IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 120 OF 2015
IN
ARBITRATION PETITION (L) NO. 1316 OF 2014

Simplex Infrastructures Limited ....Appellant.
(Original Petitioner)

V/s

Siemens Limited
and Another ..... Respondents.

Mr. Janak Dwarkadas, Senior Counsel a/w. Mr. Kochar, Mr. Manish Dembra i/b Mr. Satosh Mishra for the Appellant.

Mr. D.D. Madon, Senior Counsel alongwith Mr. Birendra Saraf, Mr. Ajay Bhargava, Mr. Rahul S. Sahay, Mr. Akash Menon, Mr. Yashesh Kamdar & Ms. Aparna Bagree i/b Khaitan & Co. for Respondent No.1.

Ms. Pathak i/b Hiren Mehta for Respondent No.2.

CORAM: V. M. KANADE &
A.R. JOSHI, JJ.

DATE : 5th March, 2015

P.C.:- ***(Per V.M. Kanade, J.)***

1. Appellant/original Petitioner has filed this appeal under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") against the judgment and order dated 05/01/2015 passed by the learned

Single Judge, who was pleased to dismiss the Petition filed under Section 9 of the said Act.

2. Respondent No.1 and the Appellant entered into contract/agreement dated 21/12/2010. By the said agreement, Respondent No.1 was engaged for the purpose of executing Main Civil Works for the Project.

3. Appellant/original Petitioner was required to complete the work as per schedule of specified milestones for the Main Civil Works ("MCW"). The last milestone specified in the said schedule was to be achieved by the Petitioner by 25/04/2012. According to the Appellant, the project was delayed which was on account of the reasons attributable to Respondent No.1. Though, initially, contract price under the contract was Rs 1,46,67,35,578/-, the price was increased to Rs 216,05,16,103/-. According to the Appellant, because of the delay caused on account of Respondent No.1, they offered and paid additional amounts/compensation in order to expedite the works and recover the delays and three amendments were made to the contract dated 08/02/2013, 26/07/2013 and 06/08/2013. According to the Appellant, the work was duly completed on 20/03/2014.

4. According to the Appellant, Respondent No.1 invoked all the Performance Bank Guarantees and Retention Bank

Guarantees submitted by the Appellant/original Petitioner in terms of the contract to the tune of Rs 47,76,35,568/- on 21/08/2014. Appellant, therefore, filed a Petition under section 9 of the said Act and, by that time, an amount of Rs 29,42,93,621/- had already been encashed by Respondent No.1.

5. It is the case of the Appellant that Respondent No.1 had committed an offence of cheating by first entering into amendment agreement and inducing the Appellant/Petitioner to engage additional resources by promising additional payments and after the work was completed by the Appellant, Respondent No.1 invoked the Bank Guarantees and had taken back the additional compensation promised and paid in terms of the amendment agreement. It is the case of the Appellant that the contract contains a limitation liability as per Clause 16.2 wherein it was provided that the Appellant's liability was limited to maximum of 15% of the final contract price and, therefore, the said maximum liability could not exceed 15% of the final contract price i.e. Rs 32,40,77,415.45. According to the Appellant, Respondent No.1 had committed a fraud by invoking the Bank Guarantees. Secondly, it was contended that since Respondent No.1 had encashed the Bank Guarantees for an amount almost at par with the maximum limit of liability of the Appellant/Petitioner under the contract, encashment of

any further Bank Guarantee would be in breach of the specific contractual provisions and would also cause an irreparable loss to the Appellant.

6. Mr. Janak Dwarkadas, the learned Senior Counsel appearing on behalf of the Appellant invited our attention to the relevant clauses of the contract viz Clauses 16.2, 6.5, 13.2, 8.15, 15.1, 17, 13.1 (as amended by SCC), 13.3, 13.6, 3.7, 6.6 (as amended by SCC). He submitted that Respondent No.1 had promised additional compensation for accelerating the work and there was no mention of any liquidated damages or any other claims of Respondent No.1 in the revised target dates which were fixed on 17/01/2014 and 04/02/2014. He submitted that several E-mails were exchanged between the parties and meetings were held to discuss the issues relating to the Project from time to time and only on 11/07/2014, Respondent No.1's Officer sent E-mail, stating that the minutes were unilateral and they did not agree with the contents of the Appellant's E-mail. He submitted that on 19/08/2014, Respondent No.1 sent a letter rejecting the minutes, though no mention was made of any claims of Respondent No.1 and, thereafter, within two days on 21-22/08/2014, Respondent No.1 sent invocation letters to various Banks for encashment of all Bank Guarantees furnished by the Appellant amounting to Rs 47.76 crores and for the first time on 23/08/2014, Respondent No.1 sent a

letter to the Appellant, stating therein that it had claims of Rs 56.92 crores and had invoked the Bank Guarantees amount to Rs 47.76 crores against the same.

