

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

Date of Reserve: 27.3.2009
Date of Order: 1st April, 2009

OMP No. 698/2008

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01.04.2009

GATI Limited

... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Rajat Aneja and Ms. Sudha Sinha, Advocates

Versus

**M/s National Aviation Company of
India Limited**

... Respondent

Through: Mr. Amarjeet Singh Chandhoik, Sr. Adv.
with Mr. Satish Sharma, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

By this petition/application under Section 9 of Arbitration and Conciliation Act the petitioner/applicant has prayed that this Court should restrain respondent from invoking or encashing Bank Guarantee No. 0008BG00075607 dated 3rd October, 2007 for Rs.15 crore and Bank Guarantee No.

0008BG00099607 dated 15th December, 2007 both drawn on ICICI Bank Limited.

2. The applicant had entered into a Wet Lease Freighter Agreement dated 16th May, 2007 with the respondent. Under the lease agreement, the respondent was to offer payload of approximately 15 tons available on each aircraft to the lessee on committed basis for agreed freighter flights for the hours mentioned in clause 5.1 of the agreement. For rest of the duration, it was the discretion of the lessor to use the leased aircraft. The lessor was to provide 5 operational aircrafts with minimum of 425 hours per month subject to the reasons of force majeure and availability of freighter aircrafts. It is submitted that the aircrafts were to be inducted and become operational from 15th July, 2007 to 15th January, 2008. The applicant had given bank guarantees prior to the commencement of the operation in order to ensure payment of the rentals and other undisputed amounts within the periods stipulated under the agreement.

3. The contention of the counsel for the applicant is that although the respondent had committed to bring 5 freighter aircrafts in operation, it actually did not bring 5 freighter aircrafts in operation and the capacity of freight offered to the applicant was also of 11 tons instead of 15 tons. Consequently, the petitioner/applicant had to face severe consequences at the hands of its customers to whom applicant had promised timely overnight deliveries. It is also submitted that the respondent unilaterally increased the lease charges, while as

per agreement, the lease charges were fixed and could not be increased. The respondent also billed the lessor for flying hours in excess of actual flying hours. The lessee had been maintaining a log book and the flying hours billed by respondent did not tally with the log book maintained by the lessee. It is submitted that the bank guarantee could be invoked only in respect of admitted amounts, and in case of disputed amounts the bank guarantee could not be invoked. Since the applicant had disputed billed amounts due to difference in the flying hours and the rentals/lease amount, the applicant did not pay the disputed amount as a result of which the respondent threatened to invoke the bank guarantee.

4. It is settled law that the bank guarantees is an independent contract between the bank and the beneficiary of the guarantee. The Courts have to be loathe in granting injunction restraining the realization of the bank guarantee. No injunction should be granted except in the situation where a fraud was played in obtaining the bank guarantee vitiating the very acceptance of such guarantee and the beneficiary wanted to take advantage of the fraud. The other ground on which the courts have interfered in encashment of bank guarantee is where the encashment of bank guarantee would result in irreparable harm and injustice to one of the parties concerned. The Court has also to keep into mind the covenants mentioned in the bank guarantee and the nature of the bank

guarantee. In the present case, the bank guarantee issued by the bank provides as under:

- a) The Bank hereby agrees that it shall pay to the Airline on demand such sums as may be quantified and claimed by the Airline within 7 days of the receipt of the first demand from the Airline without any contest, demur or protest and / or without any reference to the Charterer and / or without questioning the legal relationship subsisting between the Charterer and the Airline and / or irrespective of any dispute whatsoever that may be raised by the Charterer with the Airline or with the Bank as regards maintainability, legality or validity of such demand.*
- b) The Bank hereby agrees and acknowledges that the decision of the Airline as to whether any money is payable by the Charterer to the Airline will be binding on the Bank and the Bank shall not be entitled to ask the Airline to establish its claim or claims under this Guarantee or to claim any such amount from the Charterer in the first instance but shall pay the same to the Airline forthwith on demand. Any such demand made by the Airline on the Bank shall be conclusive and binding on the Bank, notwithstanding any difference between the Airline and the Charterer or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.*

