# THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.11.2013

\+ **FAO(OS) 529/2013**

**M/S INDU PROJECTS LTD** ..... Appellant

versus

**UNION OF INDIA** ..... Respondent

\+ **FAO(OS) 530/2013**

**M/S INDU PROJECTS LTD** ..... Appellant

versus

**UNION OF INDIA** ..... Respondent

\+ **FAO(OS) 531/2013**

**M/S INDU PROJECTS LTD** ..... Appellant

versus

**UNION OF INDIA** ..... Respondent

\+ **FAO(OS) 532/2013**

**M/S INDU PROJECTS LTD** ..... Appellant

versus

**UNION OF INDIA** ..... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr Dushyant Dave and Mr Ashok Bhan, Senior Advocates with Mr Ashish Bhan and Mrs Genny Jetley Rautray

For the Respondent : Mr Rajeeve Mehra, ASG with Mr Sumeet Pushkarna, Mr Jaswinder Singh and Ms Sana Sundaram

**CORAM:-**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR JUSTICE R.V.EASWAR**

**JUDGMENT**

**BADAR DURREZ AHMED, J (ORAL)**

**CM Nos. 18349-52/2013**

The exemptions are allowed subject to all just exceptions.

**FAO(OS) 529/2013, 530/2013, 531/2013 & 532/2013**

1. These appeals have been preferred against the judgments dated 18.11.2013 delivered by a learned Single Judge of this court in O.M.P Nos. 1112-1115/2013. The said OMPs were all petitions under Section 9 of the Arbitration and Conciliation Act, 1996 seeking injunctions in respect of encashment of identical performance bank guarantees. The facts in all four cases are identical except that the numbers of the bank guarantees and the amounts and the underlying contracts are different. However, the bank guarantees, the invocation letters and the underlying contracts are in identical terms. It is for this reason that we shall be referring only to the bank guarantee No. 2010133IBGP0326 dated 25.10.2010 in OMP No. 1112/2013 and the relative invocation letter dated 23.10.2013.

2. The learned Single Judge after analyzing the law on the subject and on going through the facts and circumstances of the case has declined to grant injunctions against the encashment of the bank guarantees. Several points were argued before the learned Single Judge, one of them being

that the bank guarantees themselves have been wrongfully invoked. Another aspect which was argued was that the factum of loss or damage has not been established and therefore the invocation was bad / fraudulent. It was also argued that special equities arose in the case, inasmuch as, according to the appellants / petitioners there were difficulties with regard to the availability of site, availability of steel and unprecedented rains which delayed the execution of the underlying contracts. It was also argued that because of these difficulties extensions had been granted from time to time.

3. After examining these facts in the light of the law on the subject, the learned Single Judge came to the conclusion that the invocations were within the terms of the bank guarantees and that it was not necessary for the appellants / petitioners to have quantified the loss or damage which had occurred or was likely to be suffered by the respondent. It was also concluded by the learned Single Judge that this was not a case in which the concept of special equities could have been invoked. He was of the view that the expression "special equities" have been interchangeably used with the expression "irretrievable injury" or "irreparable injustice". The learned Single Judge further concluded that a broad test as to whether such an irretrievable injury or irreparable injustice had been caused or special equities had arisen would be to find out as to whether the aggrieved party would be in difficulty to realise or recover the amounts which are reflected in the bank guarantees from the opposite party if the aggrieved party were to ultimately succeed in the principal action based on the underlying contract that it may launch against the opposite party.

For this the learned Single Judge placed reliance on the Supreme Court decision in the case of ***Vinitec Electronics Pvt. Ltd. v. HCL Infosystems Ltd.*** **(2008) 1 SCC 544** (paragraph 29). The learned Single Judge concluded that if he was to apply the said test to the present case, the same would not come within the ambit of special equities.

4. Mr Dave, the learned Senior counsel, appearing on behalf of the appellants submitted that the invocation was not in terms of the bank guarantee and, therefore, the same could be injuncted. He submitted that it was incumbent upon the respondent to have quantified the loss or damage caused or which was likely to be caused or suffered and unless and until that was done, the invocation itself was bad. He drew out attention to the terms of the guarantee and, in particular, to paragraph (1) and (2) thereof which reads as under:-

> "1. The IDBI Bank Limited, D.No. 5-9-89/1, Chapel Road, P.B.No.370, Hyderabad Main Branch, Hyderabad – 500001 (herein after referred to as "the Bank") do hereby undertake to pay to the Government an amount not exceeding Rs 6,76,69,100/- (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only) against any loss or damages caused to or suffered or would be caused to or suffered by the Government by reason of any breach by the said Contractor of any of the terms or conditions contained in the said Agreement.
>
> 2. We IDBI Bank Limited, do hereby undertake to pay the amounts due and payable under this guarantee 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 or any breach by the said Contractor of any of the terms or conditions contained in

> the said Agreement or by reason of the contractor'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 6,76,69,100/- (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only)."

