

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 25.09.2018
Judgment pronounced on: 28.09.2018

+ O.M.P.(I) (COMM.) 373/2018

M/S. CHINA PETROLEUM PIPELINE
BUREAU INDIA PVT. LTD.

.....Petitioner

Through: Mr. Parag P. Tripathi, Sr. Advocate
with Mr. Atul S. Mathur, Ms.
Deepabali Datta, Mr. Prabal Mehrotra
and Mr. Srinivas Ramaswamy,
Advocates.

VERSUS

INDIAN OIL CORPORATION LTD. & ANR.

.....Respondents

Through: Mr. V.N. Koura with Mr. S. Sirish
Kumar, Advocates for R-1/ IOCL.
Ms. Radha Bansod, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Backdrop

1. The instant petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). In brief, the only relief that the petitioner seeks is for grant of injunction qua a bank guarantee furnished by it to respondent no.1. This bank guarantee is dated 30.05.2016 and was amended on 18.07.2016. The bank guarantee bears the No.0072FBG160010.

1.1 For the sake of brevity, the said bank guarantee hereafter would be referred to as the “subject bank guarantee”.

1.2 The subject bank guarantee, the record shows, has been issued by respondent no.2 i.e. Axis Bank Ltd. (in short “the bank”).

2 In order to adjudicate upon the issues raised in the instant petition, the following facts as gleaned from the record, presently available, have come to fore:

2.1 The petitioner claims to be in the business of construction of pipelines and is a market leader in pipeline infrastructure in China. The petitioner filed its bid against a Notice Inviting Tender dated 20.08.2015 (in short “NIT”). This NIT was issued by respondent no.1 for Mainline Laying and Combined station works for laying new crude oil pipeline from Chennai Port to CPCL Refinery, located at Manali, Chennai, and for combined station works concerning mechanical, civil, electrical and instrumentation works in respect of other facilities situate at the Chennai Port and CPCL Refinery, located at Tamil Nadu (hereafter referred to as the “subject work”).

2.2 Since, the petitioner was declared successful in the bidding process, a Letter of Acceptance dated 11.04.2016 (‘LOA’) was issued in its favour by respondent no.1. Resultantly, a formal contract dated 01.06.2016 was executed between petitioner and respondent no.1.

2.3 In consonance with the General Conditions of the Contract (in short “GCC”) and in terms of the LOA, the petitioner furnished the subject bank guarantee in the sum of Rs.3,10,53,113/- via the aforementioned bank in favour of respondent no.1. The value of the bank guarantee in terms of the

contract obtaining between the parties was equivalent to 2.5% of the total cost of the subject contract. The subject bank guarantee which is valid till 10.10.2018 was issued in lieu of initial security deposit.

2.4 The petitioner avers that it commenced work on the subject site upon issuance of a specific notice for commencement of work dated 07.06.2016. It is also the petitioner's case that the respondent no.1 failed to provide the necessary Right of Way (in short "ROW"). It is the petitioner's stand that on account of this very problem, disputes erupted which led to the termination of the contract, *albeit*, by respondent no.1. The petitioner avers that the termination of contract took place on 07.12.2016.

2.5 It is also the case of the petitioner that even prior to the termination of contract in and about September, 2016, respondent no.1 had floated a fresh NIT.

2.6 The petitioner further avers that despite the subject contract having been terminated the petitioner and respondent no.1 exchanged correspondence which resulted in two meetings being held at respondent no.1's office at Noida on 01.05.2017 and 02.06.2017. It is the petitioner's case that as a result of the said meetings officials of respondent no.1 assured the petitioner that the disputes would be settled amicably. The petitioner claims that despite such assurance being given to its utter surprise, it received from respondent no.1 a communication dated 17.09.2018 claiming amounts towards risk, cost and supervision charges.

2.7 According to the petitioner the calculation made by respondent no.1 in arriving at supervision charges is contrary to the provisions of clause 7.0.9.0 of the GCC. The petitioner takes the stand that the supervision

charges which respondent no.1 seeks to claim at the rate of 15% of the value of the fresh contract awarded by it, is erroneous, as it is contrary to the provisions of clause 7.0.9.0 of the GCC.

