

Simplex Infrastructure Limited Vs. Siemens Limited and Another

Simplex Infrastructure Limited Vs. Siemens Limited and Another

SooperKanoon Citation : sooperkanoon.com/1174344

Court : Mumbai

Decided On : Jan-05-2015

Judge : S.J. Kathawalla

Appeal No. : Arbitration Petition (L) No. 1316 of 2014

Appellant : Simplex Infrastructure Limited

Respondent : Siemens Limited and Another

Judgement :

1. The above Petition is filed by the Petitioner Simplex Infrastructures Limited against Respondent No. 1 Siemens Limited and Respondent No.2 IndusInd Bank Limited under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act), inter alia, for the following reliefs:

(a) pending the passing of an arbitral award and its enforcement, this Honble Court may be pleased to:

(i) pass an order/direction thereby restraining Respondent No. 1 from en-cashing the Bank Guarantee bearing No. 0015PR10005693 dated December 30, 2010, for a sum of Rs. 18,33,41,947/- (Rupees Eighteen Crore Thirty Three Lakh Forty One Thousand Nine Hundred and Forty Seven only) and any other bank guarantee furnished by the Petitioner to Respondent No.1 until final adjudication of the disputes between the Petitioner and Respondent No.1;

(ii) stay the operation of the invocation letter dated August 21, 2014 bearing reference No. IN1024/andABC020/0917/SILEXT0111/ NRR issued by Respondent No. 1 to Respondent No.2;

(iii) direct Respondent No. 1 to secure an amount of Rs. 29,42,93,621/(Rupees Twenty Nine Crore Forty Two lakh Ninety three Thousand Six Hundred and Twenty One only) in favour of the Petitioner together with interest at the rate of 18% p.a. till the final resolution of the disputes between the Petitioner and Respondent No.1;

(iv) pass an adinterim ex-parte order in terms of clauses (i) to (iii) above.

The Petitioner has, at the time of hearing and final disposal of the Petition, not pressed for relief in terms of prayer clause (a) (iii) above However, in the written submissions filed by the Petitioner, the Petitioner has submitted that the Petitioner is entitled to the relief as prayed for in prayer clause (a) (iii) of the Petition.

2. The facts as narrated by the Petitioner in the Petition are briefly set out hereunder:

2.1 That the Petitioner is a leading service provider in civil and structural construction and is inter alia engaged in pilling, foundation and ground engineering, construction of roads, railways and bridges, urban infrastructure, building and housing.

2.2 That the Respondent No.1 had received an order for the project from Torrent Energy Limited (Owner). Respondent No.1 engaged the services of the Petitioner for executing the main civil works of the project vide the formal Contract Agreement dated 21st December, 2010 (contract).

2.3 That the initial contract price under the contract was Rs. 1,46,67,35,578/. However, due to various amendments and supplementary orders placed under the contract, the contract price increased to Rs. 216,05, 16, 103/.

2.4 The Petitioner was required to complete the works as per the schedule of Specific Milestone for Main Civil Works (MCW). The last milestone specified in the

said schedule was to be achieved by the Petitioner by 25th April, 2012.

2.5 That Clause 13.2 of the contract provides that if the milestone under the contract cannot be complied with on account of unforeseeable events which are beyond the reasonable control of the parties, the customer (Respondent No.1) may instruct the Contractor (Petitioner) to implement acceleration measures towards maintaining the original milestones or reducing potential delay. The said clause also provides for reimbursement to the Petitioner of additional expense arising from implementation of such measures. It is clear from clause 13.2 of the contract that acceleration measures with additional payments are contemplated under the contract only where the delay is not on account of the Petitioner. This aspect is further supported by Clause 6.5 of the Commercial Conditions of Contract which states that if, during execution of the works, progress in providing the Works is unsatisfactory or if completion by the milestones or in accordance with the contract is uncertain for reasons for which the Contractor is responsible, the Contractor shall bear the additional costs of measures required to avoid delays.. It is submitted that the project was delayed for various reasons attributable to Respondent No.1. In this regard, three amendments to the contract dated 8th February, 2013, 26th July, 2013, and 6th August, 2013 were executed between the Petitioner and Respondent No.1 wherein Respondent No.1 Offered additional payment/compensation amounting to Rs. 14,90,00,000/- to the Petitioner based upon target dates for various milestone events specified in the amendments. Pursuant to such amendments, an amount of Rs. 7,72,50,000/- was paid by Respondent No.1 to the Petitioner as additional compensation. It is submitted that the additional payments made to the Petitioner by the Respondent No. 1 for mitigating the delays substantiates the fact that the delays were not attributable to the Petitioner.

2.6 That the fact that the Petitioner was not responsible for any delay is also evident from the minutes of meetings dated 17th January, 2014, and 4th February, 2014 wherein revised dates for completion of works were agreed by promising additional payments to the Petitioner, without imposing any liquidated damages. In the minutes dated 4th February, 2014, it was agreed that Respondent No.1 would pay as additional compensation a further sum of Rs. 2.175 crore to the Petitioner.

2.7 That the Petitioner duly completed the works within the agreed time schedule of 30th March, 2014, and only snag list/punch items which are of a minor nature are being attended since then.

2.8 That the only claim put forth by Respondent No.1 against the Petitioner was towards recovery of the alleged excess advance paid amounting to Rs. 3, 83, 42,667/- based upon Respondent No.1s internal reconciliation. In response to the letter of Respondent No.1 dated 16th June 2014, the Petitioner vide its email dated 17th June, 2014, disputed the figure and stated that the correct amount was Rs. 2,65,66,319/- . It was also pointed out by the Petitioner in the said email that there is an outstanding balance of Rs. 5, 60, 29,943/- after adjusting the said excess advance amount. It is therefore evident from the said email dated 16th June, 2014, that the claim of the Respondent No.1 against the Petitioner was only to the tune of Rs. 3,83,42,667/- which was in any event to be adjusted against the total outstanding payment of Rs. 8,25,96,626/- as on the date of issuance of the Petitioners email dated 17th June, 2014.

