

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 924/2014 & I.A.No.16356/2014**

Judgment reserved on: 11.11.2014

Judgment pronounced on: 16.12.2014

M/S RPP INFRA PROJECTS LTD Petitioner

Through: Mr.Dayan Krishnan, Senior
Advocate with Mr.Govind
Manoharan, Advocate.

versus

M/S NTPC TAMIL NADU ENERGY & ANR. Respondents

Through: Mr.Bharat Sangal with
Ms.Anusuya Choudhury,
Advocate for respondent No.1.
Ms.Padma Priya, Advocate for
respondent No.2/Indian Overseas
Bank.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The present petition has been filed by the petitioner with the prayer that the respondent no.1 be restrained from invoking and encashing the bank guarantee and respondent no.2 from making payment to respondent no.1 in respect of bank guarantees.

2. The admitted facts of the case are that the petitioner was awarded the township work in the vicinity of power plant on a turnkey basis with residential and non-residential buildings and

other services vide LPA No.NTECL/C&M/Township (CS-0260-364-9)/LOA/09-10/201 dated 30.01.2010 by respondent no.1. Thereafter the agreement/contract was drawn on 25.03.2010. The work was for a value of Rs.137.847 Crores. The completion period was 24 months. However, since the work could not be completed within 24 months, the period was extended by respondent no.1 from time to time but the work could not be completed even after expiry of 53 months. The petitioner could complete the work worth of 35 % of the awarded contract value by April, 2014.

3. At the time when the contract was drawn, the petitioner had furnished security in the form of bank guarantees, the details of the bank guarantees are reproduced as under:

S.No.	Date	Nature of B.G.	Bank Guarantee No.	Amount
1.	10.02.2010 (Bank guarantees as on date extended upto 27.10.2014)	B.G. for security deposit	1015/1LG/5/10-11	3,06,33,000/-
2.	22.10.2013 (Bank guarantees as on date extended upto 19.10.2014)	Security Deposit	5/2013	4,41,63,765/-
3.	27.02.2013 (Bank guarantees as on date extended upto 25.08.2014)	Additional security deposit	9/2013	1,25,00,000/-

4.	02.04.2014 (Bank guarantees as on date extended upto 03.10.2014	Additional Security Deposit	ILG 42/14	3,00,00,000/-
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4. After April, 2014, the petitioner wrote a letter dated 02.06.2014 for further extension of time for completing the work. The respondent no.1 rejected the request of the petitioner for extension. The case of the petitioner is that the respondent threatened to encash the bank guarantee. Thereafter vide letter dated 28.08.2014 the respondent o.1 terminated the agreement. Before that the petitioner had moved this court seeking restrain on encashment of the above mentioned bank guarantees and the matter was listed before this court on 08.08.2014. The respondent was represented in court on that date through counsel on caveat and informed the court that they were not likely to invoke the bank guarantees until the next date of hearing. Meanwhile the respondent had moved an application being I.A.No.16356/2014 and the petitioner also filed the reply of the said application. During the pendency of the present petition also vide its letter dated 05.09.2014, the petitioner invoked the arbitration clause and raised a summary of claims worth of Rs.15,87,33,026.90/-

(Rupees fifteen crores eighty seven lacs thirty three thousand and twenty six and ninety paise). In reply to the said invocation the respondent no.1 vide its letter dated 01.10.2014 appointed Mr.Rakesh G.Samuel, GM (Vallur Project), Project-in-Charge of the Vallur Thermal Power Project, as the Arbitrator to decide disputes between the parties.

