

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

Judgment decided on May 28, 2015

+ **OMP (I) 267/2015**

VIL LIMITED

..... Petitioner

Through: Mr.K.V.Singh, Adv. with
Mr.Nachiketa Goyal,
Mr.Rishabh Arora, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Ms.Ayushi Kiran, Adv. with
Mr.Mukesh Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (Act, in short) inter alia seeking the following reliefs:

“(i) Restrain the Respondent from recovering or adjusting any or all of the part of the aggregate amounts advanced to the Petitioner as three (3) separate installments, viz. (i) 1st advance installment amounting to Rs. 5.58 crores; (ii) 2nd advance installment amounting to Rs. 8.37 crores and (iii) 3rd advance installment amounting to Rs. 13.95 crores aggregating approximately Rs. 27.9 crores;

(ii) Restrain the Respondent from taking any other coercive action against the Petitioner, including imposing any penalty or liquidated damages or recovering any other amount(s) whatsoever from the Petitioner for any alleged action or inaction, including slow progress or non-performance on the

part of the Petitioner”

2. It is the case of the petitioner that the respondent invited proposal by its request for annual pre-qualification dated September 11, 2012 for short-listing of bidders for two lanning with paved shoulders of Sitarganj-Bareilly Section of NH-74 from 254.820 KM to 329.280 KM in the states of Uttarakhand and Uttar Pradesh on Engineering, Procurement, Construction mode. Thereafter, the respondent invited bids from the short-listed bidders for undertaking the project. The respondent accepted the bid of the petitioner for Rs. 279 Crores only. An EPC Agreement dated October 25, 2013 with a construction period starting from the appointed date and ending on 730th day was entered into between the parties.

3. According to Mr.K.V.Singh, the learned counsel for the petitioner, as per Article 4.1.3 (a) of the agreement, upon the petitioner furnishing the performance security, the respondent was obliged to provide at least 90% of the total length of the project highway free from any encroachment and encumbrance to the petitioner within 15 days of the date of the agreement. According to him, clause 8.2.3 of the agreement, which is a non-obstante clause, clearly stipulates that under no circumstance, the cumulative length of the project site which the respondent could not deliver to the petitioner within 15 days of the date

of the agreement shall exceed 10% of the total length of the project. It is his submission that in response to the queries of the petitioner in the pre-bid meeting dated June 20, 2013, the respondent stated that the total available land with the respondent was 211.72 Hectares i.e. 92.6%. A performance guarantee for a total sum of Rs.20,92,50,000/- was also furnished by the petitioner. He states that in terms of clause 19.2.1 of the agreement, the respondent had made an interest free advance payment equal in amount to 10% of the contract price for mobilization expenses and for acquisition of equipment. The advance payment was made in three instalments of 2%, 3% and 5% of the contract price respectively i.e. Rs.5.58 Crores, Rs.8.37 Crores and Rs.13.95 Crores aggregating approximately Rs.27.9 Crores. He would also state that against the advance payment made by the respondent in terms of clause 19.2.2, the petitioner has given an irrevocable and unconditional guarantee from a Bank for an amount equivalent to 110% of such instalment paid by the respondent. According to him, the petitioners in all furnished four irrevocable and unconditional bank guarantees in favour of the respondent.

4. It is his case that the respondent had not provided 90% of the right of way to the total project site within 15 days of the submission of the performance guarantee. He would state, the respondent has only been

able to provide 37% of the total right of way, thus, the respondent has played egregious fraud upon the petitioner by falsely stating, at the time of pre-bid queries that the total available land with the respondent was 92.6 % and thereby inducing the petitioner to bid for the project and enter into an agreement with the respondent. According to him, the period of 730 days would commence only after 90% of the right to way was provided to the petitioner. He has drawn my attention to the definition of “appointed date” to mean that date, which is later of the 15th day of the date of the agreement, the date of which the contractor has delivered the performance security in accordance with the provisions of Article 7 and the date on which the authority has provided the right of way on no less than 90% of the total length of project highway. He would rely upon the two judgments in support of his submissions reported as *(1997) 1 SCC 568, U.P. State Sugar Corporation Vs. Sumac International Ltd.* and *177 (2011) Delhi Law Times 248 (DB) Simplex Infrastructure Ltd. Vs. National Highways Authority of India* to contend that the fraud has been played by the respondent by representing it in the pre-bid meeting, thereby inducing the petitioner to enter into a contract and further, to contend that the respondent is required to maintain the sanctity of the contract and the respondent should maintain the status quo by not taking an action to the prejudice of the petitioner

till such time the disputes are decided by an appropriate forum.