2.8 The petitioner avers that firstly, clause 7.0.9.0 of the GCC will get triggered only if the value of the fresh contract is higher than the value for which contract between the petitioner and respondent no.1 was executed and secondly, the supervision charges, as per the provisions of the said clause, were required to be calculated at the rate of 15% based on the difference in value in the two values.

3 In other words, since, in the instant case the value of the contract awarded to the third party, which was, a sum of Rs.1,23,66,95,922/- was lower than the value of the contract awarded to the petitioner which was pegged at Rs.1,24,21,24,538.50, the provisions of clause 7.0.9.0 of the GCC could not have been triggered.

3.1 In sum, according to the petitioner, since the subject bank guarantee was being invoked by respondent no.1 primarily to recover supervision charges, the invocation was fraudulent.

4 The petitioner, thus, being aggrieved by the invocation of the subject bank guarantee by respondent no.1, vide claim letter dated 17.09.2018 has approached this Court by way of the instant petition.

Submissions of Counsel

5 In support of the case set up by the petitioner, arguments were advanced by Mr. Parag Tripathi, learned senior counsel, which were largely in line with the averments made in the petition.

5.1 Mr. Tripathi submitted that the attempted invocation of the subject bank guarantee was fraudulent inasmuch as the value of the fresh contract awarded by respondent no.1 was less than the value at which the subject contract had been awarded to the petitioner. In order to buttress his submission, Mr. Tripathi drew my attention to the provisions of Clause 7.0.9.0 of the GCC.

5.2 This apart, learned counsel also referred to the Minutes of Meeting ('MOM') dated 01.05.2017 and 02.06.2017, to demonstrate, that the parties had in fact arrived at a settlement.

5.3 The submission of Mr. Tripathi was that given these circumstances it was both iniquitous and unreasonable for respondent no.1 to seek encashment of the subject bank guarantee.

6 Mr. Koura on the other hand, who, appeared for respondent no.1 vigorously opposed grant of any injunction in favour of the petitioner. Learned counsel said that petitioner, in fact, had woefully failed to discharge its obligations under the contract and, therefore, respondent no.1 was constrained to seek encashment of the subject bank guarantee.

6.1 Furthermore, learned counsel contended that since the said bank guarantee was unconditional, no injunction could be granted by the Court qua its encashment.

6.2 It was Mr. Koura's contention that the arguments advanced on behalf of the petitioner that the invocation was fraudulent inasmuch as it was contrary to Clause 7.0.9.0 of the GCC was wholly misconceived. According to the learned counsel, respondent no.1 could seek recovery of supervision charges at the rate of 15% of the amount expended by the owner

(respondent no.1) in getting the subject work executed upon termination of the contract entered into with the petitioner. In other words, the argument being that the submission advanced on behalf of the petitioner that supervision charges could be recovered, if at all, at the rate of 15% based on the difference in the value of the two contracts which was contrary to provisions of Clause 7.0.9.0.

6.3 Furthermore, it was Mr. Koura's submission that respondent no.1 was in fact entitled under the very same clause to recover the amounts from the security deposit.

6.4 In sum, the stand taken by Mr. Koura was that the petitioner's case for grant of injunction was untenable.

Analysis and Reasons

7 Having heard the learned counsel for the parties and perused the record, to my mind, what is relevant to note are the terms of the bank guarantee. There can be no cavil that the subject bank guarantee is an irrevocable and an unconditional bank guarantee. This fact is borne out upon a plain reading of the terms of the bank guarantee. For the sake of convenience, the relevant terms of the bank guarantee are set forth hereafter:-

"1. The guarantee shall be a continuing guarantee and shall remain valid and irrevocable for all claims of the corporation upon the bank made up to the midnight of 10th October 2018 provided that the bank shall upon the written request of the corporation made upon the bank at any time within 6 (six) months from the said date extend the validity of the bank guarantee for a further 6 (six) months so as to enable claims to be made under this guarantee by a further 6 (six) months from the said date with the intent that the validity of this guarantee shall automatically stand extended by a further 6 (six) months upon such request by the corporation.

2.

