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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. Nos.703/2009, 710/2009 & 711/2009

Date of decision : March 22, 2010

1. OMP 703/2009

DENEL (PROPRIETARY) LTD

... Petitioner.

Through: Mr. N.K.Kaul, Sr. Advocate with
Mr. Ravinder Singhanian, Mr. Tarun Dua
and Mr. Abhishek Kumar, Advocates.

VERSUS

UNION OF INDIA & ANR

....Respondents

Through: Mr. Mohan Parasaran, ASG & Mr. Rajeev
Mehra, Sr. Advocates with
Mr. B.V.Niren, Ms. Arti and Mr. Alok
Prasanna Kumar, Advocates.

2. OMP 710/2009

DENEL (PROPRIETARY) LTD

... Petitioner.

Through: Mr. V.P.Singh, Sr. Advocate with .
Mr. Ravinder Singhanian, Mr. Tarun Dua
and Mr. Abhishek Kumar, Advocates.

VERSUS

UNION OF INDIA & ANR

....Respondents

Through: Mr. Mohan Parasaran, ASG & Mr. Rajeev
Mehra, Sr. Advocates with
Mr. B.V.Niren, Ms. Arti and Mr. Alok
Prasanna Kumar, Advocates.

3. OMP 711/2009

DENEL (PROPRIETARY) LTD

... Petitioner.

Through: Mr. V.P.Singh, Sr. Advocate with .
Mr. Ravinder Singhanian, Mr. Tarun Dua
and Mr. Abhishek Kumar, Advocates.

VERSUS

UNION OF INDIA & ANR

....Respondents

Through: Mr. Mohan Parasaran & Mr. Rajeev
Mehra, Sr. Advocates with
Mr. B.V.Niren, Ms. Arti and Mr. Alok
Prasanna Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT(ORAL)

VALMIKI J. MEHTA, J

1 The aforesaid three petitions are being disposed of by this common order inasmuch as the facts of the three cases are more or less similar. Wherever the need arises to refer to a difference in an issue or fact for any individual case, then, the same would be adverted to. These petitions have been filed by the

petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 seeking restraint against the invocation of the Bank Guarantees totalling to an amount of approx. USD 6,110,038 by the respondent no.1. The Bank Guarantees are given by the banks which have been arrayed as other respondents.

2 The facts of the case are that the petitioner was awarded various contracts by the respondent no.1/Union of India for supply of certain defence equipments such as AMR Rifles and ammunition. In pursuance of the requirements of these contracts, the petitioner gave two types of Bank Guarantees. The Bank Guarantees are Warranty Bank Guarantees and Performance Bank Guarantees. On the ground that the petitioner employed agents and gave commission for securing the contracts in question, disputes arose between the parties, and the respondents have sought to inter alia encash the Bank Guarantees. I may note that so far as OMP Nos. 710/2009 and 711/2009 are concerned, the arbitration proceedings were initiated between the parties way back in the year 2007. The Arbitration Tribunal was constituted and certain orders were passed by the Arbitration Tribunal. At the present stage, the Arbitration Tribunal is however non-functional firstly on account of the demise of the presiding Arbitrator, secondly on account of, the Arbitrator appointed by the petitioner having recused himself and thirdly because the petitioner has filed proceedings for removal of the Arbitrator appointed by the respondent no.1.

3 The cases on behalf of the petitioner were argued by Mr. N.K.Kaul and Mr. V.P.Singh, Sr. Advocates. So far as OMP 703/2009 is concerned, Mr. Kaul raised the following contentions:

(i) The Warranty Bank Guarantees were specific Bank Guarantees meant to cover only specific situations pertaining to the equipment failing to meet the contractual specifications or being defective and since presently the Bank Guarantees in question are not being enforced for any breach of contractual conditions pertaining either to technical specifications or because of the fact that the equipments were in any manner defective, it was contented that the Bank Guarantees cannot be encashed. It is argued by Mr. Kaul that this is so when the language of the Bank Guarantees is read along with the relevant Clauses of the contract.

(ii) The second argument put forth by Mr. Kaul was that the Bank Guarantees have been given for specific contracts and the same are being enforced for breaches in other contracts, and for which Bank Guarantees have not been given.

(iii) The third and final argument raised by Mr. Kaul was that the Bank Guarantees were given for a specific period covering the guarantee period of the equipments and since the specific period has come to an end without the equipment being defective or the eventuality of requiring rectification of the

defects in any of the equipments, the Bank Guarantees in question have exhausted their purposes and hence cannot be encashed. Mr. Kaul relied upon the contractual Clauses 10.1 to 10.6 in support of his arguments.

4 Mr. V.P.Singh, Sr. Advocate in OMP 710/2009 and OMP 711/2009 has argued on the lines of point Nos.2 and 3 above as urged by Mr. Kaul and he has additionally relied upon Clause 12.2 of the contract to contend that the Performance Bank Guarantee exhausts itself after delivery is complete or when delivery cannot be effected because operation of one contract was suspended in this case.

