

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **OMP (I) (COMM) NO. 359/2017**

Reserved on: 12th December, 2017
Date of decision: 22nd December, 2017

SINTEX OIL AND GAS LIMITED

..... Petitioner

Through: Mr. Harish Malhotra, Sr. Adv. with
Ms. Shivani Kher, Ms. Dhara Doshi &
Mr. Ravi Ranjan, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ravi Prakash, Mr. Farman Ali &
Ms. Anshula Laroia, Advs

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 ad interim ex-parte stay on the effect and operation of the termination letter dated 01st September, 2017 issued by the Respondent No.1 to the Petitioner thereby terminating the PSC dated 30th June 2010;

(b) pass ad-interim ex-parte orders restraining the Respondents from taking any coercive or precipitate steps in respect of, or invoking, encashing, depositing/receiving any payment under, the following:

(i) The Bank Guarantee No.PBGI00701700138 dated 23.03.2017 for an amount of INR 8,30,00,000/- (Rupees Eight Crore Thirty Lac

*Only) issued by the Respondent No.3 in favour of the Respondent No.1; and
(ii) the Bank Guarantee No.PBGI00701600310 dated 07.06.2016 for an amount of INR 4,33,62,231/- (Rupees Four Crore Thirty Three Lac Sixty Two Thousand Two Hundred Thirty One Only) issued by the Respondent No.3 in favour of the Respondent No.1”.*

During the course of the oral submissions, the learned senior counsel for the petitioner confined his submissions only with respect to prayer (b) quoted above, presumably because the petitioner itself vide letter dated 24.04.2017 had requested the respondent to accept the letter of surrender of Block-1 granted in its favour under “Production Sharing Contract between the Government of India and Esveegee Steel (Gujarati) Private Limited” (hereinafter referred to as an ‘Agreement’). It is to be noted that the petitioner was earlier called Esveegee Steel (Gujarati) Private Limited.

2. It is the case of the petitioner that the petitioner was awarded “S” Type Block in Cambay Basin to undertake the exploration activities under the above mentioned agreement. The initial exploration period in respect of Block-1 was for a period of four years from the effective date, i.e., 15.10.2010 to 14.10.2014. An extension of six months was granted vide 12th MCR dated 08.10.2014 extending the period till 14.04.2015. The petitioner was also granted a Petroleum Exploration license on 15.10.2014 (hereinafter referred to as PEL) validity whereof was extended till 14.10.2017. The petitioner contends that on grant of PEL, the petitioner floated tender for pre-seismic Environmental Impact Assessment ("EIA") and 3D seismic data acquisition and also proceeded to appoint consultant for this work. However,

as the consultant was unable to accept the proposal, a fresh tender had to be issued where after a fresh consultant was appointed, who also refused to carry out the work. It is alleged that in January 2014, the petitioner was finally able to engage the services of a consultant and commenced the work of digging of 123 upholes, which were completed between January 2014 and March 2014. However, as soon as the activities were commenced, the petitioner started getting rigid resistance from the villagers who started to obstruct / create hurdles as the villagers were afraid that the exploratory activities to be undertaken by the petitioner might shake the upper strata of earth dis-balancing the water table, which was earlier experienced by them when similar activities were undertaken by an another operator in the same area. The villagers further feared that the activities of the petitioner may damage their crops resulting in loss of livelihood.

3. Relying upon Article 9.1 of the agreement, it was contended that it was the duty of the respondent no.1 to provide to the petitioner, the right to ingress and egress from the contract area and to assist the petitioner in procurement or commencing of facilities required for execution of work, which the respondent nos. 1 and 2 failed to comply with.

4. The petitioner further claims that various litigations were filed against it making it impossible for the petitioner to carry out the work and the same constituted 'force majeure'. Paragraph 33 of the petition is important in this regard and is reproduced herein below:-

“33. Further, the Respondent No.2 vide letter dated 15th March, 2016 had incorrectly stated that out of the total Block 1 area of 113 sq.km., only 0.092 sq.km. area, that is 0.08% of the total area was affected due

to litigation and protests from the gram panchayat. However, according to the Petitioner, the hardships faced by the contractor and the workers was not limited to the 0.08% area but much beyond that. The difficulties of hostile locals, legal action and aggressive letters from the elected heads of seven (7) villages and one (1) taluka in the district Patan being home to two talukas namely Chanasma and Harij, which are major and key areas of the Block 1, are almost entirely under oppositions and resistance. Therefore, as per the assessment of the Petitioner, the affected area is actually 60-70% of the entire Block 1 (and not 0.08%) which is also taking into consideration that the entry points of the work place stem from the areas under controversy. Thus, the oppositions, resistance and protests in the 60-70% affected area caused adverse impact on almost the whole Block 1, making it almost difficult impossible to undertake the MWP activities as stipulated under the PSC since the same were beyond the control of the Petitioner, who took reasonable steps time and again to mitigate the same”.

5. The petitioner claims that it kept informing the respondent no.2 regarding the force majeure condition, however, in regard of the same and in an arbitrary and unjustified manner, the respondent no.2 vide letter dated 30.11.2016 asked the petitioner for payment of USD 11,215,000 as liquidated damages. It is submitted that in light of the ongoing protest and opposition from the villagers, Gram Panchayats etc., the petitioner was compelled to surrender Block-1 vide letter dated 22.04.2017 and requested the respondent nos. 1 and 2 to release the bank guarantees that have been given by the petitioner to the respondents under the terms of the agreement.

However, instead of accepting the surrender, the respondent no.1 terminated the agreement retrospectively with effect from 14.04.2015.