5. On the other hand, Ms.Ayushi Kiran, learned counsel, who appears on advance notice on behalf of the respondent, would submit that there is a concealment of relevant facts by the petitioner which would disentitle the petitioner to any relief in this petition. According to her, the respondent has handed over the complete land to the petitioner. In this regard, she has placed before me a communication dated January 24, 2014 to contend that on as on January 24, 2014, except 1.27 length Kilo Meter, for the rest of the site, right of way was provided to the petitioner. She would also state, for the balance stretch of 1.27 Kilo Meter, the right of way was provided on July 15, 2014 in terms of the letter of the same date, which also was placed before me. In fact, it is her submission that the petitioner, vide its own letter dated January 31, 2014 has accepted the appointed date for the above project as January 24, 2014. She would also draw my attention to the provision in the agreement i.e. clause 19.2.6, which stipulates that advance payment shall be repaid by the contractor to the authority not later than 365 days from the respective date of advance payment. Because of failure on the part of the petitioner to execute the work, so as to recover the amount of advance payment from the bills, necessity has arisen for invocation of the bank guarantees furnished by the petitioner against the advance

payment. She would state, out of four bank guarantees, three bank guarantees have been invoked and honoured by the bank. Insofar as the fourth bank guarantee for an amount of Rs. 15.345 Crores, that has not been invoked/encashed till date.

6. Having heard the learned counsel for the parties, suffice to state, the submissions made by Mr.K.V.Singh, learned counsel for the petitioner, was on the merit of the dispute between the parties. It may be necessary to state here, even though, the prayer has been couched in such a way from where, it appears that the petitioner is seeking only a restraint order against the respondent from adjusting the money, in effect, the petitioner is seeking a restraint order against the respondent from invoking the bank guarantee(s). The position of law insofar as invocation of bank guarantees are concerned is well settled in terms of one of the judgments so relied upon by the learned counsel for the petitioner. In para 12 of *U.P.State Sugar Corporation (supra)*, the Supreme Court has held that the Courts should be slow in granting injunction to restrain the realization of a bank guarantee. The Court had also observed, the two exceptions carved out to include a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee and cases, where, allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or

injustice to one of the party concerned. The only plea advanced by the learned counsel for the petitioner that the respondent has played fraud in representing that 92.6% of the site was available which induced the petitioner to enter into an agreement. Suffice to state that such a plea is not related to fraud having been played by the respondent in connection with bank guarantee(s) with which we are concerned in this petition. No submission has been made by the learned counsel for the petitioner insofar as the other exception carved out by the Supreme Court. Apart from the judgment in *U.P.State Sugar Corporation (supra)*, there are other judgments of the Supreme Court wherein the law laid down in *U.P. State Sugar Corporation (supra)* has been upheld and ratified. I note for benefit the judgment in *Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. and Ors., (2001) 1 SCC 663* wherein, the Supreme Court 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 Bank International Ltd. (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 Arab 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".

7. Insofar as the other judgment relied upon by the learned counsel for the petitioner in ***Simplex Infrastructure Ltd.*** (*supra*), is concerned, the same is not applicable in the facts of this case. In the said case, the relief sought for by the petitioner was seeking a restrain order from implementing and/or enforcing or otherwise giving effect to letters and deducting any amounts from payment due to the petitioner or recovering

any payment in pursuance of letters until eventual resolution of disputes between the petitioner and the respondent. As stated above, even though, the petitioner has couched the prayer in such a manner to give an impression that it is also seeking a similar prayer, but, in effect, the prayer is to seek a restraint order against the respondent from invoking the bank guarantee(s), which in view of this Court cannot be granted.

8. I do not see any merit in the petition. The petition is accordingly dismissed.

(V.KAMESWAR RAO)
JUDGE

MAY 28, 2015
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