2.9 That the Respondent No.1 vide its letter dated 27th May, 2014, addressed to the Petitioner has stated that The reason for withholding Simplex payment by Siemens is due to the accounting reasons (i.e. recovery of outstanding advance paid by Siemens to Simplex, etc.).

2.10 That a meeting was held between the parties on 30th June, 2014 where all outstanding issues pertaining to the project as on the said date were discussed. The Petitioner had stated during the said meeting that the complete list of pending payments is already available with Respondent No.1. Thereupon Respondent No.1 had stated that it had some reservations regarding the amounts shown against excise duty and reimbursement of excess recovery of electricity charges. The only other relevant outstanding issue was the unadjusted mobilization advance and the advance bank guarantee. There was not even a whisper of any other claim by Respondent No.1. The minutes of the said meeting were circulated by the Petitioner vide its email dated 3rd July, 2014. Mr. P.M.S. Bajaj, a Senior Officer of Respondent No.1 who also participated in the meeting, accepted the minutes vide his email of the same date and requested that the discussion on the

issue of labour cess may also be included in the minutes.

2.11 That the fraudulent conduct of Respondent No.1 is evident from the fact that after more than a week of having acknowledged the minutes circulated by the Petitioner vide its email dated 3rd July, 2014, Respondent No.1 vide its email dated 11th July, 2014, wrongfully and dishonestly stated that the minutes are unilateral and we do not agree to all the contents of your email. However, Respondent No.1 did not point out as to what was missing from the minutes except that it wanted the Petitioner to submit the vendor out-standings. The Petitioner vide its email dated 19th July, 2014, objected to such denial while referring to the acceptance of the minutes by Mr. Bajaj vide his email dated 3rd July, 2014. Thereafter on 19th August, 2014, i.e. more than 45 days after the minutes were circulated and just two days before the invocation of the Bank Guarantee, Respondent No.1 sent a letter thereby completely rejecting the minutes.

2.12 That the Petitioner was shocked, surprised and dismayed to learn that on 21st August, 2014, Respondent No.1 fraudulently invoked all the Performance Bank Guarantees and Retention Bank Guarantees submitted by the Petitioner in terms of the contract to the tune of Rs. 47,76,35,568/- out of which an amount of Rs. 29,42,93,621/-has already been en-cashed as on the date of filing of the Petition. The details of the Bank Guarantees are set out in a tabular form in paragraph 13 of the Petition.

2.13 That it is apparent that Respondent No.1 had committed the offence of cheating by first entering into the amendment agreements referred to above and inducing the Petitioner to engage additional resources by promising additional payments agreed therein. Thereafter having induced the Petitioner to engage additional resources and making additional effort to mitigate the delays against payment of additional compensation, after getting the work done the Respondent No.1 by encashment of the Bank Guarantees has taken back the additional compensations promised and paid in terms of the amendment agreement. That the Respondent No.1 has therefore fraudulently invoked the Bank Guarantees after getting the additional work and effort undertaken by the Petitioner.

2.14 That the contract contains a limitation of liability provision under clause 16.2 of Commercial Conditions of Contract (CCC) [as amended by Special Conditions of Contract (SCC)] wherein the Petitioners liability under the contract is limited to a maximum of 15% of the final contract price. That the final contract price is Rs. 216,05,16,103/-. Assuming without conceding that the Petitioner is liable to pay any amount to Respondent No.1, the maximum liability of the Petitioner under the contract cannot exceed 15 per cent of the final contract price i.e. Rs. 32,40,77,415.45/.

2.15 That the most shocking aspect of the fraud is that only an amount of Rs. 3 crore was claimed by Respondent No.1 in its letter dated 14th June, 2014 which amount too was to be adjusted against the Petitioners outstanding dues of about Rs. 8 crores at that time. However, Respondent No.1, in order to perpetuate the fraud upon the Petitioner and to derive wrongful gains invoked all the Performance and Retention Bank Guarantees furnished by the Petitioner for a total sum of Rs. 47,76,35,568/.

2.16 That the fraudulent conduct of Respondent No.1 is apparent from the fact that upon completion of the project, without notifying any specific claims, the Petitioner first invoked all the aforesaid Bank Guarantees and thereafter to create a justification for such fraudulent invocation, it served upon the Petitioner a letter dated 23rd August, 2014, thereby falsely making a claim of Rs. 56,92,43,090/- which claims are purely an afterthought, concocted and baseless. Respondent No.1 has raised such claims in order to dishonestly and fraudulently usurp the Bank Guarantee amounts knowing well that in any event the liability of the Petitioner cannot exceed an amount of Rs. 32,40,77,41545/.

2.17 That there are certain purported claims of the vendors of the Petitioner which are pending consideration with the Petitioner and are subject to independent rights of the Petitioner against the respective vendors. However, taking undue advantage of this position, while Respondent No.1 is not clearing the legitimate dues of the Petitioner, it has also been pressurizing the Petitioner to first clear the dues of such vendors irrespective of the Petitioners independent rights and contentions. In any case, Respondent No.1 cannot invoke or en-cash the Bank Guarantees

furnished by the petitioner against the purported claims of third parties. Under clause 3.7 of CCC, intervention by Respondent No.1 is warranted only in cases where any of the vendors of the Petitioner delays or threatens to cease the supplies and services on account of the delays in its payments which has not been the case.

