

IN THE HIGH COURT OF DELHI AT NEW DELHI

Order Reserved on: 24th March, 2014

Order Pronounced on: 29th May, 2014

OMP 125 OF 2014

UNITY PRATIBHA CONSORTIUM

..... PETITIONER

Through: Mr. Kailash Vasdev, Sr. Advocate
with Mr. S. S. Ray, Mr. Vishal
Phal, Ms. Rakhi Ray and Mr.
Vaibhav Gulia, Advocates

versus

AIRPORT AUTHORITY OF INDIA & ANR. RESPONDENTS

Through: Mr. Abhinav Vashisht, Sr.
Advocate with Mr. Digvijay Rai,
Mr. Rishi Chadha and Mr. Anuj
Malhotra, Advocates along with
Mr. Sunil Sethi, AGM(C) for AAI

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The Petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996. By the present petition the Petitioner has sought stay of the invocation of Bank Guarantee dated 16.03.2009 and

a further restraint against the Respondents from invoking Bank Guarantees at document No. 5 and 7 (i.e. Bank Guarantees both dated 04.08.2009 as amended by Bank Guarantees dated 10.08.2010).

2. As per the Petitioner, the Petitioner and Respondent No. 1 entered into an agreement dated 02.12.2006 by which the Petitioner was awarded a contract to carry out construction work. Respondent No. 3 is the bank that has issued the Bank Guarantee.
3. The start date of the contract was 19.12.2006 and the stipulated date for completion was 18.10.2007, however the actual date of completion was 30.06.2009. As per the Petitioner the performance report dated 17.09.2009 issued by the Respondents rated the performance of the Petitioner as 'Good'. As per the Petitioner it was required under the contract to submit Bank Guarantees including performance guarantees.
4. The Petitioner had provided a Bank Guarantee for a sum of Rs.3,30,00,000/-. The Bank Guarantee was subsequently reduced to 1,00,00,000/-. As per the Petitioner it was required to and submitted various

other Bank Guarantees to the Respondent from time to time.

5. As per the Petitioner the main contract was completed on 30.06.2009. The Petitioner relies upon the performance report dated 17.09.2009. As per the Petitioner there were certain defects that were pointed out at the time of issuance of the performance report and the Petitioner was required to complete/replace the defective works. The Petitioner thereafter claims to have completed even the defective works. The Petitioner by letter dated 20.09.2013 requested for the release of the Bank Guarantee of Rupees One Crore.
6. As per the Petitioners the dispute arose when the Petitioners demanded the release of the Bank Guarantee and the Respondents instead of releasing the Bank Guarantee stated that the same would be released only symbolically but stated further that the same shall have to be withheld in view of the directions received from CHQ and that the Bank Guarantee was to be withheld in view of expected recovery on account of inspections. No payment was to be released and any amount in the

form of Bank Guarantee or otherwise was to be retained.

7. As per the Petitioner the Respondents not only decided to withhold the amounts due to the Petitioner but have also sought to invoke the Bank Guarantee.
8. Learned Senior counsel for the Petitioner contended that the obligations under the contract stood performed and therefore the Petitioner was discharged of the obligations under the contract. He further contended that upon performance the Bank Guarantee cannot be invoked and if it is so invoked it would be a dishonest invocation. He further submitted that Bank Guarantees are a consequence of the main contract and upon the main contract been performed, calling upon the promisee to extend the Bank Guarantee is contrary to the contract.
9. Learned Senior counsel for the Petitioner contended that on 17.09.2009 the provisional completion report was prepared and on 30.03.2010 the completion certificate was issued and even the full and final payment was made in October 2010. After the full and

final payment a sum of Rs. 93,00,000/- was retained. He contended that the defects that were pointed out were duly rectified. He submitted that as per the Respondents a sum of at least Rs. 30,00,000/- was being withheld for defective glass. He contended that the Bank Guarantee was being invoked on the basis of an internal report.

10. He submitted that since the entire contract was completed and the obligations discharged, invocation of the Bank Guarantee on complaint of a third-party was dishonest invocation.
11. Learned Senior counsel contended that the Bank Guarantee was given only in lieu of the security deposit being deposited in cash. He further contended that special equities flow in favour of the Petitioner and the conduct of the Respondents is dishonest. He submitted that even if the Petitioner was overpaid, the overpayment can be examined and adjudicated but the Bank Guarantee cannot be invoked. He submitted that the invocation of Bank Guarantee was totally dishonest. The contract was over and it was not a case of

termination of contract Midway.