5 In order to appreciate and deal with the arguments of the counsel for the petitioner, it is necessary to refer to the relevant Clauses of the Contract and which are Clauses 10.1 to 10.6 & 12.2 and the same read as under:-

“10. WARRANTY BOND

10.1 For every consignment of the Products to be delivered to the Buyer in accordance with the delivery schedule as set out in Annex D, a warranty bond in the form of a Bank Guarantee from a first class bank duly confirmed by the Bank of Baroda, New Delhi Branch, equal to 5% (five percent) of the value of the relevant consignment, shall be furnished by the Seller, by not later than 30 (thirty) days before the FOB (Incoterms 2000) delivery of the relevant consignment. The warranty bond shall become effective on FOB delivery of the relevant consignment. The Buyer will be entitled to call on a warranty bond in the event that the Seller has failed to replace (delivered FOD) or rectify defective Products within a period of 150 days after receipt of the Buyer's notice in terms of clause 9.3.

10.2 Should the Buyer intend to call up a Warranty Bond, the Buyer shall give the Seller 30 days prior written notice of its intention to do so, setting out valid reasons as to why the bond is to be called up. Should the Seller fail to remedy the default within 30 (thirty) days after receipt of notice of Buyer's intention to call up the Warranty Bond, the Buyer may proceed to call up the Warranty Bond.

10.3 The Warranty Bond shall be valid for a period of 60 (sixty) months after lot acceptance of the relevant Products in accordance with Annex A, chapter 5.

10.4 The Seller shall have the option to, instead of establishing a warranty bond in respect of each consignment, establish a single warranty bond for all Products supplied under this Contract and to amend the value of such single bond to 5% (five percent) of the value of Products delivered FOB in respect of which the warranty has not yet expired. The Seller will upon expiry of the warranty of Products be entitled to proportionately decrease the value of such single warranty bond.

10.5 In the event that the Seller exercise its option in terms of clause 10.4 to establish a single warranty bond, the relevant lot numbers of the Products covered by the warranty bond will be recorded in the warranty bond and the Buyer will only be entitled to claim against the portion of the warranty bond covering the relevant lot (s) of defective Products.

10.6 The Warranty Bond shall be in the format as set out in Annex G hereto.”

“12.2 The Performance Bond will automatically and in full terminate 90 days after FOB delivery of the last production lot. In case of delay in deliveries the Seller will extend the validity of the Performance Bond at his expense by an adequate period to cover 90 days from actual last FOB delivery as stated in Annex D (Delivery 14).”

6. (i) It is also necessary to refer to two sample Bank Guarantees and the same reads as under :-

FIRST TYPE

“ SWIFT-MT :760 NORMAL DM-2
SWIFT-DEST: SBINZAJJ
SENT TO :
State Bank of India
3rd Floor, Cnr Baker / Cradock Ave
Rosebank
South Africa
:27: SEQUENCE OF TOTAL
1/1
:20: TRANSACTION REFERENCE NUMBER
821-02-0009989-G
:23: FURTHER IDENTIFICATION:
REQUEST
:30: DATE
031121
:77C: DETAILS OF GUARANTEE:

UNDER OUR FULL AND IRREVOCABLE RESPONSIBILITY AND OUR COUNTER GUARANTEE NO: 821-02-0009989-G PLEASE ISSUE A WARRANTY BOND IN FAVOUR OF THE PRESIDENT OF INDIA THROUGH THE JOINT SECRETARY (ORDNANCE), MINISTRY OF DEFENCE, AS PER THE TEXT PROVIDED HEREUNDER,

QUOTE:

TO :THE PRESIDENT OF INDIA
THROUGH THE JOINT SECRETARY (ORDNANCE)
MINISTRY OF DEFENCE, GOVERNMENT OF INDIA,
NEW DELHI, INDIA.

WARRANTY BOND NUMBER :

....

LOT:M91(1)A1 LOT 002 AND M92(1) A1 LOT 004

WHEREAS YOU HAVE ENTERED INTO A CONTRACT REFERENCE NUMBER 18(6)/99/D(GS-IV)/D(01) DATED 23 APRIL 2002 WITH M/S DENEL (PTY) LTD ACTING THROUGH ITS DIVISION SOMCHEM (HEREINAFTER REFERRED TO AS THE "THE SELLER") HAVING ITS PRINCIPLE OFFICE IN SOUTH AFRICA FOR THE TOTAL CONTRACT VALUE OF USD 50.900.000,00 (FIFTY MILLION NINE HUNDRED THOUSAND UNITED STATES DOLLARS) (HEREINAFTER REFERRED TO AS THE "SAID CONTRACT") AND:

WHEREAS THE SELLER HAS UNDERTAKEN TO PRODUCE A BANK GUARANTEE FOR 5 PCT (FIVE PERCENT) OF THE VALUE OF EACH CONSIGNMENT TO SECURE ITS OBLIGATIONS TO THE PRESIDENT OF INDIA.

WE, STATE BANK OF INDIA, HEREBY EXPRESSLY, IRREVOCABLY AND UNRESERVEDLY UNDERTAKE AND GUARANTEE AS PRINCIPLE OBLIGERS ON BEHALF OF THE SELLER THAT IN THE EVENT THAT THE PRESIDENT OF INDIA SUBMITS A WRITTEN DEMAND TO US THAT THE SELLER HAS NOT PERFORMED ACCORDING TO THE WARRANTY OBLIGATIONS UNDER AFOREMENTIONED CONTRACT, WE WILL PAY YOU, ON DEMAND AND WITHOUT DEMUR, ANY SUM UP TO A MAXIMUM OF USD 186.750.00 (ONE HUNDRED AND EIGHTY SIX THOUSAND SEVEN HUNDRED AND FIFTY UNITED STATES DOLLARS).

