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ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

CS-COM/750/2024
IA No. GA-COM/1/2024

SKIPPER LIMITED
-VS-
INDIAN BANK & ANR.

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO

Date : August 2, 2024.

Appearance :

Mr. Sabyasachi Choudhury, Adv.

Mr. Sayantan Bose, Adv.

...for the plaintiff/petitioner

The Court: Mr. Sabyasachi Choudhury, learned Advocate, is appearing for the petitioner.

The plaintiff/petitioner has filed the present application for grant of ad interim injunction.

In the year 2018, the respondent no.2 invited bids for construction of a 220 KV D/C Akal-Jaisalmer – 2 Line – 75 KMS on trunk basis and accordingly the petitioner has participated in the said bid. On 1st June, 2018, the respondent no.2 has accepted the bid of the petitioner and called upon the petitioner to execute the contract agreement and furnish performance security within 28 days in accordance with the condition of the contract.

On 13th August, 2018, a contract agreement was entered into between the petitioner and the respondent no.2. As per the contract, the petitioner would design, manufacture, test, deliver, install, complete and

commission certain facilities, i.e., construction of 220 KV D/C Akal-Jaisalmer – 2 Line – 75 KMS on trunk basis. The contract price payable by the respondent no.2 to the petitioner would be Rs.24,47,41,994.82. The time of completion of the project for the whole facilities was 360 days from the effective date as defined in the said contract.

In terms of the contract, the petitioner has submitted the performance guarantee of Rs.2,44,79,199/- with the Industrial Finance Branch, Kolkata. The project could not be completed within the original completion of time provided under the contract and on the request of the petitioner the respondent no.2 has extended the time for completion of contract without any liquidated damage. The petitioner ultimately completed the said project by installing and commission the facilities on 28th March, 2021.

On completion of the work, the respondent no.2 has issued completion certificate certifying that the scope of work of the petitioner under the contract has been completed on 28th March, 2021. By a letter dated 8th April, 2021, the respondent no.2 while enclosing the completion certificate directed to release 10% retention amount for supply and service part upon issue of completion certificate. The respondent no.2 has also issued taking over certificate in relation to the said work to the petitioner on 11th June, 2021.

In terms of the clause 13.3.3 of Section 8 of the Special Conditions of Contract, the security shall become null and void or shall be reduced pro rata to the contract price of a part of the facilities for which a separate time for completion is provided, 540 days after completion of the

facilities or 365 days after operational acceptance of the facilities, whichever occurs first. The defect liability period under the said contract expired on 10th June, 2022 being the date of expiry of the period of one year from the date of operational acceptance of the facilities. For completing the work under the said project, the petitioner has raised 46 invoices for an aggregate amount of Rs.22,19,11,338/- and against the said amount, the respondent no.2 had made a payment only of Rs.17,01,95,298/- leaving a sum of Rs.5,17,16,040/- and the said amount is due and payable by the respondent no.2 to the petitioner under the said contract.

Mr. Choudhury, learned advocate representing the petitioner, submits that taking over of the facilities was completed by the respondent no.2 on 11th June, 2021 and the defect liability period expired on 10th June, 2022 and the performance security had become null and void even though, the respondent no.2 requested the petitioner to keep the performance guarantee extended on the pretext that "case under decision".

Mr. Choudhury submits that the respondent no.2 has also threatened the petitioner that if the Bank Guarantee is not extended, the Bank Guarantee shall stand operated without giving any further notice to the petitioner.

Mr. Choudhury submits the last extension of the performance guarantee was sought by a letter dated 13th June, 2024 till 31st December, 2025. He submits that the petitioner being coerced to extend the Bank Guarantee, the petitioner has extended the time period of Bank Guarantee till 31st December, 2024. Mr. Choudhury submits that on 31st July, 2024

at about 17:58 hours the petitioner was intimated by the respondent no.1 by an electronic mail that the performance guarantee submitted by the petitioner had been invoked by the respondent no.2 by a letter digitally signed by the Chief Engineer (Contracts) of the respondent no.2 on 31st July, 2024 at 12:17 pm. on the pretext that the petitioner has not fulfilled its contractual obligations.

Mr. Choudhury submits that invocation of the Bank Guarantee is fraudulent on the face of the record as the Bank Guarantee in terms of the said contract has already become null and void in the month of June, 2022. He submits that the respondent no.1 was aware of the fact that the performance of the contract has been completed but in spite of the same, the invocation has been made by way of fraud and contrary to the terms of contract. He submits that the petitioner has not committed any breach of any terms and conditions of the contract. He submits that the respondent no.2 has taken over the facilities on 11th June, 2021 by accepting that the project has been completed by the petitioner on 28th March, 2021 and the defect liability period under the contract has also expired and no claim of any defect has been raised by the respondent no.2 till date.