6. It is further submitted that the petitioner has invested an amount of Rs. 17 Crores towards the exploration operation as on 31.03.2017. As far as the bank guarantees are concerned, the only plea of fraud or irretrievable injustice is to be found in paragraphs 48 and 49 of the petition and same are reproduced herein below:-

“48. Therefore, the Petitioner intends to invoke arbitration in accordance with Article 33 of the PSC, however, unless interim protection is granted under this petition, grave prejudice and harm will be caused to the Petitioner. It is most respectfully submitted that the Petitioner has, at their own cost and expenses, engaged contractors, tried to overcome the hurdles and protests by the villagers, fight and defend multiple litigations, and began undertaking the MWP, as nevertheless, if the termination of the PSC is held to be valid then irretrievable injustice and injury shall be caused to the Petitioner. The Petitioner hereby reserves its right to raise claims, demands, costs, expenses, damages, etc. at a later stage before the Arbitral Tribunal.

49. That if the Respondents invoke and encash the Bank Guarantees then irretrievable injustice and injury shall be caused to the Petitioner. It is respectfully submitted that the Respondents' invocation/ encashment of the Bank Guarantees is fraudulent, unwarranted and without any basis in law, and any such invocation/encashment shall perpetuate a fraud of an egregious nature and result in irretrievable injustice to the Petitioner”.

7. This Court passed the following order on 13.09.2017:-

“Learned senior counsel for the petitioner relies upon the interim orders passed by the Principal Civil Judge, Gujarat details of which are given at page 272 of the petition to contend that in view of the injunction orders passed the local courts, the petitioner has not been able to carry out the drilling work in terms of the contract and cannot be blamed for the delay. He further submits that 75% of the land on which drilling has to take place is the subject matter of these injunction orders.

Issue notice.

Learned counsel for the respondents accepts notice. He may take instructions regarding the contention of the learned senior counsel for the petitioner and may possibly also file a short reply confining to the submission of the learned counsel for the petitioner within four days.

List on 21.09.2017.

Till the next date of hearing, the respondents shall not encash the bank guarantee of the petitioner.

Copy of the order be given dasti under the signatures of the Court Master”.

8. In compliance with the above order, the respondent nos. 1 and 2 filed an affidavit contending that the petitioner had been granted a right over approx 113 sq. kms. under agreement; as far as the litigations are concerned, only 0.092 sq. kms. of land was covered under the same. The agreement provides for a “Minimum Work Programme”. It was contended that the petitioner failed to achieve the same.

9. This Court vide its order dated 09.10.2017 directed the respondent to place on record a chart giving details of the suits which are pending alongwith the exact area involved. The respondents complied with the said

order and filed an affidavit dated 24.10.2017 giving details of the ongoing litigation. The respondent nos.1 and 2 also filed their reply to the petition. It is relevant to note here that, in spite of being given opportunity, the petitioner did not file a rejoinder to the petition.

10. The learned counsel for the petitioner has drawn my reference to the litigations that are pending as also to some letters issued by Gram Panchayats to contend that the respondent nos. 1 and 2 have failed to appreciate that it is not only the order of injunction but also these letters, which are to be taken into account while determining the resistance faced by the petitioner from the local villagers in carrying out the work under the agreement. He submits that the respondent completely erred in determining the area affected by such resistance to be only 0.092 sq. kms. He submits that such resistance from the villagers amounts to force majeure condition and therefore, the respondents no.1 and 2 cannot invoke the bank guarantees in question.

11. I am unable to agree with the submissions made by the learned senior counsel for the petitioner. As contended by the counsel for the respondent, the injunction orders relates only to 0.08% of the total area allotted to the petitioner; the same also seems to have been on a self-invitation as the injunction order(s) record that the petitioner was unable to show the existence of any right to carry out the exploration activities in the said area. It seems that the petitioner did not produce before the concerned Court(s), the agreement granting such a right in its favour. The dates of injunction orders are also relevant. The injunctions were granted on 24.12.2014, 18.03.2015, 18.04.2015 and 07.07.2017. As noted above, initial exploration

period expired on 14.10.2014 and the extended period also expired on 14.04.2015. Therefore, during initial period there was no order of injunction passed restraining the respondent from executing the work. Even during the extended period only a small area of land is involved in litigation. As far as the letters of Garm Panchayats are concerned, these are also starting from the period of 2014 and barring such letters, nothing has been filed by the petitioner on record to show if the petitioner had taken any other steps in light of any such purported agitation or resistance from the villagers. As far as petitioner's difficulties in appointment of the consultant, it is a matter for which the respondent nos.1 and 2 cannot be faulted.

12. In any case, the law relating to the power of the Court to grant an injunction against the invocation of bank guarantees is well settled.

13. 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.

14. 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.

15. 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.”

16. In the present case, I have quoted the only averments with respect to the fraud and irretrievable injustice made by the petitioner in the petition. In my opinion, the same cannot be sufficient to grant an injunction as per the principles laid down by the Supreme Court in the above referred judgments and accordingly the petitioner has not made out any case for grant of an injunction against the invocation of the bank guarantees mentioned in the prayer (b) as quoted above.

17. I accordingly find no merit in the present petition and the same is accordingly dismissed with no order as to costs. The interim order granted in favour of the petitioner shall stand vacated.

18. I may hasten to add that my above observations are only *prima facie* in nature and shall not be binding or influence the final adjudication of the disputes between the parties before the Arbitral Tribunal.

NAVIN CHAWLA, J

DECEMBER 22, 2017

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