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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th February, 2018

Pronounced on: 01st March, 2018

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O.M.P.(I) (COMM.) 90/2018

ATLANTA LIMITED

..... Petitioner

Through : Ms.Meenakshi Arora, Sr Advocate
with Mr.Chirag M Shroff and
Ms.Neha Sangwan, Advocates.

versus

NATIONAL HIGHWAYS & INFRASTRUCTURE & ANR

..... Respondents

Through : Mr.Rajiv Bansal, Sr Advocate with
Mr.Amit Mishra, Mr.Gaurav
Mahajan, Mr.Kabir Shankar Bose,
Mr.Mohit Singh, Mr.Ritesh Bajaj
and Ms.Vidhi Gupta, Advocates
for respondent No.1.
Mr.Akhil Sibal, Sr Advocate with
Ms.Jahnavi Mitra, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') has been filed by the petitioner with the following prayers:-

“(a) Pending, hearing and disposal of the present petition, Restrain the Respondent No.1 and their agents, servants, employees, assignees from acting upon the letter of the

Respondent dated 23.02.2018 and/or invoking the Performance/mobilization Security of the Petitioner to the tune of 46.62 crores and restrain Respondent No.3 to 5 from honoring invocation of the said BG of the Petitioner and;

(b) By an order or direction, stay the effect and operation of the letter/communication dated 23.02.2018 issued by Respondent No.1 during the pendency of the present petition;

(c) Direct the Respondent Authority to consider the bids of the Petitioner for further projects as responsive, pending resolution of disputes by the Arbitral Tribunal and this Hon'ble Court;

(d) Restrain the Respondent Authority from taking any other coercive action pending resolution of disputes by the Arbitral Tribunal and this Hon'ble Court;

(e) Grant any other relief as is deemed fit and proper in the facts and circumstances of the instant case."

2. On 11.02.2016 an agreement between the petitioner and respondent No.1 was signed for four lanning of end of Morpan Bypass (KM 561.700) to Bogibeel Junction near Lapetkata (KM 580.778) of NH-37 till the State of Assam under SARDP-NE, Phase A Project - the length of the stretch running up to 19.008 KMS. The grievance of the petitioner is it was to get 90% of total land free from all obstructions by a certain date but the respondent No.1 took long time to handover such land and further had threatened to terminate the contract time and again for which the petitioner had approached this Court twice earlier. It is alleged besides handing over obstruction-free land to the petitioner, there was certain utilities which need to be shifted from both sides of the road

for which too the petitioner was made to make the payments to such utility shifting contractors for removing and/or installing those, though such payments were to be reimbursed by respondent No.1. It is alleged much payments were made to such contractors but the respondent No.1 failed to reimburse such payments in time and it all led to the delay in project for which the petitioner cannot be held solely responsible; hence it is alleged the termination of the contract by the respondent No.1 be held illegal and respondent No.1 be restrained to encash various bank guarantees viz performance and mobilisation advance guarantees given by the petitioner to respondent No.1.

3. The learned senior counsel for the petitioner referred to the history of the case viz the termination of the contract by respondent No.1 vide its termination letter dated 08.06.2016 and approaching this Court by the petitioner on 14.06.2016 vide OMP (I) (COMM) No.266/2016, which was disposed of by this Court on 17.06.2016 wherein the counsel for respondent No.1 submitted, on instructions from Mr.K.G.Bhatt, that *without prejudice to the rights of the respondent No.1 the impugned termination notice shall not be acted upon and recourse to law would be taken as per the EPC Agreement in question.* The said petition was disposed of as infructuous.

4. Later, admittedly, a survey was conducted and vide letter dated 12.08.2016 91.88% land was made available encroachment free under subject package on 09.08.2016 in compliance of the provisions of clause No.4.1.3.(a) and 8.2.1 of the contract agreement for starting of the work. The appointed date for the subject package was fixed as 10.08.2016.

