

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ OMP(I) (COMM) 271/2017

Reserved on: 13TH December, 2017
Date of decision: 22nd December, 2017

IVRCL LTD. Petitioner
Through: Mr.Sumesh Dhawan, Ms.Vatsala Kak,
Ms.Jasvin Dhama, Advs.
versus

RAIL VIKASH NIGAM LIMITED & ORS Respondents
Through: Mr.Rajesh Kr.Gautam, Adv. for R-3
Mr.Udit Seth and Mr.Dilip, Advs. for R-1
Mr.Satish Bhati, proxy counsel for R-2

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The Petitioner has filed the present petition *inter alia* praying for the following relief:

“a) grant an injunction by restraining the Respondents, their agents, servants or any other persons claiming through or under them from invoking or en-cashing the bank guarantee Performance Bank Guarantee ("PBG") for a sum of Rs.9,55,69,925/- (Rupees Nine Crores Fifty Five Lakhs Sixty Nine Thousand Nine Hundred and Twenty Five Only), Material Advance Guarantee for a total sum of Rs. 2,15,00,000/-(Rupees Two Crore Fifteen Lakh only) and Mobilization Advance Bank Guarantees for a total sum of Rs.2,91,71,655/- (Rupees Two Crore Ninety One Lakhs Seventy One Thousand Six Hundred and Fifty Five Only), issued by Respondent No. 2 & 3 till the issues being

*resolved under the Arbitration and Conciliation Act, 1996,
and
b) restrain the Respondents No. 2 & 3 banks from honoring en-cashing the schedule bank guarantees;
c) Pass any such or further orders as may be deemed”.*

2. The Petitioner was appointed as a contractor for the construction of Road Bed, Major and Minor bridges, and Track Linking (excluding supply of rails, sleepers and thick Webs Witches) S&T General Electrical Works in Abu Road, Sarotra Road (24.35 kms) in Ajmer Division of North Western Railway in Rajasthan and Gujarat State, India. The total value of the said contract was Rs. 70,71,91,602/-(Rupees Seventy Crores Seventy One Lacs Ninety One thousand Six Hundred and two only). The term of the Contract was 30 months. The said Contract, in addition to General Conditions of the Contract ("GCC"), was further supplemented by Special Conditions of Contract ("SCC") and a contract agreement dated 19th December, 2011 was executed between the parties.

3. In terms of the agreement, the Petitioner submitted to the Respondent, a Performance Bank Guarantee, Mobilization Advance Bank Guarantee and Material Advance Guarantee.

4. The Petitioner submitted running bills amounting to Rs. 33,71,78,838 and a final bill of Rs. 5,63,72,022 to the Respondent No. 1. It is the case of the Petitioner that the final bill remains outstanding till date. It is the case of the Petitioner that due to various hindrances at the

site, which were attributable solely to Respondent No. 1, there was a delay in execution of the work under the above agreement. It is submitted that the Respondent No. 1 acknowledged such delays and it is for that reason that vide its letter dated 22nd June, 2015, Respondent No.1 granted the extension of Date of Completion of the contract from 6th June, 2015 to 5th June, 2016 with PVC and without levying any Liquidated Damages. It is submitted that though such defaults on the part of the Respondent No. 1 continued, the Respondent No. 1 issued a “Notice To Correct” dated 9th May, 2016 to the Petitioner under clause 15.1 of the General Conditions of Contract (GCC); the Petitioner responded to the above notice under cover of its letter dated 21st May, 2016 giving status of the work and calling upon the Respondent No. 1 to withdraw its notice and extend the period of completion up to December, 2016. It is submitted that without considering the above reply and in a mechanical manner, the Respondent issued the Notice of Termination of the contract under Clause 15.2 of the GCC. The Petitioner protested against the same vide letter dated 14th June, 2016, however, later submitted the final bill, as mentioned above, on 6th August, 2016 to the Respondent No. 1.

