

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 16th October 2015
Judgment delivered on : 26th February, 2016

+ FAO(OS) 319/2015

**GMR KISHANGARH-UDAIPUR-AHMEDABAD
EXPRESSWAYS LTD**

..... Appellant

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Gopal Jain, Sr Advocate with Ms Mrinalini Sen Gupta

For the Respondents : Mr Sudhir Nandrajog, Sr Advocate with Mr Mukesh Kumar and
Ms Meenakshi Sood, Advocates

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

J U D G M E N T

SANJEEV SACHDEVA, J

1. The appellant impugns the judgment dated 29.06.2015, whereby the petition filed by the appellant under section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the “Act”) seeking a restraint on the Respondent from invoking or encashing the Performance Guarantee dated 23.5.2012 and a further restraint on the Respondent from making any demand or receiving any money under the said Performance Guarantee has been dismissed.

2. The respondent had called for bids for design, engineering, finance, construction, operation and maintenance of six-laning of Kishangarh - Udaipur - Ahmadabad section of National Highway No. NH 79A, NH 79, NH 76 and NH 8.

3. The Appellant being the successful bidder was awarded the Contract. The case set up by the appellant is that under the Concession Agreement dated 30.11.2011 executed between the parties, the rights and obligations of the parties were to come into effect after fulfilment, by the respondent, of the mandatory conditions precedent under clause 4.

4. It is contended by the appellant that in terms of clause 4.1.2 of the Agreement, the respondent had to fulfil the following obligations; i) Issue a Fee Notification; ii) Providing a Right Of Way to the Site to the Concessionaire; iii) Procure approval of the Railway Authorities to enable the Concessionaire to construct road over-bridges/under bridges at crossings on the highway project; iv) Procure all Applicable Permits relating to environmental protection and conservation of the Site. A notice by the Concessionaire/appellant under clause 4.1.2 was optional, while the satisfaction of Conditions Precedent prior to the “Appointed Date” by the respondent was mandatory. Only, upon the respondent authority fulfilling the Conditions Precedent, the “Appointed Date” was to take place and the rights and obligations under the Concession Agreement would come into effect. The Conditions Precedent were mandatory and as per proviso to clause 4.1.2, the respondent authority had an option to extend the time required for performance of the Conditions Precedent relating to environmental clearances and approval from railway authorities, provided

that the commercial operation date had taken place and the right of way had been handed over.

5. As per the appellant, it had started to fulfil its obligations under the Concession Agreement and notified the respondent authority that it had appointed EPC contractors and sub-contractors and that mobilization had commenced. It made significant investments and was ready to commence work. Appellant is stated to have notified the respondent authority time and again that it had an obligation to inter-alia publish the Fee Notification and grant environmental and forest clearances, which were necessary for the Appellant to commence operations. Regularly status reports were also submitted to the respondent. Referring to letter dated 22.10.2012 of the respondent to the Appellant stating that the User Fee Notification would be issued shortly and the forest clearance proposal was still pending with the Ministry of Environment & Forest, it was contended that there was a clear admission that the Fee Notification and the forest clearance proposal had not been obtained and thereby the Conditions Precedent had not been fulfilled. This position it is contended continued at least till 27.12.2012. It is contended that even the independent Engineer, appointed by the respondent authority, in its communication dated 23.11.2012 recorded the default.

6. It is contended that in view of the respondent's failure to fulfil the Conditions Precedent, the question of Appellant's performance did not arise. Thus, the respondent could not invoke the Performance Guarantee. It is further contended that due to the acts of the respondent, the performance of obligation of the Appellant was not possible. Because of failure on the part of the respondent to perform the Conditions Precedent, the Appellant has

given notice dated 21.12.2012 of termination of the agreement and as the same had been terminated, the respondent has no legal right to invoke Bank Guarantee.

7. It is contended that the conduct of the respondent shows lack of good faith as a contracting party. Since the appellant had approached the court prior to invocation of the bank guarantee, the strict test laid down in post invocation cases would not apply and the general principles of grant of injunction, i.e. prima facie case, balance of convenience and irreparable loss and injury would apply. In post invocation cases what is sought to be restrained is encashment of already invoked bank guarantee. In cases such as the present, the agreement (i.e. Bank Guarantee) does not get triggered and the court has to consider the prima facie case, balance of convenience and irreparable loss only *vis-à-vis* the main contract.

8. Per contra, the respondent has contended that it is one of the biggest projects undertaken by the Government, and involves improvement and development of 555.5 km of National Highway. The Appellant was selected from amongst the seven bidders who participated in the International Competitive Bidding undertaken by the respondent authority. The Appellant was the successful bidder having committed to pay a sum of Rs. 636 crores per year with annual increment of 5% for a period of 26 years commencing from the Appointed Date and as such, the Appellant was to pay a sum of approximately Rs. 32,500/- crores over a period of 26 years. The Appellant was entitled to collect User Fee (Toll) for the four laning from the Commercial Operation Date and for the entire six lanes upon date of completion of six laning besides carrying out the improvement and

construction of six lanes and operation and maintenance during the currency of the Agreement.