YOUR WRITTEN DEMAND SHALL BE CONCLUSIVE EVIDENCE TO US THAT SUCH REPAYMENT IS DUE UNDER THE TERMS OF THE SAID CONTRACT. WE UNDERTAKE TO EFFECT PAYMENT UPON RECEIPT OF SUCH WRITTEN DEMAND.

WE SHALL NOT BE DISCHARGED OR RELEASED FROM THIS UNDERTAKING AND GUARANTEE BY ANY ARRANGEMENTS, VARIATIONS MADE BETWEEN YOU AND THE SELLER, INDULGENCE TO THE SELLER BY YOU, OR ANY ALTERATIONS IN THE OBLIGATIONS OF THE SELLER OR BY ANY FORBEARANCE WHETHER. AS TO PAYMENT, TIME PERFORMANCE OR OTHERWISE.

THIS GUARANTEE SHALL REMAIN VALID UNTIL 22 DECEMBER, 2008, UNLESS A DEMAND OR CLAIM UNDER

THIS GUARANTEE IS MADE TO US IN WRITING ON OR BEFORE THE AFORESAID EXPIRY DATE AS PROVIDED ABOVE IN THE REFERRED SAID CONTRACT OR UNLESS THIS GUARANTEE IS EXTENDED BY US, ALL YOUR RIGHTS UNDER THIS GUARANTEE SHALL BE PROFEITED AND WE SHALL BE DISCHARGED FROM THE LIABILITIES HEREUNDER.

THIS GUARANTEE SHALL BE A CONTINUING GUARANTEE (WHICH MEANS THE GUARANTEE WILL ALSO BE VALID IF THE BANK IS IN LIQUIDATION OR BANKRUPTCY) AND SHALL NOT BE DISCHARGED BY ANY CHANGE IN THE CONSTITUTION OF THE BANK OR IN THE CONSTITUTION OF THE SELLER.

UNQUOTE

IN CONSIDERATION OF YOUR ISSUING THE WARRANTY BOND IN FAVOUR OF THE PRESIDENT OF INDIA THROUGH THE JOINT SECRETARY (ORDNANCE), MINISTRY OF DEFENCE, AT OUR REQUEST AGAINST OUR COUNTER GUARANTEE NO.821-02-0009989-G, WE, ABSA BANK LIMITED, TRADING AS ABSA CORPORATE AND MERCHANT BANK, INTERNATIONAL BANKING SA – PRETORIA CENTRE, HEREBY IRREVOCABLY AND UNCONDITIONALLY CONFIRM THAT WE UNDERTAKE TO PAY YOU ON YOUR FIRST WRITTEN DEMAND BY AUTHENTICATED S.W.I.F.T. / TELEX MESSAGE STATING THAT YOU HAVE BEEN CALLED UPON TO MAKE PAYMENT UNDER AND IN TERMS OF YOUR GUARANTEE, NOTWITHSTANDING ANY CONTESTATION OR PROTEST BY THE SELLER, BY OURSELVES OR ANY OTHER THIRD PARTY, THE SUM NOT EXCEEDING THE MAXIMUM AMOUNT OF USD186.750.00 (ONE HUNDRED AND EIGHTY SIX THOUSAND SEVEN HUNDRED AND FIFTY UNITED STATES DOLLARS).

OUR RESPONSIBILITIES TO YOU IN RESPECT OF OBLIGATIONS UNDER THIS COUNTER-GUARANTEE SHALL BE GOVERNED BY SOUTH AFRICAN LAW AND WE HEREBY SUBMIT IRREVOCABLY TO THE EXCLUSIVE JURISDICTION OF THE COURTS IN SOUTH AFRICA.

WE CONFIRM THAT THE COUNTER-GUARANTEE WILL BECOME EFFECTIVE IMMEDIATELY UPON ISSUANCE OF YOUR WARRANTY BOND TO THE PRESIDENT OF INDIA AND WILL CEASE TO BE VALID ON 22 JANUARY 2009.

PLEASE NOTE THAT THE GUARANTEE MUST BE DELIVERED TO THE FOLLOWING JOINT SECRETARY (ORDNANCE) IN INDIA:

ALOK RANJAN
TEL NO: 09 91 11 23014222
FAX NO:09 91 11 23794602

PLEASE CONFIRM YOUR ACTIONS BY AUTHENTICATED S.W.I.F.T.

MENTIONING YOUR / OUR REFERENCE NUMBER AND FORWARD TWO COPIES OF YOUR GUARANTEE TO OURSELVES IN DUE COURSE.

THANK YOU IN ADVANCE FOR YOUR KIND CO-OPERATION.

REGARDS

ABSA BANK LTD.

