

Omaxe Construction Ltd. Vs. Union of India (Uoi) and ors.

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Court : Delhi

Decided On : May-06-2004

Reported in : 2004(2)ARBLR110(Delhi); IV(2004)BC570; 112(2004)DLT526; 2004(74)DRJ599; (2006)142PLR28

Judge : Mukundakam Sharma, J.

Acts : Arbitration and Conciliation Act - Sections 16 and 17; [Constitution of India](#) - Article 229; Code of Civil Procedure (CPC) - Order 39, Rules 1 and 2

Appeal No. : CS (OS) No. 334/2004 and is No. 2477/2004

Appellant : Omaxe Construction Ltd.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : V.K. Shali, Adv.

Advocate for Pet/Ap. : S.P. Kalra, Sr. Adv. and; R.C. Beri, Adv

Judgement :

Mukundakam Sharma, J.

1. A Notice Inviting Tender (for short NIT) was issued by the Public Works Department of the Government of National Capital Territory of Delhi inviting tenders from reputed firms / willing contractors for the work of construction of the

Institute of Liver and Biliary Sciences at Vasant Kunj, Sector-D, New Delhi. In response to the aforesaid NIT, the plaintiff herein submitted its tender giving its offer. The validity of the aforesaid bid was extended by the plaintiff from time to time and the last extension was granted by the plaintiff on 20.1.2004 by its letter written on the same day clearly stating that the plaintiff extends the validity of the submitted bid by 30 days from the last date of the already extended validity. The aforesaid bid of the plaintiff was accepted and a communication thereof was sent on 7.2.2004 under the signature of the Executive Engineer. The said communication reads as follows:

'The undersigned on behalf of the President of India intends to accept your tender for the above mentioned work for the negotiated amount of 30,07,55,232.00 (Rupees thirty crores seven lakh fifty thousand two hundred thirty two only). As per condition of tender on page 81-84 (photo copy enclosed), you are requested to submit an Irrevocable Performance Guarantee @ 5% of tendered amount.

The irrevocable performance Guarantee shall be in the favor of Executive Engineer, PWD Division-27, New Delhi.'

2. After the receipt of the aforesaid letter, the plaintiff wrote a letter to the Executive Engineer PWD Div-27 on 16.2.2004 thanking him for awarding the aforesaid work to the plaintiff. In the said letter dated 16.2.2004 it was further intimated that the plaintiff had applied for the 5% Irrevocable Performance Guarantee of the tendered amount which is under process and the same would be available to the plaintiff on 28.2.2004. Accordingly, it was requested under the said letter that the period for submission of the bank guarantee be extended by one week i.e. up to 28.2.2004. The said bank guarantee was finally submitted by the plaintiff with the Public Works Department under letter dated 21.2.2004. Interestingly, however, a letter was written by the Finance Officer of the Public Works Department to the plaintiff on 1.3.2004 stating therein that validity of the bid had expired on 21.2.2004 and, therefore, the plaintiff is to extend the validity period of the submitted bid up to 22.3.2004. A response thereto is also shown to have been sent by the plaintiff to the Finance Officer on 4.3.2004 informing him that the plaintiff was unable to extend the validity of its offer in respect of the

aforesaid tender beyond the validity period last extended.

3. Arguments have been advanced by the counsel for the parties on the legality and validity and merit of the aforesaid two letters, which would be discussed at an appropriate place. The Finance Officer on 11.3.2004 wrote a letter to the plaintiff stating that since the letter of intent and performance Guarantee had already been submitted by the plaintiff to the Executive Engineer, therefore, the letter dated 1.3.2004 should be treated as withdrawn and cancelled. The said letter of 1.3.2004, which was withdrawn and cancelled by the aforesaid letter, is the same letter which was written by the Finance Officer requesting for extending the validity of the bid. On 13.3.2004 and by the subsequent letter dated 15.3.2004, the plaintiff objected to the manner in which the letter dated 1.3.2004 was withdrawn by the Public Works Department. By writing the said letters, the plaintiff informed the defendants that validity of the bid expired on 21.2.2004 and thereafter the said validity period was not extended and since no letter of intent confirming the acceptance of the competent authority as per clause mentioned in page No.81 to 84 was intimated during the validity of the offer period, therefore, it was submitted that no effective concluded contract came into existence between the parties. It was also submitted that since there was no concluded contract between the parties, therefore, the performance bank guarantee, which is submitted by the plaintiff could not be invoked by the Public Works Department.

4. In the light of the aforesaid background facts, the present suit is filed by the plaintiff praying for a mandatory and permanent injunction restraining the defendant i.e. Public Works Department of the Government of National Capital Territory of Delhi from encashing / enforcing the performance bank guarantee and to return the same. An application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure is also filed seeking for an order granting temporary injunction in favor of the plaintiff restraining the defendants, their agents and employees from enforcing / encashing the performance guarantee.

