$~54

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

\+ **W.P.(C) 2006/2017 & CM No. 8914/2017**

M/S JASMINE BUILDMART PVT. LTD.
& ANR ..... Petitioners

Through: Ms Bina Gupta and Ms Surbhi Kapoor, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD.
& ANR ..... Respondents

Through: Ms Vibha Mahajan Seth, Mr Laimon Rani Boro, Advocates with Mr Sanjay Kumar, Law Officer.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **31.07.2018**

1. The petitioner has filed the present petition, *inter alia,* praying as under:-

> "(a) issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate Writ, Order of direction under Article 226 of the Constitution of India ordering and directing the Respondent No. 1 to forthwith withdraw the impugned communication dated 28.02.2017 issued by the Respondent No.1 and/or issue a Writ of Certiorari quashing the letter dated 28.02.2017; and/or
>
> (b) issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate Writ, Order of direction under Article 226 of the Constitution of India directing the Respondent No. 1 to consider the request for clarification on the position of the Respondent, on developing a multiplex and communicate their decision

in writing before seeking further compliances of the tender conditions; and/or

(c) issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate Writ, Order of direction under Article 226 of the Constitution of India restraining the Respondent No.2, whether through its servants, agents, officers or otherwise howsoever, from encashing the bank guarantee issued by it on 30.08.2016 to the Respondent No.1; and/or

(d) issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate Writ, Order of direction under Article 226 of the Constitution of India to Respondent No. 1 directing them to extend the period of deposit of the Interest Free Security Deposit to 31.05.2017 as requested by the Petitioner."

2. On 26.07.2016, respondent no.1 (hereafter 'DMRC') issued a Request for Proposal (RFP) inviting bids for "Property Development at Dwarka Sec-21 MRTS Station of Line-3 & Airport Xpress Line" (hereafter 'the Project'). In terms of the tender conditions, the bidders who were interested in development and lease of the Project were required to make an offer indicating the lease rentals offered by them as well as upfront fee.

3. Pursuant to the RFP, the petitioner submitted its bid on 15.09.2016 alongwith the tender security in the form of the bank guarantee for a sum of ₹58,50,000/-. In terms of its bid, the petitioner agreed to pay an upfront fee of ₹5,00,00,000/- and further agreed to pay monthly lease at the rate of ₹873/- per square meter for a lease period of 25 years. The tender was opened on 16.09.2016. The petitioner's bid was accepted and a Letter of Acceptance (LOA) was also issued on 10.11.2016.

4. In terms of the tender conditions, the petitioner was required to arrange a performance security equivalent to one year's lease rentals. This worked out to ₹26,43,09,480/-.

5. It is stated that thereafter, the petitioner made efforts to arrange for the performance security in the form of a bank guarantee for a sum of ₹26,43,09,80/-. However, the petitioner was unable to secure the same. The petitioner claims that this was on account of demonetization of the high denomination currency notes. In the circumstances, on 24.11.2016, the petitioner sought extension of time for depositing the security. By letter dated 29.11.2016 DMRC informed the petitioner that the said request would be considered. However, it appears that the petitioner did not accept the petitioner's request. The petitioner claims that on 06.02.2017, it was ready to deposit the amount of the upfront fee; however, the same was not accepted.

6. By a letter dated 28.02.2017 (which is impugned herein), DMRC invoked the bank guarantee, which was tendered by the petitioner as a bid security alongwith its bid.

7. The contract awarded to the petitioner has been terminated and DMRC has already awarded the contract to another entity.

8. The relief sought by the petitioner, essentially, relate to invocation of the bank guarantee furnished by the petitioner as a bid security and further directions for continuing with the contract. It is clear that the reliefs sought for by the petitioner for extension of time for depositing the performance security and for continuing the contract do not survive. The contract has been terminated and has been awarded to another entity and, therefore, no

relief in that regard can be granted.

9. Insofar as the relief regarding interdiction of the bank guarantee is concerned, by an order dated 03.03.2017, this had restrained respondent no.2 (Corporation Bank) from encashing the bank guarantee and transferring the amount to DMRC. It was further directed that in the event the transfer had already been initiated, DMRC would keep the amount in a no lien account subject to further orders of this Court. The said interim order was passed as this Court was of the *prima facie* view that the letter dated 28.02.2017 issued by the DMRC for invoking the bank guarantee was not in terms of the bank guarantee.

10. This Court is informed that DMRC has already recovered the amount from Corporation Bank and the same is kept in a no lien account. The petitioner claims DMRC is not entitled to recover any amount from the petitioner; plainly this controvery cannot be considered in these proceedings and the petitioner would have to initiate appropriate proceedings for seeking any relief in this regard.

11. The questions whether the actions of the DMRC in terminating the contract and invoking the bank guarantee furnished by the petitioner as a bid security are wrongful and illegal, cannot be the subject matter of the present proceedings. However, Ms Gupta, the learned counsel appearing for the petitioner requests that this Court determines the question whether the invocation was in terms of the bank guarantee. In this regard, it would be necessary to refer to the terms of the bank guarantee.

12. The relevant extract of the bank guarantee furnished by the petitioner

as a bid security is set out below:-

“4. **THE CONDITIONS OF OBLIGATION ARE**:

a. If the Tenderer withdraws his Tender during the period of Tender validity specified in the Form of Tender, or

b. If the Tenderer does not accept the correction of his tender price in terms of Clause 3.20.7 of the RFP document.

c. If the Tenderer having been notified of the acceptance of his tender by the DMRC during the period of tender validity.

i fails or refuses to furnish the security deposit in accordance with Clause 3.11 of the “RFP document” and/or

ii fails or refuses to enter into a Contract within the time limit Specified in Clause 3.26 of the “RFP document.”.