12. Learned Senior counsel relied on Section 17 of the Contract Act, 1872 to contend that that any act fitted to deceive would tantamount to fraud.
13. On the other hand learned Senior Counsel for the Respondent contended that the invocation of the Bank Guarantee was done as the Petitioner had overbilled the work. He contended that the bank guaranty was unconditional and the term of the Bank Guarantee stipulated that it was being executed as a security/guarantee for due fulfilment by the contractor of the terms and conditions of the agreement. The Bank Guarantee stipulates that the bank is liable to pay unconditionally the amount claimed by the Respondent without any demur. Any such demand made on the bank is conclusive as regards the amount due and payable by the bank under the guarantee. He further submitted that the bank had undertaken to pay any money so demanded notwithstanding any dispute or disputes raised by the Petitioner in any suit of proceedings before any court or tribunal.

14. Learned senior counsel for the Respondent submitted that the invocation was based on examination by Chief Technical Examiner (CTE) of the Government of India and CTE was under the Chief Vigilance Commissioner. He submitted that the CTE found that the Petitioner had overbilled and had been paid in excess and as such recoveries were to be made from the Petitioner of the amount overpaid.
15. He relied upon clause 29 (1) of the contract to contend that whenever any claim arose against the contractor for payment of money out of or under the contract the Airport Authority of India was entitled to recover such sum by appropriating in part or whole the security deposit of the contractor and in case the security was insufficient than the balance could be recovered or deducted from any sum that may become due or that may be due to the contractor under the contract or under any other contract. He submitted that the Bank Guarantee was furnished in lieu of the security deposit and as such was liable to be invoked in case any sum was found due from the contractor.

16. Learned Senior counsel for the Respondent relied on clause 29 (2) of the contract to submit that the Respondent had the right to cause an audit and technical examination of the works and the bills of the contractor including all supporting vouchers and abstract even after final payment of the bill and if as a result of an audit any sum is found to have been overpaid then the contractor was liable to refund the amount and further that the authority was entitled to recover the same in the manner provided under clause 29 (1).
17. Learned Senior counsel for the Respondent submitted that on 30.01.2014 the Petitioners were duly informed that they had to pay/deposit on the claim being made in terms of the inquiry. He contended that the Petitioner was duly informed about the pending inquiry and the inquiry had revealed that the Petitioner had indulged in overbilling and had been paid in excess on account of the overbilling. As per the inquiry a substantial amounts was found to have been overbilled and overpaid under various heads.

18. Learned Senior counsel for the Respondent submitted that as the Petitioner had indulged in overbilling of approximately Rs. 2.75 Crores and the Respondents were entitled to seek recovery of the amount overpaid and as such were further entitled to invoke the Bank Guarantee. He submitted that the Petitioner was liable to refund the amount that had been paid in excess on account of such overbilling.
19. The principles with respect to grant of an injunction in Bank Guarantee cases have been settled by the Supreme Court of India.
20. The Supreme Court in the case of ***U.P. COOP. FEDERATION LTD. V. SINGH CONSULTANTS AND ENGINEERS (P) LTD. 1988 (1) SCC 174*** has laid down that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of Bank Guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of Bank Guarantees would be

negatived and the fabric of trading operation will get jeopardised. The court further held that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere.

21. The Supreme Court in the case of *U.P. STATE SUGAR CORPN. V. SUMAC INTERNATIONAL LTD., (1997) 1 SCC 568* further laid down that when in the course of commercial dealings an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a Bank Guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a Bank Guarantee. The courts have carved out only two exceptions. A fraud in connection with such a

Bank Guarantee would vitiate the very foundation of such a Bank Guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

22. The Supreme Court further in the case of ***U.P. STATE SUGAR CORPN. (SUPRA)*** held that there are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such

as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee. The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.

23. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional Bank Guarantees are sought to be realised the Supreme Court held that to avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately

succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank Guarantees. There must be a fraud in connection with the Bank Guarantee.

