

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

Date of decision: 23rd March, 2012

+ **FAO (OS) 240/2010**

% **DENEL PROPRIETARY LTD.** Appellant
Through: Mr. Chetan Sharma, Sr. Adv. with
Mr. Ravi Singhania & Mr. Vikas
Goel, Advs.

Versus

UOI Respondent
Through: Mr. Mohan Parasaran, ASG with
Mr. B.V. Niren and Ms. Aarthi
Rajan, Advs.

AND

+ **FAO (OS) 241/2010**

% **DENEL PROPRIETARY LTD.** Appellant
Through: Mr. N.K. Kaul, Sr. Adv. with Mr.
Ravi Singhania, Mr. Vikas Goel and
Mr. Abhishek Kumar, Advs.

Versus

UOI Respondent
Through: Mr. Mohan Parasaran, ASG with
Mr. B.V. Niren and Ms. Aarthi
Rajan, Advs.

AND

+ **FAO (OS) 242/2010**

% **DENEL PROPRIETARY LTD.** Appellant
Through: Mr. Chetan Sharma, Sr. Adv. with
Mr. Ravi Singhanian & Mr. Vikas
Goel, Adv.

Versus

UOI Respondent
Through: Mr. Mohan Parasaran, ASG with
Mr. B.V. Niren and Ms. Aarthi
Rajan, Adv.

AND

+ **FAO (OS) 420/2010**

% **DENEL LTD.** Appellant
Through: Mr. N.K. Kaul, Sr. Adv. with Mr.
Ravi Singhanian, Mr. Vikas Goel and
Mr. Abhishek Kumar, Adv.

Versus

UOI Respondent
Through: Mr. Mohan Parasaran, ASG with
Mr. B.V. Niren and Ms. Aarthi
Rajan, Adv.

AND

+ FAO (OS) 423/2010

% DENEL LTD.

..... Appellant

Through: Mr. N.K. Kaul, Sr. Adv. with Mr.
Ravi Singhania, Mr. Vikas Goel and
Mr. Abhishek Kumar, Advs.

Versus

UOI

..... Respondent

Through: Mr. Mohan Parasaran, ASG with
Mr. B.V. Niren and Ms. Aarthi
Rajan, Advs.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

1. These appeals impugn the common order dated 22.03.2010 of dismissal of OMPs No.703/2009, 710/2009 and 711/2009 and two separate orders both dated 12.04.2010 of dismissal of OMPs No.682/2009 and 702/2009. All the said OMPs were preferred by the appellants under Section 9 of the Arbitration and Conciliation Act, 1996 seeking to restrain the respondent from invoking the Bank Guarantees furnished at the instance of the appellant to the respondent. While the order dated 22.03.2010 is a detailed one, the orders dated 12.04.2010 merely follow the earlier order dated 22.03.2010.

2. Notices of these appeals were issued. The amount in respect of some of the Bank Guarantees was got deposited in this Court. Some of the Bank Guarantees are stated to be still alive. Mr. Mohan Parasaran, learned ASG informs that an amount of ₹15,89,87,349/- against the following Bank Guarantees already stands deposited in this Court and there is thus no need for keeping them alive.

FAO (OS) No.	Warranty Bank Guarantee No.
423/2010	Warranty Bank Guarantee No.OND/FGN/BG/03/57 dated 11.09.2003 valid upto 31.10.2008. Counter Guarantee No.821020009480G issued by ABSA Bank, South Africa.
240/2010	Warranty Bank Guarantee No.OND/FGN/BG/03/54 dated 11.09.2003 issued by Bank of Baroda valid upto 25.08.2008. Counter Guarantee No.821020009417G issued by ABSA Bank, South Africa.
420/2010	Warranty Bank Guarantee No.SBI/GUAR/97 dated 26.04.2004 valid upto 30.06.2005. Counter Guarantee No.821020010566G issued by ABSA Bank, South Africa. Warranty Bank Guarantee No.SBI/GUAR/64 dated 28.03.2002 valid upto 12.12.2007. Counter Guarantee No.303110155G108407 issued by Standard Bank, South Africa.
241/2010	Warranty Bank Guarantee No.SBI/GAUR/1460 dated 28.03.2002 valid upto 12.12.2007. Counter Guarantee No.821020002584 issued by ABSA Bank, South Africa.

3. Mr. Mohan Parasaran, learned ASG further informs that the following Bank Guarantees are still being kept alive

- a) Performance Bank Guarantee No.OND/FGN/BG/2003/56 dated 11.09.2003 valid upto 25.08.2008.

Counter Guarantee No.821020009435G issued by ABSA Bank Ltd., South Africa.

