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

\+ O.M.P. (I) (COMM) 52/2019

Date of Decision : 10th April, 2019

M/S SINTEX PREFAB & INFRA LIMITED ..... Petitioner
Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Jayant Mehta, Mr.Rishi Agrawala, Mr.Gaurav Mathur, Mr.Simranjit H.Virk, Ms.Drishti Harpalani, Ms.Niyati Kohli, Ms.Shruti Arora, Advs.

versus

DELHI URBAN SHELTER IMPROVEMENT BOARD, GOVT. NCT OF DELHI ..... Respondent
Through: Mr.J.P.Sengh, Sr. Adv. with Ms.Mini Pushkarna, Ms.Swagata Bhuyan, Ms.Manisha Mehta, Ms.Mrigna Shekhar, Mr.S.P.Singh, Mr.Zuvind Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner *inter alia* praying for an order of injunction restraining the respondent from invoking/encashing Bank Guarantee No.0070THBG0014416 for an amount of Rs.4.50 crores and the Bank Guarantee No.0070THBG0014516 for an amount of Rs.5.50 crores.

2. The parties had entered into an agreement bearing No.31/EEDD-I/2011-12 dated 12.03.2012 whereunder the respondent awarded the work of construction of 4060 EWS Houses for Group-I in Block-A,B,C,D & E including building work, water supply, sanitary installations, internal electrification and development works such as construction of roads, S.W. Drains, Sewerage, water supply and laying of C.C. pavement in lanes, construction of UGR including pump house, parks etc. to the petitioner.

3. The parities on the same day also entered into agreement bearing No. 32/EEDO-I/2011-12 for construction of 3560 EWS Houses for Group-II in Block, F,G,H & I.

4. The agreements stipulate the date of completion to be 15 months from the letter of commencement of work, which was issued on 27.02.2012.

5. During the course of the work, the respondent, in exercise of its powers under Clause 2 read with Schedule F of the Agreements, had withheld amounts with respect to non-achievement of milestones from the payments due to the petitioner.

6. The petitioner by its letter dated 19.02.2016 sought release of the withheld amount claiming financial crisis. The petitioner also offered to give Bank Guarantees for the amount that would be released by the respondent. This plea of the petitioner was accepted by the respondent by its letters dated 24.05.2016, whereafter an amount of Rs.10 crores was released

in favour of the petitioner on the petitioner furnishing the Bank Guarantees in question.

7. The petitioner claims that the work was completed by the petitioner on 01.07.2017 and 10.07.2017 with respect to the two abovementioned agreements. In the Completion Certificates, though the Engineers mentioned various works that were yet to be completed, they also made the following remarks:

> *"These fittings and final coat of painting white washing distempering and water proofing cement paint are not desirable to provide due to the reason these flats are not likely to be allotted in near future."*

8. The petitioner asserts that the remaining work was not done at the instance of the Engineers and the respondent itself, and therefore, the petitioner cannot be penalized for the same. Infact, the respondent went ahead and released the performance guarantees that had been submitted by the petitioner with the respondent at the time of entering into the agreements.

9. Further, drawing reference to the terms of the two Bank Guarantees, it is submitted that the Bank Guarantees can be invoked only for recovering any amount due or likely to be due from the contractor. It is submitted that the Letter of Invocation dated 15.02.2019 does not mention any amount as due or likely to be due from the petitioner and therefore, is not in terms of the Bank Guarantees.

10. It is further submitted that reading of the said Letter of Invocation would infact suggest that the same has been issued only because of certain audit objections taken by the

Comptroller and Auditor General and that too only for the loss of interest of Rs.90 lacs. As far as other penalties or any other recovery is concerned, the same is yet to be quantified by the respondent.

11. On the basis of the above, it is submitted by the learned senior counsel for the petitioner that the invocation of the Bank Guarantees by the respondent is not only not in terms of the Bank Guarantees but is also frivolous in nature. It is further submitted that as on today, the respondent holds an amount of Rs.8.89 crores as withheld amount and the Bank Guarantees of a sum of Rs.26.13 crores, including the Bank Guarantees in question, and therefore, is adequately secured for any claim that it may have against the petitioner.

12. On the other hand, learned senior counsel for the respondent submits that in terms of the agreements, the respondent was entitled to withhold the amounts on account of non-achievement of the milestones by the petitioner. Such amounts were duly withheld by the respondent and even the extension of time was granted to the petitioner from time to time reserving the right of the respondent to levy liquidated damages for the delay.

13. He further submits that the amount of Rs.10 crores was released in favour of the petitioner on a plea of the petitioner, that due to financial constraint, it was unable to perform the work under the Agreements. It was only to facilitate the completion of the project that these amounts were released to

the petitioner. However, on obtaining the Provisional Completion Certificates, the petitioner completely abandoned the work and in spite of repeated request, did not complete the pending works.