Mr. Choudhury submits that on receipt of the mail dated 31st July, 2024, by a letter dated 1st August, 2024 the petitioner has called upon the respondent no.1 to refrain from making any payment under the Bank Guarantee and its extensions, making the respondent no.1 aware of the fraud as committed by the respondent no.2.

Counsel for the petitioner submits that the prior to the impugned letter dated 31st July, 2024, the respondents have never demanded any

amount from the petitioner but all of a sudden without any notice to the petitioner, the Chief Engineer has directly made request to the respondent no.1 for invocation of the Bank Guarantee.

Heard learned counsel for the petitioner. Perused the materials on record.

Contract was entered between the petitioner and the respondent no.2 on 13th August, 2018. Though the time was stipulated for completion of the work but on the request of the petitioner, the time for completion of the work was extended from time to time.

The respondent no.2 had issued the completion certificate to the petitioner notifying that the facilities have been completed on 28th March, 2021 and in accordance with the terms of the contract, the employer takes over the said parts of the facilities, together with the responsibilities for care and custody and the risk of loss thereof.

On 8th April, 2021, the respondent no.2 had also issued a letter to the Senior Accounts Officer for release of the 10% contractual retention of the total on pro rata Ex-works amount of supply and service part upon issuance of completion certificate and, accordingly, the petitioner has received the said 10% amount in terms of the completion certificate.

The respondent no.2 had also issued taking over certificate on 11th June, 2021 wherein it is mentioned that as per the work order, clause no.25, taking over certificate was issued on successful completion and commissioning of the said line on 28th March, 2021. On 9th February, 2022, the respondent no.2 had also issued a communication to the Senior Accounts Officer for release of 10% of contractual retention

(supply and service) upon issue of the operational acceptance certificate i.e. taking over certificate of facilities for construction of 220 KV D/C Akal-Jaisalmer – 2 Line – 75 KMS on trunking basis. As per Section 8 of the Special Conditions of Contract, GCC 13.3.3., it is mentioned the security shall become null and void or shall be reduced pro rate to the contract price of a part of the facilities for which a separate time for completion is provided, 540 days after completion of the facilities or 365 days after operational acceptance of the facilities, whichever occurs first.

Respondent no.2 have issued the completion certificate as well as taking over certificate. The taking over certificate is dated 11th June, 2021. 365 days completed on 12th June, 2022. From the date of taking over certificate till 31st July, 2024 i.e. the date of communication to the respondent no.1 for revocation of the performance Bank Guarantee, the respondent no.2 has not raised any claim against the petitioner though contrary an amount of Rs.5,17,16,040/- is due and payable by the respondent no.2 to the petitioner.

Though after the period of 365 days, the performance guarantee became null and void as per Section 8 of GCC, the respondent no.2 time and again threatened the petitioner for extension of Bank Guarantee, failing which the Bank Guarantee shall stand operated without giving any further notice and as such the petitioner had no other alternative but to extend the period of performance Bank Guarantee from time to time which was last extended till 31st December, 2024.

Considering the above facts and circumstances, this Court finds that the petitioner has completed the work and the respondent no.2 had

issued the completion certificate as well as taking over certificate on 11th June, 2021. The terms of the contract, 365 days is completed on 12th June, 2022. In spite of completion of work and taking over work, by the respondent no.2, the petitioner being coerced to cause extension of Bank Guarantee from time to time, this Court, *prima facie*, finds that invocation of Bank Guarantee is on the face of the record fraudulent and illegal as the said Bank Guarantee in terms of contract already became null and void on 12th June, 2022.

In view of the above, this Court finds that the petitioner has made out a *prima facie* case and the balance of convenience and inconvenience is in favour of the petitioner and at this stage if an interim order is not granted, the petitioner will suffer irreparable loss and injury. Accordingly, the respondents, their men agents, servants and assigns are restrained from giving any effect or further effect to the impugned notice dated 31st July, 2024 issued by the Chief Engineer to the respondent no.1 for invocation/operation of performance security Bank Guarantee of the petitioner being no. RVPNL/SE/CONT-II/XEN-III/A-III/KFW/ICB-7/SKIPPER/D.302 dated 01.06.2018 till 10th September, 2024.

The plaintiff is directed to serve the copy of the application, documents and the copy of the plaint to the defendants and to file affidavit of service on the returnable date.

List the matter on 10th September, 2024.

(KRISHNA RAO, J.)