5. It is apparent that the bank guarantees executed in favour of the respondent by the petitioner drawn on ICICI Bank provide for payment of the guarantee amount without any contest, demur or protest and without any reference to the applicant. The amount under guarantees was payable irrespective of any dispute whatsoever that may be raised by the applicant with the respondent, regarding maintainability, legality or validity of such demand. The bank guarantees provided that any demand made by the respondent from

the bank will be conclusive and binding on the bank. Thus, the contention of the applicant that the bank guarantees could not be invoked by the respondent whenever the demand was a disputed demand must fail. The bank guarantees do not contain such a clause. The applicant's counsel relied upon clauses 8.1 & 8.2 of the agreement which read as under:

8.1 The Lessee will provide an irrecoverable Bank Guarantee as agreed amongst the parties herein, in favour of the Lessor's Bank equivalent to a three months estimated billing. This Bank Guarantee will be provided prior to commencement of operations for the Lessee. Should the Lessee fail to make payment of undisputed amounts within the stipulated period, the Lessor has the right to enforce the said Bank Guarantee after giving due notice.

8.2 The Bank Guarantee shall be kept valid for a period of three (3) years and lessee undertakes responsibility for its renewal of the same before its expiry. IA may use the Bank Guarantee to offset undisputed significant non-payment by the Lessee. The Lessee would then be obliged to make good any shortfall in the Bank Guarantee. The Bank Guarantee to be extended in the event the terms of lease under CLAUSE 4 para 4.4 is mutually extended.

6. It is submitted that the above clauses of the agreement make it binding that the respondent could encash bank guarantees only where there was non-payment of undisputed amount, where there was dispute, the bank guarantee could not be encashed.

7. The above covenants do not mean that the applicant was at liberty to dispute amount payable by it under the agreement and the moment dispute was raised by the applicant, it could withhold the payment of dues and

respondent had no way out. If the agreement is interpreted in this manner then the very purpose of obtaining bank guarantee by the respondent would fail. Moreover, the above covenants agreed upon between the applicant and the respondent, have not been incorporated in the bank guarantee. The bank guarantees do not provide that the moment an amount was disputed by the applicant the bank guarantee was not encashable. The bank guarantee is irrevocable and the bank had agreed to pay under the bank guarantee without any demur and without questioning the legality of the amount and without referring it to applicant and irrespective of the fact that whether there was a dispute or not. The bank was not a party to the agreement between the applicant and respondent. The contract of bank guarantee is an independent contract between respondent and the bank and has to be interpreted independent of the agreement. In *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation* JT 1996(7) SC 336 Supreme Court observed that a serious dispute of question as to who committed the breach of the contract and whether the amount was due and payable by the contractor till the Arbitrator declared the award were not circumstances, justifying granting an injunction to restrain the bank from paying under the guarantee. In *Hindustan Steel Work Construction Ltd. v. Tarapore & Company* and Anr. 1996(5) Scale 186 Supreme Court held that bank guarantee was an independent and distinct contract between the bank and the beneficiary and was not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee was

given and the beneficiary. In case of an unconditional bank guarantee, the nature of obligation of the bank was absolute and not independent of any dispute or proceeding between the party at whose instance the bank guarantee was given to the beneficiary.

8. It is also not a case where irreparable damage would be caused to the applicant/petitioner. As and when matter is referred to arbitration, Arbitrator will adjudicate which party had to pay what, and pass an award. There is no question of irreparable loss being there to the applicant/petitioner.

In view of my above discussions, I find that there was no force in the application/petition. The application/petition is hereby dismissed.

April 01, 2009
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SHIV NARAYAN DHINGRA, J.