

vks

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

COMMERCIAL ARBITRATION PETITION (L) NO.495 OF 2019

Sri Sai Krishna Constructions	...	Petitioner
V/s.		
Glove Infracom & ors	...	Respondents

Mr. Ankit Lohia a/w Mr. Purvesh Buttan i/by I.C. Legal, for the Petitioner.

None for respondent Nos. 1 & 2.

Mr. Chetan Alia i/by Khushboo Katarika, for respondent No.4 NHAL.

Mr. Anupam Dighe a/w Kiran Padalkar and Ms. Kishita Bajaj i/by India Law Alliance, for respondent No.5.

CORAM : G. S. KULKARNI, J.

DATE : 24th September, 2019.

PC. :

1] This petition was heard from time to time.

2] Mr. Lohia, learned counsel for petitioner has drawn my attention to the previous orders passed by this Court dated 12th May, 2019, 17th June, 2019, 28th June, 2019, 4th July, 2019, 11th July, 2019, 18th July, 2019 and the order dated 17th September, 2019.

3] A perusal of these orders would indicate that respondent Nos. 1 & 2 had appointed adv. Mr. A.K. Singh, Advocate, to represent them. He had also filed his Vakalatnama. Today he states that respondent Nos. 1 and 2

have taken away the papers from him and he has given a NOC in favour of Adv. Sohail E. Kazi. Respondent Nos. 1 & 2, thus, had not only sufficient notice of these proceedings but had already appointed an advocate to represent them. However, today none appears for these respondents. Mr. Lohia, learned counsel for the petitioner contends that these proceedings be not adjourned any further considering the reliefs being sought by the petitioner. According to him the petitioner is entitled for the reliefs as the margin money is locked for non cancellation of the bank guarantee.

4] On behalf of respondent No.5, Reliance Infrastructure Ltd, reply affidavit of Mr. Omkar Raut, is placed on record, who has stated that the contract awarded to respondent No.5 by respondent No.1 was terminated due to default on the part of respondent No.1 in furnishing bank guarantee, as per clause No.17.1 of the agreement entered between respondent No.5 and respondent No.1. In paragraph Nos. 4, 5 and 6 of the reply-affidavit, the deponent has stated as under :-

“I say that, as per the clause 1.17 (a) & (c) of the said MOU, respondent No.1 was required to provide a performance bank guarantee of an amount of Rs.58,08,00,000/- (Rupees fiftyeight crores and eight lakhs only) to NHAI within a period of 21 days from the date of the said MOU failing which the said MOU would stand terminated automatically. I say that, this condition was the essence of the said MOU, Clause 1.17(a) & (c) reads as under:-

1.17 Parties agree that

a) Within 21 (twenty one days) from signing of this MOU, sub contractor shall provide Performance Bank Guarantee (PBG) of amount Rs.58.08 Cr. (Rupees fiftyeight crores only)(to client in the form of two separate BGs one for Rs.49.95 Cr for Rs.8.13 Cr. From it's own limits and strictly in the format attached with this MOU under Annexure 1.

(c) Notwithstanding anything contained in this MOU, in case the vendor fails to submit the BG by the due date as mentioned at sub clause (a) above, then this MOU shall stand terminated automatically. This is the essence of this MOU.

5. Accordingly, as per the above stated clause 1.17(a) of the said MOU, respondent No.1 was required to provide the Performance Bank Guarantees as per the provisions of the clause 1.17 (a) to Respondent No.5 within a period of 21 days i.e. 3rd September, 2018, from the date of the signing of the MOU i.e. 13th August 2018.

6. I say that respondent No.1 could not comply with the conditions stipulated in clause 1.17 (a) of the said MOU and therefore, at the request of respondent No.1, on 3rd September, 2018 vide its letter dated 3rd September 2018, respondent No.5 extended the period to submit the aforementioned Performance Bank Guarantee till 30th September, 2018. Hereto annexed and marked **Exhibit "C"** is a copy of the said letter dated 3rd September, 2018, addressed by Respondent No.5 to respondent No.1.