2.18 That in the above facts and circumstances, it is evident that invocation of the Bank Guarantees by Respondent No.1 is tainted with egregious fraud and has caused and would further cause irretrievable loss and injury to the Petitioner. Thus, it will be equitable, just, fair and convenient to restrain Respondent No.1 from en-cashing any further Bank Guarantee furnished by the Petitioner and also to direct Respondent No.1 to secure the amount of the Bank Guarantees fraudulently en-cashed by it along with interest thereon at the rate of 24 per cent per annum.

2.19 That the Petitioner has a good prima facie case. The balance of convenience is in favour of the Petitioner. Encashment of the Bank Guarantees will cause irreparable loss and injury to the Petitioner and therefore the reliefs sought in the above Petition need to be granted.

3. Mr. Seervai, the Learned Senior Advocate appearing for the Petitioner, has in his oral arguments reiterated the facts and submissions which are already set out hereinabove. Mr. Seervai also tendered a chart and submitted that the same along with the list of dates and events ex facie and conclusively demonstrates that the milestone summary (Page 110-F) prepared by Respondent No.1 is totally false and misleading. He submitted that the said chart unequivocally establishes that (a) there were no delays in completion, at least none that were ascribable to the Petitioner; (b) that Respondent No. 1 had promised to pay additional amounts at 100 per cent or 75 per cent as an incentive for completion of work for the extended period; and (c) that the Petitioner was not responsible for the delays.

4. Mr. Seervai further submitted that Respondent No.1 has claimed Rs. 18.3 crores towards liquidated damages for alleged delays and Rs. 32.8 crores towards additional costs incurred due to alleged defaults in completion of work by the Petitioner. Both these claims are related to the alleged delays to the project.

Relying on the decision of the Honble Supreme Court in *Sir Chunilal V. Mehta vs. Century Spinning and Manufacturing Company Ltd.*(AIR 1162 SC 1314), Mr. Seervai submitted that when liquidated damages are specified for a breach in the contract, other damages for breach of the same contract cannot be claimed.

5. Mr. Seervai next submitted that invariably a party claiming payment under Bank Guarantee first raises a demand for payment and in the event of the demand not being satisfied, invokes the bank guarantee. However, in the present case, Respondent No.1 has first fraudulently invoked the Bank Guarantee vide letters of invocation dated 21/22nd August, 2014 and thereafter Respondent No.1 has by its letter dated 23rd August, 2014, sought to justify the invocation of the bank guarantees. The subsequent letter dated 23rd August, 2014, is nothing but a feeble attempt by Respondent No. 1 to legitimize its wrongful action. It seeks to raise false and concocted claims as an afterthought to justify the invocation of the Bank Guarantee. In the letter of invocation of Bank Guarantee dated 21st August, 2014 the only grievance made by Respondent No. 1 is that the Petitioner was in default. On 23rd August, 2014, Respondent No.1 stated for the first time that Respondent No.1 has claims of Rs. 56.92 crores and accordingly invoked Bank Guarantee for Rs. 47.76 crores. In the claims summary, no claims are made relating to vendor payment. This is significant because Respondent No.1 has in its affidavit in reply falsely raised nonpayment to Vendors as an issue to justify invocation of Bank Guarantee.

6. Mr. Seervai submitted that the Petitioner has categorically pleaded fraud in the Petition. The Petitioner has also attached the minutes of meetings and addendums to establish that the milestone summary prepared by Respondent No.1 and attached to the letter dated 23rd August, 2014, is ex facie false and concocted. The response of the Respondent No.1 to correspondence regarding delays is misleading and irrelevant in view of the letter dated 23rd August, 2014, wherein Respondent No.1 has categorically crystallized its claim in a belated attempt to justify the invocation. All prior correspondence referred to by Respondent No.1 regarding delay are insignificant. Mr. Seervai therefore submitted that the Bank Guarantees have been fraudulently invoked with a view to wrongfully gain and unjustly enrich itself when from the face of the record it is evident that no monies

are due and payable by the Petitioner to Respondent No.1.

7. Mr. Madon, the Learned Senior Advocate appearing for the Respondent No.1 made the following submissions:

7.1 That the Petitioners have not pressed for relief in terms of prayer clause (a) (iii) and are therefore deemed to have given up the same.

7.2 That in any event the Petitioner has failed to fulfil the essential requirements for an order in terms of Section 9 (ii) (b) of the Act i.e. to make out a prima facie case and to establish an attempt to remove or dispose of the assets by Respondent No.1 with the intention of defeating the decree that may be passed. In fact, it is important to note that it is the Respondent No.1 who has invoked the arbitration vide its letter dated 17th November, 2014, and has appointed an Arbitrator.

7.3 That the contention that the quantum of delay for which damages have been claimed is inflated which goes to show that the invocation of the Bank Guarantee is fraudulent, was sought to be established on the basis of a chart forming Annexure 1 to the list of dates tendered by the Petitioner. The particulars contained in the chart have not been pleaded. The inference sought to be drawn at the time of arguments, based on the contents of the said chart is also not pleaded. In the absence of a specific pleading as to fraud and the alleged manner in which it has been perpetrated, the Court cannot come to a prima facie finding of fact on that aspect.

7.4 That the fact that the quantum of delay and damages is being disputed establishes the existence of a dispute and consequently the said acts cannot be termed as an established fraud. The appropriate forum for adjudicating these disputes arising under the works contract would be the Arbitral Tribunal. It is settled law that while deciding matters pertaining to Bank Guarantees, the Courts will not entertain disputes relating to the underlying contract (Vinitec Electronics Pvt. Ltd. vs. HCL Info-systems((2008) 1 SCC 544 p. 12-13.)