TRADING AS ABSA CORPORATE AND MERCHANT BANK
INTERNATIONAL BANKING SA – PRETORIA CENTRE

PHYSICAL ADDRESS:

ADDRESS:

31 ST FLOOR, VOLKSKAS CENTRE
230 VAN DER WALT STREET
0002 PRETORIA

POSTAL

P.O. BOX 1748
PRETORIA

TELEPHONE : 27 12 3107667

FASCIMILE : 27 12 3207607

TELEX : 320275 IBPTA SA / 322201 IBPTA

S.W.I.F.T. : ABSAZAJJCPT"

SECOND TYPE

" Bank of Baroda

(1:F01ABSAZAJJCPT7492700512) (2:I760BARBINBBXONDN)

(4:

:27:1/1

:20:821-02-0009435-g

:23:REQUEST

:30:030819

:77C:ATTENTION: MR JS ARORA – INTERNATIONAL
BUSINESS BRANCH

YOUR FACSIMILE MESSAGE OF 16 AUGUST 2003 TO OUR
ANDRE SNYMAN OF OUR HEAD OFFICE IN JOHANNESBURG
REFERS.

WE ACCEPT YOUR CHARGES OF 0.45 PERCENT P.A.

HOWEVER THE APPLICANT, DENEL (PTY), LTD HAS
REQUESTED YOUR KIND RECONSIDERATION TO
EXCEPTIONALLY CHARGE YOUR COMMISSION ON A
QUARTERLY BASIS INSTEAD OF IN ONE AMOUNT UP-FRONT,
FOR GUARANTEES RELATING TO THE CONTRACT OF
USD50.900.000.00 WITH THE INDIAN GOVERNMENT.

UNDER OUR FULL AND IRREVOCABLE RESPONSIBILITY AND
OUR COUNTER GUARANTEE NO.821-02-0009435-G PLEASE
ISSUE A PERFORMANCE GUARANTEE IN FAVOUR OF THE
PRESIDENT OF INDIA THROUGH THE JOINT SECRETARY
(ORDNANCE), MINISTRY OF DEFENCE, AS PER THE TEXT
PROVIDED HEREUNDER,

QUOTE:

TO : THE PRESIDENT OF INDIA, NEW DELHI
THROUGH
THE JOINT SECRETARY (ORDNANCE)
MINISTRY OF DEFENCE
GOVERNMENT OF INDIA
NEW DELHI, INDIA

PERFORMANCE GUARANTEE NUMBER:
.....

WHEREAS YOU HAVE ENTERED INTO A CONTRACT REFERENCE NUMBER 18(6)/99/D(GS-IV)/D(01) (HEREINAFTER REFERRED TO AS THE "SAID CONTRACT") DATED 23 APRIL 2002 WITH M/S. DENEL (PTY) LTD ACTING THROUGH ITS DIVISION SOMCHEM (HEREINAFTER REFERRED TO AS "THE SELLER") HAVING ITS PRINCIPLE OFFICE AT REEB ROAD, FIRGROVE, 7130, REPUBLIC OF SOUTH AFRICA FOR THE SUPPLY OF 155 MM BI-MODULAR ARTILLARY CHARGES AND WHEREAS THE SELLER HAS UNDERTAKEN TO PRODUCE A BANK GUARANTEE FOR AN AMOUNT OF USD2.545.000,00 (TWO MILLION FIVE HUNDRED AND FORTY FIVE THOUSAND UNITED STATES DOLLARS ONLY) BEING 5 PCT (FIVE PERCENT) OF THE TOTAL CONTRACT VALUE, TO SECURE ITS OBLIGATIONS TO THE PRESIDENT OF INDIA.

WE, BANK OF BARODA, ..., HEREBY EXPRESSLY, IRREVOCABLY AND UNRESERVEDLY UNDERTAKE AND GUARANTEE AS PRINCIPLE OBLIGOR ON BEHALF OF THE SELLER THAT IN THE EVENT THAT THE PRESIDENT OF INDIAN SUBMITS A WRITTEN DEMAND TO US THAT THE GOODS HAVE NOT BEEN SUPPLIED ACCORDING TO THE CONTRACTUAL, OBLIGATIONS, WE WILL PAY YOU, ON DEMAND AND WITHOUT DEMUR, ANY SUM UP TO A MAXIMUM OF USD2.545.000.00 (TWO MILLION FIVE HUNDRED AND FORTY FIVE THOUSAND UNITED STATES DOLLARS ONLY).

YOUR WRITTEN DEMAND SHALL BE CONCLUSIVE EVIDENCE TO US THAT SUCH REPAYMENT IS DUE UNDER THE TERMS OF THE SAID CONTRACT. WE UNDERTAKE TO EFFECT PAYMENT UPON RECEIPT OF SUCH WRITTEN DEMAND.

WE SHALL NOT BE DISCHARGED OR RELEASED FROM THIS UNDERTAKING AND GUARANTEE BY ANY ARRANGEMENTS, VARIATIONS MADE BETWEEN YOU AND THE SELLER, INDULGENCE TO THE SELLER BY YOU, OR ANY ALTERATIONS IN THE OBLIGATIONS OF THE SELLER OR BY ANY FORBEARANCE WHETHER AS TO PAYMENT, TIME PERFORMANCE OR OTHERWISE.

IN NO CASE SHALL THE AMOUNT OF THIS GUARANTEE BE INCREASED.