5. Mr Dave also drew our attention to the first invocation by the respondent which was on 07.08.2013. In that invocation letter it was, inter-alia, mentioned as under:-

> "3. And whereas it is expressly provided in the aforesaid Bank Guarantee Bond that you undertake to pay the amount due and payable under the guarantee without any demur, merely on a dmand from the Government stating that the amount claimed is due by way of loss or damage caused to or suffered or would be caused to or suffered by the Government by reason of any breach by the contractor of any of the terms and conditions contained in the said Contract Agreement or by the reason of contractor's failure to perform the said agreement.
>
> 4. And whereas there has been a breach by the contractor of the terms and conditions of the Agreement.
>
> 5. I, on behalf of the President of India, hereby serve you with this notice of demand against the aforesaid Bank Guarantee Bonds for the sum of Rs 6,76,69,100.00 (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only)."

This was superseded by the respondent's subsequent invocation dated 23.10.2013. The relevant paragraphs of which are as under:-

> "4. And whereas it is expressly provided in the aforesaid Bank Guarantee Bond that you undertake to pay the amount due and payable under the 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 suffered or would be caused to or suffered by the Government by reason of any breach by the contractor of any of the terms and conditions contained in the said Contract Agreement or by the reason of contractor's failure to perform the said agreement.
>
> 5. And whereas there has been a breach by the Contractor of the terms and condition of the Agreement <u>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 values of the said Bank Guarantee Bond.</u>
>
> 6. I, on behalf of the President of India, hereby serve you with this notice of demand against the aforesaid Bank Guarantee Bonds for the sum of Rs 6,76,69,100.00 (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only)on account of loss/damage which would be caused to or suffered by the Government."
>
> (underlining added)

6. On going through the clauses of the bank guarantee, it is evident that the bank guarantee was in terms unconditional. The requirement under the bank guarantee was that on a demand made from the Government stating that the amount claimed was 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 contractor (the appellant herein) of any of the terms or conditions contained in the agreement (underlying agreement) or by reason of the contractor's failure to perform the said

agreement, the bank would pay the amount due and payable under the guarantee 'without demur'. While Mr Dave has pointed out that no amount of loss or damage has been quantified, it is evident that the said clause is divided into two parts. One is where the Government has incurred loss or damage and the other being where it is likely to incur loss or damage by reason of breach of the contract by the contractor. In the present case, the invocation as it was initially set up on 07.08.2013 was, to our minds, deficient inasmuch as it had not been stated that there was a likelihood of loss or damage. That deficiency was corrected by the subsequent invocation dated 23.10.2013 which was an invocation in supersession of the earlier invocation letter dated 07.08.2013. In the letter dated 23.10.2013, it has been categorically stated that there has been a breach by the contractor of the terms and conditions of the agreement and by virtue of such breach there would be loss / damage caused to the Government, which in the estimate of HQ DG MAP, would exceed the value of the bank guarantee. As such, in our view, the invocation of the bank guarantee is in terms of the second limb of the bank guarantee where it was not at all necessary to quantify the amount of the loss and damage and only upon the respondent indicating that there would be loss or damage to be suffered by the Government on account of the breach of contract by the appellant, the bank was liable to pay under the bank guarantee without any demur merely on demand. We may also point out that clause (2) of the bank guarantee also contains the condition that - "any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee". Therefore, it is evident that the bank guarantee was clearly unconditional

and the bank had to pay without demur on invocation being made in terms of the bank guarantee. We have already taken the view that the invocation was in terms of the bank guarantee and, therefore, no injunction against the encashment of the bank guarantee could be granted.

7. Mr Dave also drew our attention to the Supreme Court decision in the case of ***Larsen & Toubro Limited v Maharashtra State Electricity Board And Others*** **(1995) 6 SCC 68** wherein according to the learned counsel, the Supreme Court had injuncted a bank guarantee on account of the fact that encashment of bank guarantee would result in 'irretrievable injustice'. In that case, there were two sets of bank guarantees, one was a bank guarantee against the retention money and the other was in respect of liquidated damages. Insofar as the bank guarantee concerning the liquidated damages was concerned, the Supreme Court did not grant the injunction as it was of the view that no prima-facie case of fraud or irretrievable injustice had been made out to restrain the injunction of the bank guarantee. However, with regard to the bank guarantee in respect of retention money, the Supreme Court took the view that the invocation of the bank guarantee would result in 'irretrievable injustice' and, therefore, an injunction as prayed for was granted. However, on going though the said decision in some detail, we find that the main reason why the Supreme Court granted the injunction in respect of the bank guarantee concerning the retention money was that the invocation itself was not in accordance with the bank guarantee. The bank guarantee had carried the expression that - "the bank hereby agrees unequivocally and unconditionally to guarantee the said amount released by the Board *till*

*successful completion of trial operations in due performance of the contract*."