7.5 That the said chart was prepared based on the three amendment agreements dated 8th February, 2013, 26th July, 2013, and 6th August, 2013 and two minutes of meetings dated 17th January, 2014 and 4th February, 2014. The three amendment agreements were executed without prejudice and were not in derogation to the original contract. The two performance amendment agreements had a specific clause 1(g) which preserved the right of Respondent No.1 to claim liquidated damages which had already accrued. The Supplemental order dated 2nd September, 2013, clearly provides that the specific milestone as per the main contract would remain unchanged. Specific milestone has been defined in the main contract and is categorically related to the levy of liquidated damages.

7.6 That it is clear from a scrutiny of the said chart that with regard to item 5 there is admittedly a delay in completion even after taking into consideration the extended deadline.

7.7 That it is settled law that in order to injunct a Bank Guarantee on the ground of fraud, it must be established fraud in connection with the execution of the Bank Guarantee as would vitiate the very foundation of such Bank Guarantee (ITD Cementation Ltd. vs. Reliance Infrastructure (2014 (3) BomCR1, paras 17 and 18)). The subject Bank Guarantee is admittedly unconditional and irrevocable. The Petitioner is incorrect in contending that the delay was purely attributable to Respondent No.1. The extensive correspondence exchanged (which has been suppressed in the Petition) shows that Respondent No.1 had repeatedly emphasized the delays on the part of the Petitioner, who had time and again assured corrective action.

7.8 That the alleged MOM dated 30th June, 2014, was a unilateral document drafted by the Petitioner which remains unsigned till date (unlike other MOMs). The email from Mr. P.M.S. Bajaj was not an acceptance of the contents but simply asked for inclusion of one more item, which in fact is related to another project, before the minutes were fully considered by the higher officers. After full consideration, Respondent No.1 felt that the alleged MOM did not represent what was fundamentally agreed upon in the meeting.

7.9 That the submission of the Petitioner that in the light of clause 13.3 which provides for liquidated damages, it is not open for Respondent No.1 to claim the additional amounts in item 2 of the letter dated 22nd August, 2014, is incorrect. Clause 13.3 on liquidated damages itself states that additional damages, in terms of clause 13.1 may also be levied for delays in completion of works within the specific milestones. Respondent No.1 is also entitled to reimbursements for payments made to various third parties on account of the Petitioners failures. Owing to the Petitioners defaults, Respondent No.1 was compelled to appoint third parties to execute jobs initially assigned to the Petitioner and to recover the costs thereof from the Petitioner. The contract permits Respondent No.1 to follow such a course of action. The claim made in item 2 of the claim letter dated 22nd August, 2014 is in fact for the recovery of such additional costs incurred by Respondent No.1.

7.10 That the contention of the Petitioner that the limitation of liability at the rate of 15 per cent as contained in clause 16.2 would mean that the maximum liability of the Petitioner under the contract cannot exceed Rs. 32,40,77,415.45/ is also incorrect and cannot be accepted. The limitation of liability clause (clause 16.2 on page 43 of the Petition) is limited in its scope and within that limited scope contains certain exceptions for intentional or willful misconduct (such as nonpayment to vendors) and liquidated damages. The limitation of liability clause does not cover within its ambit the recovery of expenses incurred on behalf of the Petitioner and the Petitioner is liable to reimburse the same to Respondent No.1. The limitation of liability clause is not a bar against recovery of expenses necessitated on account of the financial difficulties faced by the Petitioners, risk purchase made to avoid disruptions in the project schedule and appointment of third parties to execute jobs initially assigned to the Petitioner. The numerous defaults brought to the attention of the Petitioner over the duration of the project were willfully disregarded despite assurances given for compliance. The Petitioners conduct would therefore fall within the willful misconduct exception of this clause.

7.11 That it is incorrect to state that the sum of Rs. 32.8 crores was also charged to the Petitioner as damages for the delays. The payments made by Respondent

No.1 in terms of clause 3.7 cannot be termed as damages and are simply reimbursements for payments made on behalf of the Petitioner. Clause 6.6 permits Respondent No.1 to appoint third parties to complete specific works if the Petitioner fails to do so within the stipulated time period and any further extended time period thereafter which is at the expense of the Petitioner. The provision for liquidated damages was intended only as one of the modes to recover damages, for a specific breach i.e. failure to achieve the specific milestone targets. The judgment in *Sir Chunilal Mehta vs. Century Spinning* (supra) would therefore not be applicable to the facts of the present case.

7.12 That the contention of the Petitioner that the claim for the sum of Rs. 56,92,43,090/- was not raised till after invocation of the Bank Guarantee, and consequently the Petitioners were not given an opportunity to either make the payment as demanded or dispute the claim as raised is baseless since Respondent No. 1 has from as far back as 21st June, 2011, informed the Petitioner of the delays being caused and has reserved its right under the contract to claim damages and take other remedial measures as required if the Petitioner failed to take corrective action.

7.13 That the demand note dated 16th June, 2014, was limited to a sum of Rs. 3,83,42,667/- as it pertained only to the refund of the excess advance paid as is evident from the letter itself (Page 109 of the Petition). Further Respondent No. 1's letters of 17th June, 2014, 7th July, 2014 and 6th August, 2014, (Pages 403, 406 and 409 of the reply Part-II) clearly mentions other reasons such as breach of contract, etc. The claim raised thereafter on 22nd August, 2014, includes claims and reimbursements under various heads in addition to the refund of the aforementioned excess amount.

7.14 That the contentions raised by the Petitioner in its petition cannot be raised or determined in proceedings under Section 9 of the Act where the Petition seeks to restrain the invocation of the Bank Guarantee. The issues raised are those which require to be raised before the Arbitral Tribunal, which is the only forum to adjudicate the same.

7.15 That in order to make out a case for injunction on the ground of irretrievable/special equities, the Petitioner would have to establish that there would be no possibility whatsoever of the recovery of the amount by way of restitution even if the Petitioner ultimately succeeds. The Petitioner did not present any arguments for an injunction on this ground and therefore is deemed to have conceded that no such circumstances exist. According to the Respondent No.1, no such circumstances exist.