THIS GUARANTEE SHALL REMAIN VALID UNTILL 15 MARCH 2007 (HEREINAFTER REFERRED TO AS "EXPIRY DATE"). UNLESS A DEMAND OR CLAIM UNDER THIS GUARANTEE IS MADE TO US IN WRITING ON OR BEFORE THE AFORESAID EXPIRY DATE AS PROVIDED ABOVE ON UNLESS THIS GUARANTEE IS EXTENDED BY US, ALL YOUR RIGHTS UNDER THIS GUARANTEE SHALL BE PROSCRIBED AND WE SHALL BE DISCHARGED FROM THE LIABILITIES HEREUNDER.

THIS GUARANTEE SHALL BE A CONTINUING GUARANTEE (WHICH MEANS GUARANTEE WILL ALSO BE VALID IF THE BANK IS IN LIQUIDATION OR BANKRUPTCY) AND SHALL NOT BE DISCHARGED BY ANY CHANGE IN THE CONSTITUTION OF THE BANK OR IN THE CONSTITUTION OF THE SELLER.

UNQUOTE

IN THE CONSIDERATION OF YOUR ISSUING THE PERFORMANCE GUARANTEE IN FAVOUR OF THE PRESIDENT OF INDIA THROUGH THE JOINT SECRETARY (ORDNANCE), MINISTRY OF DEFENCE, AT OUR REQUEST AGAINST OUR COUNTER GUARANTEE NO. 821-02-0009435-G, WE, ABSA BANK LIMITED. TRADING AS ABSA CORPORATE AND MERCHANT BANK, INTERNATIONAL BANKING SA – PRETORIA CENTRE, HEREBY IRREVOCABLY AND UNCONDITIONALLY CONFIRM THAT WE UNDERTAKE TO PAY YOU ON YOUR FIRST WRITTEN DEMAND BY AUTHENTICATED S.W.I.F.T. / TELEX MESSAGE STATING THAT YOU HAVE BEEN CALLED UPON TO MAKE PAYMENT UNDER AND IN TERMS OF YOUR GUARANTEE, NOTWITHSTANDING ANY CONTESTATION OR PROTEST BY THE SELLER, BY OURSELVES OR ANY OTHER THIRD PARTY, THE SUM NOT EXCEEDING THE MAXIMUM AMOUNT OF USD2-545.000.00 (TWO MILLION FIVE HUNDRED AND FORTY FIVE THOUSAND UNITED STATES DOLLARS ONLY).

OUR RESPONSIBILITIES TO YOU IN RESPECT OF OBLIGATIONS UNDER THIS COUNTER GUARANTEE SHALL BE GOVERNED BY SOUTH AFRICAN LAW AND WE IMMEDIATELY UPON ISSUANCE OF YOUR PERFORMANCE GUARANTEE TO THE BENEFICIARY AND WILL CEASE TO BE VALID ON 15 APRIL 2007.

PLEASE CONFIRM YOUR ACTIONS BY AUTHENTICATED S.W.I.F.T. MENTIONING YOUR / OUR REFERENCE NUMBER AND FORWARD TWO COPIES OF YOUR GUARANTEE TO OURSELVES IN DUE COURSE.

THANK YOU IN ADVANCE FOR YOUR KIND CO-OPERATION.

REGARDS
ABSA BANK LTD.
TRADING AS ABSA CORPORATE AND MERCHANT BANK
INTERNATIONAL BANKING SA – PRETORIA CENTRE

PHYSICAL ADDRESS :

POS

6.(ii) A sample invocation letter is as under :-

“{1:F01ABSAZAJJACW10390238519}-{2:O7671846091016
SBINZAJJAXXX75241331770910161846N}-{3:{10B:SC28298}}-{4:
:27:1/1
:20:SBI/GUAR/83/91
:21:9989G/9756G
:23: REQUEST
:30:091016
:26E:2
:31C:091016
:77C:KIND ATTENTION: GUARANTEE DEPARTMENT
WE HAVE RECEIVED A MESSAGE DATED 15.10.2009 FROM
THE BENEFICIARY OF THE GUARANTEE, GOVERNMENT OF
INDIA, MINISTRY OF DEFENCE, SOUTH BLOCK, NEW DELHI
110011 WHICH IS BEING REPRODUCED BELOW FOR YOUR
NECESSARY ACTION-
“QUOTE
EXTENSION OF TWO BANK GUARANTEES (1) PERFORMANCE
BANK GUARANTEE NO SBI/GUAR/83 DATED 07.10.2003 FORUS
DOLLARS 195000.00 WHICH IS VALID UPTO 31.10.2009 AND (2)
WARRANTY BOND NO SBI/GUAR/91 DATED 27.11.2003 FOR
USD186750.00 WHICH IS VALID UPTO 22.12.2009 M/S DENEL
(PTY) LTD SOUTH AFRICA ACTING THROUGH ITS DIVN
SOMCHEM SOUTH AFRICA FOR SUPPLY OF DEFENCE STORES
AGAINST CONTRACT NO 18(6)/99/D(GS-IV)/D/(O-1) DATED
23.4.2002
DEAR SIR AS THE GOODS HAVE NOT BEEN SUPPLIED
ACCORDING TO THE CONTRACTUAL OBLIGATIONS BY THE
SELLER UNDER THE SAID CONTRACT THE VALIDITY OF
ABOVE MENTIONED BANK GUARANTEES BE EXTENDED
UPTO 31.10.2010 AND 22.12.2010 RESPECTIVELY FAILING
WHICH THIS LETTER MAY BE TREATED AS NOTICE FOR
ENCASHMENT OF BOTH THE ABOVE BANK GUARANTEE
AND DEMAND DRAFTS / CHEQUES FOR THE FULL VALUE OF
GUARANTEES IN FAVOUR OF PCDA HQRS MINISTRY OF
DEFENCE NEW DELHI MAY BE SENT IMMEDIATELY.
RECEIPT OF THIS COMMUNICATION MAY PLS BE
ACKNOWLEDGED BY RETURN FAX AT 011-23018304 YOURS
FAITHFULLY SD/- JOINT SECRETARY TO THE GOVT OF INDIA
FOR AND ON BEHALF OF THE PRESIDENT OF INDIA
UNQUOTE”
WITH REGARD TO THE ABOVE MESSAGE WE REQUEST YOU
TO EITHER EXTEND THE GUARANTEE AS REQUIRED OR
ARRANGE FOR PAYMENTS OF THE SUM IN TERMS OF YOUR
COUNTER GUARANTEE.