5. Again some disputes arose between the petitioner and the respondents. The petitioner again approached this Court vide OMP (I) (COMM) No.244/2017 wherein this Court vide order dated 01.08.2017, records a settlement between the parties as under:-

“5. For the purposes of completion, the terms and conditions of settlement as recorded in clauses 3(a) to 3 (g) are reproduced hereunder:-

‘3(a) Atlanta Limited will take full responsibility for shifting the obstructing utilities as per Contract Clause 9.2 and National Highways & Infrastructure Development Corporation Limited (NHIDCL) will extend necessary assistance wherever possible for accomplishing the same.

(b) It is stated by Atlanta Limited that Milestone-I shall be achieved by 10.10.2017; Milestone-II shall be achieved by 22.02.2018 and the Project will be completed by 31st May, 2019.

(c) Atlanta Limited has submitted a revised Programme vide Atlanta Letter No.AL/ASSAM/MB/16-17/1673 dated 06th July, 2017 and as per Contractual Provisions. NHIDCL shall seek the recommendations of the Authority’s Engineer M/s Voyants Solution Private Limited on revised programme and the resources to be deployed by Atlanta to achieve the committed dates.

(d) Based on the categorical assurance by the Contractor to take up all works in right earnest, including but not limited to the Shifting of Obstructing Utilities, Site Clearances and the Project Works at a rate commensurate with achievement of the

Milestones by deploying the equipments and resources. NHIDCL will observe the progress of work upto 22nd February, 2018 (2nd Milestone) and the intention to Termination Notice issued by NHIDCL to the Contractor will be kept in abeyance till that date and will not be acted upon.

(e) The Contractor agrees to mobilize necessary equipments and funds for the progress of the project.

(f) Atlanta Limited has submitted for extension of time vide letter dated 03rd July, 2017. It is agreed between the parties that the authority shall consider the same in view of the recommendations of the Authority's Engineer.

(g) Both the parties are agreeable that in view of the above, the captioned petition shall be withdrawn by M/s. Atlanta Limited, by submitting the copy of these minutes before the Hon'ble Court."

6. It is argued though the respondent No.1 had agreed to reimburse the amount spent on shifting of different utilities and also promised to look into the request of the petitioner for extension of time, but did not cooperate with the petitioner on any count. Though the learned senior counsel for the petitioner also referred to a letter dated 13.09.2017 written by the Authority's Engineer to the petitioner asking the petitioner to clear dues of the utility shifting contractors but since the reimbursement was not made in time, such money could not be paid.

7. Alternatively it is argued the mobilisation advance given by respondent No.1 was only ₹ 25.20 Crores out of which an amount of ₹1.50 Crore has already been returned and at best the respondent No.1

can only encash the advance mobilisation guarantees only to an extent of ₹23.70 Crores and anything encashed beyond this amount would tantamount to fraud upon the petitioner.

8. The learned senior counsel for the petitioner referred to page No.8 of the petition (list of dates) wherein the details of five bank guarantees are given. It is alleged the bank guarantees listed at serial numbers 4 & 5 have since been encashed and whereas the remaining bank guarantees at serial numbers 1 to 3 are yet to be encashed.

9. The petitioner in para No.3 of petition asserts:-

“3. The Petitioner states that the act of Respondent to invoke Performance Bank Guarantee to the tune of Rs.18,90,00,000/- and Mobilization advance Bank Guarantees to the tune of Rs.27,72,00,000/- (Rs.Twenty Seven Crores Seventy Two Lacs Only) totaling to Rs.46,62,00,000/- (Rupees Forty Six Crores Sixty Two Lakhs Only) is premised on completely false, frivolous and fraudulent grounds. It is pertinent to state that the 10% mobilization advance for the contract value of Rs.25.2 Crores availed by the Petitioner is only Rs.25,20,00,000/-. Whereas the Bank Guarantee furnished is for an amount of Rs.27,72,00,000/- i.e. 10% extra in terms of clause 19.2.2., 19.2.3 and 19.2.4 of the Agreement, which interalia stipulated for furnishing of Guarantee from a Bank for an amount equivalent to 110% of the advance installments.