7.16 That the above Arbitration Petition be therefore dismissed with compensatory costs.

8. I have considered the submissions advanced by the learned Senior Advocates appearing for the parties. The subject Bank Guarantee is annexed and marked as Exhibit-I to the Petition. Admittedly the subject Bank Guarantee is an unconditional and irrevocable Bank Guarantee issued by the Respondent No. 2 to the Respondent No. 1 at the instance of the Petitioner as provided in the contract. The relevant clauses of the said Bank Guarantee are reproduced hereunder:

We, INDUSIND BANK LIMITED irrespective of the validity and the legal effects of the Contract and waiving all rights of objection and defence arising there-from, hereby irrevocably guarantee to pay to you any amounts upto a maximum amount of Rs. 18,33,41,947/- (Rupees Eighteen crores thirty three lacs forty one thousand nine hundred forty seven only) without delay and without the necessity of any judicial or administrative action to be lodged. Any payments under this performance guarantee shall be made upon your first written demand.

.

The guarantee contained herein constitute our unconditional and irrevocable direct obligations towards you. No alteration in the terms and conditions of the Contract or in the extent or nature of the supplies and/or services to be performed there under or any other act or omission by you which but for this provision might exonerate or discharge us in any way shall release us from any liability hereunder.

The Petitioner has admitted that the subject Bank Guarantee is unconditional and irrevocable. No grievance is made by the Petitioner qua the procedure followed by the Respondent No. 1 whilst invoking the Bank Guarantee. The Petitioner has filed the Petition seeking reliefs on the ground that the Respondent No. 1 has fraudulently invoked the subject Bank Guarantee. The Petitioner has alleged in the Petition that three amendments to the contract dated 8th February, 2013, 26th July, 2013, and 6th August, 2013, were executed between the Petitioner and Respondent No.1 wherein Respondent No. 1 offered additional payment/- compensation amounting to Rs. 14,90,00,000/- to the Petitioner based upon target dates for various milestone events specified in the amendments. The additional payments made/- agreed to be made by Respondent No.1 to the Petitioner for mitigating the delays substantiates the fact that the delays were not attributable to the Petitioner. It is also stated in the Petition that thereafter the Respondent No. 1 cheated the Petitioner by invoking the Bank Guarantee thereby taking away the additional compensation paid to the Petitioner through the said invocation and again thereafter addressing a letter dated 23rd August, 2014, to the Petitioner thereby falsely making a claim of Rs.56,92,43,090/- which claims are purely an afterthought, concocted and baseless. In the said Petition, the Petitioner has not analysed the clauses contained in the here amendment deeds or the claim made by the Respondent No. 1 by its letter dated 23rd August, 2014 or minutes of any meetings held between the parties wherein purported decisions, as contended by the Petitioner, were taken. Instead, only a general statement is made that there was no delay on the part of the Petitioner and if at all there was any delay, the same was attributable to the Respondent No.1 and the claims made by the Respondent No. 1 aggregating to Rs. 56,92,43,090/- were an afterthought, concocted and baseless. The Petitioner for the first time submitted through its Counsel, during oral arguments, a chart along with the list of dates and events and contended that the said chart along with the list of dates and events unequivocally establishes that the milestone summary attached to the letter of Respondent No. 1 dated 23rd August, 2014, was false and misleading and there were no delays in completion which could be ascribable to the Petitioner. In my view, the Respondent No. 1 is correct in its submission that the particulars contained in the said chart tendered on behalf of the Petitioner ought to have been pleaded. The

inference sought to be drawn at the time of arguments, based on the contents of the said chart, i.e. to say, that the inflated quantum of delay which translates to an inflated claim is fraudulent in nature, also ought to have been pleaded in the Petition. The provisions of Order 6 Rule 4 require that where a party relies on a plea of fraud, particulars of such fraud must be specifically pleaded. In the absence of a specific pleading as to fraud and the alleged manner in which it has been perpetrated, a Court cannot come to a prima facie finding of fact on the aspect of fraud.

9. In any event, it is the Petitioners case that the Respondent No. 1 having agreed to pay additional amounts to the Petitioner to mitigate the delay establishes that the Petitioner is not at all responsible for any delay in completion of the milestones. Even the said chart is prepared based on the three amendment agreements dated 8th February, 2013, 26th July, 2013 and 6th August, 2013 which are annexed at pages 93, 96 and 99 of the Petition and the two minutes of meetings dated 17th January, 2014, and 4th February, 2014, at pages 102 and 105 of the Petition. In the said amendment agreements, the Petitioner is referred to as Contractor and the Respondent No. 1 as Customer. The Petitioner has overlooked some of the recitals/clauses of the amendment agreements which are reproduced hereunder:

(A) Amendment Agreements dated 8th February, 2013, and 6th August, 2013.

WHEREAS in order to recover the accrued delay at this point of time and in the best interest of the project, CUSTOMER hereby offers additional payments to CONTRACTOR to take acceleration measures as specified in Annexure 1 to recover from the delays already accrued in the CONTRACT, Customer hereby offers to pay additional payments without prejudice to any of its rights which has already accrued or to be accrued under the CONTRACT.

. . . .

13.8 Payment towards acceleration measures

(a) Notwithstanding to the milestone dates set out in the CONTRACT and without prejudice to the rights and obligations of the parties therein, the CUSTOMER and CONTRACTOR have now agreed to the acceleration measures with Target Dates and Additional Payments there on as specified in Annexure 1 of this amendment.

... .

(g) Nothing in this clause 13.8 shall preclude the rights of the CUSTOMER to levy and collect liquidated damages which have accrued or to be accrued under the CONTRACT. The CONTRACTOR hereby agrees that such liquidated damages under the CONTRACT are genuine pre-estimated and reasonable compensation against loss to the CUSTOMER on breach. The right to liquidated damages on breach is an absolute right.