- b) Warranty Bank Guarantee (ii) No.SBI/GUAR/83 dated 07.10.2003 valid upto 30.10.2008. Counter Guarantee No.821020009756G issued by ABSA Bank, South Africa.
- c) Warranty Bank Guarantee (iii) No.SBI/GUAR/91 dated 27.11.2003 valid upto 22.12.2008. Counter Guarantee No.821020009989G issued by ABSA Bank, South Africa.
- d) Warranty Bank Guarantee (v) No.SBI/GUAR/101 dated 04.06.2004 valid upto 14.06.2009. Counter Guarantee No.821020010799 issued by ABSA Bank, South Africa.
- e) Warranty Bank Guarantee (viii) No.SBI/GUAR/124 dated 01.03.2005 valid upto 15.12.2009. Counter Guarantee No.821020011743G issued by ABSA Bank, South Africa.
- f) Performance Bank Guarantee No.SBI/GUAR/132 dated 05.04.2005 valid upto 30.06.2007. Counter Guarantee No.821020012029G issued by ABSA Bank.”

4. After hearing the senior counsels for the appellants and the learned ASG for considerable time, what we find is that the cause of action for filing of the aforesaid OMPs under Section 9 of the Arbitration Act was the letters of the respondent calling upon the appellant to renew the Bank Guarantees, term whereof was about to expire, and invoking the same if the same were not so renewed. It was thus not as if the respondent was

seeking to appropriate unto itself the amount of the said Bank Guarantees. The respondent only wanted the Bank Guarantees to be kept alive. Mr. Mohan Parasaran, learned ASG in the hearing before us also confirms that the respondent UOI even now does not want to pocket the money of the Bank Guarantees and is only desirous of having the Bank Guarantees kept alive for satisfaction of its claims. It is contended that the appellant is a foreign entity and in the event of the claims of the appellant being ultimately upheld, unless the Bank Guarantees are alive, it will be difficult and inconvenient for the respondent UOI to realize its claim.

5. In view of the aforesaid stand of the respondent UOI, we have enquired from the senior counsels for the appellant, the purpose of the present appeals. We have put to them that even if we are to find in their favour, the said finding considering the nature of the proceedings will only be a *prima facie* finding. It is not for this Court in Section 9 proceedings to adjudicate the respective claims and contentions. Rather, restraint, even if were to be granted to the encashment of the Bank Guarantees, cannot be unconditional resulting in an irreversible situation. If the respondent was to be restrained from invoking the Bank Guarantees and the Bank Guarantees were to lapse, in the event of it being ultimately held that the respondent was entitled to have the Bank Guarantees kept alive and / or to encash the same, if the Bank Guarantees are not alive, the respondent would be deprived of the benefits of the arbitral award if ultimately in its favour. Even otherwise, ordinarily, the orders of restraint of encashment

of Bank Guarantees are conditional i.e. subject to the Bank Guarantees being kept alive.

6. However in the present case all that the respondent requires is to keep the Bank Guarantees alive.

7. That being the position, we do not consider the need to delve into the factual and the legal controversy or to burden our order with the same. The time so saved can be utilized for other deserving cases.

8. However since some of the Bank Guarantees have already been invoked and the money thereof has already been received in this Court, the only order with respect thereto can be of retaining the said amount in this Court subject to orders of the Arbitral Tribunal. Similarly, the only order qua the Bank Guarantees which are still alive is for the same to be kept alive subject to the orders of the Arbitral Tribunal.

9. We are also told that the respondent has so far not preferred any claims before the Arbitral Tribunal. The learned ASG has explained that the Bank Guarantees were invoked / enchashed on the ground of the appellant having violated the clause, in the Agreement of sale and supply of arms and ammunition, prohibiting offering of gift, bribe, inducement etc. He further informs that the said matter is still under investigation before the CBI and the making of the claims by the respondent is held up for the said reason.

10. We are of the opinion that the respondent cannot insist upon the Bank Guarantee and the deposits being kept alive / retained indefinitely. We therefore dispose of these appeals with the following directions:

- (i) The Bank Guarantees qua which the respondent has already filed the claims before the Arbitral Tribunal, we implore the Arbitral Tribunal to make attempt to decide the dispute between the parties as early as possible. Even if the final adjudication is likely to take time, the Arbitral Tribunal can always pass interim award deciding whether the appellant is under any obligation to keep these Bank Guarantees alive or not;
- (ii) The Bank Guarantees qua which the respondent has not so far preferred any claims, we grant six months time to the respondent to prefer the claims. If no claims are preferred within six months, the liability of the respondent to keep the Bank Guarantees alive shall cease; if the amount of the Bank Guarantees has already been received in this Court, the appellant shall become entitle to refund thereof;
- (iii) Else we direct that the amount deposited in this Court and the Bank Guarantees which are still alive shall be kept alive by the appellant, and shall be subject to the orders of the Arbitral

Tribunal;

- (iv) The findings and observations of the learned Single Judge being on a *prima facie* view of the matter shall have no bearing on the decision of the Arbitral Tribunal;
- (v) To balance the equity, we further direct that in the event of the appellant succeeding in the arbitral proceedings, the costs hereafter of keeping the Bank Guarantees alive shall have to be borne by the respondent.

The appeals are disposed of. No order as to costs.

ACTING CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

MARCH 23, 2012

‘gsr’