The said Bank Guarantees are annexed hereto and marked as ANNEXURE Pl-(colly).

The present dispute pertains to work on a stretch of a highway in Assam, i.e. Four

Laning of End of Moran Bypass (km.561.700) to Bogibeel Junction near Lapatkata (km580.778) of NH-37 in the State of Assam under SARDP-NE, Phase A Project - the length of the stretch running up to 19.008 kms.

The Petitioner further respectfully submits that it has invested substantial efforts, money, machineries and resources in the said project so far and there has been significant delay on part of the Respondent in complying with its obligations of the terms of the agreement i.e. clauses 4.1.3 (a), 4.1.4, 4.2, 8.1, 8.2, 8.4, 9.2 and 10.5 of the EPC Agreement dated 11.02.2016, which has consequently delayed the construction work.”

10. Hence, it is argued considering the conduct of respondent No.1 in terminating the contract twice and not releasing the encroachment free land in time despite settlement; coercing petitioner to pay for shifting of utilities to different utilities shifting contractors without extending the time for completion of contract shows the equities are in favour of the petitioner and against the respondents and hence the petition be allowed.

11. It is also argued per termination notice dated 23.02.2018, the respondent No.1 had though alleged only 6.44% of the work has been completed, but the petitioner has given bills for 16% of the work till 21.02.2018 hence not only the termination is illegal, but also per decision in *M/s Nangia Construction (India) Limited vs International Airport Authority of India and Ors* DRJ 1992 (22) 379, the respondent No.1 can only encash the mobilisation advance guarantees to the extent of its

outstanding viz. ₹23.70 Crores till date and not the entire amount of the mobilization advance bank guarantees of approx ₹27.72 Crores.

12. Heard arguments of both the learned senior counsels. Admittedly, the mobilisation advance has been given by respondent No.1 to petitioner for executing the contract but since the petitioner had failed to perform its work within the stipulated timeframe the respondent No.1 was well within its rights to terminate the contract and to encash the bank guarantees. Though the petitioner avers an amount of ₹1.50 Crore towards mobilisation advance stood repaid as also the interest till April, 2018 but qua performance guarantee the dues of more than ₹8.00 Crores are allegedly to be recovered from the petitioner.

13. Moreso clause No.(d) (*supra*) of the settlement per order dated 01.08.2017 records *the categorical assurance by the contractor to take up all works in right earnest including but not limited to the shifting of obstructing utilities, site clearance and the project work at a rate commensurate with the achievement of the milestones by deploying the equipments and resources. The respondent No.1 to observe the progress of work upto 22nd February 2018 (2nd milestone) and the intention to termination notice issued by the respondent No.1 to the contractor will be kept in abeyance till that date and will not be acted upon.*

14. Now, the Authority Engineer surveyed the work and found only 6.64% could be complete as against 30% of the work till 22.02.2018, hence termination notice which was kept in abeyance was again sent and it gave the right to respondent No.1 to encash the bank guarantees, being *unconditional* ones where the respondent No.1 was not even liable to

plead *the petitioner being in default*. Thus, in view of the nature of guarantees, the petitioner had no case. Admittedly, it was the primary duty of the petitioner to make payments to Utility Shifting Contractors and then to submit the bills and only upon certification by the Authority Engineer, such bills could be reimbursed. Though the request for extension of time was submitted by the petitioner vide its letter dated 03.07.2017, but admittedly it was to be considered only in view of the recommendations of the Authority's Engineer.

15. However, the letters dated 11.11.2017 and 22.02.2018 written by the Authority's Engineer show the petitioner had miserably failed to uphold the commitments made to achieve milestone-I (10% Progress) by 10.10.2018 and milestone-II (30% Progress) by 22.02.2018. It was also noted by the Authority's Engineer that status of progress as on 22.02.2018 was 6.64% instead of 30%. It was only on the basis of such letters dated 11.11.2017 and 22.02.2018 the contract was terminated and the bank guarantees were sought to be encashed.

