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

\+ O.M.P.(I) (Comm.) 22/2016, CAV 53/2016 & IA 871/2016

ERA INFRA ENGINEERING LIMITED

..... Petitioner

Through: Mr. Vineet Tayal, Adv. with Mr. Mukesh Sharma, A.R

versus

BHARTIYA RAIL BIJLEE COMPANY LTD. AND ORS.

..... Respondents

Through: Mr. Puneet Taneja, Adv. with Ms. Shaheen, Adv. for R-1
Mr.Davesh Vashishtha, Adv. for Mr.S.L. Gupta, Adv. for R-3
Mr.O.P. Gaggar, Adv. for R-4

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **19.01.2016**

CAV 53/2016

Since the counsel as above appears for the respondent No.1/caveator, the caveat stands discharged.

IA 871/2016 (Exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P.(I) (Comm.) 22/2016

The present petition has been filed by the petitioner seeking the following reliefs:-

> *"(a) Restrain respondent No.1 herein from invoking and/or encashing the following Bank Guarantees issued by respondent Nos.2 to 5/Banks (on behalf of the petitioner herein), during the pendency of the present petition, till the final adjudication of the matter by an Arbitrator or as may be so required/directed by this Hon'ble Court:*
>
> *(i) Bank Guarantee No.6059IFIBG100023, dated 06-03-2010 for Rs.865.52 Lakhs;*
> *(ii) Bank Guarantee No.6059IFIBG100015, dated 23-03-2010 for Rs.50.00 Lakhs;*
> *(iii) Bank Guarantee No.0999611BG0001509, dated 25-05-2011 for Rs.100.00 Lakhs;*
> *(iv) Bank Guarantee No.0999611BG0002171, dated 10-08-2011 for Rs.100.00 Lakhs;*
> *(v) Bank Guarantee No.0999611BG0000240, dated 30-01-2012 for Rs.100.00 Lakhs;*
> *(vi) Bank Guarantee No.0999611BG0001760, dated 10-07-2012 for Rs.100.00 Lakhs;*
> *(vii) Bank Guarantee No.0999611BG0002246, dated 08-09-2012 for Rs.100.00 Lakhs;*
> *(viii) Bank Guarantee No.0999611BG0003140, dated 18.12.2012 for Rs.100.00 Lakhs;*
> *(ix) Bank Guarantee No.0999611BG0000718, dated 16-03-2013 for Rs.100.00 Lakhs;*
> *(x) Bank Guarantee No.49780IGL00201813, dated 31-10-2013 for Rs.50.00 Lakhs;*
> *(xi) Bank Guarantee No.0999611BG0001214, dated 24-04-2014 for Rs.100.00 Lakhs;*
> *(xii) Bank Guarantee No.0999611BG0001217, dated 24-04-2014 for Rs.75.00 Lakhs;*
> *(xiii) Bank Guarantee No.0999611BG0002315, dated 15-10-2014 for Rs.56.00 Lakhs;*

(xiv) Bank Guarantee No.6059IPEBG100067, dated 12-06-2010 for Rs.184.85 Lakhs;
(xv) Bank Guarantee No.6059IPEBG100068, dated 12.06.2010 for Rs.184.85 Lakhs;
(xvi) Bank Guarantee No.6059IPEBG100069, dated 12.06.2010 for Rs.184.85 Lakhs;
(xvii) Bank Guarantee No.0543/LG/217/14, dated 17-12-2014 for Rs.100.00 Lakhs;
(xviii) Bank Guarantee No.0543/LG/218/14, dated 17-12-2014 for Rs.100.00 Lakhs;
(xix) Bank Guarantee No.6059IPEBG150034, dated 19-03-2015 for Rs.150.00 Lakhs;
(xx) Bank Guarantee No.6059IPEBG150035, dated 19-03-2015 for Rs.150.00 Lakhs; and/or

(b) In case of encashment of the aforesaid Bank Guarantees by respondent No.1, before consideration and/or grant of the aforesaid prayer (a) by this Hon'ble Court – To pass an order of interim measure of securing the aforesaid Bank Guarantee amounts by requiring/directing respondent No.1 herein to:

(i) refund/revert bank the same to the petitioner herein or
(ii) deposit the encashed amounts before this Hon'ble Court;

Till the final adjudication of the present petition (including arbitration proceedings, if any) or as may be so required/directed by this Hon'ble Court;

(c) In case of grant of aforesaid prayer (b) (ii) by this Hon'ble Court- To further grant an interim measure of protection, as this Hon'ble Court may find just & convenient, in favour of the petitioner herein in respect of demands, if any, raised from respondent Nos.2 to 5/Banks to deposit the encashed amounts with the latter, till the final adjudication of the present petition (including arbitration proceedings, if any) or as may be so

required/directed by this Hon'ble Court; and/or

d) Pass such further or other orders as this Hon'ble Court may deem fit in the facts and circumstances of the case in favour of the petitioner and against respondent No.1 herein."

2. It is the submission of learned counsel for the petitioner that the invocation of bank guarantees is contrary to Clause 2 & 3 of the said guarantees. He would also state that in terms of Clause 41 of the contract, it was pre-requisite for the respondent No.1 to issue a notice of breach/default before invoking the bank guarantees. He would also rely upon the order passed by this Court in ***ERA Infra Engineering Ltd. vs. National Thermal Power Corporation & Ors., OMP(I)(Comm.) 10/2016, dated January 07, 2016***, wherein according to learned counsel for the petitioner, this Court had directed the parties to maintain status quo with respect to bank guarantees in that case.