5. The Petitioner, apprehending, that the Respondent would invoke the bank guarantee(s) submitted by the Petitioner under the contract, filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the “Act”) before the City Civil Court, Hyderabad, being ARB. O.P. 1254/2016. The same was renumbered as COP No. 13/2017 and the 11th ACJ vide its order dated 15th June, 2016,

granted an *ad interim ex parte* injunction restraining the Respondent No. 1 and 2 from invoking or encashing the bank guarantees. The said petition was dismissed on 14th July, 2017 for want of jurisdiction, whereafter the Petitioner filed the present petition before this Court.

6. This Court vide its order dated 24th July, 2017 passed an *ad interim* order directing the parties to maintain *status quo*.

7. Relying upon Clause 4.2 read with Clause 15.3 of the GCC, it is submitted that upon termination of the agreement, the engineer has to make a determination of the sums due to the contractor for the work executed in accordance with the contract. Further, relying upon Clause 2.5, it is submitted that if the employer (Respondent No. 1) considers itself to be entitled to any payment under the contract, it shall have to give a notice and particulars thereof to the contractor and the same would thereafter have to be determined by the engineer in terms of clause 3.5 of the agreement. It is submitted that as the Respondent No. 1 has not issued any such notice of claim, it is not entitled to encash the bank guarantees in question. It is further submitted that the Petitioner has raised a substantial claim of Rs. 5, 62,72,022 in the form of the final bill which remains unpaid since 6th August, 2016, and therefore, Respondent No. 1 remains adequately secured of any claim that it may have against the Petitioner and cannot be allowed to invoke and encash the bank guarantees. Relying upon the Judgments of Supreme Court in ***Gangotri Enterprises Limited v. Union of India and Others*** (2016) 11 SCC 720, it is submitted that as the claim of the Respondent No. 1 is neither an

admitted sum nor a sum which stood adjudicated by any court of law in any judicial proceedings, the bank guarantees for recovery of such claims cannot be allowed.

8. On the other hand, the counsel for the Respondent No. 1 submits that bank guarantees in question are separate contracts between the Respondent No. 1 and the banks. These bank guarantees are unequivocal and unconditional in nature. The same cannot be enjoined from being given effect to, as they are independent contract and dispute in relation to the main contract cannot be allowed to be raised as an excuse for preventing the encashment of the same.

9. I have considered the submissions made by the counsel for the parties. It is not disputed and cannot be disputed that the bank guarantees are unconditional in nature. Clause 15.4 provides that after a notice of termination, the employer (Respondent No. 1 herein) may encash the performance guarantee and forfeit the performance security in full in case of termination of the contract as a whole. It may be correct that in terms of Clause 2.5, the Respondent No. 1 may have not raised any separate claims against the Petitioner, however, the right to encash the bank guarantees in full, upon termination of the contract is a separate right vested with the Respondent No. 1 in Clause 4.2 and 15.4 of the agreement. The claims and counter claims between the parties would have to be adjudicated by the Arbitral Tribunal in accordance with the law, however, in anticipation of those disputes the encashment of the bank guarantees cannot be enjoined.

10. The law of injunction in case of bank guarantee is no longer *res integra*. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*** (1997) 6 SCC 450, Supreme Court reiterated this law as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] and U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows: (SCC p. 574, para 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 the 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.”

*Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351, CA] are apposite:*

“... 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)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174]

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

11. In ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.*** (2008)1 SCC 544, Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to alleged breach of contract by the Respondent is not a plea of fraud of a

egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

“24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any “special equities” in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

“That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003.”

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable injustice”. There is no plea of any “special equities” by the appellant in its favour. So far as the plea of “irretrievable injustice” is concerned the appellant in its petition merely stated:

“That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant.”

28. The plea taken as regards “irretrievable injustice” is again vague and not supported by any evidence.

12. In ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.*** (2016) 10 SCC 46, Supreme Court once again cautioned that the bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the

arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has

been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , at para 14: (SCC pp. 117-18)

“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 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 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.”