(3) This Amendment shall be in addition to and not in derogation of the CONTRACT. All other terms and conditions of the CONTRACT shall apply mutatis mutandis to this agreement. In the event there is a conflict between the terms and conditions of this Amendment and the CONTRACT and/or any attachments, annexure, appendix thereto, the CONTRACT and/or any attachments, annexure, appendix thereto shall prevail.

(B) Amendment Agreement dated 26th July, 2013.

WHEREAS the CUSTOMER has agreed, in the best interest project and to avoid further severe impact to project schedule to pay such sum as advance payment under the AGREEMENT without prejudice to any of its rights and to any of the CONTRACTORS obligation under the FORMAL CONTRACT AGREEMENT.

..

3. The advancement of this additional advance payment shall be without any prejudice to any of the rights of the CUSTOMER under the AGREEMENT and/or any attachments, annexure thereto.

4. This Amendment shall be in addition to and not in derogation of the AGREEMENT. All other terms and conditions of the AGREEMENT shall apply

mutatis mutandis to this agreement. In the event there is a conflict between the terms and conditions of this Amendment and the AGREEMENT and/or any attachments, annexure thereto, the AGREEMENT and/or any attachments, annexure thereto shall prevail.

10. The afore-stated clauses establish that all the three amendment agreements were executed without prejudice and were not in derogation to the original contract. The additional advance payments were made without prejudice to any of the rights of the Respondent No.1 under the agreement and/or any attachments, annexures thereto. The Agreements dated 8th February, 2013 and 6th August, 2013 had a specific clause which preserve the right of Respondent No.1 to claim liquidated damages which had already accrued. Apart from the above clauses in the amendment agreement, the Supplemental Agreement dated 2nd September, 2013, (at page 89 of the Petition) clearly provides that the specific milestones as per the main contract would remain unchanged. The said clause is reproduced hereunder:

3. Scope of the Supplement

The Specific Milestone dates as per Main Contract dated 21 Dec 2010 and all the supplement orders remain unchanged during execution of this job by the Contractor. No claims (in terms of cost and time) from Contractor for delay in execution of works is admissible

Specific milestone has been defined in the main contract (Page 54 of the Petition) as under:

Specific Milestones: Milestones critical to the Customer and which are subject to the application of penalty for delayed achievement.

In view of the above, the submission now made on behalf of the Petitioner that since additional payments were made to them by the Petitioner, they cannot be held responsible for any delay and that delay if any is to be attributed only to the Respondent No.1, cannot be accepted at this stage. In fact, as pointed out by the Learned Senior Advocate appearing for the Respondent No.1, it is clear from a

scrutiny of the chart submitted on behalf of the Petitioner, that with regard to item 5, there is admittedly a delay in completion even after taking into consideration the extended deadline.

11. The Petitioner has submitted that the delay was attributable to Respondent No.1. This submission is belied by the extensive correspondence exchanged between the Petitioner and the Respondent No. 1 which shows that the Respondent No. 1 has repeatedly emphasized the delays on the part of the Petitioner, who had time and again assured corrective action. The letters categorically stated that the willful neglect in performing as per the milestone schedule would compel Respondent No. 1 to take mitigation measures under the contract such as performance by substitution, which expenses would be back-charged to the Petitioner. This submission is further belied by the tabular chart with details regarding some of the monthly meetings conducted for the years 20112012, 20132014 and the discussions concluded therein at pages 166, 169 and 177 of the reply Part-I, Minutes of meetings at page 302 of the reply Part-I and 359 of the Reply Part-II and letters at pages 371, 378, 384 and 407 of the reply Part-II.

12. The Petitioner has also relied on the alleged Minutes of Meeting dated 30th June, 2014, sent by email dated 3rd July, 2014 which also mentioned acceleration payments (page 109 of the Petition). It is alleged by the Petitioner that the same was wrongly denied by the Respondent No. 1 vide email dated 11th July, 2014, even after acceptance by one Mr. P.M.S. Bajaj (employee of Respondent No.1) vide email dated 3rd July, 2014 (Page 109 of the Petition). It is an admitted fact that the said Minutes of Meeting is drafted by the Petitioner and has remained unsigned till date. The Respondent No.1 prima facie appears to be correct in its submission that the email from Mr. P.M.S. Bajaj was not an acceptance of the contents of the minutes, but by his email Mr. Bajaj simply asked for inclusion of one more item which in fact is related to another project. It is possible that after full consideration Respondent No.1 felt that the alleged Minutes of Meeting did not represent what was fundamentally agreed upon in the meeting. It therefore cannot be concluded at this stage that the Petitioner cannot be held responsible for any delay in achieving the milestones and it is the Respondent No.1 who is solely

responsible for the delays caused, if any.

13. The Petitioner has also contended that the Respondent No. 1 has claimed Rs. 18.3 crores towards liquidated damages for alleged delays and Rs. 32.8 crores towards additional costs incurred due to alleged defaults in completion of work by the Petitioner and that both these claims relate to alleged delays to the project. Relying on the decision of the Honble Supreme Court in *Sir Chunilal Mehta (supra)*, it is submitted on behalf of the Petitioner that when liquidated damages are specified for a breach in the contract, other damages for breach of the same contract cannot be claimed.

