

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

Judgment reserved on March 10, 2015

Judgment delivered on March 17, 2015

+ **O.M.P.(I) 19/2015**

JCL INFRA LTD. (FORMERLY KNOWN AS J.SONS CO. LTD.)

..... Petitioner

Through: Mr.Raman Kapoor, Sr.
Advocate with Mr.Aviral
Tiwari, Mr.R.P.Singh,
Advocates

versus

GOVT. OF NCT OF DELHI THROUGH CHIEF SECRETARY
AND ANR.

..... Respondents

Through: Ms.Vibha Mahajan Seth,
Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present petition has been filed by the petitioner, inter alia, seeking an injunction against the respondents from encashing three bank guarantees bearing Nos. 1050210BG0001026 for Rs.66,86,313/-, Rs.1050210BG0001008 for Rs.14,69,450/- and 1001113BG0000130 for Rs.20,00,000/-.

2. When the matter was listed on February 13, 2015, this Court had directed the respondents to maintain status quo with regard to invocation of the aforesaid three bank guarantees.

The facts:

3. On March 29, 2010, the respondents had invited tenders for construction of eight Foot Over Bridges (FOBs in short) in Delhi. The petitioner, who had also bid for the tender was found successful and its bid was accepted. The stipulated date of start was July 2, 2010 and the duration of the work was four months. The petitioner furnished performance bank guarantees for all the FOBs as per the terms of the contract. Two sites were handed over to the petitioner on the said date. The petitioner's case is three more sites were handed over to the petitioner on February 23, 2011. According to the petitioner, on December 30, 2011, much after the expiry of the original date of completion, the petitioner was informed that only four FOBs were available to it in the scope of the work i.e. Jia Sarai, Munirka, Azad Pur and Seelampur. The petitioner's case is that the site of Seelampur was not handed over to it.

4. On August 31, 2012, the petitioner was informed that it needed to construct an additional FOB at IIT Gate, Aurbindo Marg. While excavation was going on, the petitioner was called to stop the work at Aurbindo Marg. Later, on September 28, 2013, it was found that the location of the Aurbindo Marg site had been changed.

5. It was the case of the petitioner that on July 9, 2014, petitioner was

informed that FOB at Nelson Mandela Marg needed to be constructed. The petitioner's case is that no drawings have been issued to it for construction till the date of termination of the contract. It is also averred that on September 3, 2014, work was again revived at the original location at Aurbindo Marg. A show cause notice was issued on December 29, 2014 for termination of the contract. On January 20, 2015, the petitioner invoked the arbitration under clause 25 of the contract. Unfortunately, arbitrarily, the respondents issued a notice of final action, determining the contract of the petitioner & at the same time, forfeiting the earnest money, security deposit and performance guarantee. It is the case of the petitioner that on February 3, 2015, the respondents invoked the bank guarantees which compelled it to approach this Court.

6. On the other hand, the respondents in their reply have pleaded non-joinder of bank as a party. The respondents would allege connivance between the bank and the petitioner, since the bank did not honour its liability under the bank guarantees till the respondents produce the order of this Court. The respondents would contend that the bank guarantees are absolute and irrevocable. According to the respondents, the petitioner has concealed material facts and not placed all the correspondence between the parties on record inasmuch as the

respondents had issued two earlier show cause notices dated February 2, 2011 and January 30, 2012, even though, the respondents have not taken any action against the petitioner pursuant to those show cause notices.

7. It is the case of the respondents that the petitioner did not have the necessary resources to execute the work under contract from its very inception. The respondents would contend that the site drawings were provided to the petitioner on various occasions. Additionally, with regard to the Aurbindo Marg Site, upon inspection by the PWD staff, it was seen that the petitioner was under-staff, had not opened a site office, did not have proper storage facilities and did not have proper engineers. The respondents would dispute the obligation to hand over all the sites to the petitioner at one go. The respondents have also averred that the law on bank guarantees being well settled, this Court would not like to interfere with the invocation.

Submissions:

8. Mr. Raman Kapoor, learned Senior Counsel for the petitioner would submit that the respondents had not handed over all the eight sites for the start of the work. Only two sites were initially handed over to the petitioner. The petitioner was additionally required to do several tasks like sub-surface work to find out all the prior underground services passing through the area so as to not damage them. This was beyond its

scope of work. According to Mr.Kapur, the larger part of the delay was attributable to the respondents, emphasizing on instances like the fact that the Nelson Mandela Marg site had not been handed over to them, or that, there were various issues with regard to Aurbindo Marg site, where the site was changed after basic ground work was done only for the respondents to later revert to the original site. He would state that milestones were revived several times and extension of time for the work was given from time to time. The submission of Mr.Kapur is that the delay that has occurred cannot be on account of the petitioner. He has drawn my attention that with regard to the drawings of a site, the clarifications sought by the petitioner in the year 2012 was only given in the year 2014. It is his submission that the non-disclosure at the time award of work, that all the eight sites for which tender was invited, were unavailable, is a fraud played by the respondents on the petitioner. He would state that against the four FOBs where the work is complete, the respondents have cleared the bills except an amount of Rs.13 lakhs, without raising any objection on the aspect of the delay having occurred for the reasons attributable to the petitioner. He would rely upon the judgment of this Court in the case reported as **41 (1990) DLT 359, Nangia Construction India Pvt. Ltd. Vs. National Buildings Construction Corporation Ltd.** in support of his contention that, the

Courts are within their rights if the ground exists to grant injunction against bank guarantee.

