

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No. 3928 of 2018
Date of Decision: 19.2.2018**

M/s Jyoti Build Tech Pvt. Ltd.

.....Petitioner

v.

Punjab Water Supply and Sewerage Board and others

.....Respondents

CORAM HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

Present:- Mr. Sunil Chadha, Senior Advocate with
Mr. Dheeraj Mahajan, Advocate, for the petitioner

RAKESH KUMAR JAIN, J (Oral) :

The petitioner has challenged the proceedings of the seventh sitting of the Arbitral Tribunal held on 3.2.2018 at Chandigarh called the Procedural Order No. 7.

In short, the petitioner company entered into an agreement with the Punjab Water Supply and Sewerage Board (for short 'the Board') on 26.12.2011 to undertake the construction of Interceptor Sewers, Trunk Sewers, Lateral Sewers and House Connection for North Zone Sewers, Amritsar (JICA-ASP-004). Section 4 of the said agreement deals with the provisions for disputes and arbitration. Clause (viii) of Section 4 of the agreement read as under :

“It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a 'deposit-at-call' for ten percent of the amount claimed, on a schedule bank in the name of the

Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded **w.r.t.** the amount claimed and the balance, if any, shall be forfeited and paid to the other party.”

Since there was a dispute between the parties, therefore, an application under Section 11 of the Arbitration and Conciliation Act, 1996, (for short 'Act of 1996') for appointment of the Sole Arbitrator was filed as Arbitration Case No.14 of 2017. The said application was disposed of on 14.7.2017 after appointment of the Sole Arbitrator to adjudicate upon the disputes and difference between the parties. The petitioner set up a claim before the Arbitrator of about Rs.140 crores. During the proceedings, respondent No.1 raised an objection that the petitioner has not complied with Clause (viii) of Section 4 of the agreement as it did not furnish “deposit-at-call' for ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator, by his official designation”. On the said objection, the Arbitrator, in its second sitting passed the order on 18.11.2017 asking the petitioner to deposit 10% of the amount claimed in the form of Fixed Deposit Receipt in the name of the Arbitrator from a nationalized bank. The petitioner sought a review of the order dated 18.11.2017, which was dismissed on 23.11.2017 in the third sitting. This led to the filing of CWP No. 27381 of 2017 at the instance of the petitioner, which was disposed of vide order dated 7.12.2017, which read as under :

*“Learned Senior Counsel has relied upon the judgment in the matter of **Bigla Kachhap @ Dilip Kachhap and others v. State of Jharkhand and others, 2002 (5) BLJR 528**, wherein a Division Bench of the Jharkhand High Court has held that furnishing of a bank guarantee gives same protection as deposit of cash or fixed*

deposit. Learned Senior Counsel has argued that the petitioner is willing to present a bank guarantee of 10% of the claimed amount and would not object to a further condition being imposed that the bank guarantee may not be invoked by the petitioner.

In my opinion, it would be appropriate if this issue is also decided by the Arbitrator at the first instance.

Learned Senior Counsel states that he would have no objection in moving an application before the Arbitrator but there is a possibility that the deadline of 11th December, 2017 set by him may not be met and the claim of the petitioner may be rejected on this ground.

I am sure that the Arbitrator would give an appropriate opportunity to the petitioner to make the deposit in terms of any order which may be passed.

Petition stands disposed of.

Copy of this order be given to the counsel for the petitioner under the signatures of the Bench Secretary.

Since the main case has been decided, the pending civil miscellaneous application, if any, also stands disposed of.”

Since by the aforesaid order, this Court had observed that the petitioner may offer the bank guarantee instead of fixed deposit receipt of 10% of the amount claimed, the matter was placed before the Arbitrator in the 5th sitting in which, the Arbitrator by his order dated 26.12.20017 allowed the petitioner to furnish the bank guarantee in the name of the Arbitrator from any schedule bank at Amritsar. In the said order, the time was also fixed for furnishing the bank guarantee i.e. 10.1.2018 and it was made clear that the schedule bank shall not release the amount to either party. It is further ordered that the bank guarantee shall remain in force till 31.12.2018 and making it clear that in case the claimant fails to furnish the bank guarantee as directed, the statement of claim shall stand rejected. In the 6th sitting of the Arbitral Tribunal held on 15.1.2018, the amount of

Rs.140 crores was reduced to Rs.80 crores on the asking of the petitioner. Thus, the petitioner was obliged to offer the bank guarantee on the schedule bank only to the extent of Rs.8 crores as against Rs.14 crores, which was the original claim of the claimant and the time was extended upto 31.1.2018, about which a certificate has been issued to the following effect :

“This is to certify that Chartered Mercantile M.B. Ltd. is Financial Institution registered with RBI Reg. No. DNBC 38/DG(H)-77 with the department of Financial Companies RBI and TC/S-21/0997.”

