

Boc Properties Ltd. Vs. Delhi Development Authority

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Court : Delhi

Decided On : Sep-01-1996

Reported in : 1996VAD(Delhi)26; I(1996)BC15; 64(1996)DLT143

Judge : S.K. Mahajan, J.

Acts : Arbitration Act - Sections 20; [Companies Act, 1956](#)

Appeal No. : Interim Application No. 9653 of 1994 and Suit No. 2465 of 1994

Appellant : Boc Properties Ltd.

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : Harish Malhotra,; Ravinder Sethi and; Sumeet Bansal, Ad

Judgement :

S.K. Mahajan, J.

(1) The tender of the petitioner for the work of 770 Mig DUs in Sector 18, Rohini, Phase II was accepted by the respondent for a total sum of Rs. 12.59 crores. In terms of the contract, a sum of Rs. 90 lakhs was released to the petitioner by way of mobilisation advance against six Bank guarantees issued by Canara Bank, Connaught Circus, New Delhi. On account of the petitioner having not been able to perform the contract, the respondent is alleged to have terminated the same and by letter dated 28th October, 1994, invoked the Bank guarantees and called

upon the Bank to pay to the Authority the total sum of Rs. 90 lakhs which the Bank had undertaken to pay under the aforesaid guarantees.

(2) That it was on the writing of the said letter invoking the Bank guarantees that the petitioner filed this petition under Section 20 of the Arbitration Act on November 1, 1994 alleging that certain disputes had arisen between the parties under the subject contract which required to be referred to arbitration. Along with the petition under Section 20 of the Arbitration Act, an application under Section 41 read with Schedule 2 of the Arbitration Act has been filed for restraining the Authority from encashing the said Bank guarantees. It is this application which I propose to dispose of by this order.

(3) The contention of learned Counsel for the petitioner is that there was a delay in the performance of its obligation by the Delhi Development Authority which resulted in the delay in the execution of work and up to December, 1992 the petitioner had executed work of the value of Rs. 88 lakhs. It is, therefore, his contention that as there was no default on the part of the petitioner, the respondent could not invoke the Bank guarantees and call upon the Bank to pay the amount covered by them. It is also the contention of the petitioner that the Delhi Development Authority itself had, by its letter dated January 2, 1993, admitted that a sum of Rs. 8,30,894.00 had been recovered out of the mobilisation advance of Rs. 90 lakhs and the liability of Canara Bank in respect of the Bank guarantees corresponding the said amounts stood discharged. By another letter dated 18th November, 1993, the Delhi Development Authority informed the petitioner that an amount of Rs. 24,15,588 had been recovered from the mobilisation advance of Rs. 90 lakhs and the balance pending mobilisation advance, as on date, was Rs. 65,84,412.00 .

(4) According to the petitioner, therefore, the maximum liability of the Bank under the bank guarantees was Rs. 65,84,412.00 and the respondent could not have called upon the Bank to pay the entire amount of the Bank guarantees. He, therefore, submits that it was a clear case of fraud and misrepresentation on the part of the beneficiary of the Bank guarantees which gives special equity in favor of the petitioner to stop payment by Bank on the basis of the demand letter.

(5) He has referred to judgments reported as Banerjee & Banerjee v. Hindustan Steel Works Construction Limited, : AIR1986 Cal374 ; M/s. G.S. Atwal & Company v. Hindustan Steel Works Construction Limited, : AIR1989 Cal184 ; Ansal Properties & Industries Limited v. Engineering Projects India Limited, 1988 (1) Delhi Law 339; M/s. Nangia Construction (India) Private Limited v. National Building Construction Corporation Limited, and M/s. Som Dutt Builders Limited v. Star Industries & Textile Enterprises 1990 (3) Delhi Law 369 in support of his contention that as disputes have been raised by the petitioner regarding the amount which is allegedly due to the respondent he is entitled to an order in his favor restraining the respondent from encouraging the Bank guarantees.

(6) The further contention of the petitioner is that the Arbitrator, in certain disputes which had earlier been raised by the petitioner, has already given an award in favor of the petitioner and a sum of Rs. 55 lakhs is due to the petitioner from the respondent for the work done and on the basis of the award already passed in his favour. It is, therefore, submitted that the respondent did not have any right to invoke the Bank guarantees.

(7) It is also the contention of the petitioner that the Bank guarantees have not been invoked for encashment by an authorised person as it was only the Chairman of the Delhi Development Authority who could issue the notice of demand whereas the demand has been issued by the Executive Engineer.