5. The case of the petitioner is that the said invocation of the bank guarantees is bad in law and contrary to the provisions of the contract. It is submitted that bank guarantees were deposited towards security deposit in terms of clause 9.1 of the GCC. It is submitted that these bank guarantees are not performance bank guarantees and therefore cannot be invoked. It is further submitted that under clause 9.4 of GCC, respondent no.1 is empowered to deduct all compensation or other sums of money payable by the contractor from security deposit and this clearly indicates that without determining the amount payable by the petitioner, the respondent no.1 cannot invoke the bank guarantees. It is also submitted that in view of clause 9.7 of GCC read with Condition 33 of the GCC, respondent no.1 had to give

7 days' notice for curing the defects and thereafter adjust the outstanding amount, if any, from the security deposits if the defects were not cured within the stipulated period. It is submitted that there is nothing on record to show that there was any defect which was required to be cured by the petitioner, hence, the respondent is not entitled to invoke the bank guarantees. It is further submitted that under clause 9 of GCC, the respondent no.1 is only required to deduct from the security deposit on a proportionate basis and therefore, the respondent no.1 cannot invoke entire security deposit. It is further submitted that the petitioner herein was facing hardships. The site was situated in a low lying area and in a coastal region and during the monsoons there was water logging and because of this nature of the site and the climatic conditions of the region delay was caused in construction. This issue was brought to the notice of the respondent vide several letters dated 12.03.2010, 18.03.2010, 19.03.2010, 12.05.2010, 17.05.2010, 09.01.2012, 11.01.2012, 29.03.2012, 25.02.2013, 17.05.2014, 04.03.2014, 08.04.2014, 19.04.2014 and 02.06.2014. The delay had also occurred on

account of respondent no.1 failing to clear bills raised by the petitioner. This fact was also brought to the notice of the respondent. It is submitted that approval for work programs, drawing etc. and clearance and instructions could not be obtained in time during the first two years of the contract and this had affected the petitioner's work progress to a great extent. It is submitted that the drawings provided were completely wrong and there were frequent changes. The said facts have been brought to the notice of the first respondent vide letters dated 12.03.2010, 18.03.2010, 19.03.2010, 12.05.2010, 17.05.2010, 09.01.2012, 11.01.2012, 29.03.2012, 25.02.2013, 17.05.2014, 04.03.2014, 08.04.2014, 19.04.2014 and 02.06.2014. It is also submitted that the surrounding locality near the site was an industrial area, which extensively engages labour force. Due to this, the petitioner had to face several frequent disturbances like politically motivated problems, problems created by people living around the site which had an impact on the progress of the work. Despite bringing these facts within the knowledge of respondent no.1 vide letter dated 20.08.2010 the respondent no.1 did not

come forward to help the petitioner. It is submitted that delay had occurred due to the reasons beyond the control of the petitioner and the petitioner could complete only 35 % of the work. It is submitted that in view of this, it is clear that balance of convenience lies in favour of the petitioner and petitioner shall suffer irreparable injury and the financial loss. It is submitted that special equities also lies in favour of the petitioner. Reliance has been placed on the findings in case of *U.P.Co-operative Federation Ltd. vs. Singh Consultants* reported in (1988) 1 SCC 174 and *U.P. State Sugar Corporation vs. Sumac International Ltd.* reported in (1997) 1 SCC 568.

6. It is submitted that findings in *U.P. State Sugar Corporation*'case (supra) are not relevant because the questions involved in the said matter was in relation to the encashment of bank guarantees that were given as performance guarantees and not towards security deposits. On these facts, it is submitted that petitioner be given relief.

7. The claim is contested by the respondent on the ground that even before furnishing the bid the bidder were advised to

inspect the site and it was expected that the petitioner would have given the bid only after inspection of the site. Clause 6 of the contract also bound down the contractor to inspect the site and its surroundings and satisfy himself before submitting his tender. Under Clause 19 of the agreement the duty was of the contractor to remove water accumulated at the site during the progress of the work at his own risk.