9. On the other hand, Ms. Vibha Mahajan Seth, learned counsel for the respondents would challenge the maintainability of the petition keeping in view the relief(s) sought by the petitioner. According to her, the law on bank guarantees being well settled, the relief(s) should be denied to the petitioner. She has taken me through the following relevant clauses of the contract:

(i) clause 2-compensation for delay

(ii) clause 3-when contract can be determined

(iii) clause 4-contractor liable to pay compensation even if action not taken under clause 3

(iv) clause 13-foreclosure of contract due to abandonment or reduction in scope of work.

It was her submission that the invocation of the bank guarantees is as per the contract. In any case, it was her case that the contracts for bank guarantees being independent to the main contract, the petitioner has to necessarily prove 'fraud' and the case that irretrievable injustice/social equity injury would be caused, if injunction is not granted. According to her, the only paragraph where fraud has been pleaded by the petitioner is in paragraph 21 and the averments in the said paragraph would not prove

the case of a 'fraud' having been established by the petitioner. She would rely upon the following judgments in support of her contentions:

1. *United Motor Finance Co. Vs. Addision & Co., AIR 1937 PC 21*
2. *M/s. R.C.Thakkar Vs. Gujarat Housing Board, AIR 1973 Guj. 34*
3. *Ganga Retreat & Towers Ltd. Vs. State of Rajasthan*
4. *William Derry Vs. Sir Henry William Peek (House of Lords) (Manu/QB/0475/1889)*
5. *M/s. ABP Motors Ltd. Vs. M/s. PSA International Pvt. Ltd.*
6. *U.P.Cooperative Federation Ltd. Vs. Singh Consultants & Engineers (P) Ltd., (1988) 1 SCC 74*
7. *Emaar MGF Construction Pvt. Ltd. Vs. DDA and Ors., (2011) (1) ARBLR 440*
8. *BHEL Vs. Mass Global Investment, I (2013) BC 552 (DB)*
9. *Lloyds Steel Industries Vs. Indian Oil Corporation, AIR 1999 Delhi 248*

10. Having heard the learned counsel for the parties, insofar as the submissions made by the learned Senior Counsel for the petitioner are concerned, the same are related to merit of the disputes between the parties. From the perusal of the provisions of the contract, it is clear that the respondents have power to terminate the contract under clause 3,

which the respondents did on January 23, 2015. Whether the termination of the contract is justified or not, needs to be considered in the arbitration proceedings. The issue to be determined in this lis between the parties is, whether the invocation of the bank guarantees is justified.

11. The law on bank guarantees is quite well settled. The Supreme Court in ***U.P.State Sugar Corporation Vs. Sumac International Ltd.*** **1997 1 SCC 568** wherein, the Supreme Court, after referring to its earlier decisions, observed as follows:

“12. The law relating to invocation of such bank guarantees is by now well settled. 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 co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. 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, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984 [1] AER 351 at 352):

"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". This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. *The same question came up for consideration before this Court in Svenska Handelsbanken v. M/s Indian Charge Chrome & Ors. (1994 [1] SCC 502). The Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of Itek Corporation v. The First National Bank of Boston etc. (566 Fed Supp. 1210). On the question of fraud this Court confirmed the observations made in the case of U.P. Cooperative Federation Ltd. (supra) and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.*

14. *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 court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the 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. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee” (emphasis supplied).

12. The Supreme Court also quoted from its decision in ***State of Maharashtra Vs. National Construction Company, 1996 (1) SCC 735***, the following passage:

“The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.”

13. After referring to the aforesaid decision, the Supreme Court, in para 16, observed as follows:

“16. Clearly, therefore, 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. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent”.

14. The terms of bank guarantees in the present case reveal that the same are unconditional and irrevocable and the respective banks have undertaken to pay the respondents without any demur merely on a demand in writing from the respondents, stating that the amount claimed is due and payable by the petitioner. The bank had also further undertaken to pay the amount under the bank guarantees in question notwithstanding any disputes or differences raised by the petitioner in any suit or proceedings. Suffice to state, the bank has clearly held out in

its guarantee, its liability under the guarantee is absolute, unconditional and irrevocable.