REGARDS
CREDIT DEPARTMENT
STATE BANK OF INDIA, JOHANNESBURG
-)-(5:{CHK:310FD1E2AB3E)-(MAC:00000000))”

(Underlining is provided by me)

7. The learned senior counsel for the petitioner has taken me through the aforesaid relevant contractual clauses, the Bank Guarantees and the invocation letters, and then on the basis of co-relation between language employed in the Bank Guarantees, the contractual clauses and the invocation letters it was contended that the Bank Guarantees were given for specific contracts and only for the warranty obligations specified in Clause 10.1 in the main contract but since the invocation was not for warranty obligations as stated in the sub-clauses of clause 10, hence the invocation of the Bank Guarantees were stated to be in fraud of the purposes for which they were given and thus invocation was not in accordance with the purpose of the Bank Guarantees. It was also contended that by the invocation letter, what were the contractual obligations which were breached were not mentioned, and consequently, it was contended that the invocation is for that reason also not in terms of the Bank Guarantee. By reference to clause 10.3 it was contended that since the period specified therein has admittedly come to an end, thus, the Bank Guarantees have exhausted themselves.

8 The learned Senior counsel for the petitioner also relied upon *Larsen and Toubro Ltd. Vs. Maharashtra State Electricity Board and others AIR 1996 SC*

334 for the proposition that since the warranty period had expired the Bank Guarantees therefore could not be enforced. Reliance was then placed upon *Hindustan Construction Co. Ltd. Vs. State of Bihar & ors. (1999) 8 SCC 436* to contend that there is a fraud upon the petitioner and an unjust enrichment of the respondent and also that there are special equities in favour of the petitioner because the Bank Guarantees were only warranty Bank Guarantees which could only be enforced for the breach of the warranty conditions pertaining to technical specifications of the equipments or qua the warranty period of are not being admittedly enforced for these purposes. It was also, relying on this judgment, contended that the Bank Guarantees were not being enforced as per its terms because the invocation letters were not in accordance with the Bank Guarantees. Reliance was also placed upon the decisions of two learned Single Judges of this Court in the cases of *Hindustan Construction Company Vs. Satluj Jal Vidyut Nigam Ltd. AIR 2006 Delhi 169* and *Continental Construction Ltd. Vs. Satluj Jal Vidyut Nigam Ltd. 2006 (1) Arb LR 321 (Delhi)*. These judgments are also relied upon for the same purposes as already stated above.

9 In response to the arguments of the petitioner, Mr. Mohan Parasaran, ASG and Mr. Rajiv Mehra, Sr. Advocate for the respondent No. 1 have relied upon Clause 17.2 of the contract and which reads as under:-

“17.2 Giving or offering of any gift, bribe or inducement, or any attempt to any such act on behalf of the Seller towards any officer/employee of the Buyer, or to any

other person in a position to influence the decision of the Buyer, directly or indirectly, or any attempt to influence any officer/employee of the Buyer for showing any favour in relation to this or any other Contract, shall render the Seller to such liability/penalty as the Buyer may deem proper, including, but not limited to, termination of the Contract, imposition of penal damages, forfeiture of the Bank Guarantee and refund of the amounts paid by the Buyer.”

It was contended, relying upon Clause 17.2, that in terms of the contract, forfeiture is permissible of the Bank Guarantees either when there is an attempt to influence any officer/employee of the respondent no.1 whether in relation to the subject contract or in relation to any other contract or giving any inducement by appointing an agent and when such position emerges then this directly or indirectly causes breach of this Clause. It was contended that the language of the Bank Guarantees were wide enough to cover all the breaches of the stipulations or warranties as required by the contract and that Clause 17.2 was also very much a warranty/obligation related to the supply of the equipments.

