

Kei Industries Ltd. Vs. D.E.S.U.

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SooperKanoon Citation : sooperkanoon.com/702439

Court : Delhi

Decided On : Aug-07-1995

Reported in : [1996]85CompCas32(Delhi); 1995(34)DRJ580

Judge : Jaspal Singh, J.

Acts : [Arbitration Act, 1940](#) - Sections 41

Appeal No. : Interim Application No. 7267 of 1995 and Suit No. 1608-A of 1995

Appellant : Kei Industries Ltd.

Respondent : D.E.S.U.

Advocate for Pet/Ap. : I.S. Mathur,; Valmiki Mehta,; Lalit Kumar,;

Judgement :

Jaspal Singh, J.

(1) Along with its petition under section 20 of the Arbitration Act, the petitioner Company has also moved an application under section 41 of the Act seeking to restrain the respondent (DESU) from invoking three Bank guarantees one of which relates to Dena bank while the remaining two to Punjab National Bank. I am penning these lines in disposal of the said application.

(2) First, a bird-eye view of the essential facts.

(3) On November 20, 1992 the petitioner company was awarded the tender for supply of 760.2 Km of control cables of various sizes. The total value of the contract was Rs.5,31,39,956. It was to be completed by November 20, 1993. However, till August, 1994, the petitioner had supplied only 195.219 Km of cables and it attributes this delay to the respondent while the respondent puts entire blame on the petitioner. Anyhow, it does appear that time for performance of the contract was extended though, despite that it still remains unfulfilled. As would be obvious, the delay is of almost two years. Besides blaming the respondent for this inordinate delay, the petitioner has yet another complaint against it. It says that despite there being an agreement requiring the respondent to open letters of credit and despite some supplies having been made, it never opened a letter of credit and now not only refuses to do so but even threatens to terminate the contract and encash the Bank guarantees.

(4) As already noticed above, the respondent does not admit being responsible for the delay. Rather, it blames the petitioner for it and claims that it is the petitioner which has committed breach of the contract. The respondent however, does admit that letters of credit were not opened but says that since the very first lot of cables was supplied after the expiry of the period of contract, it was clarified to the petitioner that it would not be possible to open letters of credit. As regards the supplies made by the petitioner, the respondent claims to have made payments against them. In short thus, as per the respondent it would be within its rights to encash the Bank guarantees if the petitioner fails to comply with the requirements as stipulated in the notice of June 9,1995.

(5) This, then, is the backdrop.

(6) Mr. Ishwar Sahai who appeared for the petitioner company pressed for the restraint order on the strength of two judgments. Both emanate from this court. The first comes from the pen of Ms. Usha Mehra, J. and the second from that of Mahinder Jain, J.

(7) In the first, reported as Victor Cables Industries Ltd. Vs . Engineering Projects (I) Ltd. : 58(1995)DLT464 the Bank was 'injected and restrained' from encashing the performance guarantee in question. The reason which prevailed with the court

was that the respondent therein had altered the essential terms of the agreement to the financial detriment of the petitioner. It was thus taken to be prima facie a case of special equity.

(8) What does the judgment show Only one thing and it is that if the petitioner makes out a case of special equity then the Bank may be restrained from encashing the performance guarantee. The challenge by the respondent is not to that proposition. It is, that no case is made out for special equity and it is here that the petitioner flounders. Or so it seems to me. The petitioner made the very first supply after the expiry of the period of contract and though almost two years have passed by even thereafter, major part of the contract still remains unfulfilled. It is not that the respondent has not been making payments towards the cables supplied. It has been and keeping in view the erratic and delayed supplies, the refusal of the respondent to open letters of credit sounds reasonable more so when it has not withheld payments. Not only this, the respondent had advanced to the petitioner a sum of Rs.52,85,905. Out of this huge amount only about Rs.8 Lakhs stand recovered. The remaining amount is still lying with the petitioner who is enjoying the interest accruing thereon. How can thus the petitioner be taken to have made out a case of special equity ?

(9) Time now to proceed to the next judgment. It is Nanpa Const. India (P) Ltd. Vs . N.B.C. Corp. and Ors. : 41(1990)DLT359 . For our purposes, what the 170 paragraphs of this judgment lay down is that if a bank guarantee eliminates defeatist contingency then in that case it would be hit by the provisions of section 23 of the Indian Contract Act. However, unfortunately for the petitioner the guarantees do not appear to me to be what the judgment calls 'an unconditional bank guarantee'. The bank guarantee here appears to be neither vague nor non-default guarantees. They talk of 'moneys payable by the contractor',

(10) To invite interference with the operation of the performance guarantee it must be established to the bank's knowledge that the demand for payment made or to be made would clearly be fraudulent and good prima facie evidence has to be not only with regard to the bank's knowledge but as to the fact of fraud as well. Let me extract a passage from G.E.T. Service Co. Inc. Vs . Mis. Punj Sons (P) Ltd. :

[1991]3SCR412 for it makes the position clear. It says :

'THE question is whether the Court was justified in restraining the Bank from paying to Gets co under the bank guarantee at the instance of respondent -1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in a recent judgment of this Court in U.P. Co-op. Fed. Ltd. Vs . Singh Consultants and Engineers (P) Ltd : [1988]1SCR1124 , wherein Sabyasachi Mukerji, J. as he then was, observed (at page 189) ; that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operations will get Jeopardised. It was further observed that the Bank must honour the bank guarantees free from interference by the Courts. Otherwise, trust in commerce internal and international would be Irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. In the concurring opinion one of us (K.Jagannatha Shetty, J) has observed that whether it is a traditional bond of performance guarantee, the obligations of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defense except in the case of fraud. The Bank's obligation of course should not be extended to obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the Courts talk about is fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is fraud of the beneficiary not the fraud of somebody else.'

(11) The petitioner establishes no fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It establishes no special equity and surely refusal to grant injunction would cause no irretrievable injustice to the petitioner. It thus fails to make out a case for the grant of a restraint order as sought by it. The

application is consequently dismissed.

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