To deal with the above submission advanced on behalf of the Petitioner, paragraphs 3.7 (page 59 of the Petition), 6.6 (page 61 of the Petition), 13.1 (page 68 of the Petition) and 13.3 (page 69 of the Petition) are reproduced hereunder:

3.7 The Contractor shall pay for the supplies and services performed by his Subcontractors in accordance with the agreements made with them. If the Contractor defaults on payment and this causes the Subcontractor to delay supplies and services or threaten to cease these, the Customer shall be entitled to pay these unpaid bills on behalf of the Contractor. Prior to such payment, the Customer shall give the Contractor opportunity to comment on the matter and shall consider any justified reservations on the part of the Contractor. The Customer shall be entitled to deduct payments made by the Customer to Subcontractors in accordance with the above regulation from payments due to the Contractor

6.6 If, for reasons which lie with the Contractor, it can be expected that Works required by the Contract will be deficient, will not be completed by the relevant Milestones or will otherwise not be in accordance with the Contract, the Customer may notify the Contractor thereof and fix a reasonable period of time for remedial action.

If this period has elapsed without such remedial measures having been undertaken by the Contractor, the Customer has the right to reject all or affected parts of the Contractors further works and to instruct a third party to continue carrying out or repairing all or affected parts of the Works at the risk and expense

of the Contractor, or to terminate the Contract in whole or in part and claim damages from the Contractor. In the event of termination, Clause 23.3 shall apply.

13.1 The time and Milestones for completion of respected Works as stated in the Contract shall all be considered as binding on the Contractor.

The Contractor shall organize his resources and perform the Works such that all agreed Milestones are met. Furthermore, the Contractor shall divide any of the time schedules upto show weekly activities in detail four weeks in advance.

In the event of noncompliance with Specific Milestones as defined in the Contractor, such shall be regulated in accordance with Clauses

13.2 and 13.3 below as appropriate.

Notwithstanding the remedies contained within clause 13.3 in the event of delay to Milestones in the agreed Contractors Baseline Time Schedule or Document Submittal Schedule (other than Specific Milestones), for which the Contractor is responsible and which are not caused by unforeseeable events as per Clause 13.2, the Contractor shall be liable to the Customer for any costs which the Customer may incur as a result of delayed commencement and/or disrupted execution of the works of other contractors which have been scheduled in reflection of the Contractors agreed detailed Baseline Time Schedule or Document Submittal Schedule. However, the customer shall use reasonable endeavours to mitigate the effect of such delay upon other contractors and towards such mitigation, the Contractor shall inform the Customer as soon as possible in respect of potential or projected delay to his scheduled activities. Any rescheduled dates which may be necessary and which are agreed by the Contractor and the Customer shall also be subject to the provisions under the Contract and of this clause. The Contractors liability under this Clause 13.1 shall be limited to the Contract Price.

13.3 Notwithstanding Clause 13.1, if the Specific Milestones specially designated in the Contract to be subject to penalties are exceeded for reasons other than those listed under Clause 13.2 above, the Contractor shall pay penalties of 2% of

the Contract Price per week commenced but not more than 10% of the Contract Price, even if the Customer did not reserve for himself such a right at the time of acceptance but, at the latest, when the final payment was made. For the avoidance of doubt the Customer is entitled to apply Clauses 13.1 and 13.3 herein concurrently.

A reading of the above clauses supports the submission advanced on behalf of the Respondent No. 1 that it is incorrect to state that a sum of Rs. 32.8 crores was also charged to the Petitioner as damages for the delays. The payments made by Respondent No. 1 in terms of clause 3.7 cannot be termed as damages and are simply reimbursements for payments made on behalf of the Petitioner. Clause 6.6 permits Respondent No. 1 to appoint third parties to complete specific works if the Petitioner fails to do so within the stipulated time period and any further extended time period thereafter which is at the expense of the Petitioner. The liquidated damages clause 13.3 allows for Respondent No. 1 to concurrently apply clauses 13.3 and 13.1 which entitles the Respondent No. 1 to recover costs incurred for delayed commencement/disrupted execution of works. It is evident from this that the parties never intended to have liquidated damages as the only amount recoverable from the Petitioner. The liquidated damages under clause 13.3 are in the nature of penalties for a specific breach i.e. failure to meet the specific milestones and the loss of profit/loss of production resulting there-from. These milestones were agreed to be kept unchanged as late as in the meeting of 4th February, 2014 (page 108 of the Petition). Clause 13.1 on the other hand allows for the recovery of all costs incurred due to delayed commencement/disrupted execution for which the Petitioner is responsible. Annexure-B of the claim letter dated 22nd August, 2014 (page 110C of the Petition) provides a breakup of the Rs. 32.8 crores charged to the Petitioner. An analysis of the said table will show that each sum is sought to be recovered on account of costs incurred by Respondent No.1 owing to the nonperformance and delays by the Petitioner or on account of being compelled to appoint third parties to complete jobs that are part of scope of works of the Petitioner. The claim of Rs. 32.8 crores, therefore is not simply on account of delays by the Petitioner but is a recovery of actual amounts spent by Respondent No.1 on the part of works which were necessitated by the nonperformance and delays by the Petitioner of its scope of works being the

Contractor of the civil works. It is clear from the above analysis of the relevant clauses that each clause applies concurrently and covers within its ambit different breaches by the Petitioner. It is therefore evident that the provision for liquidated damages was intended only as one of the modes to recover damages for a specific breach i.e. failure to achieve the specific milestone targets. The ratio in the case of Sir Chunilal Mehta (supra) was that no unascertained amount of damages can be claimed beyond the scope of the contract when the contract restricted the claim for damages to the liquidated damages stipulated therein. In the facts of the present case, however, the contract itself allows Respondent No. 1 to claim damages under various other heads in addition to and apart from the stipulated liquidated damages. Hence the ruling in Sir Chunilal Mehtas case does not apply to the present case.