The said Financial Institution forwarded the bank guarantee of Rs. 8 crores to the Sole Arbitrator vide its letter dated 2.2.2018 with reference to their letter No. CM-18-19-CMLK/2017. The extract of the letter read as under :

“We are forwarding herewith the B.G. No. CM-18-19-CMLK/2017 of Rs.8,00,00,000/- issued by us on behalf of M/s Jyoti Build Tech Pvt. Ltd.”

The bank guarantee is also on record in which it is specifically mentioned that it would be irrevocable and shall not be cancelled without written permission of the Sole Arbitrator. Thereafter, the Arbitral Tribunal in its 7th sitting held on 3.2.2018, passed the impugned order which is reproduced as under :

“The claimant was, in terms of clause (viii) in Section 4 of the agreement, required to make a “deposit-at-call” for 10% of the amount claimed on any schedule bank in the name of the Arbitrator. Time was granted to the claimant to do the needful by January 31, 2018 on payment of Rs.10,000/-as costs to the learned counsel for the respondents. When the case was taken up on January 31, 2018 the claimant filed another application seeking further extension of time to do the needful. I dictated an order declining the request of the claimant but before signing that order I felt that lest it causes injustice to the claimant, I should grant one more opportunity to it to

furnish the bank guarantee. Giving another opportunity to the claimant could only enhance the cause of justice and can, in no case, prejudice the cause of the respondents. An unsigned copy of the order is on the record and the parties and their learned counsel were informed by mail on February 1, 2018 to appear before me today. Today, the learned counsel for the claimant has brought a bank guarantee in my name from one Chartered Mercantile M.B. Ltd., Lucknow, which is not a schedule bank. It appears to be a non banking financial institution. The clause in the agreement requires the claimant to make a 'deposit-at-call' on any schedule bank. For this reason the bank guarantee that is furnished today is not accepted and the original is returned to the claimed though a copy of the same is kept on record. The claimant should now furnish a bank guarantee on any schedule bank at Amritsar on or before February 21, 2018 for 10% of the amount claimed failing which I shall pass an order on the lines of the unsigned order of January 31, 2018. This will be subject to payment of another sum of Rs.20,000/-as costs to be paid to the learned counsel for the respondents. It is made clear that costs of Rs.10,000/-awarded earlier shall also be paid in addition to the amount of costs now awarded. The claimant has been directed to furnish the bank guarantee on any schedule bank at Amritsar because Amritsar is the place of arbitration where the cause of action has arisen.

In the meantime, the respondents may, if so advised, file their amended statement of defence to the amended statement of claim with a copy to the learned counsel for the claimant. This should be done on or before February 14, 2018.

The case will come up on February 21, 2018 for the framing of issues. The learned counsel for the parties should bring with them their proposed issues.

As agreed to by the learned counsel for the parties, the case will be taken up at 9 a.m.”

The Arbitrator did not accept the bank guarantee offered by the petitioner of a Financial Institution on the ground that it has not come from a schedule bank.

Learned counsel for the petitioner has submitted that the impugned order passed by the Arbitrator is erroneous and inequitable. It is submitted that though it is provided in Clause (viii) of Section 4 that the 'deposit-at-call' shall be an amount on a schedule bank and also in the order passed by the Arbitrator in its 5th sitting, after taking into consideration the order passed, that instead of Fixed Deposit Receipt, it could be a bank guarantee but on a schedule bank at Amritsar. The bank guarantee offered by the petitioner was of a financial institution. It is sought to be argued that Financial Institution has the trappings of the bank and in this regard he has referred to Sections 17 (2)(a) and (4 BB) of the Reserve Bank of India Act, 1934 (for short 'the Act'). The aforesaid provisions are also reproduced as under :

*“17. **Business which the Bank may transact** – The bank shall be authorised to carry on and transact the several kinds of business hereinafter specified, namely -*

