

(2013) 11 DEL CK 0073

Delhi High Court

Case No: OMP 1097 of 2013

Indu Projects Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Nov. 1, 2013

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: C.A. Sundaram and Ms Ginny Jetty Rautry, for the Appellant; Jaswinder Singh, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Shakdher, J.

IA No. 17770/2013 (Exemption)

Allowed subject to just exceptions.

OMP No. 1097/2013

1. The captioned is listed before this court on mentioning. Mr. Sundaram, learned senior counsel for the petitioner, seeks an injunction on the bank guarantee in issue solely on the ground that the invocation is not in terms of the bank guarantee. It is Mr. Sundaram's contention that the bank guarantee in this case was conditional, and therefore, the petitioner would be entitled to an injunction if it was able to persuade this court that the letter of invocation did not satisfy the conditions contained in the bank guarantee. To be noted, grounds pleaded in the petition with regard to fraud are not before me. As a matter of fact, though there are assertions with regard to delay and/or failure of the respondent in discharging its obligations under the contract obtaining between the parties, no submissions are made in that behalf.

2. Therefore, in this context, shorn of unnecessary details, one would only have to examine the terms of the bank guarantee and the assertions made in the letter of

invocation.

3. Briefly, it may only be noticed that the petitioner was issued a letter of intent dated 24.12.2010 for construction of residential accommodation for army, at Port Blair, pursuant to a notice inviting tender dated 25.10.2010. The contract is valued at Rs. 266.48 crores. The time accorded for completion of the contract was stipulated as 28 months; albeit from the date of handing over of the site in issue. The work under the contract was required to be executed in five (5) phases.

3.1 As required under the terms of the contract, the petitioner furnished a performance bank guarantee dated 19.01.2011, equivalent to 5% of the contract value, amounting to a sum of Rs. 13,32,43,150/-. This bank guarantee has been furnished by IDBI Bank Ltd., and is valid till 31.07.2015.

3.2 There is no dispute that the petitioner received mobilization advance under the contract. It is, however, the case of the petitioner that the mobilization advance was received only on 27.06.2011, and therefore, work at site could commence only from that date.

3.3 It is the case of the petitioner that the delay in the execution of the contract has occurred for reasons solely attributable to the respondents. The alleged impediments are detailed out in paragraph 14 of the petition.

3.4 It appears that the petitioner has applied for extension of time. It is also averred that the respondent has recommended extension of time up till December, 2014.

4. Admittedly, in the background of these circumstances, disputes have arisen between the parties. The respondent has, as a matter of fact, issued a letter of invocation dated 01.11.2013 to the IDBI Bank Ltd.

5. It is in the background of the aforesaid facts that the petitioner has approached this court for grant of injunction of the bank guarantee in issue.

6. Mr. Sundaram has submitted that the terms of the bank guarantee are such that the respondent will have to demonstrate to this court the or damage that was likely to be cause on account of the petitioner's alleged breach of the terms and conditions of the contract obtaining between the parties. This submission is based on the wording of the bank guarantee, which is indicative of the fact that the concerned bank has undertaken to pay the amounts due and payable under the guarantee without any demur, merely on a demand from the Government, stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the contractor of any of the terms or conditions contained in the agreement obtaining between the parties or by reason of the contractor's/petitioner's failure to perform the said agreement.

6.1 Mr. Sundaram submits that the letter of invocation simply adverts to the fact that a breach has been committed by the petitioner of the terms and conditions of the agreement and that by virtue of such breach the respondent would be put to loss or damage, which, in the estimate of the respondent, will exceed the value of the bank guarantee in issue as well as other bank guarantees held by the respondent.

6.2 At this juncture I had put to Mr. Sundaram as to whether the beneficiary, i.e., the respondent, could be called upon by the concerned bank, which has furnished the bank guarantee, to demonstrate the loss and its extent, if any, which would be caused to the respondent by virtue of the alleged breach.

6.3 Mr. Sundaram, in his usual fairness, submitted that the existence of the material which would demonstrate the likely loss that would be caused, would have to be placed before the court by the beneficiary prior to the beneficiary being permitted to en-cash the bank guarantee. In other words, it is Mr. Sundaram's contention that the wordings, such as those, which obtained in the instant bank guarantee, made it conditional and therefore, there was no unfettered right, so to say in the beneficiary, to en-cash the bank guarantee.

6.4 Mr. Sundaram in support of his submission relied upon the judgment of the Supreme Court in the case of [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), and [Vinitec Electronics Private Limited Vs. HCL Infosystems Limited](#), .

