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

\+ O.M.P.(I) (COMM.) 377/2016

ZILLION INRAPROJECTS PVT LTD ..... Petitioner

Through : Mr Saurabh Kirpal, Mr Naveen Sharma, & Ms Swati Bhushan Sharma, Advocates.

versus

ALSTOM SYSTEMS INDIA (P) LIMITED & ANR. ..... Respondents

Through : None.

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**O R D E R**

% **21.09.2016**

**VIBHU BAKHRU, J**

**IA No.11700-01/2016**

1. Allowed, subject to all just exceptions.

2. The applications are disposed of.

**O.M.P.(I) (COMM.) 377/2016**

3. The petitioner (hereafter 'ZIPL') has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia,* praying as under:-

> "(i) Grant Ad-interim ex-parte Stay and Suspend the enforcement of the letter dated 16.09.2016 issued for the

termination of the sub contract until the resolution or adjudication of disputes between the parties by way of mediation or arbitration ; and

(ii) Direct the Respondent No. 1 to maintain status quo at the work sites and permit the petitioner to proceed further with the execution of the project which is of a national importance until the resolution or adjudication of disputes between the parties and;

(iii) Restrain the Respondent no. 1 from encashing the Performance Bank Guarantee BG - 1003 dated 14.12.2015 for an amount of Rs.20,000,000/- (Rupees Two Crores only) and;

(iv) Restrain the Respondent No. 1 from encashing the Performance Bank Guarantee BG - 17115 Dated 14.12.2015 for an amount of Rs.30,000,000/- (Rupees Two Crores only) and;

(v) Restrain the Respondent No: 1 from encashing the Performance Bank Guarantee BG - 0013 dated 16.12.2015 for an amount of Rs. 91,06,047/- (Rupees Ninety One Lacs Six Thousand Forty Seven only) and;

(vi) Restrain the Respondent No. 1 from encashing the Bank Guarantee BG - 3116 dated 17.02.2016 for an amount of Rs. 59,06,047/- (Rupees Fifty Nine Lacs Six Thousand Forty Seven only) and;

(vii) Restrain the Respondent No. 1 from encashing the Bank Guarantee BG - 0000124 dated 18.02.2016 for an amount of Rs. 90,00,000/- (Rupees Ninety Lacs only) and;

(viii) Restrain the Respondent No. 1 from encashing the Bank Guarantee BG - 3516 dated 18.02.2016 for an amount of Rs. 14,100,000/- (Rupees One Crore Forty One Lacs only) and;

(ix) Restrain the Respondent No. 1 from encashing the Bank

> Guarantee BG - 0001 dated 19.02.2016 for an amount of Rs. 30,100,000/- (Rupees Three Crores One Lac only)."

4. Briefly stated, the controversy in the present petition arises in the following context:

4.1 Respondent no.2, a Public Sector Undertaking, had entered into a contract with respondent no.1 (hereafter 'Alstom') on 21.07.2015, for performance of works relating to design, construction, supply, installation, testing and commissioning of 2 x 25 KV AC 50 Hz electrification signalling 7 telecommunication and associated works of double track railway lines under construction for Bhaupur Khurja section of eastern dedicated freight corridor.

4.2 Alstom in turn entered into a contract with ZIPL on 24.09.2015 (hereafter 'sub-contract agreement') whereby the works agreed to be performed by Alstom under the contract dated 21.07.2015 with respondent no.2, were sub-contracted to ZIPL. In terms of the sub-contract agreement, ZIPL submitted bank guarantees - 7 in number - for an aggregate sum of ₹11,82,12,094/-. Three bank guarantees were furnished as performance securities and four bank guarantees were issued to secure the mobilisation advance advanced by Alstom to ZIPL. The details of the bank guarantees are as under:-

| S. No. | BG Date | BG Number | Amount | Type of BG |
|---|---|---|---|---|
| 1. | 14.12.2015 | 0480315BG0001003 | 20,000,000 | Performance Security |
| 2. | 14.12.2015 | 1988ILG017115 | 30,000,000 | Performance Security |
| 3. | 16.12.2015 | 003GT02153500013 | 9,106,047 | Performance Security |
| 4. | 17.02.2016 | 1988ILG003116 | 5,906,047 | ADVANCE |
| 5. | 18.02.2016 | 0480316BG0000124 | 9,000,000 | ADVANCE |
| 6. | 18.02.2016 | 0007BGR0083516 | 14,100,3000 | ADVANCE |
| 7. | 19.02.2016 | 499INGL160500001 | 30,100,000 | ADVANCE |

4.3 Alstom alleges that the ZIPL had offered "unethical inducement" to the Deputy Team Leader. It is also alleged that ZIPL had delayed the performance of the sub-contract agreement. And, for the aforesaid alleged reasons, Alstom has - by a letter dated 16.09.2016 - terminated the sub-contract agreement with effect from 23.09.2016. According to ZIPL, Alstom is also threatening to invoke the bank guarantees furnished by ZIPL and this has led ZIPL to file the present petition.