We undertake to pay to the DMRC mere on demand without demur upto the above amount upon receipt of his first written demand, without the DMRC having to Substantiate his demand provided that in his demand the DEMRC will note that the amount claimed by him is due to him owing to the occurrence by any one or more of the conditions (a) (b), (c) mentioned above, specifying the occurred condition or Conditions.

“**Not withstanding anything contained here-in-above**:

a) Our liability under his guarantee shall not exceed Rs.58,50,000/- (Rupees:- Fifty eight lacs fifty thousand only).

b) The Bank Guarantee shall be valid upto and including 03.05.2017 and

c) We are liable to pay the guaranteed amount or any part thereof under this guarantee only and only if you serve upon us a written claim or demand on or before the expiry of this guarantee."

13. It is apparent from the above that in order to invoke the bank guarantee, DMRC was required to unequivocally state that the amount claimed by it was owed by the petitioner to DMRC on account of any of the conditions as set out in Clause 4 of the bank gurantee.

14. The said bank guarantee was invoked by a letter dated 28.02.2017, which reads as under:-

"DMRC/BG ENCASH-18/PD/2016-17 28th Feb. 2017

The Branch Manager
Corporation Bank,
D-66, Ground Floor, 60 Feet Road,
Chattarpur Enclave, New Delhi-110074

Sub: Encashment of Bank Guarantee No.PBG/2016/04 dated 30-08-2016 for Rs.58,50,000/- for Contract "PROPERTY DEVELOPMENT AT DWARKA SEC-21 MRTS STATION OF LINE-3 & AIRPORT EXPRESS LINE, NEW DELHI."

Sir,

Bank Guarantee No.PBG/2016/04 has been issued by your Bank on 30.08.2016 for an amount of Rs.58,50,000/- at the request of Consortium of M/s jasmine Buildmart Pvt. Ltd. & M/s Frost Falcon Marketing Pvt. Ltd. in favour of Delhi Metro Rail Corporation Ltd. for the Contract "Property Development at Dwarka Sect-21 MRTS Station of Line-3 & Airport Express Line, New Delhi" The above said Bank Guarantee is valud Upto 03.05.2017.

As per the terms and conditions of the Bank Guarantee

No.PBG/2016/04 dated 30.08.2016, your Bank has agreed to pay the employer (DMRC) immediately on demand any amount Upto and inclusive of the aforementioned full amount upon written order from the Employer in case the applicant i.e. Consortium of M/s jasmine Buildmart Pvt. Ltd. & M/s Frost Falon Marketing Pvt. Ltd, fails to perform its obligation as per the Concession Agreement.

We hereby invoke encashment of the above Bank Guarantee No.PBG/2016/04. You are, therefore, requested to encash the said Bank Guarantee and transfer the proceeds of Rs.58,50,000/- through RTGS as per below mentioned details –

Beneficiary Name	:	Delhi Metro Rail Corporation Ltd.
Bank Name	:	ICICI BANK LTD
Branch Address	:	9A, Phelps Building, Inner Circle, Connaught Place, New Delhi
Current Address No:		000705011546
IFSC Code	:	ICIC0000007

For Delhi Metro Rail Corporation Limited

(Niti Kothari)
Sr. Additional General Manager (Property Development)"

15. It is at once clear that the said letter of invocation is not in terms of the bank guarantee and the Corporation Bank had clearly erred in acting on the basis of the said letter.

16. The learned counsel appearing for the DMRC states that since it is an admitted case that the petitioner had defaulted in complying with the conditions as specified in paragraph 4 of the bank guarantee, the bank was liable to honour the guarantee notwithstanding that the letter of invocation was not in terms of the said bank guarantee. This contention is plainly

unmerited. It is well settled that the bank guarantee constitutes an independent contract. The Supreme Court has in a number of decisions held that a bank is not required to examine the underlying contract and has to act strictly in terms of the bank guarantee. (***See***: ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. Anr***: ***(1996) 5 SCC 450***; ***Syndicate Bank v. Vijay Kumar & Ors***: ***(1992) 2 SCC 331***; and ***Hindustan Construction Co. Ltd. v. State of Bihar & Ors***: ***(1999) 8 SCC 436***). Thus, plainly if the letter of invocation is not in terms of the bank guarantee, the bank cannot proceed to pay any amount with regard to the same.

17. Having stated the above, this Court is of the view that it would not be apposite to grant any relief in this petition on the aforesaid ground. This is so because the term of the bank gurantee would have expired and directing refund of the amount recovered by DMRC would deprive DMRC of invoking its security.

18. It will be open for the petitioner to institute appropriate proceedings for recovery of the amount from DMRC, if otherwise entitled in law. The petitioner is also not precluded from instituting appropriate proceedings against the bank in this regard.

19. As noticed above, there is a dispute whether DMRC was otherwise entitled to invoke the bank guarantee and to appropriate the bid security. This dispute cannot be considered in these proceedings.

20. The petition is disposed of with the aforesaid observations. The pending application also stands disposed of.

21. At the request of Mr Rajiv Chandhiok, learned counsel, who had entered appearance on behalf of DMRC, he is discharged.

VIBHU BAKHRU, J

JULY 31, 2018
MK