3. The obligations of the bank to the corporation hereunder shall be as principal to principal to the extent of guarantee amount and shall be wholly independent of the contract and it shall not be necessary for the corporation to proceed against the contractor before proceeding against the bank and the guarantee herein contained shall be enforceable against the bank notwithstanding the existence of any other guarantee or security for any indebtedness of the contractor to the corporation (including relative to the said security deposit) and notwithstanding that any such undertaking or security shall at the time when claim is made against the bank or proceedings taken against the bank hereunder, be outstanding or unrealised.

4. The amount stated by the corporation in any demand, claim or notice made with reference to this guarantee shall as between the bank and the corporation for the purpose of these presents be conclusive of the amount payable by the bank to the corporation hereunder.”

(emphasis is mine)

8. A plain reading of the aforementioned clauses of the subject bank guarantee would show that it is an unconditional and an irrevocable bank guarantee and that the obligation of the bank to pay moneys under the bank guarantee to respondent no.1 is wholly independent of the contract executed between the petitioner and respondent no.1. Furthermore, the bank under the subject bank guarantee is obliged to honour the subject bank guarantee in relation to “any indebtedness” of the petitioner *vis-à-vis* respondent no.1.

8.1 In particular, the subject bank guarantee provides in clause 4 that the amount stated by respondent no.1 in any demand, claim or notice which is made with reference to the said bank guarantee shall be as between the bank

and respondent no.1, conclusive of the amount payable by the bank to the respondent no.1.

8.2 Given the terms of the bank guarantee, to my mind, there is no scope for granting the interim relief which, the petitioner seeks via the instant petition. The argument advanced on behalf of the petitioner that the attempt of respondent no.1 to encash the subject bank guarantee is fraudulent, in my opinion, is a submission which is completely misconceived for the following reasons:

8.3 In the claim letter dated 17.09.2018, respondent no.1 has indicated that it has awarded a fresh contract to an entity by the name NRP Projects Pvt. Ltd. at the risk and cost of the petitioner for a nominal contract value of Rs.1,23,66,95,922/-. The said communication goes on to state that the petitioner should pay forthwith, a sum of Rs.21,92,03,276/-, towards moneys due to it as per the provisions of the subject contract along with other contractual claims within a period of 7 days. The petitioner has also been put to notice that it is liable to pay interest on the aforementioned amount at the SBI prime lending rate plus 1%. In addition thereto, respondent no.1 has stated that the demand made is provisional in nature and that it reserves its right to make additional claims. In order to facilitate the transmission of the demanded amount, details are provided in the said communication by respondent no.1 with regard to the account in which the money could be credited.

8.4 The record, undoubtedly, shows that the value of the contract which was awarded to the petitioner by respondent no.1 was higher i.e. was pegged at Rs.124,21,24,538.50, while, as indicated above, the fresh contract

awarded by respondent no.1 has a nominal contract value of Rs.1,23,66,95,922.00.

8.5 Respondent no. 1, in terms of Clause 7.0.9.0 of GCC, is entitled to recover the excess amount, if any, incurred by it for having the subject work executed by another contractor upon termination of the subsisting contract. In this case, the subsisting contract was terminated, admittedly, on 17.12.2016. Since, presently, there is no excess amount payable by respondent no.1 to the new contractor NRP Projects Ltd., no demand could have been raised by respondent no.1 on the ground that it had to undertake execution of the work through a new contractor.

8.6 That being said, Clause 7.0.9.0¹ also entitles respondent no.1 to recover supervision cost at the rate of 15% of the amount expended by it in addition to other contractual claims. It is this demand that the petitioner has made *vis-à-vis* its claim letter dated 17.09.2018.

8.7 To my mind, the claim made by the respondent no.1 cannot impact the provisions of the subject bank guarantee. The subject bank guarantee is ordinarily independent (and in this case, particularly so) of the underlying contract. Whether or not respondent no.1's demand for money made via claim letter dated 17.09.2018 is sustainable or not, is an aspect which will be adjudicated upon at the relevant time by the Arbitrator.

