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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P.(I) (COMM.) 143/2017

**FEEDBACK BRISA HIGHWAYS OMT PRIVATE
LIMITED**

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with
Ms. Misha, Mr. Raghav Gupta, Ms. Sanjana
Sharma and Mr. Y. Mittal, Advocates.

versus

**BHUBANESHWAR EXPRESSWAYS PRIVATE
LIMITED & ANR.**

..... Respondents

Through: Dr. Amit George with Mr. Neeraj
Kumar, Advocates for R-1.

CORAM: JUSTICE S. MURALIDHAR

ORDER
30.03.2017

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IA Nos. 4060 & 4061/2017 (for exemptions)

1. Allowed, subject to all just exceptions.

OMP (I) (COMM) 143/2017

2. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') by Feedback Brisa Highways OMT Private Ltd., seeking an interim order restraining Respondent No. 1, Bhubaneswar Expressways Private Limited, from encashing two Performance Bank Guarantees ('PBGs') dated 22nd September, 2015 for sums of Rs. 36,24,606 and Rs. 1,25,00,000 respectively.

3. The facts in brief are that National Highways Authority of India ('NHAI') had awarded the work of 'Design, Build, Finance, Operate and Transfer of the four laning of the Bhubaneswar-Puri Section from 0.00 to Km 59.00 on NH-203 in the State of Odisha to Respondent No. 1 by way of Concession Agreement dated 30th July, 2010 for a period of 29 years. By way of a sub-contract Respondent No. 1 entered into an Operation and Maintenance ('O&M') Contract dated 29th June, 2015.

4. One of the terms and conditions of the O&M Contract was that the Petitioner should furnish to Respondent No. 1 the aforementioned PBGs. Disputes arose between the parties regarding the payment and the performance of obligations under the O&M Contract. It is stated that a legal notice was sent 3rd September, 2016 by the Petitioner to Respondent No. 1 seeking the settlement of its dues. On its part Respondent No. 1 sent a letter dated 14th November, 2016 to the Petitioner asking it to immediately take steps for improvement of toll collection and maintenance. In this letter, NHAI stated that it had been pointing out *inter alia* that the BPTP site was not being maintained as per the provisions of the Concession Agreement and that Respondent No. 1 "had been taken to task due to pilferages at all and sluggish maintenance of Highway".

5. For the purpose of the present petition, it is necessary to refer to the terms and conditions of the PBGs issued in favour of Respondent No. 1. One of the PBGs is for a sum of Rs.34,24,606 issued by RBL Bank Limited ('RBL'). Clauses 1, 2, 5 and 10 thereof read as under:

"1. We, the Bank hereby undertake irrevocably and unconditionally without any demur and forthwith on demand to pay to the Company

to the extent of the sum of Rs. 34,24,606 (Rupees Thirty four lacs and twenty four thousand six hundred and six only) (hereinafter referred as “the said amount”) towards all losses, cost, expenses and/or damages that may be caused to the Company or suffered by the Company by reason of any default or defaults on the part of the ‘Sub-contractor’ in due performance of the said Order.

2. Notwithstanding anything to the contrary, Company’s decision as to whether the ‘Sub-contractor’ has made default or defaults and the amount or amounts to which the Company is entitled by reason thereof will be binding on the Bank and we, the Bank and we, the Bank shall not be entitled to ask the company to establish its claims under this guarantee but will pay the same forthwith merely on demand, unconditionally, without any demur or protest.

5. The Company’s right to recover the aforesaid amount from the Bank in the manner aforesaid will not be affected or suspended by reason of the fact that the sub-contractor has raised any dispute or disputes, and/or any dispute or disputes are pending before any officer, tribunal or court or arbitrator(s).

10. We, the Bank agree that the Company shall be entitled to enforce this guarantee against the Bank as a principal debtor in the first instance without proceeding against the ‘sub-contractor’ and notwithstanding any security or other guarantee that the Company may have from the ‘sub-contractor’.”

6. Similar clauses are contained in the other PBG for a sum of Rs. 1.25 crores. Both PBGs are dated 22nd September, 2015 and are valid till 14th August, 2018.

7. The case of the Petitioner is that all of a sudden on 28th March, 2017, Respondent No. 1 wrote to the Respondent No. 2, RBL, invoking the aforementioned PBGs and requesting encashment. The relevant portion of

the invocation letter reads thus:

“Sub: Encashment of Bank Guarantees

Dear Sir/Madam,

This is in reference to the below mentioned Bank Guarantee issued by you in our favour on behalf of M/s. Feedback Brisa Highways OMT Pvt. Ltd., 15th Floor, Tower 9B, DLF Cyber City, Phase-III, Gurgaon-122002.

The party is unable to full its obligation under the said contract. We request you please encash the below mentioned Bank Guarantees

Type of BG	BG No.	BG Amt (Rs.)	Original BG issue date	Valid up to	Claim up to
PBG	PBG1010015000120	36,24,606	22.9.15	14.8.18	15.9.18
PBG	PBG1010015000121	1,25,00,000	22.9.15	14.8.18	15.9.18

Further, we request you to please encash the above mentioned Bank Guarantees and credit the amount in our below mentioned Bank Account.”

8. The submission of Mr. Rajiv Nayar, learned Senior counsel appearing for the Petitioner, is that the aforementioned invocation of the PBGs is not consistent with the clauses of the PBGs requiring Respondent No. 1 to clearly indicate that the demand was “towards all losses, cost, expenses and/or damages” that may be caused or suffered by Respondent No. 1 “by reason of any default or defaults on the part of the ‘Sub-Contractor’ in due performance of the said order.” Mr. Nayar submits that the only reason the invocation of the PBGs was resorted to was because the Petitioner had been repeatedly sending reminders to Respondent No. 1 to make payment. Reliance was placed on the decision of the learned Single of this Court in

Puri International (P) Limited v. National Building Construction 1997 (1) Arb LR 691 (Del). According to the Petitioner, in similar circumstances, the Court came to the conclusion that the invocation of the PBGs was not in accordance with the terms of the bank guarantees and, therefore, the bank guarantees cannot be permitted to be encashed.