5. The aforesaid performance bank guarantee was, however, invoked by the defendants. The plaintiff filed the suit on which summons and notices were issued. However, when the matter was again listed on 19.4.2004, the defendants were

represented by the Standing Counsel for the Government of NCT of Delhi and in his presence and after hearing the counsel for the parties an order was passed by this Court giving some time to the Standing Counsel to obtain instructions from the defendants with a further direction that the matter shall be renotified on 23.4.2004. It was also recorded in the said order passed on 19.4.2004 that the defendants have already invoked the performance bank guarantee and have sent a letter to the bank for transmitting the amount of the performance bank guarantee and that in view of the aforesaid position an order was passed directing the bank not to transmit or pay the amount to the defendants with a further direction that the said amount of the performance bank guarantee shall be kept in the bank, which shall be subject to further orders to be passed in that regard.

6. On 23.4.2004, the matter was again listed before this Court when the counsel for the parties were heard. During the course of arguments both the counsel for the parties agreed that there is an arbitration clause in the agreement being clause 25. According to the said clause any dispute or difference arising out of or in connection with the agreement is required to be adjudicated upon and decided by appointing an arbitrator. The detailed procedure for appointment of the arbitrator is set out in clause 25 of the agreement. The contention of the counsel for the plaintiff was that the aforesaid clause 25 is not applicable to the facts of the present case as according to him there was no concluded, valid and subsisting contract between the parties as the aforesaid contract was not executed in accordance with the provisions of Article 229 of the [Constitution of India](#) and also because the contract was not a concluded contract. therefore, the counsel sought to raise a dispute with regard to existence, legality and validity of the agreement which is shown to have been executed between the parties. It is, however, clear and apparent that under the provisions of Section 16 of the Arbitration and Conciliation Act any dispute arising out of the contract including that even a plea regarding existence, legality and validity of the agreement is required to be adjudicated upon and decided by the arbitrator himself. The defendants have taken up a plea that there is a valid and subsisting agreement between the parties containing an arbitration clause and, therefore, the present suit cannot be proceeded with and the parties must take recourse to the arbitration clause. At this stage, counsel for the plaintiff submitted that the plaintiff would have no objection

to raise its claims and file the same before an arbitrator provided an independent arbitrator is appointed. Counsel for the defendants, however, submitted that since a procedure for appointment of the arbitrator is provided for in clause 25 of the agreement, the said procedure is to be followed for referring the disputes.

7. I have considered the rival submissions of the counsel for the parties. There can be no dispute to the fact that there is an arbitration clause in the agreement being clause 25 of the agreement. The plaintiff has raised pleas questioning the very existence and validity of the agreement. Section 16 of the Act, as stated herein above, states that even such pleas are required to be considered by the arbitrator. Both the parties have also agreed that the disputes between the parties could be resolved through arbitration. Accordingly, in terms of the stand taken by the counsel for the parties during the course of their submissions, I am of the considered opinion that all the disputes that arise between the parties arising out of and in connection with the agreement including that of challenge to the legality and validity of the agreement itself are required to be adjudicated upon and decided through the process of arbitration by appointing an arbitrator.

8. Considering the various pleas taken, I also consider it necessary that in the facts and circumstances of the present case an independent arbitrator should be appointed and, therefore, I appoint Hon'ble Ms. Justice. Usha Mehra, a retired Judge of this Court as the arbitrator to adjudicate upon and decide all the disputes arising between the parties including that of the challenge to the legality and validity of the agreement. The parties shall appear before the learned arbitrator on 24.5.2004 and shall file their claims and counter claims, on receipt of which the learned arbitrator shall proceed to decide the disputes between the parties. It shall be open to the learned arbitrator to fix her own remuneration after discussion with the counsel for the parties.

9. The next question, which is required to be considered by me is as whether or not any injunction as sought for by the plaintiff restraining encashment of the bank guarantee and transmission of the amount to the defendants is required to be or could be passed in the present case. As indicated herein above, the bank guarantee has already been invoked by the defendants but in view of an interim

order passed by this Court the amount under the performance bank guarantee could not be transmitted to the defendants. A copy of the said performance bank guarantee which was furnished by the plaintiff in favor of the defendants is placed on record. The said bank guarantee was given by the State Bank of India, Commercial Branch, Nehru Place, New Delhi in favor of the defendants. Relevant portion of the said bank guarantee is extracted below:

'2. We, State Bank of India, Commercial Branch, Nehru Place, New Delhi, 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 required to meet the recoveries due or likely to be due from the said contractor. 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.1,50,37,761/- (Rupees One Crore Fifty Lacs Thirty Seven Thousand Seven Hundred Sixty One Only).

3. We, the said Bank further undertake to pay the Government any money so demanded notwithstanding any dispute or disputes raised by contractor in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal.'

