo as existing at 04.06 p.m. on 19 November 2018. The hearing of the petition was accordingly adjourned for today.

7. Mr.Joshi, learned Senior Counsel for the petitioner, in support of the reliefs as prayed in the petition would make the following submissions:-

(i) Relying on Clause 4.2(c) of the General Conditions of Contract it is submitted that invocation of the bank guarantee is not as per the said contractual condition. The said clause read thus:-

> "4.2 Performance Security:
> … … .

> The Employer shall not make a claim under the Performance Security except for amounts to which the Employer is entitled under the Contract in the event of:
> (a) … … …
> (b) .. … …
> (c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or"

It is submitted that the Clause 15.3 of the Contract provides that all notices under the agreement are required to be given in writing and the effective date of such notice or request shall be the date of actual receipt and that all notices are required to be sent by registered mail (acknowledgement due) or by hand or by facsimile of by reputed courier on the addresses which are specified. According to Mr.Joshi, learned Senior Counsel for the petitioner, the correspondence would make it clear that no such notice was issued by respondent No.1 which is the contracting party termed as employer in the contract. It is submitted that respondent no.1 therefore cannot make a claim under the Performance Guarantee as no opportunity is granted to the petitioner to remedy the default within 42 days on issuance of an appropriate notice.

(ii) It is next submitted that in fact the entire correspondence which has been entered with the petitioner alleging defaults is by a third party namely "Group Veritas". Mr.Joshi submits that this is clearly against the contractual terms as the contract itself defines "employer" and does not include 'Group Veritas' to be a party having any concern with the contract. The submission is that the case of default is not of respondent No.1, but is sought to be made out by a third party-Group Veritas. For this reason, the contention of respondent No.1 that there was default on the part of the petitioner in performing its contractual obligation, cannot be accepted.

(iii) The next submission is that even assuming that the correspondence/notices/letters of 'Group Veritas' are to be accepted to be valid, even otherwise as per Clause 4.2(c) of the General Conditions of Contract, time is available at the disposal of the petitioner to rectify the defects/defaults and invocation of bank guarantee prior to expiry of the said period, is not acceptable considering these terms of the contract.

(iv) In support of the above submission reliance is placed on the decisions in **Hindustan Construction Co. Ltd. Versus State of Bihar And Others**[1], **S.Satyanarayana v. West Quay Multiport (Private Limited)**[2], **Doshion Water Solutions Pvt. Ltd. Versus Rashtriya Chemicals & Fertilizers Ltd. & Ors.**[3].

8. On the other hand, Mr.Kantawala, learned Counsel for respondent

---

1 (1999) 8 Supreme Court Cases 436
2 (2015) 4 Bom CR 274
3 Arbitration Petition (L.) No.302 of 2016 dated 10.01.2017

No.1, has drawn my attention to the correspondence entered between the parties, and more particularly made from 21 July 2018, which is between respondent no.1 and the petitioner. It is submitted that repeatedly the petitioner was informed of the delay in the operation of the project and the various defaults, even during the extended period. These are letters dated 21 July 2018, 21 August 2018, 6 September 2018, 11 September 2018, 29 September 2018 and 28 September 2018. My attention is also drawn to an e-mail dated 13 October 2018 addressed by Nitin Kumar Didwania, Director of respondent No.1 to Mr.Anil Khandelwal of the petitioner which reads thus:-

> “I sincerely urge your indulgence/intervention in the said matter with respect to the completion of the project. The only mails we are receiving from your office is for the payment, this issue has been aptly discussed and decided, but for the progress we are yet again in default of the timelines and performance.
> Do take and update and oblige. I am happy to speak with you on Monday for the same and update the status. We are under tremendous stress and we will not bear and cost and consequences for no fault of ours.”