9. It is submitted that there are special equities in favour of the Petitioner since notwithstanding that NHAI had terminated its contract with Respondent No. 1, the O&M Contract between the Petitioner and Respondent No. 1 has not been terminated. Further, there are amounts owing to the Petitioner from Respondent No. 1.

10. Dr. Amit George, learned counsel appearing for Respondent No. 1 on advance notice submits that the PBGs in question were unconditional as was evident from Clauses 1 and 2 read with Clauses 5 and 10 of the PBGs. Dr. George further points out that the reasons for NHAI terminating its contract with Respondent No. 1 were spelt out in NHAI's letter dated 28th March, 2017 to Respondent No. 1. The said reasons included those pointed out by Respondent No.1 in its letter dated 14th November, 2016 to the Petitioner.

11. Dr George submits that the law in relation to interdiction of unconditional BGs by the Court is fairly well settled. It is not for the Bank to enquire whether in fact there has been breach of the contract or failure by the Petitioner to fulfil its obligations thereunder. Where the BGs are unconditional, as in the instant case, even the Court will not at this stage enquire into the question as to which of the parties was in breach of the contract. Reliance was placed on the decision of this Court dated 17th

February, 2017 in OMP (I) (COMM) No. 66 of 2017 (*TRF Limited v. Energo Engineering Projects Limited*) and the decision dated 14th March, 2017 in OMP (I) (COMM) 102 of 2017 (*Corsan Corviam Construction SA v. National Highways Authority of India*).

12. At the outset, the law relating to the scope of interference by the Court with the encashment of unconditional PBGs requires to be recapitulated. Reference requires to be made only to a few of the decisions of the Supreme Court and this Court for this purpose. In *U.P. State Sagar Corporation v. Sumac International Limited* (1997) 1 SCC 568 the Supreme Court observed as under:

“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. The courts should, therefore, be 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 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. The two grounds are not necessarily connected, though both may co-exist in some cases.”

13. There are two broad exceptions carved out to the rule against injunctioning the encashment of unconditional BGs. One is that where there is 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. The second exception is where the encashment of an unconditional BG would result in irretrievable injustice being caused to the affected party. It would not be for the Bank to enquire whether there was in fact a breach of the contract warranting invocation of the BG. In *BSES Limited v. Fenner India Limited (2006) 2 SCC 728*, this position was explained thus:

“26. ... Further, it is no function of the Second Respondent- Bank nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the Second Respondent-Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the Appellant and the First Respondent. Indeed, in similar circumstances, this Court in *General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd.*, held:

“[T]he Bank must honour the bank guarantee 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 case of fraud or in case of irretrievable injustice, the court should interfere. 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.”

27. This was also a case where, after having recovered certain amount from the running bills, a call was made on the bank guarantee in

respect of the full guaranteed amount. In an observation with direct relevance for the present case, this Court pointed out that the bank was not concerned with the outstanding amount payable under the running bills: (SCC p. 238, para 10)

"The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of (the Beneficiary) to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee."

14. In the present case, Clause 10 of the PBG states that the beneficiary would be entitled to enforce the guarantee against the Bank as a principal debtor in the first instance without proceeding against the sub-contractor and notwithstanding any security or other guarantee that the Respondent No.1 may have from the sub-contractor. Further, under Clause 5, the right of Respondent No. 1 to recover from the Petitioner is not affected or suspended by reason of the fact that the Petitioner has raised any dispute or disputes. Clause 2 clarifies that the decision by the Petitioner as to whether Respondent No. 1 has committed default or defaults would be binding on the Bank.

15. In similar circumstances, this Court in ***TRF Limited v. Energo Engineering Projects Limited*** (*supra*) observed in para 48 as under:

"48. There are four preamble clauses preceding the operative portion. There can be no doubt on the reading of the above BG as a whole that it is unconditional. However, it does not stop there. There is a specific clause under which the Bank has agreed that Energo would be the sole judge as to whether TRF

has committed any breach of the terms and conditions of the BG and the extent of loss, damage etc. There are further clauses which make it abundantly clear that the demand made on the Bank would be conclusive as regards the amount due and payable by the Bank under the BG. There is express waiver in favour of Energo of all the rights, defence and pleas to which, both the Bank and the guarantor and/or the supplier may be entitled to. It is further stated that Energo could act as though the Bank were the principal debtor.”

16. The decision cited by Mr. Nayar in ***Puri International (P) Limited v. National Building Construction*** (*supra*) is distinguishable on facts. There, the invocation letter merely stated that the beneficiary was lodging its claim for encashment of the BG without any statement that there was any breach of the contract by the party on whose behalf of it was issued. In those circumstances it was held that the invocation was not in terms of the BGs in question. In the present case, however, the invocation letter does state that the Petitioner was unable to fulfil its obligation under the said contract.

17. In the considered view of this Court, this is sufficient as far as the Petitioner is concerned to complete its obligation to honour the contract as neither of the two exceptions pointed out by the Supreme Court in ***U.P. State Sugar Corporation v. Sumac International Limited*** (*supra*) exist in the present case to persuade this Court to injunct the encashment of the PBGs in question.

18. The petition is dismissed but, in the circumstances of the case, with no orders as to costs.

19. The observations in this order are of a *prima facie* nature and will not

influence the final determination of issues in the arbitral proceedings.

S. MURALIDHAR, J

MARCH 30, 2017

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