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

% Judgment delivered on: 18.11.2013

\+ **OMP 1114/2013**

INDU PROJECTS LTD. ..... Petitioner

Versus

UNION OF INDIA ..... Respondent

Advocates who appeared in this case:
For the Petitioner: Mr C.A. Sundaram & Mr Ashok Bhan, Sr. Advocates with Mr Ashish Bhan & Ms Ginny Rautray, Advs.
For the Respondent: Mr Rajeeve Mehra, ASG with Mr Sumeet Pushkarna, CGSC & Mr Jaswinder Singh & Ms Sara Sundaram, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

IA No. 18124/2013 (Exemption)

Allowed subject to just exceptions.

OMP No. 1114/2013

1. This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act) to seek an injunction qua the encashment of the performance bank guarantee bearing No.110133IBGP00145 dated 20.04.2011, in the sum of Rs. 4,57,21,800/-, issued by the concerned branch of the IDBI Bank, situate at Hyderabad.

1.1. I must note, at the very outset, that a petition, raising similar pleas,

though pertaining to a different contract, was filed by the petitioner, once again, under Section 9 of the Act. By this petition, as well, injunction on invocation of the bank guarantee in issue, in that case, was sought. The said petition was numbered as: OMP 1097/2013. By a judgment dated 01.11.2013, the petition, was dismissed. I am informed that an appeal was preferred with the Division Bench, which was rendered infructuous, as the respondent during the pendency of the appeal, had encashed the bank guarantee.

1.2. This petition, in broad terms, is a repetition of the pleas taken and dealt with by me, while delivering judgment in OMP No. 1097/2013. This petition is thus, like a second string to the bow. Having said that, one cannot help but observe, that the time consumed and the expense involved, in adjudicating upon such like disputes repeatedly, is enormous.

1.3 As indicated by me in my judgment dated 14.08.2013, passed in OMP No. 742/2013, titled ***DSC Ltd. vs Rail Vikas Nigam Limited & Ors.***, it appears that advocates are unable to guide petitioners as to the state of the law on the subject. One of the reasons why such petitions are filed repeatedly, without fail, is perhaps the diffidence shown by courts in not imposing heavy costs in respect of issues on which the law is settled far too well, by the highest court in the country. What makes the matter worse is that the present petition is accompanied by three other petitions, and perhaps, several others waiting in the pipeline.

2. Therefore, without much ado, let me advert to the facts which obtain in the present petition, and the arguments, advanced in support of those contentions. I must, however, state at the outset that Mr Sundaram, who appeared for the petitioner, categorically conveyed to me that the

submissions made in the lead matter, would cover the other three petitions filed along with the lead petition.

2.1 However, for the sake of good order, I have passed separate orders, so that the dates and events, obtaining in each matter are distinctly set out; the discussion qua submissions made though, is common.

3. On 24.09.2010, the respondent floated a Notice Inviting Tender (NIT), for execution of the work described as "construction of residential accommodation at Basoli, Mamun and Damtal / Package 3A" (the work in issue).

3.1 Since, the petitioner was declared a successful bidder, a Letter of Award (LOA) dated 08.03.2011, was issued in its favour. The total value of the work in issue was pegged at Rs. 91.40 crores. The total tenure of the contract was 26 months commencing from the date on which the site was handed over; as averred in the petition. The work was required to be executed in five phases. The date of commencement of the work was 08.05.2011. Therefore, the contract was required to be completed on or before 07.05.2013.

3.2 The petitioner, as per the terms of the contract, was required to furnish a performance bank guarantee, equivalent to 5% of the contract value. Accordingly, the petitioner furnished a performance bank guarantee dated 20.04.2011 of a value of Rs. 4,57,21,800/-. The bank guarantee, according to the petitioner is valid till 07.08.2015.

3.3 It is the case of the petitioner that there was delay in payment of the mobilisation advance to it. The petitioner avers that recovery against mobilization advance was commenced, by the respondent, along with interest, from the fourth (4th) month of the LOA. It is also the case of the

petitioner that, in order to commence execution of the work, it had mobilized resources at the site in issue. It is averred that the petitioner had erected scaffolding worth several crores, to enable the execution of the work in issue.

3.4 The petitioner claims that, contrary to the terms of the contract, the site in issue, was handed over to it on a piecemeal basis, which, inter alia, resulted in delay, in the execution of the work.

