

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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OMP No.645/2008

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Date of decision: 31ST July, 2009

Wipro GE Healthcare Pvt. Ltd.

....Petitioner

Through: Mr. V.Sheshagiri and Mr. Arunabh Suman, Advocates

Versus

Medical Superintendent Deen Dayal

Upadhyay Hospital & Others

... Respondents

Through: Ms. Jyoti Singh, Advocate for respondents No.1
& 2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the Digest? No

RAJIV SAHAI ENDLAW, J.

1 Petition under Section 9 of the Arbitration Act, 1996 seeking the relief of restraining the respondents No.1 and 2 i.e. Medical Superintendent Deen Dayal Upadhyay Hospital, Delhi and the Secretary, Health and Family Welfare, Government of NCT of Delhi, from encashing the Performance Bank Guarantee No.CBG 343/2004 dated 12th November, 2004 in the sum of Rs.25,53,750/- issued by the respondent No.3 Corporation Bank, Bangalore at the instance of the petitioner in favour of respondent No.1 i.e. Medical Superintendent, Deen Dayal Upadhyay Hospital, Delhi, is sought. Disputes and differences are stated to have arisen between the petitioner and the respondents No.1 & 2 out of a purchase order placed by the respondents No.1 and 2 on the petitioner. The said purchase order is stated to be containing a clause for arbitration.

2 In terms of the aforesaid purchase order, 80% of the price of equipment to be supplied by the petitioner was to be paid by the respondents No.1 and 2 to the petitioner against shipping documents and the balance 20% within 30 days of i) due certification of the successful completion of proving test in which the performance of the machines supplied was to be demonstrated after commissioning at the premises of the respondent No.1; and ii) the submission of bank guarantee for 10% of the value of the contract indemnifying the purchaser against all losses during the guarantee period stipulated in the warranty clause.

3 The petitioner arranged for the issuance of the bank guarantee, encashment whereof is sought to be restrained in pursuance to the above.

4 The petitioner has received 80% payment. It is the case of the petitioner that notwithstanding the petitioner having furnished the bank guarantee, the respondents No.1 and 2 have not released the balance 20% payment to the petitioner. Attention is invited to the language of the performance bank guarantee which in recitals states that the same was being issued in consideration of the respondents No.1 and 2 having agreed to pay the balance contract price to the petitioner. Else the said guarantee is unconditional, guaranteeing payment of the amount thereof to the respondent No.1 on demand and without demur and merely on receipt of intimation that the supplier i.e. the petitioner has committed a breach of any of the contractual obligations.

5 The counsel for the petitioner has contended that since the consideration for furnishing the bank guarantee was the release of the balance 20% payment and which has admittedly not been released, the petitioner has become entitled to the order restraining the encashment of the bank guarantee. That is the case set up in the petition also.

6 This court vide ex-parte order dated 28th November, 2008 restrained the encashment of the bank guarantee. Since the bank guarantee was taken to be valid till 9th November, 2009, perhaps need was not felt to make the said order conditional to keeping the bank guarantee alive.

7 The respondents No.1 and 2 have filed a reply to the petition. They have contended that the balance 20% payment was not released to the petitioner because the equipment supplied was in fact not the equipment ordered and had several deficiency and missing parts and had also failed to perform as per the specification. It is further the case of the respondents No.1 and 2 that though the maintenance charges have also been charged by the petitioner in advance but the petitioner has failed to provide any maintenance services whatsoever. The respondents No.1 and 2 thus justified the issuance of the letter dated 7th November, 2008 to the respondent No.3 bank intimating that the petitioner had failed to fulfill the contract obligations and requiring the respondent No.3 bank to release the amount of bank guarantee in favour of the petitioner.

8 The counsel for the petitioner at the outset stated that he has filed the rejoinder to the reply of the respondents No.1 and 2. However the said reply was not on record. Since there was an ex-

parte order restraining encashment of bank guarantee, it was not felt prudent to adjourn the matter and a photocopy of the rejoinder has been taken on record in the court and kept on file. The counsel for the respondent No.3 bank stated that he did not need to file any reply and will be bound by the orders of this court. The counsels for the parties have been heard. The counsel for the petitioner has reiterated that the respondents No.1 and 2 having not released the balance 20% payment of the equipment and which was the consideration for issuance of the bank guarantee are not entitled to encash the same. The counsel for the respondents No.1 and 2 has read from her reply.

