

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

+ **Arb. Appeal Nos.32/2015 & 33/2015**

% **8th July, 2015**

1. **Arb. A. No.32/2015**

ESSAR PROJECTS (INDIA) LIMITED Appellant
Through: Mr. Chetan Sharma, Senior Advocate
with Mr. Vikrant Pachnanda,
Advocate.

Versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. Abhinav Vashisht, Senior
Advocate with Mr. Amit Meharia,
Advocate and Ms. Tanishtha Singh,
Advocate.

2. **Arb. A. No.33/2015**

ESSAR PROJECTS (INDIA) LIMITED Appellant
Through: Mr. Chetan Sharma, Senior Advocate
with Mr. Vikrant Pachnanda,
Advocate.

Versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. Abhinav Vashisht, Senior
Advocate with Mr. Amit Meharia,
Advocate and Ms. Tanishtha Singh,
Advocate.

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat Nos.670-71/2015 in Arb. A. No.32/2015

1. Counsel appears for the caveator and thus the caveat stands discharged.

+ Arb. A. No.32/2015, I.A. No.13395/2015 (stay) and I.A. Nos.13396-97/2015 (exemption)

2. This is an appeal under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996 impugning the order of the Arbitrator dated 6.7.2015. Arbitrator by the impugned order has vacated the interim order granted in favour of the appellant herein and by which interim order respondent herein was restrained from encashing the subject bank guarantee dated 23.2.2011 (extended from time to time thereafter) for a total sum of Rs.11,46,36,536/-.

3. Since the impugned order of the Arbitrator in the opinion of this Court is a crisp order containing exhaustively the relevant facts, issues and reasoning, it would be apposite if I reproduce the short impugned order, and the same reads as under:-

“ **ORDER DATED 6.7.2015**

The claimant has filed an application before the Tribunal on 20.6.2015 for seeking restrain against the Respondent from

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encashing/invoking the Bank Guarantee No.550LG0816/10 issued by ING Vyas Bank Mumbai dated 23.2.2011. They also stated that the Claimant is ready and willing to keep the Bank Guarantee (BG) alive during the course of present arbitration proceedings.

Earlier on a petition filed by the Claimant for the purpose of relief on BG encashment in the Hon'ble High Court, the court had passed an order that in case the Respondent desires to invoke the BG, the Respondent shall give 4 days clear notice to the Claimant. Accordingly, the Respondent issued a notice on 14.6.2015. Thereafter the Claimant filed the present application and the hearing was held on 22.6.2015.

Both the parties presented their arguments and submitted written submissions on the same along with various judicial pronouncements of High Court and Supreme Court on similar cases. Respondent's counsel also submitted the copy of BG and related clauses of the contract.

Based on the statements/arguments of the counsels of the 2 parties and the judgment submitted to this tribunal, the following emerges:

1. When in the commercial dealings an unconditional BG is given in favour of the beneficiary, the beneficiary is entitled to invoke such a bank guarantee irrespective of any pending dispute.
2. Only in exceptional cases the BG can be restricted to be invoked and these are, a)Fraud b)Irreparable damage would be caused if BG is invoked.
3. The Claimant claims are pending to be settled. Also, the counter claim of the Respondent are yet to be filed while the defense of the Respondent has already been filed to this tribunal.
4. The Claimant has stated that in case the BG is invoked, an irreparable injury and injustice would be caused to it.
5. As an argument, the Claimant, has again stated about the pending claims as the basis for their irreparable loss.
6. In one of the judgments of Hon'ble Supreme Court Hindustan Steel Works Construction Limited v Tarapore & Company & another (1996) 5 SCC 34 stated, ".... There is serious dispute on the question

as to who has committed Breach of the contract, that the contractor has a counter claim against the appellant that the disputes between the parties have been referred to the Arbitrators and that no amount can be said to be due and payable by the contractor to the applicant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case, justifying interference by restraining the appellant from enforcing the Bank Guarantees.”

7. In another judgment pronounced by the Hon’ble Supreme Court in the matter ONGC v Jagson Int. Ltd (2005) 5 Bom Cr 58 stated, “The party which has given the Bank Guarantee suffers loss of money. Loss of money never causes any irreparable injury.

In the light of the foregoing, the application of the Claimant hereby stands rejected and the earlier order dated 22.6.2015 stands vacated.”
(underlining added)

4. A reference to the above order shows that the Arbitrator has rightly taken a view that bank guarantees are not stayed ordinarily. The Arbitrator has also rightly observed that the issues with respect to who is guilty or who is not guilty of breach are issues which will be decided in the arbitration proceedings and issue of breach cannot be a ground for stay of the encashing of the bank guarantee.

5. I may note that the law with respect to courts not interfering with invocation of bank guarantee is now well-settled and I need not reproduce the catena of judgments on this aspect and which law is that an on demand without demur bank guarantee like the one in the present case cannot be stayed unless there is an egregious fraud or there is a case of

special equities. The principles of egregious fraud and special equities have been pronounced upon by the court by which effectively it has to be held that to stay the encashment of the bank guarantee, the bank guarantee amount has to be found as to be never payable to the beneficiary *ex facie*. Some examples where bank guarantees have not been allowed to be invoked are where theoretically amount is given to secure a mobilization advance but mobilization advances are never given, bank guarantee is given for performance in a defect liability period and the defect liability period has already come to an end, in a case where bank guarantee is for theoretically Rs. one crore and admitted liability is only for Rs.10 lacs but the bank guarantee is said to be invoked not for Rs.10 lacs but for the entire amount of Rs.one crore. Examples can be multiplied and it depends on facts of each case whether invocation and encashment of a bank guarantee has to be interdicted.

6. In the present case, the arguments urged on behalf of the appellant essentially are arguments with respect to the fact that appellant is not guilty of breach of contract but the respondent is because the site was handed over late to the appellant. In this regard, this Court would like to observe that who is guilty of breach i.e whether the appellant herein or the

respondent herein will be an issue which will be decided in the arbitration proceedings at the stage of giving of Award but existence of disputes with respect to breach of contract cannot be a ground for holding that there is fraud and thus staying of invocation and encashment of a bank guarantee. Similarly, a bank guarantee can always be invoked till the last possible valid date and therefore the contention urged on behalf of the appellant that bank guarantee is being invoked late and hence invocation thereof should be stayed, is an argument which has no legs to stand upon. Also the fact that the respondent has not filed its counter claim and therefore bank guarantee should not be invoked is to be rejected for the reason that admittedly the status/position before the Arbitrator is the stage of completion of pleadings and the Arbitrator in the impugned order notes that respondent has to file its counter claim.

7. As an Appellate Court, this Court is entitled to interfere with the impugned order only if the order is completely perverse or against the law. Merely because two views are possible, an appellate court will not interfere with the one possible and plausible view taken by an original court/forum.

8. In view of the above, I do not find any merit in the appeal and the same is therefore dismissed. No costs.

Arb. A. No.33/2015 and I.A. No.13398/2015(stay) & I.A. Nos.13399-400/2015 (exemption)

9. This appeal is on identical issues and more or less similar facts, and hence the same will also stand dismissed in view of the reasoning given while dismissing Arb. A. No.32/2015.

JULY 08, 2015
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VALMIKI J. MEHTA, J