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

+ **O.M.P.(I) (COMM.) 373/2016**

SHARMA KALYPSO PVT. LTD

..... Petitioner

Through: Mr Sandeep Sharma, Mr Vatsal
Kumar and Ms Devyani Sharma,
Advocates.

Versus

ENGINEERS INDIA LIMITED AND ANR.

..... Respondents

Through: Mr Sandeep Sethi, Senior Advocate
with Ms Rashmeet Kaur and Ms
Arpana Majumdar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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19.09.2016

VIBHU BAKHRU, J

IA No.11582/2016

1. The application is allowed, subject to all just exceptions.
2. The same stands disposed of.

O.M.P.(I) (COMM.) 373/2016

3. The petitioner (hereafter 'SKPL') has filed the present petition, *inter alia*, praying as under:-

"(i) Restrain the respondents from invoking, encashing and receiving the amount under the Bank Guarantees bearing no 2013/44 dated 08.08.2013;

- (ii) Further direct Branch Manager of Respondent No.2 Bank not to remit any amount to the respondent no.1 under the abovementioned Bank guarantees or to issue any pay order/demand draft/RTGS and if any such pay order/demand draft(s) have been issued then the same should not be encashed by the respondent;"

4. Briefly stated, the controversy involved in the present case arises in the following context:-

4.1 The respondent no. 1 (hereafter 'EIL') invited tenders for execution of the interior works for Convention Centre of its new office complex at Gurgaon, Haryana. SKPL was successful in the bidding process and EIL issued a Fax of Acceptance (FAO) dated 05.07.2013 accepting SKPL's bid and the parties entered into a contract on the same date for execution of the works. In terms of the contract between the parties, the works were to be completed by 04.01.2014. It is not in dispute that the works were delayed and finally the convention centre was handed over to EIL on 15.07.2015. In terms of the contract, the defect liability period was for a period of 12 months, that is, from 15.07.2015 to 14.07.2016.

4.2 Admittedly, the Certificate for Completion of works has not been issued and SKPL's final bill has not been processed.

4.3 SKPL had furnished a performance bank guarantee being BG no.

2013/44 dated issued 08.08.2013 in the sum of ₹84,97,432/- (hereafter 'the BG') issued by Respondent no. 2 to EIL, which has been invoked by EIL. And, this has led SKPL to file the present petition.

5. Mr Sharma, learned counsel appearing for SKPL contends that EIL had invoked the BG only because SKPL had issued a letter invoking the arbitration clause and seeking appointment of an Arbitrator. He submits that it is SKPL's case that despite accepting the works on 15.07.2015, EIL has not processed the final bill and has inordinately delayed the payments due to SKPL under the contract in question. He earnestly contends that in the given facts where the convention centre had been handed over and was being used by EIL, a case of special equities is established in favour of SKPL and it is entitled to an order restraining invocation of and payment against the BG. He relied upon the decision of Supreme Court in Hindustan Steel Works Construction Ltd. v. Tarapore and Co. and Another: (1996) 5 SCC 34 and the decision of this Court in Hindustan Construction Co. Ltd. and Anr. v. Satluj Jal Vidyut Nigam Ltd.: 2006 (1) Arb.LR 16 (Del) in support of his contention.

6. Mr Sethi, learned senior counsel who appears for EIL on advance notice, stoutly countered the arguments made by Mr Sharma. He, first of all,

pointed out that SKPL had not annexed the relevant documents along with the petition; although SKPL had included the letters sent by SKPL to EIL, it had not annexed the letters sent by EIL. He contended that EIL had sent several communications to SKPL during the defect liability period calling upon SKPL to rectify the defects but the defects were not rectified/removed. He further submitted that, admittedly, the project had been delayed and in terms of the contract, EIL was entitled to 10% price reduction. According to him, since the contract value was ₹849 lacs, EIL would be entitled to recover ₹84.9 lacs on account of delay in completion of the works. He submitted that in addition, SKPL had failed to pay its sub-contractors and EIL had assured the sub-contractors that the payments would be made, in order to ensure that the work did not suffer. EIL's claim on this count is ₹20 lacs. In addition, EIL is also claiming a sum of ₹27 lacs on account of defects in the works, which were not rectified during the defect liability period.