3. On the other hand, Mr.Puneet Taneja, learned counsel for respondent No.1 would state that the law on the bank guarantees is quite well settled. The contract relating to bank guarantee is independent and separate from the main contract, by which the relationship between the petitioner and respondent No.1 is regulated. He also states that the terms of the bank

guarantees are very clear and has drawn my attention to page 40 of the documents to submit that the bank has undertaken to pay the amount of the bank guarantees to the company on demand and without any demur. He also relies upon the judgment of this Court in the case reported as ***(2015) 221 DLT 316 GMR Kishangarh Udaipur Ahmedabad Expressway Ltd. vs. National Highway Authority of India*** in support of his contentions. He also states that awaiting the outcome of this petition, the respondents shall invoke the bank guarantees.

4. Having heard the learned counsel for the parties, insofar as the submission that in view of clause 2 & 3 of the bank guarantees, till such time the respondent No.1 notify the breaches/default to the petitioner, the respondent No.1 could not have invoked the bank guarantees and also that the bank guarantees would remain in full force till the performance of the contract and as such the respondent No.1 could not have invoked the bank guarantees is concerned, suffice to state that at page 40 the bank guarantee clearly stipulate as under:-

> *"XXX XXX XXX*
> *Kurla Complex, Bandra (East) Mumbai-400051 through our Large Corporate Branch at 4, Parliament Street, PTI Building, New Delhi – 110001 (hereinafter referred to as "the said Bank") do hereby undertake and agree to indemnify and keep indemnified the Company from time to*

> *time to the extent of Rs.8,65,52,000/- (Rupees Eight Crore Sixty Five Lacs Fifty Two Thousand Only) against any loss or damage costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Company by reason of any breach or breaches by the said Contractor of any of the terms and conditions contained in the said Contract and to unconditionally pay the amount claimed by the Company on demand and without demur to the extent aforesaid."*

5. It is clear that on invocation the bank has to honour the invocation unconditionally and is required to pay to the company on demand without any demur the amount guaranteed. In fact, a perusal of clause 2, it is revealed, that, the Bank is not concerned with a breaches/default/loss of damage etc, which is primarily the decision of the respondent No.1. In view of such stipulation, the submission of learned counsel by relying upon clause 2 & 3 need to be rejected.

6. Insofar as the submission of learned counsel for the petitioner relying upon clause 41 of the contract is concerned, the said clause relates to cancellation of contract in full or in part. The said clause has no applicability to the contract related to the bank guarantees. In other words the said clause would come into play when the respondent No.1 intends to cancel the main contract in full or in part. The law on the bank guarantees is quite well settled. The Supreme Court in the case of ***Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. and Ors., (2001) 1***

SCC 663 has observed as under:-

> *“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".

Further in ***Himadri Chemicals Industries Ltd Vs Coal Tar Refining Company [2007 (8) SCC 110]***, the Supreme Court has held as under:

"10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In ***<u>U.P. State Sugar Corporation Vs. Sumac International Ltd.</u> [(1997) 1 SCC 568],*** *this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee.*

It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of ***U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. 1988 (1) SCC 174*** *held as follows:*

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.(emphasis supplied)

While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA V/s. Chase Manhattan Bank (1984) 1 All ER 351 at p. 352 which is as follows:

"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 discharged."(Emphasis supplied)

12. In ***Svenska Handelsbanken Vs. Indian Charge Chrome [(1994) SCC (2) 155],*** *it has also been held 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. In fact, on the question of fraud, this decision approved the observations made by this court in the case of* ***U.P. Coop. Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd. 1988 (1) SCC 174.***

13. So far as the second exception is concerned, this court in ***U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC 568*** *as considered herein earlier, at para 14 on pp. 575-76 observed as follows :*

> *"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 realized 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 Corpn. Case (566 Fed Supp 1210). In that case an exporter in USA entered into an agreement with the Imperial government of Iran and sought an order terminating its liability on stand by letter 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 US 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 realization 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 it he 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 Itek case, there was 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."

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

"The aforesaid has further been reiterated and reaffirmed by the Apex Court in Appeal (civil) 5121 of 2007 titled Vinitec Electronics Private limited Vs HCL Infosystems Limited. In the present case neither a case of fraud or irretrievable harm and injury has been alleged and as such the only two grounds upon which a court of law can interfere with the right of the Respondent herein are not satisfied in the present case. In this regard, it is respectfully submitted that there is not even a whisper by the Petitioner much less any allegation of fraud having being committed by the Respondents. Even otherwise, mere allegation of fraud alone is not enough, the said allegation has to be substantiated as also the fraud has to be of an egregious nature, which would vitiate the very foundation of the Bank Guarantee. On this ground alone the prayer for restraining the Respondent from encashing the bank guarantee is not maintainable and liable to be dismissed."

7. No submission is made by learned counsel for the petitioner alleging fraud. The plea of irretrievable damage would not be applicable in the facts of this case, more particularly when the respondent is a public sector undertaking.

8. Insofar as the reliance placed by the learned counsel for the petitioner on the order passed by this Court in OMP (I) (Comm.) 10/2016 is

concerned, the said order was on a *prima facie* view as an *ad interim* measure. In any case as I have decided the issue based on the judgments of the Supreme Court, the order would not be of any help to the petitioner. In the facts of the case, I do not find any merit. The petition is dismissed. The above observation has no bearing on the merits of the inter-se disputes between the petitioner and the respondent No.1.

V. KAMESWAR RAO, J

JANUARY 19, 2016/km