3.5 There are several other reasons set out in the petition, which according to the petitioner, impeded the execution of the work in issue. These being: non-removal of trees and pipelines; ban on brick kilns and restricted supply of sand and lastly, the non-availability of steel, which had to be sourced from approved vendors, i.e., SAIL.

3.6 It is also averred that, the petitioner, has applied for extension of time vide letter dated 06.07.2013 till 31.03.2014 which, is pending consideration of the respondent.

4. It is in this background when, the petitioner came to know on 08.08.2013, that the respondent, had sought to invoke the bank guarantee in issue vide letter dated 07.08.2013, that it approached this court, by way of a petition, under Section 9 of the Act; which was numbered as OMP No. 784/2013. Vide order dated 12.08.2013 an interim injunction was granted in favour of the petitioner, for the reason that prima facie, the invocation, at that stage, did not appear to be in consonance with the terms of the bank guarantee. The respondent, apparently, to meet this defect in its letter of invocation overrode the earlier letter of invocation with a fresh letter of invocation dated 23.10.2013.

4.1. The petitioner, has assailed, in substance, the fresh invocation made

vide letter dated 23.10.2013.

4.2 Vide order dated 31.10.2013, OMP No. 784/2013, was disposed of giving liberty to the petitioner to impugn the letter dated 23.10.2013; albeit in accordance with law.

5. It is in this background, Mr Sundaram, learned senior counsel for the petitioner has made the following submissions:

(i) The invocation was not in terms of the bank guarantee as it did not state that a loss had occasioned on account of the alleged breach committed by the petitioner. In other words, the factum of loss, was not articulated in the letter of invocation. In this regard, he referred to provisions of clauses 47 and 48, and first proviso to clause 60 of the General Conditions of the Contract (GCC).

(ii) While, it was not for the concerned bank, which had furnished the bank guarantee, to make an inquiry as to whether or not loss had occasioned; the respondent was duty bound to place before the court material to establish that loss had in fact occasioned; which propelled it to invoke the performance bank guarantee. The invocation of the bank guarantee was thus, pivoted on this jurisdictional fact.

(iii) The parties herein, have entered into eight (8) contracts; albeit for different locations, in respect of which eight (8) bank guarantees had been furnished. The total value of the bank guarantees was a sum of Rs. 43 crores. If, the respondent, was permitted to encash all bank guarantees, the petitioner, would practically, become insolvent; thus causing grave injustice to it.

(iv) Since the factum of loss was not established, the invocation was fraudulent.

(v) The impediments in the execution of the contract, (adverted to in the petition), being solely attributable to the respondent, give rise to special equities, in favour of the petitioner; which was, yet another reason for injuncting the encashment of the bank guarantee.

5.1 In support of his submissions, Mr Sundaram relied upon the following judgments: ***Hindustan Construction Co. Ltd. & Anr. vs Satluj Jal Vidyut Nigam Ltd. 2006 (I) AD (Delhi) 466*** and ***State Trading Corporation of India Ltd. vs State Bank of India & Ors. 200 (2013) DLT 283 (DB)***.

6. On the other hand, Mr Mehra, learned ASG who appeared for the respondent, contended that no ground was made out for grant of injunction. It was submitted that the petitioner's case did not fall within any of the three exceptions articulated by the courts for grant of injunction of an unconditional bank guarantee.

6.1 Mr Mehra in this behalf relied upon the terms of the bank guarantee and the letter of invocation dated 23.10.2013. It was his submission that the letter of invocation adverted to the fact that the petitioner had breached the terms and conditions of the agreement obtaining between the parties, and that, by virtue of such a breach, the loss/ damage, which would be caused to the respondent, would exceed the value of the bank guarantee in issue.

6.2 It was Mr Mehra's contention that against the total value of the contract, which was in the range of Rs. 91 crores (approximately), the petitioner had completed work amounting to only 15.59%. As a matter of fact, he brought to the notice of the court that a fresh NIT had been issued, wherein the contract value was indicated at Rs. 94.87 crores (approximately), which was higher than the value of the contract executed between the parties herein, by at least Rs. 23.23 crores (approximately). In

other words, Mr Mehra sought to convey that, as a matter of fact (as was obvious), loss had already occasioned and, there was every possibility of it being much higher, than the, difference in values indicated hereinabove.

6.3 In any event, according to Mr Mehra, the terms of the guarantee required the respondent only to say that a breach had occurred, which had or was likely to, result in a loss. Furthermore, it was Mr Mehra's contention that, reliance on clauses 47 and 48, and the first proviso of clause 60 of the GCC, was misconceived, as none of these clauses, had been referred to in the bank guarantee in issue.