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and

proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”

13. In the present case also, after narrating the facts that have given rise to the present petition, the only plea in relation to fraud or irretrievable injustice/ irretrievable injury are to be found in paragraph 14 to 17 of the petition, which are quoted here in below.

“14. It is submitted that if the above ratio is applied in the facts and circumstances of the present case it would be very apparent that no sum is due or payable to the Respondent as admittedly the Respondent itself has not raised any claim so far and infact, it is the other way round that the amounts of the Petitioner are due and payable.

15. Further, there is no drawback or failure in performance by the Petitioner herein and the Respondent No. 1 had, only with a fraudulent intention and with an intention to extract monies from the Petitioner, without any reason whatsoever had been trying to invoke the bank guarantees by not providing any sufficient cause or reason. As such, a fraud of egregious nature is played by the Respondent No. 1 on the Petitioner only to make

good of the amounts furnished by the Petitioner to the Respondent No. 1 in the form of Bank Guarantee. Further, the Petitioner was being made to undertake additional works under the threat of invocation of bank guarantees furnished by it.

16. In view of the above facts and circumstances it is respectfully prayed that this Hon'ble Court may graciously be pleased to grant an injunction by restraining the Respondents No. 1 and 2, their agents, servants or any other persons claiming through or under them from invoking or encashing the schedule bank guarantees issued by Respondents No.2&3 banks and further restraining the Respondents No.2 & 3 banks and further restraining the Respondents No. 2 & 3 banks from honouring/ encashing the schedule bank guarantees.

17. It is submitted that the facts stated above and the documents filed along with this petition would clearly establish the prima facie case of the Petitioner and the balance of convenience is also in favour of the Petitioner and if the Respondent No. 1 is not restrained from encashing the Schedule Bank Guarantees issued in favour of Respondent No. 1 and if the Respondent No. 2&3 is not restrained from paying out the amount against the schedule bank guarantees to Respondents No. 1 and 2 or any other beneficiary, the Petitioner would be put to grave and irreparable loss and injury, which cannot be compensated in any manner."

The same do not clearly make out a case of fraud of egregious nature or irretrievable injury or irretrievable injustice so as to warrant an injunction against the encashment of bank guarantee.

14. Reliance of the Petitioner on the judgment of Supreme Court in ***Gangotri Enterprises (supra)*** cannot be accepted as in that case the bank guarantee did not relate to the contract in question for which, in fact, no bank guarantee had been furnished. The claim was in the nature of damages, which was yet to be adjudicated and it was in those circumstances that the Supreme Court found that an injunction restraining the encashment of bank guarantee therein was justified. In the present case, as noted above, the bank guarantees have been given under the terms of the agreement and Clause 4.2 and 15.4 of the agreement clearly provide that upon termination of the same, the bank guarantees can be encashed by Respondent No. 1.

15. The Petitioner has also placed reliance on the judgment of ***A.S. Motors Private Limited v. Union of India and Others*** (2013) 10 SCC 114, to contend that in absence of a claim being raised by Respondent No. 1, the bank guarantee could not be invoked. In the said case, however, it is to be noted that there was no appeal filed by the Respondent therein against the order of injunction passed by the High Court. Further, what was sought to be collected by way encashment was the excess fee being charged by the contractor, however, the same had not even been estimated by the authority nor any basis of doing so had been shown to the Court. It was in those circumstances that the Supreme

Court found that the invocation of the bank guarantee was rightly injuncted. Such is not the case in the present petition. In fact, even in case of *A.S. Motors (supra)*, the Supreme Court had taken note of the fact that the authority had already forfeited the performance security amount.

16. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, however, with no order as to costs. The interim order granted in favour of the Petitioner shall stand vacated.

17. I may only hasten to add that any observation on merit made by me above, would not in any manner influence the arbitrator in final adjudication of the disputes between the parties.

DECEMBER 22, 2017/Nk

NAVIN CHAWLA, J