8. Clause 41 empowers the respondent no.1 to cancel the contract by written notice in case the contractor fails to complete the work within stipulated period. It is argued that existence of any pending dispute between the parties cannot be a ground for preventing the invocation of the bank guarantee. Reliance has been placed on *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.* reported in (2008) 1 SCC 544 and *U.P.State Sugar Corporation's* case (supra). It is further argued that the invocation of the bank guarantee can be challenged only on the ground of fraud and irreparable injury and the nature of irreparable injury has been defined by the Supreme Court in *U.P.State Sugar Corporation's* case (supra) and *Itek*

Corporation vs. First National Bank of Boston reported in **566 F.Supp.1210**. It is submitted that the petitioner has failed to show that it has suffered irreparable loss and injury and therefore is not entitled for the relief. It is submitted that the security has been furnished by the petitioner in the form of unconditional bank guarantee and the bank guarantee is an independent contract between the bank and the beneficiary and its invocation cannot be stopped. It is further submitted that it was the petitioner who has failed to honour the contract despite the fact that the respondent had given extension of time for completion of work on several occasions in pursuance to Clause 32 of GCC. It is submitted that therefore the petitioner is liable for liquidated damages.

9. I have heard arguments and have perused the relevant record. There is no dispute to the fact that under Clause 9.1 of GCC the petitioner was required to furnish security deposit. This clause also gives liberty to the petitioner to deposit the security either in cash or in the form of government securities or fixed deposit receipts or bank guarantees furnished by any of the nationalised banks. The petitioner had chosen to furnish the said

security deposit in the form of bank guarantees. From the language of the bank guarantee it is apparent that all the bank guarantees are unconditional bank guarantees. The bank has clearly stated “*to unconditionally pay the amount claimed by the Corporation on demand and without demur to the extent aforesaid*”.

10. Paragraph 2 of the said bank guarantee also reads as under:

2. We, Indian Overseas Bank, Surampatti Branch, further agree that the Corporation shall be the sole judge of and as to whether the said Contractor has committed any breach or breaches of any of the terms and conditions of the said Contract and the extent of loss, damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Corporation on account thereof and the decision of the Corporation that the said Contractor has committed such breach or breaches and as to the amount or amounts of loss, damage, costs charges and expenses caused to or suffered by or that may be caused to or suffered by the Corporation from time to time shall be final and binding on us.”

11. The nature and purpose of bank guarantee has been discussed by Supreme Court in the case of **Hindustan Construction vs. State of Bihar** (1999) 8 SCC 436, relied upon by the petitioner. The relevant paragraphs 8 and 9 of the said

judgment are reproduced as under:-

“8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are excusable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. In U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd.: [1988]1SCR1124, the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any

injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken v. Indian Charge Chrome: AIR1994SC626; Larsen & Toubro Ltd. v. Maharashtra State Electricity Board: AIR1996SC334; Hindustan Steel Works Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.: AIR1996SC131; National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd.: AIR1996SC445 ; State of Maharashtra v. National Construction Co.: [1996]1SCR293; Hindustan Steel Works Construction Ltd. v. Tarapore & Co :AIR1996SC2268 as also in U.P. State Sugar Corporation v. Sumac International Ltd.: AIR1997SC1644 , the same principle has been laid down and reiterated.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.”

12. As discussed above, the bank guarantees in dispute, clearly in unequivocal terms and unconditionally recite that the amount

would be paid without demure or objection. The bank guarantee thus is an independent contract between the bank and the beneficiary and can be challenged only on the ground of fraud and irreparable injury.

13. In the present case, the petitioner has challenged the invocation of the bank guarantee only on the ground of irreparable injury. The plea of irreparable injury is based on the contentions that the petitioner since having financial problems would suffer irreparable loss, if the respondent be allowed to encash the bank guarantees. Whether this constitutes irreparable injury of the nature which is sufficient to restrain the respondent from invoking the bank guarantees is the matter which requires consideration. Now what is an irreparable loss and injury on the basis of which court can restrain the respondents, has been discussed and the principle laid down by the supreme court in the ***U.P.State Sugar Corporation's*** case (supra). The petitioner has also relied on this case. The Supreme court has held as under:

“on the question of irretrievable injury which is the second exception to the rule against granting of injunctions when an unconditional bank guarantees are sought to be realised the irretrievable injury must be of

the kind which was the subject matter of the decision in the Itek Corporation Case.