(8) With a view to appreciate the contention of the petitioner, it will be useful to note the terms of the Bank guarantees. All the Bank guarantees are exactly similar and the contents of one of the Bank guarantees are as under :

'IN consideration of the Chairman, Delhi Development Authority (herein after called the Authority which expression shall include unless repugnant to the subject or context include his successors and assigns) having agreed under the terms and conditions contract No. F-54,(78)/A/89/RPD.00 6/DDA/857 dated 5.7.1991 made between Boc Properties Ltd., a Company under the [Companies Act, 1956](#) and having its registered office at E-584, Greater Kailash, Part-11, New Delhi-110 048 in the State of Union Territory hereafter called the said contractor and the Chairman, Delhi Development Authority in connection with C/O 520(770) Mig

Houses in Block C&D; in Sector 18, Rohini Phase11 on Turn key basis therein after called the said Contract) to make at the request of the contractor a mobilisation advance of Rs. 20,00,000.00 (Rupees twenty lacs only) for utilising it for the purpose of the contract on his furnishing a guarantee acceptable to the Chairman, DDA. We the Canara Bank, F-19, Connaught Circus, New Delhi-110001. (hereinafter referred to as the said Bank) a Company under the [Companies Act, 1956](#) and having our Registered Office at 112 Jc Road Bangalore do hereby guarantee the due recovery by the Chairman, Dda to the said advance with interest thereon as provided accordingly to the terms and conditions of the Contract. We, Canara Bank, F 19, Connaught Circus, New Delhi, do hereby undertake to pay the amount due and payable under this guarantee without any demur, merely on a demand from the Chairman, Dda stating that the amount claimed is due to the Chairman, Dda under the said agreement. Any such demand made on the contractor, Boc Properties Limited, shall be conclusive as regards the amount due and payable by the said liability of the Bank to pay the Chairman, Dda the amount so demanded shall be absolute and unconditional notwithstanding any dispute or disputes raised by the contractor and notwithstanding any legal proceeding pending in any Court or tribunal relating thereto. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 20,00,000.00 (Rs. Twenty lacs only).

We, Bank, F-19, Connaught Circus, New Delhi, further agree that Chairman, Dda shall be the sole judge of and as to whether the said contractor has not utilised the said advance or any part thereof for the purpose of the contract and the extent of loss or damage caused to or suffered by the Chairman, Dda on account of the said advance together with interest now being recovered in full and the decision of the Chairman, Dda that the said contractor has not utilised the said advance or any part thereof for the purpose of the contract and as to the amount or amounts of loss or damage caused to or suffered by the Chairman, Dda shall be final and binding on us.

We, Canara Bank, F-19, Connaught Circus, New Delhi, further agree that the Guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said contract and till the said

advance with interest has been fully recovered and its claim satisfied or discharged and till Dda certify that the said advance with interest has been fully recovered from the said contractor, and accordingly discharges this guarantee subject, however that the Chairman, Dda shall have no claims under this guarantee after 30.7.1992 from the date of completion of the said contract, as the case may be, unless notice of the claim under this guarantee has been served on the Bank before the expiry of the said period of 30.7.1992 in which case the same shall be enforceable against the Bank notwithstanding the fact that the same is enforce after the expiry of the said period of 30.7.1992.

THE Chairman, Dda shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee or indemnity, from time to time to vary any of the terms and conditions of the said contract or the advance or to extend time of performance by the said contractor or to postpone for anytime and from time. to time any of the powers exercisable by it against the said contract or and either to enforce or forbear from enforcing any of terms and conditions governing the said contract or the advance or securities available to the Chairman, Dda and the said Bank shall not be released from its liability under these press by any exercise by the Chairman, Dda of the liberty with reference to the matter aforesaid or by reason of time being given to the said contractor or any other forbearance, act or omission on the part of the Chairman, Dda to the said contractor or of any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Bank from its such liability.

IT shall not be necessary for the Chairman, Dda to proceed against the contractor before proceeding against the Bank and the Guarantee herein contained shall be enforceable against the Bank notwithstanding any security which the Contractor shall at the time when proceedings are taken against the Bank hereunder be outstanding or unrealised.'

Under the Bank guarantees, the bank had agreed to pay to the Chairman, Delhi Development Authority any amount due to the Chairman under the Agreement without any demur. The contract in question had been signed by the Executive Engineer for an on behalf of the Delhi Development Authority. It is not disputed by

the petitioner that the Executive Engineer was duly authorised to enter into agreements on behalf of the Authority and it was by virtue of the said authority which had been given to the Executive Engineer that he had entered into the agreement by virtue of which the contract was awarded in favor of the petitioner. In case the Executive Engineer was authorised to enter into an agreement on behalf of the Authority, it is just not understood as to how the same Executive Engineer is not authorised to issue a letter of invocation of the Bank guarantee on behalf of the Authority. It is not that the Chairman is personally interested to receive the amount from the Bank but the Chairman is acting on behalf of the Authority and when a mention has been made that the Bank will pay to the Chairman, Delhi Development Authority any amount without demur on a demand having been made to it by the Chairman, Delhi Development Authority, what it implies is that the Bank would pay to the Delhi Development Authority the amount in case a demand is made by any person authorised on behalf of the Authority to make such demand. As the right of the Executive Engineer to enter into an agreement on behalf of the Authority is not challenged, I have no hesitation in holding that the Executive Engineer was fully justified and authorised to issue the letter of invocation on behalf of the Chairman, Delhi Development Authority calling upon the Bank to pay the amount covered by the Bank guarantees to the Authority.