8. It was clear from the facts of the case before the Supreme Court that the plant had admittedly been taken over by the respondent upon successful completion of trials. Therefore, on the admitted fact that the event of successful completion of trials had taken place, the Supreme Court came to the conclusion that the bank guarantee which was to enure only till the successful completion of the trial operations could not be encashed after the plant was taken over. The facts in the present case are entirely different.

9. We may refer to the very same decision in ***Larsen & Toubro Limited*** (supra) to state the position in law. Paragraph (5) of the said decision is as under:-

> "5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v Bank of India*[1], *U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd.*[2], *General Electric Technical Services Co. Inc v Punj Sons (P) Ltd.*[3] and the decision of the Court of Appeal in England in *Elian and Rabbath v Matsas and Matsas*[4] and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome*[5], laid down the law thus: (SCC pp. 523-27, paras 60-72)
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> 1 (1981) 2 SCC 766
> 2 (1988) 1 SCC 174
> 3 (1991) 4 SCC 230
> 4 (1996) 2 Lloyd's Rep 495, CA
> 5 (1994) 1 SCC 502

> "...in case of confirmed bank guarantee/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...
>
> ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

It will be clear from the above that the Supreme Court noted the earlier decision in ***Svenska*** (supra) wherein it categorically observed that before a bank guarantee could be injuncted there should be a prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. What is more, the Supreme Court observed that mere irretrievable injustice without a prima facie case of established fraud is of no consequence in restraining encashment of a bank guarantee. Therefore, we are of the view that, far from the said decision in ***Larsen & Toubro Limited*** (supra) coming to the aid of the appellants, it runs counter to their cause.

10. Mr Dave also referred to the decision of the Supreme Court in the case of ***Hindustan Construction Co. Ltd v State of Bihar And Others*** **(1999) 8 SCC 436** to demonstrate that the Supreme Court, does at times, refer to the underlying contract as also to the facts relating to the underlying contact while considering the question of injuncting a bank guarantee. However, we are of the view that the bank guarantee itself in that case made a reference to the underlying contract and this would be

apparent from paragraph 14 of the said decision which is to the following effect:-

> "14. This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilization loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilization loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilization loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilization advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants culd be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee."

From the above extract it is apparent that the condition clearly referred to the original contract between the parties. It is also evident that by a specific reference to clause (9) in the bank guarantee, the bank had qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or that HCCL had misappropriated any portion of the "advance mobilisation loan". It was in these circumstances that the Supreme Court held that the said clause would operate and that the whole of the amount covered by the "mobilisation advance" would become payable on demand. The Supreme Court observed that the bank guarantee could thus be invoked only in the circumstances referred to in clause (9) where under the amount would become payable only if the obligations were not fullfilled or there was misappropriation. In other words, the bank guarantee was injuncted from being encashed on the terms of the bank guarantee itself since the bank guarantee referred to the underlying contract. It is only because of this special circumstance that the Supreme Court went into the issue of examining the underlying contract. In the present case, we do not find any reference to the underlying contract which would enable the bank to examine the facts and circumstances relating to the underlying contract.

11. Furthermore, from the extract referred to above, the Supreme Court was of the view that the bank guarantee in that case was not unconditional or unequivocal in terms so that the beneficiary could be said to have had an unfettered right to invoke the guarantee and demand payment from the bank. The facts of present case are entirely different as

the bank guarantee is unconditional and unequivocal. We also note that in ***Hindustan Construction Co. Ltd.*** (supra) in paragraph 10 thereof the Supreme Court has clearly noted that in that case, the whole matter could be disposed of purely on the basis of the "terms of the bank guarantee". We also note that the invocation itself was also bad because it was invoked by a wrong person as observed by the Supreme Court in paragraph 21 of the said decision which reads as under:-

> "21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer."

In view of the foregoing discussion we do not see any reason to interfere with the impugned orders except to delete the order of costs and observations made with regard to the counsel.

The appeals stand disposed of.

Dasti under the signatures of the Court Master.

**BADAR DURREZ AHMED, J**

**VIBHU BAKHRU, J**

NOVEMBER 21, 2013 / SU