7. I have heard the learned counsel for the parties at length.

8. At the outset, it must be stated that the statement of truth filed along with the petition is admittedly a false affidavit. Although, it has been affirmed that "*all documents in my power, possession, control or custody,*

pertaining to the facts and circumstances of the proceedings initiated by me have been disclosed and copies thereof annexed with the plaint, and that I do not have any other documents in my power, possession, control or custody"; it is apparent that communications sent by EIL (presumably pointing out the defects) has not been annexed with the petition.

9. It is also apparent from the submissions made that there are serious disputes between the parties as regards the execution of works performed by SKPL. Admittedly, the execution of the works had been delayed. The letter dated 30.05.2016, which is relied upon by SKPL, indicates that it is SKPL's stand that the delay in completion of the works was on account of the following:-

- "a). Non Handing over of complete site at one go - the site was handed over in piece meal basis.
- b). Non completion of Services works at the time of award of work to us.
- c). Issue of GFC drawings in piece meal basis.
- d). Delay in release of payments
- e). Delay in approval of samples.
- f). Delay in giving decisions & details.
- g). No payments for extra/additional items of work executed."

10. Needless to state that the same is disputed by EIL. It is also relevant

to note that by a letter dated 18.08.2016, EIL had acceded to the request of SKPL for appointment of an Arbitrator and had also reiterated that SKPL had breached the terms of the FOA dated 05.07.2013 inasmuch as SKPL had failed to complete the works within the time limit as prescribed, thus, causing loss to EIL.

11. The law relating to restraining invocation/encashment of bank guarantees is now well settled. It is only in exceptional cases that invocation of a bank guarantee can be interdicted.

12. In **Larsen & Toubro Limited v Maharashtra State Electricity Board and Others:** (1995) 6 SCC 68, the Supreme Court referred to the earlier decision in **Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others:** (1994) 1 SCC 502 and held as under:-

“5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in United Commercial Bank v Bank of India, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd., General Electric Technical Services Co. Inc v Punj Sons (P) Ltd. and the decision of the Court of Appeal in England in Elian and Rabbath v Matsas and Matsas and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome AIR 1994 SC 626,

laid down the law thus:

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...

...there should be *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without *prima facie* case of established fraud is of no consequence in restraining the encashment of bank guarantee.””

13. There have been cases where the Courts have interfered when presented with exceptional circumstances; but, it is clear that invocation of bank guarantees cannot be interdicted merely because a party articulates contractual disputes and alleges the invocation of a bank guarantee to be wrongful. Merely alleging fraud is also of no avail; a party must plead full particulars of fraud alleged and establish a *prima facie* case of fraud affecting the underlying transaction. A party seeking an injunction restraining invocation of a bank guarantee must show exceptional circumstances and hardship, in addition to a strong case on merits.

14. In the facts of the present case, it is not disputed that the works were not completed in time. The dispute as to whether EIL is responsible for the same or whether SKPL is in breach of the terms of the contract, is a matter for the Arbitrator to decide. The purpose of providing a bank guarantee would be wholly defeated if the Courts are to interfere and interdict the bank guarantees merely because disputes have arisen between the parties or it is inconvenient for the party furnishing the bank guarantee to suffer its encashment by the beneficiary.

15. The decision of this Court referred to by Mr Sharma in *Satluj Jal Vidyut Nigam Ltd.* (*supra*) also does not assist the SKPL in any manner. On the contrary, in that case, it was pointed out that the Courts have extended the scope of injuncting bank guarantees in various cases of irretrievable injury, fraud, extraordinary special equities. However, this Court had also highlighted that payment against bank guarantees should be interdicted only in exceptional cases. As stated earlier, the mere question as to which party is responsible for breach of the contract does not present any exceptional circumstance.

16. In so far as furnishing of the false affidavit is concerned, Mr Sharma submits that a lenient view be taken against the deponent. He further assures that no affidavit will be filed in such casual manner in future.

17. In view of the above, a lenient view is taken in this instance and no proceedings for imposing punitive measures are being initiated.

18. Accordingly, the present petition is dismissed.

SEPTEMBER 19, 2016
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VIBHU BAKHRU, J