(9) A perusal of the Bank guarantees shows that the Bank had unequivocally agreed to pay the amount of mobilisation advance to the Delhi Development Authority without any demur on a demand having been made by the Authority stating that the amount claimed was due to it under the agreement. Any such demand made on the contractor was said to be conclusive as regards the amount due and payable by the Bank under the guarantee and the liability of the Bank under the guarantee was absolute and unconditional notwithstanding any dispute or disputes raised by the contractor and notwithstanding any legal proceedings pending in any Court or Tribunal in relation there to. However, the liability of the Bank has been limited to the amount of the guarantee,

(10) In view of the clear and unequivocal undertaking to pay to the Authority without any demur any amount not exceeding the amount of the Bank guarantee as per terms and conditions, contained therein, the petitioner could not take the

plea that an award having already been made in its favor and sufficient amount still being allegedly due to it from the respondent for the work executed by the petitioner. Moreover this award has not yet been made a rule of the Court and decree in terms of the award has not been passed. Delhi Development Authority has filed objection to the award and the petitioner, therefore, in my view cannot take any advantage of the same (11) Any disputes which have been raised or which might be raised by the petitioner under the principal contract cannot be looked into while making payment under the Bank guarantee. It has been repeatedly held by the Courts that the Bank guarantee is a separate contract which has nothing to do with the claims under the principal contract and the Courts while deciding as to whether the amount is payable under the guarantee or not has to see only the terms of the Bank guarantee. Unless a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties had been made out, there cannot be any ground to restrain the invocation of the Bank guarantee, otherwise the very purpose of Bank guarantee would be negated and fabric of trading 'operation would be jeopardised. In the present case, the plaintiff has not made out any case of fraud what to speak of irretrievable injustice. All that has been argued by the petitioner is that it is respondent No. 1 who is guilty of the breach of the principal contract and that the Bank is not liable to make payment of a sum of more than Rs. 65,84,412.00 which is the higher limit.

(12) In *U.P. Co-operative Federation Limited v. Singh Consultants and Engineers (P) Limited*, : [1988]1SCR1124 , the Court had held as under :

'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 a serious dispute and a 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 negative and the fabric of trading operation would be jeopardised. The commitments of the Banks must be, honoured free from interference by the Courts; otherwise, trust in commerce internal and international would be irreparable injustice that the Court should interfere. This is not a case where irretrievable injustice would be done by enforcement of the Bank guarantee.

This is also not a case where a strong prima facie case of fraud in entering into a transaction was made out. The High Court should not have interfered with the Bank guarantee. The judgment and order of the High Court set aside. The order of the Civil Judge restored'.

I need not refer to various other judgments of the Supreme Court where a similar view has been taken and it has been held that Bank guarantee is a separate contract nothing to do with the principal contract except to refer to the following observation of the Supreme Court in *Ansal Engineering Projects Ltd. v. Tehri Hydroelectric Corporation Ltd.*, : (1996)5SCC450 :

'IT is settled law that Bank guarantee is an independent and distinct contract between the Bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the Bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the Bank guarantee even if dispute between the beneficiary and the person at whose instance the Bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the Bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor. It is equally settled law that in terms of the Bank guarantee the beneficiary is entitled to invoke the Bank guarantee and seek encashment of the amount specified in the Bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of Bank guarantee or Letters of Credit solemnly given by the Bank must be honoured. The Court exercising its power cannot interfere with enforcement of Bank guarantee / Letters of Credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading

operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief.'

(13) In view of the above decisions of the Supreme Court, the judgments cited by learned Counsel for the petitioner are of no assistance to him. Though it is the case of the petitioner that out of the mobilisation amount of Rs. 90 lakhs, a sum of Rs. 24 lakhs has already been recovered from the running bills of the petitioner, in my view, the same will have no bearing whatsoever on the Bank guarantees inasmuch as the Bank is not a party to any certificate which might have been given by the Authority to the petitioner informing it that the amount of mobilisation has been reduced by Rs. 24,15,588.00 . Even assuming, for the sake of arguments, that the amount of mobilisation advance has been reduced to Rs. 65,84,412.00 , the Bank is still liable to pay to the Delhi Development Authority the amount under the Bank guarantees as the Bank had agreed to pay without demur not only the principal amount but also the interest accrued thereon. The amount of mobilisation advance is due from the petitioner since about August, 1991 and calculating interest upon the said mobilisation advance, the amount, to which the Authority may be found entitled, may be much more than Rs. 90 lakhs. I am, therefore, of the opinion that the Delhi Development Authority was entitled to claim the total amount of Rs. 90 lakhs from the Bank.

(14) In view of the foregoing, no case has been made out for restraining the Bank not to release payment under the Bank guarantee.

(15) There are no merits in the application and the same is, accordingly, dismissed and interim orders passed earlier are hereby vacated.

(16) Any observation made in this order shall not have any bearing on the merits of the case.