9 At the outset I may state that the law with regard to injunctions in the matter of bank guarantees is now well settled. The Supreme Court and the other courts have laid down that the courts ought not to interfere lightly in the same and only ground in fact laid down for interference by the court is, a fraud of egregious nature so as to vitiate the underlying transaction and the very issuance of bank guarantee. The said fraud is not to be in the encashment of the bank guarantee but has to be in obtaining the bank guarantee. Reference in this regard can be made to ***Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company*** AIR 2007 Supreme Court 2798 and ***UP Co-operative Federation Limited Vs. Singh Consultants & Engineers PA Limited***, 1988 (1) SCC 174 and ***UP State Sugar Corporation Vs. Sumac International Limited*** 1997 (1) SCC 568 amongst others.

10 What is peculiar to the present case is that even in the petition there are no averments of fraud of such nature. In the absence of fraud, merely because the disputes have arisen between the parties

and the beneficiary is alleged to be fraudulently encashing the bank guarantee does not become a ground for the court to restrain encashment thereof. If that were to be permitted, it would interfere with the very fabric of commerce and trade. Such unconditional bank guarantees are generally taken to protect the beneficiary, when payments are being made in advance, as in this case also.

11 Though in the absence of any averments of fraud, the petition ought to be dismissed summarily but since the courts have in a few cases held special equities to be also a ground for interfering in the bank guarantee need is felt to discuss the ground taken by the petitioner for restraining encashment.

12 The contention of the petitioner of the consideration for the issuance of bank guarantee being the release of balance 20% payment is not found to be correct. The balance 20% payment was to be released subject to the petitioner satisfying two conditions i.e. furnishing the bank guarantee and secondly obtaining due certification of successful completion of machines performance after commissioning. There is no averment that such certification has been obtained by the petitioner. While the petitioner blames respondents No.1 and 2 for the same, the said respondents contend otherwise. That is to be gone into in the arbitration proceedings and not in these proceedings.

13 Though undoubtedly the bank guarantee mentions only the release of balance 20% payment as the consideration therefore but in my view the said bank guarantee cannot change the agreement between the parties. The bank guarantee is neither signed by the

petitioner nor by the respondents No.1 and 2. Thus it cannot change the agreement between the parties.

14 The mere fact that the bank guarantee does not mention the complete agreement between the parties or mentions only a part of the consideration is no ground in equity or otherwise for interfering with the same.

15 Even otherwise the mentioning of a wrong consideration in a document does not prevent the parties from showing the real consideration. In this regard see ***State Bank of India Vs. Premco Saw Mill*** AIR 1984 Guj. 93 (DB).

16 Moreover we are in this case not concerned with what was the consideration for issuance of the bank guarantee. It is not the case where the bank guarantee is being sought to be voided for being without consideration. Payment under the bank guarantee is sought to be restrained. In judging the same, the reason for issuance of the bank guarantee is not material.

17 The result of the aforesaid discussion is that the petitioner is not entitled to the relief claimed in as much as no case for restraining encashment of bank guarantee is made out.

18 The counsel for the petitioner has during the hearing contended that the respondent No.3 bank had pursuant to the letter of invocation of the petitioner debited the account of the petitioner with the amount of the bank guarantee. However payment under the bank guarantee could not be made to the respondents No.1 and 2 owing to the ex-parte order aforesaid of this court. During the

hearing it has transpired that respondent No.3 bank has kept the amount of the bank guarantee in a FDR. The Supreme Court recently in ***Abhimanyoo Ram Vs. State of U.P.*** 2009 (III) Apex Decisions (SC) 41 has upheld the order of the High Court holding that the petitioner cannot be permitted to draw the benefit of interim order when petition is finally dismissed. I have also in ***Green Delhi BQS Ltd. Vs. DTC*** OMP No.614/2008 decided on 26th March, 2009 while finally dismissing the petition seeking restrain on encashment of bank guarantee imposed interest @ 9 % per annum on the petitioner for delay occasioned in the beneficiary receiving the amount of the bank guarantee owing to ex-parte order obtained from the court. Following the said dicta, I hold that the respondent No.3 bank shall along with the amount of the bank guarantee also pay to the petitioner the interest accrued on the FDR made of the amount of the bank guarantee.

19 The petition is dismissed. The respondents No.1 and 2 are also held entitled to costs of these proceedings of Rs.25,000/- from the petitioner.

**RAJIV SAHAI ENDLAW
(JUDGE)**

July 31, 2009
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