24. The Supreme Court in the case of ***I.T.C. LTD. v. DEBTS RECOVERY APPELLATE TRIBUNAL***, (1998) 2 SCC 70 has laid down as under:

22. What is necessary for the Bank to refuse payment is a case of clear “fraud” and the Bank's knowledge as to such fraud (*Bolivinter Oil S.A. v. Chase Manhattan Bank N.A.*) [(1984) 1 LLR 392] . As pointed by Lord Denning and Lord Lane in *Edward Owen* [(1978) 1 All ER 976 : 1978 QB 159 : (1977) 3 WLR 764, CA], the Bank cannot refuse payment merely because according to it the claim was “dishonest” or “suspicious” or it appeared to be a sharp practice but it must be established as “fraud”. Lord Ackner in *United Trading Corpn. S.A. & Murray Clayton Ltd. v. Allied Arab Bank Ltd.* [(1985) 2 LLR 554, CA] held that the Bank could object to pay not because the demand was not “honestly” made but was made

fraudulently. Waller, J. in *Turkiye v. Bank of China* [(1996) 2 LLR 611] [LLR pp. (617-618)] said that the question was whether the demand for payment was “fraudulent”. Mere allegations and counter-allegations between the parties as to breach of contract, non-payment of advances or non-supply of machinery did not amount to fraud.

25. The Supreme Court further in the case of ***HIMADRI CHEMICALS INDUSTRIES LTD. V. COAL TAR REFINING Co., (2007) 8 SCC 110*** after considering the law as laid down by the Supreme Court in various decisions laid down the following principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a letter of credit:

- (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any

dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a Bank Guarantee or a letter of credit.

(iv) Since a Bank Guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.

26. Keeping these principles in mind and applying the same on the facts of this case, the conclusion that can be drawn is that no good ground has been made out by the Petitioner for grant of an order of injunction.

27. As per the Respondents, the invocation was based on examination by Chief Technical Examiner (CTE) of the

Government of India and CTE was under the Chief Vigilance Commissioner. The CTE is claimed to have found that the Petitioner had overbilled and had been paid in excess and as such recoveries were sought to be made from the Petitioner of the amount overpaid. As per the Respondents, the petitioners were aware from time to time of the pending inquiry and the consequent recovery to be made. As per the Respondents on 30.01.2014 the Petitioners were informed that they had to pay/deposit on the claim being made in terms of the inquiry. The inquiry is stated to have revealed that the Petitioner had indulged in overbilling and had been paid in excess on account of the overbilling. The inquiry is stated to have found that the Petitioner has indulged in overbilling of approximately Rs. 2.75 Crores.

28. Clauses 29(1) and 29(2) of the Contract between the parties stipulates as under:

29(1) Whenever any claim, against the contractor for the payment of a sum or money arises out of or under the contract, Airports Authority of India (International Airport Division) shall be entitled to recover such

sum by appropriating, in part or whole, the security deposit of the contractor, and sell any Government promissory notes, etc., forming the whole or part of such security. In the event of the security being insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with Authority. Should this sum be not sufficient to cover the full amount recoverable, the contractor shall pay to Airports Authority of India (International Airports Division) on demand the balance remaining due.

29.2 Airports Authority of India (International Airports Division) shall have the right to cause an audit and technical examination of the works and the final bills of the contractor including all supporting vouchers, abstract etc. to be made after payment of final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed by him to have been done by him under the contract and found not have been executed the contractor shall be liable to refund the amount of overpayment and it shall be lawful for Airports Authority of India

(International Airport Division) to recover the same from him in the manner prescribed in sub clause (i) of this clause or in any other manner legally permissible and if it is found that contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by Airports Authority of India (International Airports Division) to the contractor.

Provided that Airports Authority of India (International Airports Division) shall not be entitled to recover any sum overpaid, nor the contractor shall be entitled to payment of any sum paid short where such payment has been agreed upon between the Executive Director Engineering/Gen. Manager Engg/Dy. Or Addl. Gen. Manager Engg/Asstt Gen. Manager Engg or the Sr. Manager Engg on the one hand and the contractor on the other under any term of the contract permitting payment for work after assessment by the Executive Director Engineering/Gen. Manager Engg/Dy, Or Addl. Gen. Manager Engg/Asstt Gen. Manager Engg or the Senior Manager Engineering.