9. It is contended that the respondent was collecting toll for four laning of approximately Rs. 350 crores annually. The Appellant has committed serious breaches of the Concession Agreement entered into between the Appellant and the respondent authority. The Appellant has failed to fulfil the mandatory Conditions Precedent evidencing, inter-alia, its lack of readiness and willingness to perform its obligations under the Concession Agreement. According to the respondent, the Appellant has not even chosen to take possession of the land in question. More than 88% of land required for the project in question was available but the Appellant has chosen not to avail it. According to the respondent, the land to the said extent was available at the time of pre-bid meeting and no protest whatsoever was raised at the relevant time.

10. It is contended by the respondent that the Agreement expressly empowers both the parties to claim damages for delay by any other party in fulfilling its Conditions Precedent. It is further contended that the notice dated 21.12.2012 of the Appellant was based on a flimsy and factually erroneous plea that the Conditions Precedent had not been met by the respondent and was duly replied highlighting the status of the three issues i.e. issuance of Fee Notification, handing over of land and environment clearance.

11. The Fee Notification, it is contended, was issued on 01.01.2013 itself. The requisite land required under the Concession Agreement to fulfil the

Conditions Precedent it is contended, was available not only on the date of letter but from the date, even prior to the award of the Contract. 88% of the required land was available with the respondent authority for handing over to the Appellant, upon the appellant fulfilling its obligations and complying with the requirements of the Agreement. The appellant was requested to depute its team for inspecting the site and for preparing a memorandum containing inventory of the site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the site but the Appellant did not deploy its representative, in the absence of which inspection of the site and the Memorandum could not be prepared and the formal handing over of the land could not be done. Further, the environment clearance for the project had already been obtained by the respondent authority from the Ministry of Environment & Forest and the progress made in achieving or otherwise of Conditions Precedent was well known to each other. Reference was drawn to the MOEF notification dated 07.01.2013 that for linear Highway Projects (which included the present Project) prior forest clearance was no longer required and construction could be started in non-forest area.

12. It is further contended that the appellant also did not issue the mandatory 90 days “Cure Period” notice as required in terms of clause 37.2.2 prior to issuance of the termination notice.

13. The Appellant, it is contended, failed to fulfil its obligations under clause 4.1.3 of the Agreement prior to the “Appointed Date”. It failed *inter-alia* to procure all applicable permits specified in schedule E i.e.

- a. Permission of State Government for Extraction of Boulders from Quarry;
- b. Permission of Village Panchayat & Pollution Control Board for Installation of Crushers;
- c. License for use of Explosives;
- d. Permission of the State Government for drawing Water from River/Reservoir;
- e. License from Inspector of Factories or other Competent Authority for setting up of Batching Plant;
- f. Clearance of Pollution Control Board for setting up of Batching Plant;
- g. Clearance of Village Panchayat & Pollution Control Board for Asphalt Plant; and
- h. Permission of Village Panchayat & State Government for Borrow Earth.

14. It is further contended that because of default on the part of the appellant the entire project had been delayed. Under the agreement, the annual amount was of more than Rs. 636 Crores, with an annual increment of 5% per annum for a period of 26 years. The Bank Guarantee amount of Rs. 269.36 Crores did not even cover half of the annual amount.

15. It is contended further by the respondent that terms of the Bank Guarantee show that the Bank Guarantee is unequivocal, unconditional and the same can be invoked even if there are disputes. It is further contended that the test laid down in post invocation cases would apply equally to pre invocation cases. It is contended that the appellant has failed to even plead fraud in relation to execution of Bank Guarantee. There is no question of

irreparable injustice as the respondent is a statutory corporation and the appellant can always recover the amount, in case it were to be successful in the arbitral proceedings. There is further no averment that there is any fraud and the bank has any knowledge of fraud on the other hand, the bank has responded to the appellant's letter conveying that it is bound to honour the bank guarantee if it were to be invoked which further fortifies the contention that there is no fraud to the knowledge of the bank.

16. The question that falls for consideration is whether the appellant is entitled to grant of injunction from invocation/encashment of bank guarantee.

17. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of Bank Guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of Bank Guarantees would be negated and the fabric of trading operation will get jeopardised. Commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases, that is, to say in cases of fraud and irretrievable injustice that the court could interfere.¹

18. When in the course of commercial dealings an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realize such a

¹ **U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174**

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. The courts should be, therefore, slow in granting an injunction to restrain the realization of such a Bank Guarantee. The courts have carved out only two exceptions. A fraud in connection with such a Bank Guarantee, which would vitiate the very foundation of such a Bank Guarantee. Hence, if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.²

19. Where fraud is alleged, it must be a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Fraud must be of a nature that may absolve a bank from honouring its guarantee. 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

² **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568**

clearly be fraudulent. However, the evidence must be clear both as to the fact of fraud and as to the bank's knowledge.³

20. To avail of the exception of irretrievable injury, the party seeking an injunction would have to show that exceptional circumstances exist which made it impossible for the guarantor to reimburse himself if he ultimately succeeds and this will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of Bank Guarantees. There must be a fraud in connection with the Bank Guarantee.³

21. The Supreme Court in the case of **I.T.C. Ltd. v. Debts Recovery Appellate Tribunal, (1998) 2 SCC 70** has laid down as under:

“22. What is necessary for the Bank to refuse payment is a case of clear “fraud” and the Bank's knowledge as to such fraud (Bolivinter Oil S.A. v. Chase Manhattan Bank N.A.) [(1984) 1 LLR 392]. As pointed by Lord Denning and Lord Lane in Edward Owen [(1978) 1 All ER 976 : 1978 QB 159 : (1977) 3 WLR 764, CA], the Bank cannot refuse payment merely because according to it the claim was “dishonest” or “suspicious” or it appeared to be a sharp practice but it must be established as “fraud”. Lord Ackner in United Trading Corpn. S.A. & Murray Clayton Ltd. v. Allied Arab Bank Ltd. [(1985) 2 LLR 554, CA] held that the Bank could object to pay not because the demand was not “honestly” made but was made fraudulently. Waller, J. in Turkiye v. Bank of China [(1996) 2 LLR 611] [LLR pp. (617-618)] said that the question was whether the demand for payment was

³ **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568**

“fraudulent”. Mere allegations and counter-allegations between the parties as to breach of contract, non-payment of advances or non-supply of machinery did not amount to fraud.”

22. The principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a letter of credit that emerge from various judicial pronouncements are the following⁴:

- (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 realise 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 realisation 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

⁴ Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110

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.

23. It is settled law that Bank Guarantees are the very life-blood and backbone of commerce. Courts would be very reluctant to interfere with contracts of bank guarantees. To facilitate trade and commerce the concept of bank guarantee has evolved as a substitute to upfront cash deposit. When a party enters into a contract, it wants an assurance/guarantee that the other party shall perform its obligations under the contract. It wants a security against the risk of the other party's non performance or default under the primary contractual obligation. The only way to ensure that the obligations under the principal contract would be performed is to take the entire security amount as a deposit upfront. But, this kind of condition would be onerous and would hamper trade and commerce. The substitute to a deposit upfront that has evolved over the years is bank guarantee/letter of credit. The guarantor i.e. the bank issues a guarantee to the beneficiary that on a demand

being made it shall honour the demand and pay to the beneficiary the security amount guaranteed. The bank guarantee gives a satisfaction to the beneficiary that the other party would perform its contractual obligations failing which it would receive the security amount from the guarantor. On this assurance, the beneficiary does not insist upon a deposit upfront but satisfies itself with the bank guarantee. The beneficiary is given a satisfaction that the security deposit amount is virtually in its own bank.

24. It is in these circumstances that strict principles as enumerated hereinabove have been laid down by the Supreme Court in cases where a restraint is sought from encashment of bank guarantee.

25. The various contentions of the parties on the merits of the dispute are for the arbitral tribunal to adjudicate and decide. The learned single judge has come to a conclusion that the appellant has not been able to show a strong prima facie case in its favour. Having examined the various contentions raised and submissions made by the parties we are of the view that the learned single judge has not committed any error in coming to the said conclusion.

26. The Appellant had committed to pay a sum of Rs. 636 crores per year with annual increment of 5% for a period of 26 years commencing from the Appointed Date and as per the respondent, the Appellant was to pay a sum of approximately Rs. 32,500/- crores over a period of 26 years. The Fee Notification, it is contended, was issued on 01.01.2013 itself. The requisite land required under the Concession Agreement to fulfil the Conditions Precedent it is contended, was available not only on the date of letter but

from the date, even prior to the award of the Contract. 88% of the required land was available with the respondent authority for handing over to the Appellant, upon the appellant fulfilling its obligations and complying with the requirements of the Agreement. Environment clearance for the project had already been obtained by the respondent authority from the Ministry of Environment & Forest. Even if a liberal test, as propounded by the appellants, were to be applied, we are of the view that the appellant has failed to show a strong prima facie case in its favour. Balance of convenience is not in favour of grant of an injunction from invocation/encashment of the Bank Guarantee. No irreparable loss and injury would be caused to the appellant as the respondent is a statutory corporation and if the appellant were to ultimately succeed, it would be in a position to recover its amount.

27. As we have held that the appellant has failed to even satisfy the liberal test as propounded by it, the question whether the strict test laid down in post invocation cases would not apply to pre invocation cases, and the general principles of grant of injunction, i.e. prima facie case, balance of convenience and irreparable loss and injury would apply, is left open.

28. In view of the above, we find no merit in the appeal, the same is dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

FEBRUARY 26, 2016/HJ