9. This e-mail was responded by the petitioner by its e-mail dated 24 October 2018 where item wise justification and the method and manner by which the issue would be resolved, has been informed. Finally on 3 November 2018, Nitin Kumar Didwania, Director of respondent No.1, by his e-mail addressed to the petitioner recorded that the petitioner has been in default of all the contractual obligations . Paragraph 2 of the said e-mail is required to be noted which reads thus:-

> "As per the schedule of the completion that was agreed upon by us in July, the same ought to be addressed in entirety by latest, end of August 2018. Barring a few of the issues that have indeed been addressed, lots remain pending yet. You are aware of the tremendous financial hardships that we have undergone for no fault of ours, in-spite of the same we shall wait for the completion of all the pending issues till 15th November, 2018. In event of failure hereon, we shall constitute it as a failure of your commitment/performance yet again for which we reserve our rights which please note."

10. Mr.Kantawala has thereafter drawn my attention to the e-mail dated 16 November 2018, of the Director of respondent No.1 informing Mr.Anil Khandelwal of the petitioner that as the respondent No.1 had not heard from the petitioner, it appeared that the pendency was not of any urgency to the petitioner and in the situation, the respondent No.1 shall take further action. It was stated that the final date of 15 November 2018 had also lapsed. It is submitted that accordingly respondent no.1 by its letter dated 17 November 2018 addressed to the bank has invoked the Performance Guarantee.

11. On the above backdrop, I have heard learned Counsel for the parties as also I have perused the record. From the correspondence as placed on record, the submission of Mr.Joshi that the entire correspondence in regard to non performance of the obligations by the petitioner was by third party namely the 'Group Veritas', cannot be accepted. This firstly for the reason that the various e-mails which are placed on record clearly indicate that they were addressed by Mr.Nitin

Kumar Didwania, Director of respondent No.1, which has not been disputed by the petitioner. It also appears that there was no objection and/or resistance by the petitioner to accept and respond these e-mails qua its contents in regard to the various issues which had arisen between the parties under the contract. In fact, it is clear that the petitioner responded to these e-mails and requested respondent no.1 to grant further time to resolve the issues.

12. Mr.Joshi's contention in regard to the invocation of the Performance Guarantee being bad for want of a notice by respondent no.1 of 42 days as contemplated by Clause 4.2 (c) of the General Conditions of Contract as a condition precedent for invocation, also cannot be accepted. This for the reason that it is not in dispute that the petitioner was already granted two extensions. Further the correspondence ensured between the parties from 21 July 2018 which includes even responses of the petitioner clearly indicates that there was sufficient notice to the petitioner of defaults having being committed by the petitioner in discharging its contractual obligations. In fact, the letters/e-mails which are addressed by the petitioner to the respondents clearly indicate acceptance of the various defaults and the works to be performed and its non completion.

13. In any event when it comes to the invocation of the performance guarantee, the Court would strictly go by the terms of the bank guarantee which is independent contract between the bank and the respondent No.1. It can be clearly seen that the Performance Guarantee is irrevocable and unconditional. As already noted there is no ambiguity on the terms of the bank guarantee which clearly stipulates that the bank becomes liable to pay the amount as stipulated under the bank guarantee on a written demand of three working days stating that the contractor has defaulted the conditions of the contract. Having already noted the invocation letter dated 17 November 2018, it can be seen that the invocation is fully within terms of the bank guarantee.

14. Notably no case of a fraud to the knowledge of the bank or any case of the irretrievable injustice was argued on behalf of the petitioner. The law in regard to the invocation of bank guarantees and the scope of interference by the Court to injunct such invocation, is well settled, as can be seen from the decisions as relied upon by Mr.Joshi. In the facts of the present case, these decisions surely do not support the petitioner and in fact assist respondent no.1.

15. In the above circumstances, in my considered opinion, no case is made out to grant any relief in this petition. The petition is accordingly

rejected. No costs.

16. At this stage, Mr.Joshi, learned Counsel for the petitioner, makes a request to continue the ad-interim order granted on 19 November 2018. In the facts of the case, the request is rejected.

[G.S. KULKARNI, J.]