5] Learned counsel for respondent No.5 has also stated that respondent No.1 has not challenged termination of the contract as effected by respondent No.5 and that respondent No.1 is not on the site in question,

subject matter of the contract between the petitioner and respondent No.1.

6] Mr. Lohia, learned counsel for the petitioner submits that this Court has already granted ad-interim relief in favour of petitioner in terms of prayer clause (a)(i) and (ii) by an order dated 14th March, 2019. He submits that today the concern of the petitioner is in this regard to prayer clause a(iii) which is for return of the bank guarantee, for its cancellation. Mr. Lohia, learned counsel for the petitioner referring to the orders passed in the earlier proceedings and in the contempt proceedings, submits that in fact a fraud is played on the petitioner by respondent Nos. 1 & 2 by entering into said contract in question. It is further submitted that when contract between respondent No.1 and respondent No.5 itself stood terminated, the bank guarantee submitted by the petitioners to respondent No.1, in pursuance of clause 18 of the agreement entered between the petitioner and respondent No.1, (the performance bank guarantee for Rs.7,99,20,000/-) is required to be returned to the petitioner. Clause No.18 of the contract reads thus :-

“18. A Bank Guarantee to a tune of Rs.7,99,000/- is submitted towards performance Guarantee for the amount of work allotted to the ;sub contractor @ 5% of the value of work allotted that should be duly released after the expiry of defects and liability period”.

7] He submits that considering the facts and circumstances of the case, even the arbitral tribunal by order dated 27th May, 2019, has also ordered

for return of the bank guarantee. The relevant paragraph 25 of the order dated 27th May, 2019 reads thus :-

“25. For the reasons and in the circumstances stated above, I pass the following order:-

a] The Respondent to hand over possession of the said site to the claimant with all attendant information and documents sought for by the claimant to enable the claimant to prepare the initial drawings etc., as required under the said Agreement within a period of one week from the date of this order;

b. In the event of the said site being handed over to the claimant, the time lines for commencement and completion of work to commence from the date on which the site is handed over;

c. In the event of the respondent failing and/or neglecting to hand over the said site, the respondent to submit the original Performance Bank Guarantee to the Tribunal ;which will then be handed over the claimant:.

8] Having heard the learned counsel for the parties as appearing, it is quite clear that respondent No.5 itself has terminated the contract awarded to respondent No.1 on the basis of which respondent No. 1 had awarded a sub-contract in question, to the petitioner. It was terminated w.e.f. 30 September, 2018. Consequently the site itself is not available.

9] It is impossible that respondent Nos. 1 and 2 can seek any relief of performance of the contract against the petitioner, as the very foundation of the contract has vanished. Mr. Lohia, would be, thus correct in contending that in these circumstances, it is futile to keep the bank guarantee deposited in this Court and that the bank guarantee is required to be returned for cancellation. This also the order passed by the learned Arbitrator dated 27th

May, 2019, which is not challenged by respondent Nos.1 and 2.

10] In my opinion the petitioner has made out a strong prima facie case for return of the bank guarantee. The prayers as made by the petitioner in this regard in terms of prayer clause a(iii) are thus, required to be granted, which reads thus :-

“(a) (iii) this Hon’ble Court be pleased to direct the Respondent No.1 by an order to forthwith return the said PBG dated 27th September, 2018 for Rs.7,99,20,000/-(Rupees Seven Crores ninety nine lacs and twenty thousand only) to the applicant for the purpose of cancellation of the same” .

11] Ordered accordingly.

12] Petition is made absolute in above terms. No cost.

13] Office is directed to hand over the original bank guarantee to the petitioner, on presenting copy of this order along with a copy of order passed by this Court on 30th July, 2019 passed in Contempt Petition (L) No. 91 of 2019.

14] Learned counsel for National Highway Authority submits that the National Highway Authority was not aware about the contract which was awarded by respondent No.5 in favour of the petitioner.

[G. S. KULKARNI, J]