10 Both the parties are ad idem that by virtue of the language in the Bank Guarantees, one has necessarily to read the terms of the contract along with the language as contained in the Bank Guarantees. Whereas the petitioner relied upon Clauses 10.1 to 10.6 and Clause 12.2, the respondent relied upon Clause 17.2. The Supreme Court in the case of **Hindustan Construction Ltd.** (supra), in a Bank Guarantee which was similarly worded, observed that the terms of the contract have to be read to appreciate the terms of the Bank Guarantee and also to decide whether or not the invocation of the Bank Guarantee is in terms of the

contract or not in order to decide the issue of fraud/special equities. The terms of the contract were also similarly relied upon by the Supreme Court in the case of **Larsen and Toubro Ltd.** (supra) to hold that the Bank Guarantee has exhausted itself because the Bank Guarantee was not enforceable after the contractual purpose for which it had been given stood satisfied.

11 One important aspect, and which is crucial to the determination of the matter in question in the present case, is the following language as found in both the Warranty Bank Guarantee and the Performance Bank Guarantee. The relevant language of both types of Bank Guarantees is as under:

“YOUR WRITTEN DEMAND SHALL BE CONCLUSIVE EVIDENCE TO US THAT SUCH REPAYMENT IS DUE UNDER THE TERMS OF THE SAID CONTRACT. WE UNDERTAKE TO EFFECT PAYMENT UPON RECEIPT OF SUCH WRITTEN DEMAND.”

The aforesaid language of the Bank Guarantees makes it clear that neither the bank, and in fact not even this court, is entitled to decide an issue on merits as to whether or not the repayment is due or not under the terms of the contract because the language makes it clear that the invocation letter is to be treated as conclusive of the circumstances existing which entitle the respondent no.1 to encash the Bank Guarantees. When such clear language is found in the Bank Guarantee, I do not think that it is permissible for the court, once Clause 17.2 is shown to exist, to venture into disputed question of fact to find out whether or not circumstances exist which entitle the respondent no.1 to encash the Bank Guarantees in that there is or is not a violation of terms of the contract so that

repayment is or is not due under terms of the contract. A demand by the invocation letter becomes conclusive in view of the aforesaid Clause in the Bank Guarantees and thus payment of the Bank Guarantees cannot be interdicted.

12. The contentions therefore raised on behalf of the petitioner that the Bank Guarantees as per its terms show that they have only been given for a specific contract and for only specific warranty obligations and only for a specific period, in my opinion, are not such which deserves acceptance. Since the petitioner itself seeks to rely upon the contractual clauses so as to understand the language of the relevant Bank Guarantees, and if therefore contractual clauses have to be referred to as urged on behalf of the petitioner, then surely the contractual Clause 17.2 as relied upon and referred to by the respondent no.1 should also be taken into account. The language of Clause 17.2 is general, wide and exhaustive as regards the subject matter contained therein. It clearly provides for encashment of the Bank Guarantee with respect to the breaches specified therein, whether under the subject contract or under other contracts. I am not entitled to whittle down the categorically wide scope and effect of the language as found in Clause 17.2 because Bank Guarantees have a special significance in the commercial world. The respondent no.1 is seeking to enforce its rights under Clause 17.2 read with the unconditional language as used in the Bank Guarantee and which it is entitled to do. Further, in my opinion, merely

because the Bank Guarantees refer to a particular contract, the same cannot be conclusive of the matter because admittedly the Bank Guarantees are given in furtherance of the contracts and which contracts contain the Clause 17.2. Similarly, the expression warranty obligation as used in the Bank Guarantee is again not conclusive inasmuch as there are different forms of warranties under a contract because in substance a warranty is only an obligation of performance. In my opinion, Clause 17.2 is also a warranty obligation of performance of the terms and conditions of the contract. The language of the Bank Guarantees in question are not so equivocal so as to be solely relatable only to sub-clauses of Clause 10 as found in the contract and not to other clauses including clause 17.2. If that be so, I am unable to accept the argument as raised on behalf of the petitioner that the Bank Guarantees can only be enforced either with respect to the warranty obligations under Clauses 10.1 and 10.3 or the performance bond obligation under Clause 12.2 of the contract.

The only thing I need to add to for the sake of completeness is that the clause numbers of the different contracts vary, however, the language of the clauses used in the contracts are identical in nature. Reference to the number of Clauses therefore in the present judgment is for the sake of convenience and pertaining to the contractual clauses of OMP 710/2009.

13 Therefore, though, the legal proposition as urged by the counsel for the petitioner is correct and accepted, but when the same are applied to the facts of

the present case, then however the conclusion which emerges is that the respondent is fully entitled to encash the Bank Guarantees for the reasoning given herein above and more particularly because of Clause 17.2 found in the contract. In doing so, the respondent no.1 cannot be interdicted because this court does not go into an issue of existence or non-existence of breach of the stipulations as found in the contract because that is a matter to be ultimately decided by the Arbitrators and not by this court.

14 The second contention as raised, pertained to the dis-entitlement of the respondent no.1 to encash the subject Bank Guarantees which are alleged to be only for specific contracts and not for breach of obligations under other contracts is covered by the reasoning given by me above.

15 The point which was urged by the senior counsel for the petitioner with respect to the Bank Guarantees in question having exhausted themselves because the object thereof, being the expiry of the defect liability period, or the delivery period will also be covered by reasoning and the conclusion given by me above.