14. He further submits that due to such abandonment, the respondent was constrained to issue a show cause notice to the petitioner, in response whereto, the petitioner gave a schedule within which it was to complete the pending work and hand over the flats in a completed state. However, in spite of such assurances, the petitioner did not commence any work, forcing the respondent to invoke the Bank Guarantees in question.

15. He further submits that the amount of Rs.10 crores was released on a premise and on a condition that the petitioner would guarantee the completion of the remaining work and the petitioner having failed to do so, the respondent is entitled to recover such amounts by invoking the Bank Guarantees.

16. Learned senior counsel for the respondent further submits that in the petition, there is no allegation of any fraud or irretrievable harm or injustice being suffered by the petitioner by such encashment of the Bank Guarantees in question.

17. He further submits that the Invocation Letter is in terms of the Bank Guarantees. The Bank Guarantees being unconditional in nature, encashment thereof cannot be restrained.

18. I have considered the submissions made by the learned senior counsels for the parties. Though, it may be correct that

the Completion Certificates for the work had been issued in favour of the petitioner certifying the work to be completed as on 01.07.2017 and 10.07.2017 respectively, the Completion Certificates also note the various works that remained pending. It may further be true that the Completion Certificates noted the opinion of the Engineer that these works need not be completed as there was no possibility of the flats being handed over for actual possession in the near future, it also cannot be disputed that the respondent immediately thereafter, and on repeated occasions, has been calling upon the petitioner to complete the pending works. Infact, the respondent has issued a show cause notice to the petitioner to complete such pending works, in response whereto, the petitioner even gave a schedule within which it would complete the work and hand over the possession of the flats to the respondent.

19. It is the case of the respondent that in spite of such assurances, the petitioner has abandoned the work thereby forcing the respondent to encash the Bank Guarantees in question.

20. It is also not in dispute that the Bank Guarantees in question were not given in the normal terms of the agreement. It was a concession given by the respondent to the petitioner on the representation of the petitioner that it was facing financial constraints. Therefore, it was the money already in the hands of the respondent that was released to the petitioner on certain conditions to facilitate timely completion of the work. The

respondent now wishes to seek its money back, as according to it, the petitioner has failed to comply with its undertaking to complete the work in a timely manner.

21. As far as the imposition of liquidated damages by the respondent is concerned, it is the case of the respondent that the respondent is in the process of taking such decision. Infact, it is the case of the respondent that the petitioner has not even submitted the final bill in regard to the work.

22. Be that as it may, the Bank Guarantees in question are unconditional and unequivocal in nature. In terms thereof, the bank has undertaken to pay the demanded amount to the respondent on a mere averment that any sum is due or is likely to be due from the petitioner. The law of Bank Guarantee is no longer *res integra*, it clearly states that a contract of Bank Guarantee is an independent contract in itself, invocation of which can only be restrained where the petitioner is able to make out a case of fraud or irretrievable harm or injustice. However, such encashment cannot be restrained only because there is a dispute between the parties in relation to the performance of the main contract under which these Bank Guarantees have been given.

23. Learned senior counsel for the petitioner submits that the petitioner has already invoked the dispute resolution mechanism in terms of Clause 25 of the Agreements. One can only hope that the respondent would act on such request in an expeditious

manner so that the disputes between the parties are fully and finally resolved at an early stage.

24. Equally, the fact that the respondent is allegedly holding a sum of Rs.8.89 crores, otherwise allegedly owed to the petitioner, or has certain other Bank Guarantees also in its possession, cannot be a relevant consideration for restraining the encashment of the Bank Guarantees.

25. It can equally not be accepted that the Bank Guarantees are being invoked by the respondent only to recover a sum of Rs.90 lacs as alleged loss of interest. A reading of the letter dated 15.02.2019 only suggests that the respondent has directed appropriation of Rs.90 lacs from the amount recovered on encashment of the Bank Guarantees towards alleged, interest lost claim. In any case, this issue looses its significance because of the eventual order being passed.

26. In view of the above, the invocation and encashment of the Bank Guarantees cannot be restrained by this Court on the above grounds.

27. However, in the present case, the Letter of Invocation addressed by the respondent to the banks do not state that any amount is due or is likely to be due from the petitioner. Therefore, the invocation is not in terms of the Bank Guarantees. The same cannot be acted upon by the banks.

28. In view of the above, while restraining the respondent from recovering any amount against the Bank Guarantees in question on the basis of Letter of Invocation addressed by it to

the banks, liberty is granted to the respondent to invoke the Bank Guarantees by a fresh letter in terms of the Bank Guarantees in question.

29. The petition is disposed of in the above terms with no order as to costs.

30. I may only clarify that the above findings are only prima facie in nature and would not bind the parties in any other proceeding. All rights and contentions of either party shall remain open in such proceedings.

NAVIN CHAWLA, J

APRIL 10, 2019
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