15. A perusal of the petition and the submissions of the learned Senior Counsel for the petitioner shows that the petitioner's grievance in the petition is the, violation of the obligations under the contract by the respondents, even though, the respondents' attempt has been to put the blame on the petitioner so as to make the alleged defaults as ground for invocation of the bank guarantees. The invocation of the bank guarantees by the respondents merely because the petitioner has raised disputes cannot be said to be fraudulent. Even the submission of the learned Senior Counsel for the petitioner that all the eight sites were unavailable to enable the petitioner to start the work would amount to fraud, cannot be accepted. The terms of bank guarantees would reveal, the inter se disputes relating to the main contract, would not come in the way of the respondents to invoke the bank guarantees.

16. I agree with the submission of the learned counsel for the respondents that the averments made by the petitioner in para 21 of the petition to plead 'fraud' are unsustainable. The Supreme Court in ***Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. and Ors., (2001) 1 SCC 663*** observed that the Court ought not to grant injunction, to restrain invocation of bank guarantees or letters of credit. The Supreme

Court carved out two exceptions to this rule, viz. fraud and irretrievable damage. It further observed that the contract of bank guarantee or letter of credit is independent of the main contract between the seller and the buyer. In case of an irrevocable bank guarantee or letter of credit, the buyer cannot obtain injunction against the final payment on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller, prima facie, complies with the terms of the bank guarantee or the letter of credit namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the basis of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. It is not permissible for the bank to refuse the demand on the ground that the buyer is claiming that there is a breach of contract. The obligation of the bank under the documents has nothing to do with any dispute as to breach of contract between the seller and the buyer. The Supreme Court also observed that in order to obtain injunction against the issuing bank that it is necessary to prove that the bank had knowledge of fraud. The Supreme Court relied on the observations of *Kerr, J. in R.D. Harbottle (mercantile) Ltd. Vs. National Westminster Bank Ltd. (1978) QB 146:(1977) 2 All*

England Reporter 862 to state that irrevocable Letters of Credit are “lifeblood of international commerce” and also observed as under:

"Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.....Otherwise, trust in international commerce could be irreparably damaged."

Denning M,R, .stated In Edward and Owen Engineering Ltd. v. Barclays Sank International Lid. (1978) Q.B. 159 that 'the only exception is where there is a clear fraud of which the bank had notice': Browne, LJ. said in the same case : "but it is certainly not enough to alleged fraud, it must be established" and in such circumstances, I should say, very clearly established", in Bolvinter Oil S.A.v. Chase Manhattan Bank, (1984) 1 All E.R, 351 at P. 352, it was said '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 be sufficient that this rests Upon the uncorroborated statement of the customer,, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated". Thus, not only must 'fraud' be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corp. S.A. v. Allied Ards Bank, (1985) 2 Lloyds

Rep, 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment”.

17. In the present case, it cannot be said that the fraud pleaded by the petitioner is an established fraud. In fact, I find the bank has not even been made a party in these proceedings. The presence of the bank would become relevant if knowledge of fraud has to be imputed on the bank. In the absence of bank being a party, the ground of fraud cannot even be looked into in view of the settled position of law of the Supreme Court in ***Federal Bank Ltd.’s case (supra)***.

18. There is another aspect of the matter, the tender document which is a part of the contract between the parties vide Annexure C prescribes the form of bank guarantee. The form stipulated the amounts under the bank guarantees are payable without demur merely on demand from the respondents stating that the amount claimed is required to meet the recovery dues or likely to be due from the petitioner. The sweep of the bank guarantee is so wide that it could be invoked to meet the recoveries likely to be due from the petitioner. It is not necessary that the respondents must determine the recoveries before invocation even in contemplation of recoveries likely to be due from the petitioner would suffice an invocation. I note for benefit, the case of ***Emaar MGF***

Construction Pvt. Ltd. (supra) relied upon by the learned counsel for the respondents, wherein, the learned Single Judge of this Court, after analyzing the law as referred to above, has upheld the invocation of the bank guarantees. Suffice to state, the petitioner has not raise the ground of irretrievable injustice/special equity or any other ground for seeking injunction against the invocation of the bank guarantees.

19. Insofar as the judgment relied upon by the learned Senior Counsel in ***Nangia Construction India Ltd. (supra)*** is concerned, the same has no applicability keeping in view the latest position of law of the Supreme Court in ***Federal Bank Ltd. (supra)***, as referred to above, inasmuch as the Supreme Court in unequivocal terms, has held, that contract for bank guarantee is a separate and independent contract and the bank issuing guarantee is not concerned with the unrelying contract between the parties to the contract.

20. Further, in view of my aforesaid conclusion, I do not think, it would be necessary to deal with all the judgments referred to by the learned counsel for the respondents.

21. I find no merit in the petition and dismiss the same. It is made clear that any observation made above, shall not be construed as an expression of opinion on merit of the case nor shall come in the way of

either party to seek adjudication of their inter se disputes through arbitration.

22. No costs.

(V.KAMESWAR RAO)
JUDGE

MARCH 17, 2015
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