14. It is is contended on behalf of the Petitioner that the limitation of liability at the rate of 15 per cent as contained in clause 16.2 would mean that the maximum liability of the petitioner under the contract cannot exceed Rs. 32,40,77,415.45. Clause 16.2 of the contract is reproduced hereunder:

Notwithstanding clauses 8.15, 16.1 and 17, the Contractor shall be liable to the Customer for any loss and/or damage caused by breach of contract, tort, or any other wrongful act or omission on the part of the liable party, its directors, officers, employees, agents, servants and/or subcontractors. Any liability under clause 16.2 shall be subject to the following limitation:

Liability for loss of production, loss of use, loss of profit, loss of information and/or data and any indirect or consequential damage shall be excluded, provided, however, that this limitation shall not affect any obligation of the Contractor to pay liquidated damages, damages and penalties under the contract or other costs as described in Clauses 13.1, 13.3 and 13.6.

Notwithstanding any provision in this Contract to the contrary, Contractors aggregate liability for all losses, claims or damage arising out of, under or in connection with this Contract, its performance or breach (including claims for an indemnity and costs under Clause 13.1) whether such liability arises in contract, tort (including negligence) or otherwise shall not exceed 15% of the final Contract

Price (as amended by any supplement), save for all third party claims, any liability for death or bodily injury, damage to customers property and third party property, intellectual property rights infringement, liabilities under 13.3 and 13.6 and liability for fraud, negligence and with regard to liabilities covered by insurance. Further, the above limitation of liability shall not apply to any damage or loss or claims caused or arising intentionally or by willful misconduct.

A reading of clause 16.2 as reproduced hereinabove shows that the same is limited in its scope and within that limited scope contains certain exceptions for intentional or willful misconduct and liquidated damages. As submitted on behalf of Respondent No.1, the limitation of liability clause does not cover within its ambit the recovery of expenses incurred on behalf of the Petitioner. According to the Respondent No.1, these expenses necessitated on account of the financial difficulties faced by the Petitioners, risk purchases made to avoid disruptions in the project schedule and appointment of third parties to execute jobs initially assigned to the Petitioners, are liable to be reimbursed to Respondent No.1 (Pages 412, 414, 417 and 420 of the Reply Part-II). The limitation of liability clause is not a bar against such recoveries. The Respondent No.1 also pointed out that the numerous defaults brought to the attention of the Petitioner over the duration of the project were willfully disregarded despite assurances given for compliance (Pages 307, 329, 344 of the Reply Part-I and 351, 359, 392, 414 and 420 of the Reply Part-II). Prima facie, the Petitioners conduct would therefore fall within the willful misconduct exception of this clause. The contention on behalf of the Petitioner that the maximum liability of the Petitioner under the contract cannot exceed Rs. 32,40,77,415.45 cannot be accepted.

15. It is also contended by the Petitioner that the demand note dated 16th June, 2014, was only for a sum of Rs. 3,83,42,667/- and thereafter the Respondent No. 1 has fraudulently raised its claim to approximately 56 Crores. The Petitioner is incorrect in its submissions. The said demand note was limited to a sum of Rs. 3,83,42,667/- as it pertained only to the refund of the excess advance paid as is evident from the letter itself (page 109 of the Petition). Further, Respondent No.1's letters of 17th June, 2014, 7th July, 2014 and 6th August, 2014, (Pages 403, 406 and 409 of the Reply Part-II) clearly mentions other reasons such as breach of

contract etc. The claim raised thereafter on 22nd August, 2014, includes claims and reimbursements under various heads in addition to the refund of the aforementioned excess advance. Therefore the submission of the Petitioner that after the demand note dated 16th June, 2014, raised by Respondent No. 1 claiming an amount of Rs. 3,83,42,667/- pertaining to the refund of excess advance paid, the Respondent No. 1 cannot make any claims on the Petitioner under the contract cannot be accepted.

16. The Petitioner has also contended that the claim for the sum of Rs. 56,92,43,090/- was not raised till after invocation of the Bank Guarantee and consequently the Petitioner was not given an opportunity to either make the payment as demanded or dispute the claim as raised. As pointed out by the Petitioner, the Respondent No. 1 has from as far back as 21st June, 2011 (Page 373 of the reply Part-II) informed the Petitioner about the delays being caused and has reserved its rights under the contract to claim damages and take other remedial measures as required if the Petitioner failed to take corrective action (Pages 382, 384, 386, 420, 422 and 429 of the reply Part-II). The Petitioner therefore cannot be heard to say that the Respondent No. 1 had not raised its claim prior to invocation of the Bank Guarantee. It may be true that Respondent No. 1 crystallized its claim after invocation of the Bank Guarantee but that cannot be construed to mean that the invocation of the Bank Guarantee by the Respondent No. 1 is fraudulent.

17. The fact that the quantum of delay and damages is being disputed by the parties establishes the existence of a dispute and consequently the said acts cannot be termed as an established fraud. The disputes raised by the Petitioner relate to the works contract between the parties, namely the underlying contract which are required to be raised before the Arbitral Tribunal. It is settled law that the Bank Guarantee is an independent contract and a challenge to the invocation/encashment of an irrevocable and unconditional Bank Guarantee has to be considered without any reference to the underlying or main contract or to the disputes/claims there-under. It is trite law that a Court can restrain encashment of Bank Guarantee in cases of established fraud in issuance of the Bank Guarantee. However, the fraud has to be absolute and egregious vitiating the very foundation

of the Bank Guarantee. In the present case, the Petitioner has failed to make out any case of fraud much less fraud of an egregious nature. The allegations therefore made by the Petitioner that the invocation of the Bank Guarantee is vitiated by fraud cannot be accepted and the said contention is rejected. The Petitioner has not advanced any arguments for any injunction on the ground of irretrievable injury/special equity.

18. In the light of the above circumstances, in my view, the Plaintiff has not made out any case to restrain the Respondent No.1 from invoking the said Bank Guarantee. I also do not agree with the submission of the Petitioner that balance of convenience is in its favour. The Arbitration Petition is therefore dismissed with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com