14. In **Itek Corporation v. First National Bank of Boston 566 F.Supp. 1210**, the Massachusetts District Court of the United States has held as follows:

“at the risk of stating the obvious, I take judicial note of the fact that conditions in Iran has changed radically since that time. What was contractually ‘customary’ and ‘necessary’ in 1977 does not, in the face of dramatically changed circumstances, exert binding force on the parties and this court more than six years later. I reiterate my earlier finding that ‘the present domestic situation there has rendered access to Iranian courts futile. Therefore I do not find that Itek should be required to pursue its remedies in the Iranian Courts before having resort to this forum.

Because I find that Itek has demonstrated that it has no adequate remedy at law, and because I find that the allegations of irreparable harm are not speculative, but genuine and immediate, I am satisfied that Itek will suffer irreparable harm if the requested relief is not granted.”

15. From the principles laid down in the abovesaid case, it is apparent that the petitioner can be said to have suffered irreparable injury if he has been able to show that he shall suffer irreparable harm.

16. In the present case, the petitioner has failed to bring on

record which can show that the petitioner shall suffer an irreparable harm. The petitioner has failed to show that in case he succeeds before the arbitrator, he will not be able to recover the refund of his security amount. It is not his case that the respondent is not financially sound or would not be in a position to refund the decretal amount.

17. Let us now examine this case from a different angle. There is no dispute to the fact that these bank guarantees have been furnished by the petitioner towards the security deposit. He had the liberty pursuant to clause 9.1 of GCC to deposit the security either in cash or in the form of bank guarantee or in the form of other securities. The petitioner has chosen to deposit the security in the form of bank guarantees. Suppose the petitioner would have deposited the security amount in cash, what would have been the situation? The cash security deposit would have remained with respondent no.1 and the petitioner would have been entitled to its refund in terms of the GCC. Clause 9.6 of the GCC deals with the refund of security deposit. It reads as under:

9.6. Refund of Security Deposit:- One half of the Security deposit refundable to the Contractor

worked out on the basis of the value of work completed shall be re-funded to the Contractor on the Engineer-in-Charge certifying in writing that the work has been completed as per condition 31 hereof etc.”

18. This clause clearly contemplates that the security deposit is refundable only on completion of the work and after the engineer-in-charge certifies in writing that the work has been completed as per the condition 31. Admittedly, in the present case the petitioner has only completed work of 35% worth of contract amount and thus in view of clause 9.6 of GCC the petitioner is not entitled for the refund of security deposit and the security deposit is to remain with respondent no.1. For this reason also the petitioner is not entitled for the relief.

19. Mere pendency of a reference before the arbitrator is also not a ground to issue restrain order to the bank guarantee.

20. This Court in a recent judgment **Consortium of Deepak Cable India Limited** (*supra*), has held as under:-

“145.....Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of

the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.”

21. Therefore, the pendency of the arbitration proceedings also is not a ground to restrain the respondent no.1 from invoking the bank guarantees. Also in the case of ***Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.*** reported in (2008) 1 SCC 544 the

Supreme Court has clearly held that the process of the arbitral proceedings is not a ground to restrain the invocation of the bank guarantees especially when there is no allegation that it would be difficult to realise the amount from the respondent. The court has held as under:

“There is no dispute that arbitral proceedings are pending. The appellant can always get the relief provided he would make his case before the Arbitral Tribunal. There is no allegation that it would be difficult to realise the amounts from the respondent in case the appellant succeeds before the arbitral tribunal.”

22. For the foregoing reasons, I found no ground to hold that the petitioner is entitled to any relief. The petition is hereby dismissed. The stay granted by this court stands vacated.

DEEPA SHARMA, J

DECEMBER 16, 2014

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