10. The law relating to encashment and/or enforcement of the bank guarantee is well settled by a long catena of decisions pronounced by Supreme Court and this Court. The principles have been authoritatively laid down which the Court is to apply when a request is made for grant of an injunction restraining encashment of a bank guarantee. In the case of Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and another reported in 1997 (2) ALR 350, the Supreme Court has summarised the said principle in paragraph 22. While summarizing the said principle the Supreme Court had laid down that commitment of the banks must be honoured free from interference by the Court and it is only in exceptional cases i.e. only in case of fraud or in a case where irretrievable injustice would be done if the bank guarantee is allowed to be encashed that the Court should interfere. The aforesaid principle was also stated by the Supreme

Court in Hindustan Steel Works Construction Ltd. v. Tarapore & Co. & another reported in : AIR 1996 SC2268 . In paragraph 23 of the said judgment it was held by the Supreme Court as follows:

'We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, it is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud had not been pleaded and the relief for injunction was sought by the contract/respondent No.1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.'

11. In Dwarikesh Sugar Industries Ltd. (supra), the Supreme Court held that in order to make out a case of fraud the petitioner has to establish that the said fraud is an established fraud. In respect of the second exception to the Rule of granting injunction in case of a bank guarantee it was stated that resulting irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds and the same shall have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution.

12. At this stage, reference also could be made to a recent decision of the Supreme Court in National Highway Authority of India v. M/s Ganga Enterprises & Anr. reported in : AIR 2003 SC3823 wherein the Supreme Court has laid down a

law regarding enforcement of 'on demand bank guarantee'. It was held by the Supreme Court in that regard that if the enforcement is in terms of the guarantee, then Courts must not interfere with the enforcement of bank guarantee. It was also held that the Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud. It was further held that courts cannot restrain invocation of an 'on demand guarantee' in accordance with its terms by looking at terms of the underlying contract and that the existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee.

13. In my considered opinion, the ratio of the aforesaid decisions of the Supreme Court are clearly applicable to the facts and circumstances of the present case. In the present case also the dispute is raised regarding existence, validity and non-existence of the underlying contract. therefore, the question regarding challenge to the legality and validity of the said underlying contract would be irrelevant if it is found that invocation of the bank guarantee is in terms of the bank guarantee. In the present case, the plaintiff has neither alleged any fraud nor made out any case of any irretrievable injury. It is also not the plea of the plaintiff that the bank guarantee has not been invoked in accordance with the terms of the bank guarantee. The nature of the bank guarantee given by the plaintiff has been set out above. The bank guarantee on the face of it is of irrevocable nature. It also provides that it is payable by the guarantor to the defendant on demand without demur merely on demand of the defendant stating that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor. It further provides that any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under the guarantee. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. : [1988]1SCR1124 , which was a case in the nature of the present case, the Supreme Court after referring extensively to English and Indian cases on the subject held that the guarantee must be honoured according to its terms. It was said that the bank which gives the guarantee is not concerned in the least with the disputes arising out of underlying contract and the bank is required to pay according to the tenor of its guarantee on demand without condition or proof.

14. In my considered opinion, for establishing fraud on the part of the defendant specific pleadings will have to be there to indicate that in fact fraud had been committed by the defendant which is by nature an established fraud. No such pleading apparently is on record. thereforee, the plaintiff has not been able to make out a case of fraud in the present case. In the case of Hindustan Steel Works Construction Ltd. (supra) it is held by the Supreme Court that in the case of unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. It is true that the plaintiff has alleged that no contract valid in the eye of law came into existence between the parties. It is already held that since the said pleas themselves give rise to disputes between the parties, which could be effectively resolved through the process of arbitration. But the said disputes even assuming that they go to the root of the contract and serious in nature do not and cannot be brought into within the concept of special equities and cannot in my considered opinion amount to a case of irretrievable injury and exceptional case. Similar factors have been held to be not sufficient to make out an exceptional case justifying interference in the case of Hindustan Steel Works Construction Ltd. (supra) when it laid down thus:

'The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, thereforee, not right in restraining the appellant from enforcing the bank guarantees.'

15. The aforesaid disputes are connected with the main underlying contract. thereforee, they cannot have any relevance to the liability of the bank under the guarantee given by it. The bank in the present case gave an unconditional bank guarantee and the bank is under an obligation to pay on demand.

16. Considering the entire facts and circumstances as stated above and particularly in view of the settled position of law in that regard, I am satisfied that the plaintiff has failed to make out any prima facie case for grant of injunction against the defendants restraining the defendants from Realizing the amount under the bank guarantee. The prayer for injunction, therefore, stands rejected. Interim order passed stands vacated.

17. In the light of the aforesaid discussion, the disputes arising between the parties are referred to the sole arbitrator appointed today. It is made clear that it shall be open for the parties to seek for any interim measure before the learned Arbitrator as envisaged under Section 17 of the Arbitration and Conciliation Act.

18. In terms of the aforesaid order, the suit as also the injunction application stand disposed of.

Mukundakam Sharma, J.

May 6, 2004

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