7. Mr. Janak Dwarkadas, the learned Senior Counsel appearing on behalf of the Appellant also invited our attention to the averments made in the Petition relating to fraud. It was contended that Respondent No.1 first fraudulently induced the Appellant to take acceleration measures to expedite the work on promising and paying the additional compensation by way of amendment agreements and upon completion of works, Respondent No.1 invoked Bank Guarantees with malafide intention to recover the amounts so paid. It was further submitted that all outstanding issues pertaining to the Project were discussed in the meeting held in June 2014 and the minutes were accepted by Respondent No.1 in writing though they were subsequently denied. It was submitted that on account of Clause 16.2, overall liability of the Appellant could not be more than Rs 32.40 crores and, therefore, Respondent No.1 could not have invoked the Bank Guarantees of Rs 47.76 crores. It was also contended that Respondent No.1 had claimed liquidated damages and other damages for the alleged delay and defaults, though, in law, Respondent No.1 were not entitled to claim both, liquidated and other damages as laid down by the Supreme Court in *Sir Chunilal*

V. Mehta and sons Ltd vs. Century Spinning and Manufacturing Co. Ltd.[1] Lastly, it was contended that this was a case of unjust enrichment by Respondent No.1 by invoking Bank Guarantees and that was a ground which was available to the Appellant for seeking an order of injunction, restraining Respondent No.1 from encashing the bank Guarantees. Mr. Janak Dwarkadas, the learned Senior Counsel appearing on behalf of the Appellant has also taken us through the impugned judgment and order passed by the learned Single Judge.

8. On the other hand, Mr. D.D. Madon, the learned Senior Counsel appearing on behalf of Respondent No.1 submitted that the case of unjust enrichment was never argued before the learned Single Judge and no ground had been taken in the memo of appeal and that this point was argued for the first time before this Court. He submitted that even otherwise the Apex Court in *Dwarikesh Sugar Industries Ltd vs. Prem Heavy Engineering Works (P) Ltd and Another*[2] has held that in encashment of Bank Guarantee, applicability of principle of unjust enrichment has no application. He submitted that no case of fraud was made out by the Appellant and the learned Single Judge after going through the averments made in the Petition has held that no particulars of fraud were mentioned in the pleadings and,

1 AIR 1962 SC 1314
2 (1997) 6 SCC 450

therefore, the case of fraud was not made out. He submitted that so far as interpretation of various clauses in the agreement including Clause 16.2 is concerned, the same would be done by the Arbitral Tribunal in the Arbitration Proceedings. He submitted that the Bank Guarantees which were given by the Appellant were unconditional Bank Guarantees and, therefore, other issues raised by the Appellant were not germane for the purpose of deciding the question as to whether the encashment of Bank Guarantees could be stayed.

9. We have heard both the learned Senior Counsels at length. We are unable to accept the submissions made by the learned Senior Counsel appearing on behalf of the Appellant. So far as submission regarding unjust enrichment by Respondent No.1 is concerned, as rightly pointed out by Mr. Madon, the learned Senior Counsel for Respondent No.1, the Apex Court in *Dwarikesh Sugar Industries Ltd*[1] (supra) has clearly held that the principle of unjust enrichment of Bank Gurantee is not applicable to the encashment of Bank Guarantee. The Apex Court in the said judgment has observed in para 29 as under:-

> “29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while

1 (1997) 6 SCC 450

> examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application." (Emphasis supplied)

Secondly, so far as interpretation of various clauses in the agreement is concerned, in our view, at this stage, it is not germane for the purpose of deciding the question involved in this case. The observations made by the learned Single Judge on the interpretation of these clauses are of a prima facie nature and, in our view, it is not necessary to discuss the interpretation of these clauses while deciding this appeal.

10. The only question which falls for consideration before this Court is : whether Respondent No.1 could have invoked the Bank Guarantees? It is well settled that the Bank Guarantee is an independent contract and the Bank is duty bound to honour its commitment upon invocation of unconditional performance guarantee. It is also quite well settled that invocation of Bank Guarantee and encashment of the same can be restrained by an order of injunction only on two grounds viz (i) fraud and (ii) irreparable loss. In our view, the learned Single Judge, after going through the pleadings and averments made in the Petition, has rightly held that particulars of fraud have not been mentioned. The learned Single Judge has held that particulars of such fraud must be specifically pleaded and in the absence of specific pleading as to fraud and the alleged manner in which it has been perpetrated, the Court cannot come to a prima facie finding of fact on the aspect of fraud. The learned Single Judge has observed that during the course of oral arguments, the Chart along with list of dates and events was relied upon and it was contended that it established that the milestone summary attached to letter of Respondent No.1 dated 23/08/2014 was false and misleading and that there was no delay in completion of the work which could be attributable to the Appellant. The learned Single Judge has held that these particulars contained in the chart had not been

pleaded.

11. In our view, therefore, no case for injunction on the ground of irretrievable special equities had been made out or established by the Appellant. It is not in dispute that the Bank Guarantees are unconditional and irrevocable. No grievance has been made regarding the procedure followed by Respondent No.1 while invoking the Bank Guarantees. In our view, it has not been established by the Appellant that Respondent No.1 has fraudulently invoked the said Bank Guarantees. All other contentions raised by the Appellant cannot be determined in a Petition for restraining invocation of Bank Guarantees and these issues will have to be decided by the Arbitral Tribunal.

12. Appeal is therefore dismissed.

(A.R. JOSHI, J.) **(V.M. KANADE, J.)**