16. Admittedly respondent No.2 was appointed to oversee the implementation of this contract. The two communications dated 01.02.2018 and 22.02.2018 written by the respondent No.2 to the petitioner points to the failure of the rate of progress to commensurate with the achievement of the milestone as agreed in the settlement arrived at and recorded in the order dated 01.08.2017 of this Court (*supra*). Admittedly 91.88% of the land was handed over to the petitioner on 10.08.2016 but by the end of the February 2018 - 61% of the time of the contract had elapsed but only 6.64% of the financial progress was made.

17. Though in its letter dated 13.02.2018 the petitioner still talks of delay of project due to reasons stated above and poaching of skilled manpower to be a reason for extension of time but in its letter No.714 had also admitted *the financial progress is more than 10% in SPS 5 with SPS 6 to be submitted on certification of SPS 5 and their progress shall be more than 18% by end of February 2018 - milestone-II*. Thus, though the petitioner disputes the progress is 6.64% by February 2018, but in its letter dated 13.02.2018 had admitted its progress shall be more than 18% by 22.02.2018, thus admittedly it could not achieve the target of 30% as settled between the parties. The respondent No.2 vide its letter dated 21.02.2018 had responded to the letter dated 13.02.2018 of the petitioner and denied all the assertions and reiterated the petitioner had miserably failed to achieve the target in time.

18. Moreso the termination clauses No.23.1 and 23.6.1 of the agreement in question notes as under:-

“23.1 Termination for Contract default.

23.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the "Contractor Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:- xxxxxx

23.6. Termination Payment

23.6.1 Upon Termination on account of Contractor's Default under Clause 23.1, the Authority shall:

(a) encash and appropriate the Performance Security and Retention Money, or in the event the Contractor has failed to replenish or extend the Performance Security, claim the amount stipulated in Clause 7.1.1, as agreed pre-determined compensation to the Authority for any losses, delays and cost of completing the Works and Maintenance, if any;

(b) encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment and interest thereon; and

(c) pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be in accordance with the provisions of this Agreement.”

19. The termination clause makes it clear upon termination on account of contractors' default the respondent no.1 shall have the right to encash the bank guarantees.

20. Undisputedly, the bank guarantees are unconditional as is noted in clause No.1 of the documents viz.:-

“The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Contractor's obligations during and under and in accordance with

the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Contractor such sum of sums up to an aggregate sum of the guarantee amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.”

21. Thus, considering the correspondence relied upon by both the parties prima facie put the petitioner at default and considering the terms of settlement as noted in order dated 01.08.2017 whereunder the performance of the petitioner was admittedly to be reviewed by respondent no.1 as on 22.02.2018 and also its request for extension of time was only to be considered at the advice of the Authority's Engineers and further considering the nature of bank guarantees and dues of respondent No.1 qua the petitioner allegedly being more than the amount of the guarantees, the prayer sought for by the petitioner cannot be granted.

22. Even otherwise, the law on the issue of bank guarantees is well settled and is reiterated in *Himadri Chemicals Industries Limited vs Coal Tar Refining Company* (2007) 8 SCC 110 :-

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the

encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.”

23. Also in *Sabarkantha Annuity Pvt. Ltd. vs. NHAI* 2017 SCC Online Del 11666 the Court held:

“10. Moreso, the law qua encashment of bank guarantee is well settled. It being an independent contract and lest any fraud or irretrievable loss to the petitioner is alleged no stay can be granted by the Court. The merits and the terms of contract are irrelevant for invoking of the bank guarantees. At this stage one can only go through the terms of the bank guarantee to find if any fraud was committed while entering into such contract and nothing beyond.”

24. Thus, in view of the facts and circumstances no case is made out for allowing the prayers of petitioner. The petition is dismissed.

25. Consequently, the interim order dated 25.02.2018 stands vacated and the respondents No.3 to 5 are at liberty to proceed as per rules.

26. No order as to costs.

YOGESH KHANNA, J

MARCH 01, 2018

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