(1) xxx xxx xxx

(2) (a) the purchase, sale and rediscount of bills of exchange and promissory notes, [drawn on [and payable in India]] and arising out of bona fide commercial or trade transaction bearing two or more good signatures, one of which shall be that of a scheduled bank [for a State Co-operative bank] [or any financial institution, which is predominantly engaged in the acceptance or discounting of bills of exchange and promissory notes and which is approved by the Bank in this behalf] and maturing -

(i) in the case of bills of exchange and promissory notes arising out of any such transaction relating to the export of goods from India, within one hundred and eighty days, and

(ii) in any other case, within ninety days, from the date of such purchase or rediscount exclusive of days of

grace]”

3 xxx xxx xxx

4BB. *The making to any financial institution notified by the Central Government in this behalf, of loans and advances -*

(a) repayable on demand or on the expiry of fixed periods not exceeding ninety days from the date of such loan or advance, against the securities of the central Government or of any State Government, or

(b) repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance, against securities of the Central Government or of any State Government, of any maturity, or against bonds and debentures issued by that financial institution and guaranteed by the Central Government or any State Government, and maturing within a period not exceeding eighteen months from the date of such loan or advance

Provided that the amount of loans and advances granted to a financial institution under sub clause (b) shall not, at any time, exceed in the aggregate sixty per cent of the paid up share capital thereof.”

He has further submitted that since the financial institution is registered with the Reserve Bank of India, therefore, Section 21 of the Banking Regulation Act, 1949 would also come to his rescue. He also referred to a decision of the Madhya Pradesh High Court in the case of **“Smt. Lata Agrawal v. Indian Oil Corporation and others, 2014 (51) RCR (Civil) 876”** in order to submit that there is nothing defined in the agreement as to what is the 'scheduled bank'. Therefore, it is submitted that the bank guarantee given by the financial institution which has the trappings of the bank, should have been accepted by the Arbitrator, otherwise in the absence of accepting the bank guarantee offered by the petitioner, the petitioner would loose his case as his claim would not entertain.

I have heard learned counsel for the petitioner and perused the record with his able assistance.

The dispute in this case is only in regard to the furnishing of “deposit-at-call” to the extent of 10% of the amount claimed. The Arbitrator has declined to accept the bank guarantee offered by the petitioner from a financial institution which is, admittedly, not a scheduled bank but as per the petitioner it has the trappings of the bank, for which he has relied upon the provisions of the RBI Act and the Banking Regulations. Since the parties in dispute entered into an agreement on 26.12.2011 and Clause (viii) of Section 4 is the part of that agreement, therefore, both the parties are bound by the terms of the agreement for all intents and purposes. This Court is required to interpret the provisions of Clause (viii) of Section 4 of the Agreement for the purpose of deciding as to whether the bank guarantee offered by the petitioner of the financial institution should be accepted by the Arbitrator?

As a matter of fact, Clause (viii) of Section 4 of the agreement does not talk of either of the 'FDR' or the 'bank guarantee'. It only talks of 'deposit at call' to the extent of 10% of the amount claimed but on a scheduled bank in the name of Arbitrator. The word 'Schedule bank' has been consciously used by the parties in the agreement, which has rightly not been ignored by the Arbitrator at any point of time. The Arbitrator asked the petitioner to furnish the FDR but in pursuance of the order passed by this Court on 7.12.2017, the Arbitrator agreed to accept the bank guarantee for the purpose of 'deposit at call' which should be furnished from any schedule bank at Amritsar. The petitioner, admittedly, has not furnished the bank

guarantee from the scheduled bank rather bank guarantee has been submitted from a financial institution which do not satisfy the provisions of Clause (viii) of Section 4 of the agreement to which both the parties are bound. Therefore, the reliance placed by the petitioner upon the provisions of RBI Act, referred to above, are of no help to the petitioner for the purpose of ignoring the mandatory provisions of Clause (viii) of Section 4 of the agreement in respect of the furnishing of 'deposit at call' on a scheduled bank.

The word 'bank' used by the parties is sine qua non for the parties. The petitioner has failed to furnish the bank guarantee from a scheduled bank as it is submitted before me that the earlier bank guarantee to the tune of Rs.28,95,00,000/-has already been forfeited by the respondents. Thus, in my considered opinion, there is no error committed by the Arbitrator in declining the prayer of the petitioner in accepting the bank guarantee furnished by a financial institution.

With these observations, the present petition is found without any merit and thus, dismissed. No costs.

(RAKESH KUMAR JAIN)
JUDGE

19.2.2018
Ashwani

Speaking/Reasoned	Yes/No
Reportable	Yes/No