16 On behalf of respondent no.1, attention of this court was invited to an order passed by the Arbitration Tribunal on 9.4.2007 (sic, 2008). Relying upon this order of Arbitration Tribunal, it is contended that the relief as prayed for in the petitions OMP 710 & 711/2009 were specifically refused by the arbitrators

and hence these petitions cannot lie. The following portion of the order of the Arbitration Tribunal dated 9.4.2008 is relevant and the same reads as under:

“1. The Claimant’s application for interim relief dated 7 December 2007 is refused on the ground that many of the contentions relied on by the Claimant involve issues of law and facts which are contested by the Respondent, which require determination after the hearing of evidence and full argument; and as to which the Claimant has not established at this stage a sufficiently strong prima facie case; no case has been made out that these issues cannot be satisfactorily dealt with at the last mentioned hearing in May 2008; the balance of convenience is in favour of deciding the claims for relief at that hearing and not by an order for interim relief.”

17 The said order was passed on an application under Section 17 of the Arbitration and Conciliation Act, 1996 filed by the present petitioner and in which application, inter-alia, the following averments were made and relief prayed:-

“1.2 encashing Bank Guarantees or compelling the Claimant wrongfully to extend the validity of Bank Guarantees in contracts other than the Subject Contracts;”

18 In my opinion, Para 1 of the order of the Arbitration Tribunal reproduced by me above, clearly shows that the very reliefs now asked for were declined by the Arbitration Tribunal to the petitioner, and therefore, also on general principles of res judicata, the present petitions are barred, not maintainable and are clearly liable to be dismissed.

19 It was contended on behalf of the petitioner that filing of the petitions is not barred because fresh cause of action has arisen inasmuch as the fresh extension of the Bank Guarantees has created new Bank Guarantees and further since the Arbitration Tribunal is presently no longer functional, grave prejudice is being

caused to the petitioner and therefore the petitioner was entitled to move this court under Section 9 seeking the appropriate interim reliefs. In my opinion, in the facts and circumstances of the present case, mere delay in disposal of the arbitration proceedings cannot be such a ground so as to hold that a fresh cause of action has accrued to the petitioner merely because the Bank Guarantees in question were extended subsequent to passing of the order dated 9.4.2008 by the Arbitration Tribunal. In certain cases and particular facts and circumstances of a case, it may be possible, though, I do not positively say so, that delay along with the other facts may create a situation entitling the filing of a fresh application, however, in the present case it cannot be so because the respondent no.1 is not to be blamed for the present state of the arbitration proceedings because it is not on account of any action or inaction of the respondent no.1 that the arbitration proceedings have prolonged or are stalled. As already stated before, the arbitration proceedings have come to a halt, firstly on account of the death of the presiding arbitrator, secondly on account of recusal of the arbitrator appointed by the petitioner itself and thirdly on account of the petitioner having filed proceedings for removal of the arbitrator appointed by the respondent no.1. Since the present petition does not amount to respondent no.1 seeking to take any advantage of its own action or inaction, I do not think that the facts of the present case create any fresh cause of action entitling the petitioner to file these petitions under Section 9.

20 In my opinion, therefore, neither is there any prima facie case in favour of the petitioner nor is there any balance of convenience in favour of the petitioner who would be caused grave irreparable injury entitling it to the reliefs as prayed for. I may only note that an aspect as regards to the balance of convenience and irreparable injury is that the respondent no.1 is not seeking to straightaway encash the Bank Guarantees. In the first instance, it has only asked for extension of the period of validity of the Bank Guarantees. It is only if the Bank Guarantees are not extended, only in such circumstances, the respondent no.1 has prayed that the banks must make payments under the Bank Guarantees. In my opinion, this stand of Union of India/respondent no.1 is also reasonable bringing the balance of convenience in favour of the respondent no.1 and against the petitioner. There is clearly neither an egregious fraud by the respondent No.1 nor any special equities in favour of the petitioner. The petitions are therefore liable to be and are dismissed.

21 Since in my opinion, the present petitions, in view of the aforesaid facts, are clearly misconceived, I find that the petitions ought to be dismissed with costs. The Supreme Court in Para 37 of the judgment reported as *Salem Advocate Bar Association Vs. Union of India (2005) 6 SCC 344* has observed that it is high time that actual costs are imposed. In fact the Supreme Court in the case of *U.P.Coop. Federation Vs. Three Circles (2009) 10 SCC 374* has held that courts are in fact entitled to impose interests on the costs which are

awarded. In the present case, considering the fact that respondent no.1 has been unnecessarily forced into this litigation, inasmuch as, all that had been asked for in the first instance was only an extension of the Bank Guarantees and not encashment thereof, and also keeping in mind that similar prayers of the petitioner were rejected earlier by the Arbitration Tribunal , I deem it fit that the respondent no.1 should file an affidavit of its authorised officer for the fees, it has paid to its advocates for these cases. The affidavit shall be supported by the certificates of the fees of the counsel that they have received and are entitled to receive in terms of an existing commitment the fees payable for these cases. Such affidavit and costs stated therein duly supported by the certificate of the advocates shall be the costs in favour of the respondent and against the petitioner. The necessary affidavit be filed within four weeks.

22 With these observations, the petitions are disposed of.

VALMIKI J.MEHTA, J

March 22, 2010

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