***Submissions***

5. Mr Saurabh Kirpal, the learned counsel appearing for ZIPL contended that the termination of the sub-contract agreement by Alstom was wrongful and would irretrievably prejudice ZIPL. He further submitted that the invocation of the bank guarantees would also cause an irretrievable harm to ZIPL. He referred to Minutes of Meeting held on 15.09.2016 under the Chairmanship of the director of respondent no.2 and drew the attention of this court to the following paragraph:-

> "Question was put up to ASIPL representative by Director (DFCCIL) for the delay in the Design & drawings submission to SAI TYPSA and discussed regarding the progress of Slice 101, Slice 102 and Slice 103 and replied by ASIPL that they have completed the excavation work at Khurja, Daud Khan, Hathras, Bhadan and Layout at Makhanpur and Bhaupur has been done and excavation will be started at these stations by 19th September, he also confirmed that all the three slices are mobilized and already for starting the construction as soon as the drawings are finalized. SAI TYPSA also stated that they have already cleared the excavation drawings submitted by ASIPL for Khurja, Daud Khan, Hathras, Bhadan, Makhanpur, Kanchausi & Bhaupur. ASIPL also confirmed that they are starting the PCC at Bhadan Crossing Station on 17.09.16.
>
> ASPIL also confirmed that Architectural Drawing for OCC Site is ready for submitting and they will submit the same to SAI TYPSA on 15.09.16 and complete set with CD on 19.09.16."

6. He submitted that it is apparent from the above that Alstom had admitted that ZIPL had mobilized its resources and had also completed part of excavation works at certain sites; and, therefore, there could be no dispute that ZIPL had mobilized its resources. He contended that in the circumstances, there was no ground for Alstom to invoke the bank guarantees furnished to secure the mobilization advance and such invocation would be fraudulent.

7. He further submitted that both the performance bank guarantees and bank guarantees furnished for securing mobilization advance, could not be invoked simultaneously. He submitted that the performance bank guarantees could be invoked only if ZIPL had not performed the sub-contract and the bank guarantees for mobilization advance could be invoked only if the ZIPL had failed to mobilize its resources. He submitted that if the Alstom invoked the mobilization advance, it was obvious that the question of performance of the contract, which would be at much later point of time, had not arisen. Similarly, if Alstom invoked the performance bank guarantees, it would imply that the stage of mobilisation had been successfully cleared.

*Reasoning and Conclusion*

8. In terms of the sub-contract agreement, ZIPL was to submit the drawings, which were to be finalised by Alstom. In its petition, ZIPL has stated that Alstom did not have any competent technical staff to provide the requisite inputs for designing and subsequent submission of drawings. It is further pleaded that although ZIPL had submitted its designs and drawings, the same were not approved by Alstom for the aforesaid reason.

9. ZIPL has further stated that it was the responsibility of Alstom to handover the sites free from all hindrances for carrying out the works under the sub-contract agreement but it had failed to do so. According to ZIPL, it had mobilised all resources, however, the same remained idle for want of unhindered sites. It is stated that ZIPL had also raised claims for idling of staff and equipment which was mobilised at site. ZIPL alleges that from the very inception, Alstom had the intention of cheating ZIPL. It is further alleged that Alstom fraudulently released an advance mobilisation amount of only ₹5.91 crores as against the total expenditure of ₹10.43 crores (approximately) incurred by ZIPL. ZIPL further claims that despite ZIPL mobilising the resources and commencing works, Alstom has fraudulently chosen to terminate the contract by the letter dated 16.09.2016. It is claimed

that this has been done by Alstom to hide its lack of capability and competence and to make ZIPL a scapegoat for non performance of the sub-contract agreement and Alstom's contract with respondent no.2.