6.4 In support of his submission, Mr Mehra, relied upon the judgment delivered between the same parties dated 04.10.2013 in OMP No. 1005/2013. Based on this judgment, Mr Mehra submitted that this court, had ruled, (in respect of a bank guarantee which had identical terms), that, where the beneficiary was in the realm of a likely loss, that could be caused to it, quantification of the loss was not required since, that was in any event, not a term of the bank guarantee.

REASONS

7. Having heard the learned counsels for the parties and perused the record, the contentions raised before me by Mr Sundaram, to use an aphorism, are really, in the nature of old wine in a new bottle. Though, I must state that, Mr Sundaram tried to draw a distinction qua the judgment delivered by me, between the same parties, in OMP No. 1097/2013, dated 01.11.2013, by emphasising the fact that the argument with regard to factum of loss, had not been dealt with in that judgment.

8. Let me, therefore, deal with this argument of Mr Sundaram based on which he seems to convey that the bank guarantee, which is otherwise

unconditional, has metamorphosed into a conditional bank guarantee. For this purpose, for the sake of convenience, the relevant portion of the bank guarantee, on which, reliance is placed by Mr Sundaram, has been extracted hereinbelow:

> "....We IDBI Bank Limited, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor (s) of any of the terms or conditions contained in the said Agreement or by reason of the contractor's (s) failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 4,57,21,800 (Rupees Four Crores Fifty Seven Lacs Twenty One Thousand Eight Hundred only)..."
>
> (emphasis is mine)

8.1 A reading of the aforesaid extract of the bank guarantee would show that the concerned bank, which has furnished the bank guarantee, is required to pay, merely on demand, to the beneficiary, i.e., the respondent herein, the amounts due and payable under the guarantee.

8.2 Therefore, one is required to examine, as to the manner, in which, the demand ought to be made. As per the terms of the bank guarantee, the demand of the beneficiary, requires to state that, by reason of breach of any of the terms and conditions contained in the agreement by the contractor or, by reason of failure on the part of the contractor to perform its obligations under the said agreement, the amount claimed, has become due by way of loss or damage caused to it or that which would be caused or suffered by it.

9. In the light of the aforesaid, the next step would logically involve the examination of the relevant contents of the letter of invocation. Therefore, relevant parts, that is, paragraphs 5 and 6 of the letter dated 23.10.2013, are extracted hereinbelow.

> ".....5. And whereas there has been a breach by the contractor of the terms and condition of the Agreement and by virtue of such breach there would be loss/ damage caused to the Government by reason of such breach by the contractor which in the estimate of HQ DG MAP will exceed the value of said Bank Guarantee Bond.
> 6. I, on behalf of the President of India, hereby serve you with this notice of demand against the aforesaid Bank Guarantee Bond for the sum of Rs. 4,57,21,800/- (Rupees Four Crores Fifty Seven Lacs Twenty One Thousand Eight Hundred only) on account of loss/ damage which would be caused to or suffered by the Government....."

9.1 A reading of the aforesaid extract would show that the respondent has firstly, stated that there has been a breach of the terms and conditions of the agreement, by the petitioner. Second, that the breach would result in loss or damage. Lastly, it is the estimate of the respondent, that the loss/damage would exceed the value of the bank guarantee in issue.

9.2 As I read the terms of the bank guarantee, it envisages two scenarios. First, where the beneficiary by virtue of the breach committed by the opposite party, would not only have suffered an injury but would also have, quantified the loss, say for example, where it had already entered into a risk-purchase contract on the date of injury or immediately thereafter but prior to the invocation of the bank guarantee. Second, which is a situation arising in the present case, where breach has occurred which has resulted in an injury, the quantification of loss though was not made possible, as the next step,

which is the execution of a fresh contract, had not reached the stage of fruition. In the facts of the present case, there is no dispute that there has been a delay in the execution of the contract. The dispute which really obtains between the parties, is that, on whose door-step, the delay, in the execution of the contract, has to be laid. The question is : to whom is the delay attributable. The record shows that, as per the respondent, there is a breach, which has resulted in an injury, which the respondent has not been able to quantify, as yet. Therefore, keeping in mind this situation, the letter of invocation in terms of the bank guarantee speaks of the loss/damage, which would be caused to it by reason of breach, which is, estimated to exceed the value of the bank guarantee. The bank guarantee thus, draws a distinction between legal injury and the quantification of compensation for that injury, when it speaks of losses that would be caused or suffered by the beneficiary, as against a situation, where amounts are claimed by way of loss or damage already caused. It is quite possible; (though one must confess in the present times it is a remote possibility, with the cost of material and labour increasing with each day), that a fresh contract may be of a value less than the value of the original contract which was breached by the contractor. In such an eventuality, at the end of the day, even though there is a legal injury suffered by a beneficiary, it may not be entitled to any damages in monetary terms, as damages under Sections 73 and 74 of the Indian Contract Act, 1872 are ultimately compensatory in nature, designed to put the aggrieved party in the same position as it would have been had the contract been performed by the opposite party, according to the terms and conditions agreed to between them. It is because, this exercise, cannot be conducted at the stage of the invocation of the bank guarantee, that is, where

