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IN THE HIGH COURT OF DELHI AT NEW DELHI

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IA No. 1638/2010, CAV. No. 19/2010 in OMP NO. 69/2010

**Reserved on : 11.02.2009
Date of Decision : 18.02.2010**

ABB Limited

..... Petitioner

Through: Mr. R. K. Singh, Adv.

Versus

Larsen & Toubro Ltd. & Anr.

..... Respondents

Through: Mr. A. Daisayi, Sr. Adv. with
Mr. A. K. Bhatnagar, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not ? | No |
| 3. | Whether the judgment should be reported in the Digest ? | No |

V.K. SHALI, J.

1. This order shall dispose of an application filed by the petitioner under Order 6 Rule 17 read with section 151 CPC.
2. Briefly stated the facts of the case leading to the filing of the application are that the petitioner had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996. It is stated that petitioner is a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Bangalore and one of its office at E-5, Shyam Nagar, Okhla, Phase-III, New Delhi-110020. It is alleged that the petitioner had entered into an agreement with the respondent No.1 i.e. Larsen and Toubro Ltd. with regard to erection and commission of some electrification work at Indira Gandhi International Airport. The petitioner had accordingly furnished certain bank guarantees to the

respondent. The petitioner is aggrieved by alleged fraudulent, illegal and unreasonable invocation of the three bank guarantees on 04.02.2010 by the respondent no. 1 and consequently the petitioner has filed the present petition. The details of the three bank guarantees which were sought to be invoked by the respondent are as under:

Particulars of claimed bank guarantee (no. and date)	Head of bank guarantee	Amount	Amount
0002BG00123008	Advance Bank Guarantee	23,42,41,435/-	23,42,41,435/-
0002BG00088308	Advance Bank Guarantee	23,42,41,435/-	7,69,02,291/-
0002BG00088208	Performance Bank Guarantee	31.2 Crores	24,23,21,913/-

3. It was alleged that first two of the bank guarantees were sought to be invoked wrongly and fraudulently because in terms of the guarantee, the respondent was required to give notice to the branch which had furnished the guarantee namely the Connaught Place Branch, New Delhi but the respondent had actually sent the notice of invocation at the bank office at Bangalore. So far as the third bank guarantee is concerned, it was alleged that it was a performance guarantee and the same was also not invoked in terms of the guarantee documents. Reliance was sought to be placed on the judgments of **Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors.** (1999) 8 SCC 436 and **Agencia Commercial International Ltd. & Or. Vs. Custodian of the Branches of Banco Nacional Ultramarino** (1982) 2 SCC 482 to urge that the bank guarantee is not invoked in terms of the guarantee documents, and therefore, the respondent no. 2/bank be restrained from transferring the money to the respondent no. 1.

4. The aforesaid matter was listed before this Court on Saturday i.e. 06.02.2010 and since there was a caveat filed by the respondent no. 1, accordingly, it was directed that a copy of the petition be served on the caveator as it was not done. The matter was adjourned to 08.02.2010 on which date the matter was listed before another Bench firstly and on account of orders of the Judge In-Charge (Original Side) it was placed before this Court only at 4.35 P.M.
5. On 08.02.2010, when the matter was taken up, the learned senior counsel Mr. Ashok Desai appeared on behalf of the caveator and informed the Court that 6.2.2010 (Saturday) at about 12.30 P.M. itself the respondent no. 2 had transferred the funds to the respondent no. 1 in pursuance to the invocation in respect of all the three bank guarantees and accordingly the petition itself has become infructuous. Time was given to the respondent No.1 to file reply to the petition so that this stand comes on record in writing. The matter was adjourned to 11.2.2010.
6. On 10.2.2010, the present application seeking amendment in the OMP has been filed.
7. The main averment which is sought to be incorporated by way of present application is that the petitioner wants the change of relief in the petition. The petitioner was earlier seeking a restraint order which was in the nature of an injunction against the respondent no. 2, the bank to make the payment to the respondent no. 1 on the ground that the invocation of bank guarantee by the respondent no. 1 was not in accordance with the terms and conditions of the guarantee itself. Now that the bank guarantee amount having been already transferred by the respondent no. 2 to respondent no. 1 the petitioner wanted the relief to the effect that

either the respondent no. 1 be directed to restore the status quo ante by transferring the funds to the account of the petitioner or alternatively the respondent be directed to secure the amount which has been encashed by the respondent no. 1. The comparison of the two prayers in the unamended and amended petition is reproduced as under:

Unamended petition	Amended petition
(a) issue an ex-parte ad-interim injunction in favour of the petitioner and against the respondents, restraining the respondent no. 1 from invoking and encashing and respondent no. 2 from making any payment in any manner with respect to the bank guarantee bearing no. 0002BG00123008 dated 26.06.2008 for a sum of Rs.23,42,41,435/- bank guarantee bearing no. 0002BG00088308 dated 28.04.2008 for a sun of Rs.23,42,41,435/- and bank guarantee bearing no. 0002BG00088208 dated 28.04.2008 for a sum of Rs.31.2 crores issued by ICICI Bank Ltd. (respondent no. 2) till conclusion of the arbitration proceedings, which is going to be initiated by the petitioner for adjudication of all disputes between the parties.	(a)(i) issue an ex parte ad-interim mandatory injunction in favour of the petitioner and against the respondent no. 1 thereby directing the respondent no. 1 to refund the encashed bank guarantee amount to the petitioner with respect to the bank guarantee bearing no. 0002BG00123008 dated 26.06.2008 for a sum of Rs.23,42,41,435/- bank guarantee bearing no. 0002BG00088308 dated 28.04.2008 for a sun of Rs.23,42,41,435/- and bank guarantee bearing no. 0002BG00088208 dated 28.04.2008 for a sum of Rs.31.2 crores issued by ICICI Bank Ltd. (respondent no. 2). Or in the alternatively (a) (ii) Direct the respondent no. 1 to forthwith deposit the entire encashed bank guarantee amount in this Hon’ble Court.

8. The respondent No.1 has filed the reply to the amendment application and contested the claim of the petitioner to amend the relief on account

of the actual encashment of the bank guarantee. It was averred by the respondent No.1 in the reply to the application that the petition itself has become infructuous in as much as the guarantee amount has already been transferred, and therefore, nothing survives and the petitioner could not change the nature of the petition by seeking an amendment to the petition by praying literally attachment before judgment.

9. I have heard the learned counsel for the plaintiff as well as the learned senior counsel on behalf of the respondent. I have also gone through the record.
10. It was contended by the learned counsel for the petitioner that on 06.02.2010 when the petitioner came to the Court till that time he had not received any notice of caveat nor was the payment made by the respondent No.2 to respondent No.1 though the bank guarantee was invoked by the respondent No.1. It was alleged that so far as the first two bank guarantees are concerned, the same was invoked by sending a notice to the office of the petitioner in Bangalore while as according to the term and conditions of the bank guarantee the valid invocation could be done only by sending a notice to the branch which had furnished the bank guarantee. So far as the third bank guarantee which was a performance guarantee is concerned, it was contended that this was also not invoked according to the terms and conditions of the guarantee. It was further contended that since all the three bank guarantees have been illegally and unjustifiably invoked by the respondent the Court may direct the respondent No.1 to restore the status quo ante which means that respondent No.1 must either transfer the funds in the account of the petitioner or alternatively secure the said amount which has been so

released so that the decree which the petitioner may get from the Court or from the arbitrator in terms of the agreement between the parties does not become only a paper decree and thus the petitioner had sought amendment of the OMP. The learned counsel also relied upon a judgment in **Ragu Thilak D. John Vs. S. Rayappan & Ors.** AIR 2001 SC 699