¹Clause 7.0.9.0 - Upon termination of the Contract, the OWNER shall be entitled at the risk and expense of the CONTRACTOR by itself or through any independent CONTRACTOR(s) or partly by itself and/or partly through independent CONTRACTOR(s) to complete and/or get completed to its entirety the work as contemplated in the scope of work and to recover from the CONTRACTOR in addition to any discounts, compensations or damages that the OWNER may in terms hereof or otherwise be entitled (including price discount within the provisions of Clause 4.4.0.0 and liquidated damages under Clause 7.0.7.0 hereof) to the difference between the amounts as would have been payable to the CONTRACTOR in respect of the work(s) (calculated as provided for in Clause 6.2.1.0 hereof read with the associated provisions thereunder and Clause 6.3.1.0 hereof) and the amount actually expended by the OWNER for completion of the entire work(s) as aforesaid together with 15% (fifteen percent) of the said amount expended by the OWNER for completion of the entire work(s) to cover OWNER's supervision charges, and in the event of the latter being in the excess of the former, the OWNER shall be entitled (without prejudice to any other mode of recovery available to the OWNER) to recover the excess from the Security Deposit or any monies due or becoming due to the CONTRACTOR.

8.8 The fact remains that the respondent no.1 appears to have, *prima facie*, suffered an injury on account of the manner in which the execution of the subject work has progressed. It may be quite possible for the petitioner to demonstrate that the injury, if any, suffered by respondent no.1 qua subject work was on account of reasons which were solely attributable to respondent no.1; *albeit*, at a point in time when the disputes between the parties are adjudicated on merits by the learned Arbitrator.

8.9 In so far as the attempt of respondent no.1 to encash the subject bank guarantee is concerned, in my view, the claim letter does not demonstrate much less establish that a fraud has been played on the petitioner. It is trite to state that if an injunction qua a bank guarantee is sought by a party based on the plea that the invocation was fraudulent, such party is required to demonstrate that it is a case of established fraud which is known to the bank. In this behalf I may only set forth the following observations made by the Supreme Court in *U.P.Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.*²: -

“54. The Court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson, M.R. said in Bolivinter Oil SA v. Chase Mannattan Bank & ors. [1984] 1 All E.R. 351 at 352:

² (1988) 1 SCC 174

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

55. *From the above discussion, what appears to me is this: The sound banking system may, however, require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud.In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated 20-2-1987 must be set aside and the order of learned Civil Judge, Lucknow dated 8-8-1986 restored."*

(emphasis is mine)

8.10 This principle was followed by the Supreme Court in another judgment i.e. ***Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. and Another***, (1997) 6 SCC 450 wherein, the Court not only reiterated the principle that no injunction could be granted where there was a mere allegation of fraud as against a case of established

fraud. The Court, in fact, went further to deprecate the practice of High Courts granting injunction on the basis of the principle of unjust enrichment. For the sake of convenience, the relevant observations made in this behalf in paragraphs 28 & 29 are extracted hereafter:-

“28 *Coming to the allegation of fraud, it is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant therein had invoked the bank guarantee arbitrarily. This application contains no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to bank guarantee No. 40/47. This is not a case where defendant no. 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees.*

29 *It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an*

application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had trail the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.”

(emphasis is mine)

8.11 Therefore, to my mind, contrary to what is contended by Mr. Tripathi, the attempted encashment of the subject bank guarantee by respondent no.1 is not fraudulent. As alluded to above, in fact, for the purposes of invocation of the subject bank guarantee, respondent no.1 is not even required to base its claim on the contents of the claim letter dated 17.09.2018.

9 Insofar as the argument advanced on behalf of the petitioner that there was a settlement reached between the parties and, therefore, the attempted encashment of the subject bank guarantee was iniquitous, in my view, is an

argument which is unsustainable. The reason, I say so, is that, a careful perusal of the MOM dated 01.05.2017 and 02.06.2017 would show that negotiations which were held between the representatives of the petitioner and respondent no.1 were strictly without prejudice to each other's rights and contentions. Furthermore, because the petitioner refused to entertain any of the claims put forth by respondent no.1, the negotiations for settlement came to an abrupt end.

9.1 Given these circumstances, it cannot be said that respondent no.1 acted unfairly or unreasonably.

10 Thus, for the foregoing reasons I find no merit in the petition. The petition is, accordingly, dismissed. Costs will follow the result.

RAJIV SHAKDHER
(JUDGE)

SEPTEMBER 28, 2018

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