a fresh contract has not been executed by the aggrieved party, or where corrective measures have not been taken; that the bank, is called upon to pay, without demur and merely on a demand by the beneficiary.

9.3 It is trite to say that a bank guarantee is an independent contract. The bank, which has furnished the bank guarantee, at the behest of the contractor, i.e., the petitioner in this case, is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary, i.e., the petitioner and the respondent herein.

9.4 Therefore, the submission of Mr Sundaram that one would have to look at the provisions of clauses 47 and 48, and first proviso of clause 60 of the GCC, is completely untenable for more than one reason. First, there is no reference to the said clauses in the bank guarantee. Second, the examination by the court has to be from the point of view of the concerned bank which has furnished the bank guarantee and not independent of it. It is because of this reason that while examining the exception of fraud, or the other exception, which is, whether or not the invocation is in terms of the bank guarantee, that the tests adopted by the court are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Is the encashment in consonance with the terms of the bank guarantee? In respect of the two exceptions, referred to above, the court has to examine the material from the point of view of the bank. Any other approach, if adopted, would put an unacceptable burden on the bank, and therefore, in one sense, paralyse the commercial world, which is the prime purpose why courts ordinarily do not injunct the encashment of bank guarantees, save and except where circumstances fall within the exceptions articulated hereinabove. The only area perhaps, where the court could

examine the material placed before it, and in that sense independent of the bank, is where, the aggrieved party sets up a case of special equities. Therefore, the argument of Mr Sundaram that in this particular case the court needs to examine the factum of loss, at this stage, in my view, is an argument which cannot be accepted.

10. In so far as special equities are concerned, the only argument that has been advanced before me, in sum and substance, is that, there were several impediments in the execution of the contract, which were solely attributable to the respondent. An overall view of the judgments pertaining to the bank guarantees would show that courts have interchangeably used the expression "special equities", with expressions, such as, "irretrievable injury" or "irretrievable injustice". In my opinion, the expression “irretrievable injury” or “irretrievable injustice”, is difficult to define with precision, as it would depend on facts and circumstances obtaining in each case. A broad test though, to my mind, would be that, would an aggrieved party find it difficult to realize or recover the amounts, which are reflected in the bank guarantee from the opposite party, if the aggrieved party were to ultimately succeed in the principal action, that it may launch against the opposite party. [See ***Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544*** in paragraph 29 at page 553]. If I were to apply the aforesaid test to the present case, in my view, the petitioner's case does not come within the ambit of special equities.

10.1 I had in fact taken the very same view in ***DSC Ltd.*** case., wherein in somewhat similar situation a case for grant of injunction on the ground of special equities was sought to be raised. I had rejected that plea. The matter was carried in appeal to the Division Bench. The appeal was numbered as:

FAO(OS) 374/2013. The Division Bench vide judgment dated 19.08.2013, dismissed the appeal. As a matter of fact, a Special Leave Petition was preferred against that judgment, which was numbered as: Civil Appeal No. 26796/2013. The Special Leave Petition was dismissed in limine vide order dated 27.08.2013.

10.2 In this context, the argument of Mr Sundaram that the petitioner had overall entered into eight contracts with the respondent and furnished, accordingly, eight bank guarantees worth Rs. 43 crores and that encashment of all eight bank guarantees would ruin the petitioner, is a submission which overlooks the following. First, that at the rate of 5% of the contract value (which is the rate Mr Sundaram provided me), the bank guarantees worth Rs. 43 crores, against contracts worth Rs. 860 crores (approximately), no employer likes to put contracts of such values unnecessarily into jeopardy. I am stating this only to put the matter in perspective, with the usual caveat that the trial would determine as who is it to blame for the delay. Second, there is no material put on record to show the petitioner's financial position; assuming one can look at the petitioner's financial worth. Third, this argument, in one sense is self-defeating, because it is precisely for this reason that bank guarantees are provided.