10. A plain reading of the petition as well as documents annexed with the petition indicates that there are disputes between the ZIPL and Alstom with regard to performance of the sub-contract agreement. In its communications – particularly letters dated 13.05.2016 and 07.07.2016 - Alstom has alleged that ZIPL has failed to perform the sub-contract agreement in accordance with its terms. The letters on record also indicate that Alstom had sent other letters, presumably to the same effect, however the same have not been placed on record. According to Alstom, ZIPL is responsible for delay in performance of the sub-contract agreement as it is alleged that ZIPL had (a) delayed submission of the project document and design; (b) delayed carrying out site surveys and geo-technical investigation; and (c) delayed commencement and progress of construction activity. ZIPL does not dispute that the execution of the sub-contract has been delayed but disputes Alstom's allegation that the delay in execution of the sub-contract agreement is attributable to it; it is ZIPL's case that the delay has been caused due to various grounds solely attributable to Alstom.

11. It is, thus, an admitted fact that performance of the sub-contract agreement has been delayed. The question whether ZIPL is responsible for the delay or whether delay has been caused due to Alstom, is a question to be decided by the Arbitral Tribunal as and when constituted. However, this dispute cannot be the ground for restraining invocation of the bank guarantees. It is well settled that bank guarantees can be interdicted only in exceptional circumstances such as egregious fraud, special equities and irretrievable injury.

12. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others*****: (1994) 1 SCC 502,** the Supreme Court had held as under:-

> "...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. The aforesaid view was reiterated by the Supreme Court in ***Larsen &***

***<u>Toubro Limited v Maharashtra State Electricity Board and Others:</u>*** **(1995) 6 SCC 68**.

14. In ***<u>U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.</u>***: 1988 (1) SCC 174, the Supreme Court had held as under:

> "The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

15. Although, in ***<u>Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.</u>***: **AIR 1996 SC 2268** the Supreme Court has held that fraud could be at subsequent stage also, the law that the fraud must be of egregious nature affecting the underlying transaction has not been differed with. In that case, the Court held as under:

> "We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a 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 appellant 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. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

16. The allegation that Alstom intended to cheat ZIPL from the inception cannot be readily accepted. Further, it is also not disputed that Alstom had provided the mobilization advance to ZIPL and thus, would be entitled to recover the same. Merely stating that the invocation of the bank guarantees is fraudulent or that Alstom intended to cheat ZIPL from the inception is not sufficient. It is necessary that particulars indicating an egregious fraud are pleaded and a *prima facie* case of such fraud is established for securing an order interdicting an unconditional bank guarantee. The present case is, plainly, one of contractual disputes as to which party has delayed the performance of the works to be executed under the sub-contract agreement. The entire purpose of insisting on an unconditional bank guarantee would be frustrated if the beneficiary is required to have such disputes adjudicated as a precondition for invoking the bank guarantee.

17. Mr Kirpal's contention that the bank guarantees furnished for

securing the mobilization advance and for securing the performance of the sub-contract agreement cannot be invoked simultaneously, is also bereft of any merit. Clearly, the bank guarantees for mobilization advanced were furnished for securing the recovery of the mobilization advance, which in terms of the sub-contract would be recovered through deductions from the amounts payable to ZIPL against its invoices. In the present case, Alstom has terminated the sub-contract agreement and, therefore, the question of adjusting any amount from ZIPL's invoices does not arise. The performance bank guarantees have been furnished for performance of the sub-contract agreement and according to Alstom, ZIPL has failed to perform the sub-contract agreement. Thus, there is no intrinsic conflict or repugnancy in invoking both kinds of bank guarantees. The contention that invocation of performance bank guarantees and bank guarantees furnished against mobilization advanced are mutually exclusive cannot be accepted.

18. Mr Kirpal's contention that the bank guarantees furnished to secure mobilisation cannot be invoked as ZIPL had mobilized its resources at site is also unmerited. Even if it is assumed that ZIPL had mobilized its resources, the fact that the contract has been terminated, would entitle Alstom to recover the advance provided by Alstom by invoking the bank guarantees

notwithstanding the dispute whether the termination is wrongful on not. In ***U.P State Sugar Corporation v Sumac International Limited***: AIR 1997 SC 1644, the Supreme Court had held that:

> "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."

19. In ***Hindustan Construction Co. Ltd. v State of Bihar & Ors.***: **(1999) 8 SCC 436**, the Supreme Court observed as under:

> "8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "Advance", the Guarantee is invoked and the amount is recovered from the Bank."

20. Insofar as the prayer for staying the letter of termination dated 16.09.2016 is concerned, the same would not be permissible. Admittedly, the sub-contract agreement is a determinable agreement and in terms of Section 14 of the Specific Relief Act, 1963, the sub-contract agreement cannot be specifically performed.

21. For the reasons stated above, the petition is dismissed.

22. *Dasti* under signatures of the court master.

**VIBHU BAKHRU, J**

**SEPTEMBER 21, 2016**
**RK/MK**