11. As against this, the learned senior counsel for the respondent has vehemently opposed the prayer of the petitioner. It was contended that the invocation of bank guarantee by the respondent herein was perfectly in accordance with the terms and conditions of the bank guarantee. It was invoked on 04.02.2010 and on 06.02.2010 the funds were transferred to the account of respondent No.1 which have been further appropriated by it. It was contended that once the amount is realized and merged in the account of the respondent No.1, it is not possible to say which amount was transferred and from where and if at all the petitioner succeeds in the arbitration proceedings the respondent is solvent enough to discharge the liability so fastened.
12. The learned senior counsel also referred to the Master Circular issued by the Reserve Bank of India wherein under Clause 1.4 with regard to the question of payment under the bank guarantee. It was observed that the settlement of account should be done expeditiously in the commercial transactions. It was also pointed out that the Apex Court in **BSES LTD. Vs. Fenner India Ltd. and Anr.** 2006 (2) SCC 728 had categorically observed that the bank guarantee is an independent contract and ordinarily there should be no stay of the invocation of the said bank guarantee or payment thereof unless and until there is an allegation of

fraud having been committed in obtaining such a bank guarantee or there was a case of special equity in favour of the petitioner which warranted that the bank guarantee should not be permitted to be invoked.

13. I have carefully considered the submissions made by the respective sides. I have also gone through the record.
14. There is no dispute about the fact that Section 9 of the Arbitration and Conciliation Act, 1996 only deals with interim measures by the Court. The interim measures which the petitioner wanted to be passed when it came to the Court on 6th February, 2010 was that the bank guarantee has been wrongly and illegally invoked in a fraudulent manner and therefore, the bank/respondent No.2 be restrained from making payment to the respondent No.1. On 6th February, 2010 no effective order could be passed as the petitioner himself had not served a copy of the petition on the Caveator despite the caveat having been lodged, as a consequence of which the matter had to be adjourned to 8th February, 2010. On 8th February, 2010, the learned senior counsel for the respondent No.1 informed that the funds in pursuance to the invocation of guarantee by the respondent No.1 have already been transferred to them by the respondent No.2 on 6th February, 2010 itself. Therefore, the petition itself had become infructuous and the Court could not be called upon to pass an order which in fact could not be implemented. The petitioner by seeking an amendment is now trying to change the nature of the main petition itself in as much as his earlier prayer was seeking a restraint order against the payment by the respondent No.2 to 1 and now he by virtue of the present application of amendment is seeking either the retransfer of funds from the account of the respondent No.1 to their own

account or alternatively securing the said amount by keeping it either in the account of the respondent No.1 itself or directing them to deposit the same in Court. The amended prayer of the petitioner is in the nature of literally an attachment before judgment or restoration of status quo ante which is totally different than the one which was the original prayer. The judgment which has been relied upon by the learned counsel for the petitioner in Raghu Tilak's case is not applicable to the facts of the case in hand for the simple reason that was not a case dealing with the realization of a money pursuant to the bank guarantee. Therefore, neither an analogy between the two cases can be drawn nor can any help be obtained from the said judgment that amendment must be allowed in the present case.

15. The applications under Section 9 are in the nature of interim measures which are treated as OMPs. Normally speaking, these kind of applications even if have become infructuous on account of subsequent events does not foreclose the right of the party to file a fresh application/petition but to permit an amendment of such an application/petition seeking interim relief would go against the very basic fundamentals of amendment of pleadings which is based on the principle that such amendment should not result in change of nature of the case itself. In the instant case the very nature of the petition of the petitioner from prohibitive injunction is being changed to attachment before judgment which in my opinion cannot be permitted to be done. I, therefore, feel that the application of the petitioner cannot be allowed and accordingly, the same is dismissed. Since the application for amendment has itself been dismissed and it has already come on record

that the amount of bank guarantee has already been transferred to the account of the respondent No.1, the main petition itself has become infructuous. Therefore, the petition itself is also dismissed.

V.K. SHALI, J.

FEBRUARY 18, 2010
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