11. In the ***DSC Ltd***. case, I had distinguished the judgment of a Single Judge of this court, in the case of: ***Hindustan Construction Co. Ltd***. the same distinction would hold good in the present case. The facts as set out in ***Hindustan Construction Co. Ltd***. would show that, the bank guarantee in issue in that case, was sought to be invoked even though the beneficiary of the bank guarantee had issued, a certificate of substantial completion of work; there was a decision of the Dispute Review Board awarding a

substantial amount in favour of the contractor, with regard to its claim for extension of time; and that, the internal committee deliberations, which included the CMD of the beneficiary company, had returned findings in support of the contractor . As a matter of fact, the bank guarantee was sought to be invoked, just a day prior to the expiry of the performance period. As would be seen, the facts obtaining in the present case, are completely distinguishable.

12. In so far as the judgment in the case of ***State Trading Corporation of India Ltd.*** is concerned, the facts, as articulated in the judgment would show that the Division Bench was considering a challenge to an order passed by the Debts Recovery Tribunal (DRT) under Article 226 of the Constitution. The challenge to the order of the DRT arose in the background of the following circumstances: The petitioner before the court, i.e., State Trading Corporation Of India Ltd. (in short STC) had entered into a contract for purchase of wheat with respondent no. 3, in that case. To ensure due performance of contract by respondent no. 3, STC insisted on issuance of a performance guarantee, which was provided by respondent no.3, by requesting the State Bank of India (SBI)/respondent no. 1, to do the needful. SBI/respondent no. 1 to protect its interest, had sought a counter guarantee, which was provided by a Swiss Bank, i.e., UBS AG/ respondent no.2. Since, disputes arose between STC and respondent no.3, STC invoked the bank guarantee furnished by SBI, which paid the said sum, despite, intimation by AG/ respondent no.2, that it had been injuncted by the Swiss Court, to make a payment in terms of the counter guarantee. The order of the Swiss court was upheld right till the Swiss Federal Supreme Court. The STC, had contested those proceedings. Parallely, arbitration was also taken

recourse to by the parties to the main contract, i.e., the STC and respondent no. 3. Under the arbitration award a certain sum was awarded in favour of STC. On appeal, the Queen's Bench Division at London, awarded a larger sum in favour of respondent no. 3. Since, SBI was out of pocket, as it had paid STC against the bank guarantee furnished by it, it initiated proceedings before the DRT, for recovery of the sum due. In those proceedings, not only STC was impleaded as a party, but UBS AG/ respondent no. 2, as well as, respondent no. 3 were arrayed as defendants. The DRT, issued a recovery certificate in favour of SBI and against STC, while UBS AG/respondent no.2 and respondent no.3, "were exonerated". It is in this background, that STC assailed the judgment of the DRT by way of a petition under Article 226 of the Constitution. The court, while rejecting the petition, noted that the invocation and consequent encashment of the bank guarantee was fraudulent, in view of the fact that, not only were the findings in the award against STC, but also there were findings returned against STC, by the Swiss Courts. The Division Bench, also noted that the DRT had recorded that there was performance of the contract by UBS AG/ respondent no.2, and the small variations, if any, could have been negotiated by the STC. The issues, raised in the petition by the STC, inter alia, pertained to the fact that DRT did not have jurisdiction in the matter as the STC did not owe a "debt" to the SBI, and that, the decree of the foreign court, ought not to be recognized. The court noted that, not only was STC in possession of the goods, but had also retained the money recovered by it upon encashment of the bank guarantee and had, thus, unjustly enriched itself. In my view, there is nothing in the Division Bench judgment which, even remotely, comes close to the facts obtaining in the present case. Mr Sundaram's reliance on

the judgment of the Division Bench, is completely misplaced.

13. In my view, there is no merit in the petition. Needless to say though, any observations made by me hereinabove, are prima facie in nature and that they would have no impact on the merits of the disputes articulated in the petition if, and when, the petitioner, was to take recourse to arbitral proceedings.

14. In these circumstances, the petition is dismissed with costs of Rs. 25,000/-. The costs imposed will be deposited in the Prime Minister's Relief Fund, within one week. The concerned bank shall forthwith transmit the funds, as reflected in the bank guarantee in issue, to the respondent.

15. List before the learned Joint Registrar for compliance on 29.11.2013.

RAJIV SHAKDHER, J

NOVEMBER 18, 2013
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