7. In view of the submissions made by Mr. Sundaram, what would therefore have to be seen as to whether the bank guarantee in issue, is a conditional bank guarantee, as contended on behalf of the petitioner. The relevant extract of the bank guarantee, on which much emphasis has been laid by Mr. Sundaram, is extracted hereinbelow for the sake of convenience.

....We, IDBI Bank Limited, having branch office at Chapel road, Abids, Hyderabad, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor(s) of any of the terms or conditions contained in the said Agreement or by reason of the contractor"s(s) failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 13,32,43,150/-(Rupees thirteen crores thirty two lakhs forty three thousand one hundred and fifty only)....

7.1 A perusal of the aforesaid terms of the bank guarantee would show that the concerned bank has undertaken to pay without demur merely on demand of the respondent the amount reflected in the bank guarantee, in the event, the demand made states that: the respondent is claiming the amount either by way of loss or

damage or on account of loss or damage that was likely to be caused or suffered by the respondent by virtue of "any breach" of the petitioner of any term(s) or condition(s) of the contract or that there was a failure on the part of the petitioner to perform its obligations under the contract. This, in my view, is the sum and substance of the intent of the parties to the bank guarantee, as reflected in the conditions incorporated therein, to facilitate, its due invocation and consequent encashment.

8. In the light of the above, one would have to examine as to whether the invocation by the respondent falls within the terms of the instant bank guarantee. The relevant assertions in the letter of invocation dated 01.11.2013 is contained in paragraph 4, which is also extracted hereinbelow, once again, for the sake of convenience:

...4. And whereas there has been a breach by the contractor of the terms and conditions of the Agreement and by virtue of such breach there would be loss/damage caused to the Government by reason of such breach by the contractor which in the estimate of the DGMAP will exceed the value of said Bank Guarantee Bond as well as other Bank Guarantee Bonds held with DGMAP....

8.1 A reading of para 4 of the letter of invocation would show that the respondent has indicated the following: First, the petitioner has breached the terms and conditions of the contract. Second, by virtue of the breach, there is, a likelihood of loss/damage being caused to the respondent. Lastly, the loss/damage is estimated to exceed the value of the bank guarantee in issue and other bank guarantees held by the respondent.

8.2 In my view, the letter of invocation is in terms of the bank guarantee as it adverts to the loss or damage which is likely to be caused on account of the breach by the petitioner of the terms and conditions of the contract obtaining between the parties. There is no requirement, therefore, to quantify the loss at this stage. I had taken a similar view in a matter concerning the parties herein in OMP 1005/2013 by way of judgment dated 04.10.2013. I am informed that in that case the bank guarantee in issue stands encashed.

9. The argument advanced by Mr. Sundaram that the beneficiary would have to disclose the material available with it to the court before the beneficiary can be permitted to en-cash the bank guarantee, in my view, is untenable. The bank guarantee is a contract arrived at between the beneficiary and the bank and in that sense is independent of the underlying contract between the beneficiary and the party at whose behest the bank guarantee is furnished by the bank. If such an argument is accepted, it will result in unnecessary burden being thrust on the bank.

9.1 In this behalf, the reliance placed by Mr. Sundaram on the judgment of the Supreme Court in the case of Hindustan Construction Co. Ltd. and Vinitec Electronics Pvt. Ltd. is also misconceived, in my view. The Supreme Court in Hindustan Construction Co. Ltd. came to the conclusion that the bank guarantee issued in this

case was conditional, despite duty being cast on the bank which had furnished the bank guarantee to pay the sum reflected therein "unconditionally" and "irrevocably" because the bank guarantee itself adverted to the fact that the liability of the bank to pay would arise if the obligations contained in clause 9 of the contract between the parties in that case were not fulfilled by the contractor. There is no such clause of the underlying agreement referred to in the instant bank guarantee. The words used are of broad and general nature. Such words would not, in my view, convert, what is essentially an unconditional bank guarantee into a conditional bank guarantee.

9.3. This distinction, in my view, has been duly recognised by the Supreme Court in the Vinitec Electronics Pvt. Ltd. case cited by Mr. Sundaram, wherein in paragraph 22 the Supreme Court makes it clear that the mere fact that the principal agreement is referred to in the preamble of the bank guarantee would not make it conditional, unless any particular clause of the underlying agreement is made part of the bank guarantee.

9.4 Pertinently, in Vinitec Electronics Pvt. Ltd. case as well, the attempt at obtaining an injunction qua encashment of bank guarantee failed.

In these circumstances, I find no merit in the petition, it is accordingly dismissed. Accordingly, the concerned bank is free to forthwith remit the amount to the respondent. Needless to say any observation made hereinabove by me, would have no impact on the merits of the case, in the event, the petitioner was to seek adjudication of the main dispute before an appropriate forum; albeit in accordance with law.