29. Clause 29 (2) of the contract gives a right to the Respondent Airports Authority of India to cause an audit and technical examination of the works and the

final bills of the contractor including all supporting vouchers, abstract etc. This right has been granted even after payment of final bill. The clause further stipulates that if as a result of such audit and technical examination any sum is found to have been overpaid the contractor shall be liable to refund the amount of overpayment and it shall be lawful for Airports Authority of India to recover the same from him in the manner prescribed in clause 29(1).

30. Proviso to clause 29(2) stipulates that the Airports Authority of India shall not be entitled to recover any sum overpaid, nor the contractor shall be entitled to payment of any sum paid short where such payment has been agreed upon between the Executive Director Engineering/Gen. Manager Engg/Dy. Or Addl. Gen. Manager Engg/Asstt Gen. Manager Engg or the Sr. Manager Engg on the one hand and the contractor on the other under any term of the contract permitting payment for work after assessment by the Executive Director Engineering/Gen. Manager Engg/Dy, Or Addl. Gen. Manager Engg/Asstt Gen. Manager Engg or the Senior Manager Engineering. However the said proviso

is not applicable to the facts of the present case as the Petitioners have not contended that their case is covered by the proviso.

31. Clause 29(1) grants the Airports Authority of India the right to recover any claim, against the contractor for the payment of a sum or money arising out of or under the contract. The Airports Authority of India is entitled to recover such sum by appropriating, in part or whole, the security deposit of the contractor, and sell any Government promissory notes, etc., forming the whole or part of such security. If the security deposit is insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable can be deducted from any sum then due or which at any time thereafter may become due to the contractor under the said contract or any other contract with Authority. If even that amount is not sufficient to cover the full amount recoverable, the contractor has to pay to Airports Authority of India on demand the balance remaining due.

32. The Bank Guarantee is unconditional and the term of

the Bank Guarantee stipulates that it was being executed as a security/guarantee for due fulfilment by the contractor of the terms and conditions of the agreement. The Bank Guarantee stipulates that the bank is liable to pay unconditionally the amount claimed by the Respondent without any demur. Any such demand made on the bank is conclusive as regards the amount due and payable by the bank under the guarantee. The bank has undertaken to pay any money so demanded notwithstanding any dispute or disputes raised by the Petitioner in any suit of proceedings before any court or tribunal.

33. Admittedly the Bank Guarantee has been furnished in lieu of the security deposit and has been executed as a security/guarantee for due fulfilment of the terms and conditions of the agreement. If the security deposit was liable to be appropriated under Clause 29 (1) and (2) in case of any excess payment, then the Bank Guarantee can certainly be invoked for any such recovery.

34. Coming to the ground of fraud, it is seen that fraud has not even been pleaded. What has been pleaded is

dishonesty. It is contended that dishonest invocation tantamounts to fraud. Even if it were to be presumed that the dishonest invocation would amount to fraud, from a close scrutiny of the facts pleaded in the petition it cannot be held that such facts have constituted fraud for which an order of injunction in the matter of encashment of Bank Guarantee could be passed.

35. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge¹.
36. The Bank cannot refuse payment merely because according to it the claim was “dishonest” or “suspicious” or it appeared to be a sharp practice but it must be established as “fraud”. Further The Bank could object to pay not because the demand was not

¹ *U.P. STATE SUGAR CORPN. (SUPRA)*

=====

“honestly” made but was made fraudulently.²

37. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional Bank Guarantees are sought to be realised the Supreme Court has laid down that to avail of this exception, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough³.
38. The Petitioner has failed to sufficiently plead or establish the plea of irretrievable injury. Existence of exceptional circumstances is not even pleaded by the Petitioner, that make it impossible for the petitioner to reimburse himself if he ultimately succeeds, leave alone decisively establishing them.
39. In view of the above, I find no merit in the Petition. The Petition is accordingly dismissed. Interim orders

² *I.T.C. LTD. V. DEBTS RECOVERY APPELLATE TRIBUNAL (SUPRA)*

³ *U.P. STATE SUGAR CORPN.(SUPRA)*

=====

dated 31.01.2014 and 06.02.2014 are vacated.

40. Nothing stated herein would amount to an expression of opinion on the merits of the case of either party.

SANJEEV SACHDEVA, J

May 29, 2014
HJ

