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

+ **FAO(OS) (COMM) 184/2017**

Date of decision 17th October, 2017

BHARAT HEAVY ELECTRICALS LIMITED Appellant
Through **Mr. Atul Shanker Mathur and**
Mr. Prabal Mehrotra, Advocates.

versus

ELECTRICITY GENERATION INCORPORATION & ORS
..... Respondent
Through **Mr. Mayank Mishra and Mr.**
Ashwin Nayar, Advocates.
Mr. Arun Aggarwal, Advocate.

FAO(OS) (COMM) 185/2017

BHARAT HEAVY ELECTRICALS LIMITED Appellant
Through **Mr. Atul Shanker Mathur and**
Mr. Prabal Mehrotra, Advocates.

Versus

ELECTRICITY GENERATION INCORPORATION & ORS
..... Respondent
Through **Mr. Mayank Mishra and Mr.**
Ashwin Nayar, Advocates.
Mr. Arun Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL)

These two intra-Court appeals under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 10 of the Delhi High Court Act, 1966 by Bharat Heavy Electricals Limited impugn orders dated 5th September, 2017 and 19th September, 2017 passed by the Single Judge.

2. The first order dated 5th September, 2017 dismisses I.A. No. 10152/2017 filed by the appellant, who was the plaintiff, for amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908 ('The Code', for short). The second order dated 19th September, 2017 disposes of I.A. No.3182/2017 under Order XXXIX Rule 1 & 2 of the Code filed by the plaintiff, I.A. No.5090/2017 under Order VII Rule 10 & 11 filed by the second defendant, namely, AKBANK T.A.S., Istanbul, Turkey and I.A. No.7263/2017 under Order XXXIX Rule 4 read with Order VII Rule 10 & 11 filed by the third defendant i.e. Bank of Baroda. AKBANK T.A.S. is respondent No.2 and Bank of Baroda is respondent No.3 to the present appeal.

3. The appellant/plaintiff, which is a Public Sector Undertaking, had entered into a contract dated 21st April, 2015 with Electricity Generation Incorporation having its office at Ankara, Turkey for rehabilitation of eight units of Cable Hydro Electric Power Plant valued at Euro 63,859,828.24 equivalent to approximately INR 472,56,27,289.76. Electricity Generation Incorporation, the first respondent before us is a State owned company under the laws of Turkey.

4. As required and in terms of Article 11 of the contract, AKBank T.A.S. had furnished performance bank guarantee for Euro 3,831,589.69 dated 21st April, 2015 to the first respondent at the behest and instance of the plaintiff/appellant.

5. In turn, and to satisfy the conditions imposed by AKBank T.A.S. the third respondent-Bank of Baroda had a day earlier furnished counter bank guarantee for Euro 3,831,589.69 dated 20th April, 2015 in favour of the second respondent - AKBank T.A.S. This counter guarantee was issued at the behest of the plaintiff/appellant. We have quoted the above figures to indicate and show that the bank guarantee by the third respondent-Bank of Baroda is for an identical amount for which the second respondent- second respondent- AKBank T.A.S. had given bank guarantee to the first respondent i.e. a Turkish Government undertaking which had entered into the contract with the plaintiff/appellant.

6. Subsequently, disputes and differences arose between the appellant/plaintiff and the first respondent as the latter had terminated the contract for renovation and modernization of the Hydro Electric Power Plant citing defaults, which are disputed by the appellant/plaintiff.

7. The first respondent had invoked the performance bank guarantee issued by AKBank T.A.S. for EURO 3,831,589.69 and payment has been made. The first respondent did not enter appearance before the Single Judge or before us.

8. The appellant/plaintiff had filed CS (COMM) No.190/2017 primarily for restraining encashment of the bank guarantee given by

the second respondent-AKBank T.A.S. to the first respondent and the counter bank guarantee given by the third respondent-Bank of Baroda to the second respondent. In the said suit, injunction order dated 10th March, 2017 restraining encashment of bank guarantees was passed on the interim application. In the plaint, the appellant/plaintiff had alleged that the termination letter dated 7th March, 2017 issued by the first respondent was in complete contravention to Article 20 of Law 4735 applicable to the contract. It was also alleged that the appellant/plaintiff had not received the two notices dated 13th December, 2016 and 10th February, 2017 from the respondent No.1. Accordingly, invocation of performance bank guarantee was invalid and hence, void. Another allegation made was that no physical milestone has been missed by the appellant/plaintiff and therefore, invocation of the performance bank guarantee and in turn invocation of the counter bank guarantee, given by the third respondent-Bank of Baroda, to the second respondent- AKBank T.A.S. was bad in law and should be injuncted.

9. On the question of territorial jurisdiction, the relevant paragraphs of the plaint read as under:-

“22. That it is pertinent to note the entire gamut of facts in the present case. It is clear from the above that due to the jurisdiction of the Bank Guarantee being conferred upon the Commercial Court of London, it is impossible for the Plaintiff to approach the said jurisdiction at such short notice. That the delay in the contract on account of Defendant No 1 and in view of the above, the invocation of the Performance Bank Guarantee by Defendant No. 1 is completely fraudulent and vitiates the main contract as well.

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25. It is clear from the record that the acts of Defendant No. 1 by invoking the Performance Bank Guarantee communicated to the Plaintiff through the email from Defendant No. 3 dated 9th March 2017 on the basis of the information received from Defendant No. 2 smack clearly of fraud and mala fides with the clear motive to unjustly benefit from the encashment of the Performance Bank Guarantee when the next milestone was to be achieved by the plaintiff by October 2017. Further, the conduct of Defendant No. 1 in invoking the said Performance Bank Guarantee is clearly an act of deliberate deception in order to secure an amount which was not due to them since Defendant No. 1 have themselves not performed their obligations under the contract and are invoking the Performance Bank Guarantee without due chance given to the Plaintiff. Further, the invocation of the Performance Bank Guarantee on the basis of illegal termination of contract is egregious in nature since the Plaintiff is left without any remedy or recourse to law since Defendant No. 1 and/or Defendant No. 2 are fully aware that the Counter Guarantee issued in favour of Defendant No. 2 through Defendant No. 3 on behalf of the Plaintiff, for the issuance of the Performance Bank Guarantee in favour of Defendant No. 1, is governed by the English laws and exclusive jurisdiction qua the said Bank Guarantee has been conferred to the Hon'ble Commercial Court at London.

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28. That there are special equities in favour of the Plaintiff as there is no default on its part and irretrievable injustice would be caused to the Plaintiff if the Performance Bank Guarantee is encashed without the Plaintiff having an opportunity to take any legal recourse. Further, it is pertinent to note that the Plaintiff is a public sector undertaking which in the present case subjects the public funds to the risk of being misused. The situation becomes further grave due to the fact that in the fraudulent invocation of the Performance Bank Guarantee by Defendant No. 1 the payment of the full value of the said Guarantee has been asked to be deposited in

Defendant No. 1's account in Frankfurt, Germany. It therefore becomes an obligation of the Hon'ble Courts to prevent public funds from being put at risk and being misused when there is clear malafide on Defendant No 1's behalf in the present facts and circumstances. That there is no question of any loss to Defendant No. 1 in the present fact situation as it is only the Plaintiff that has invested a large sum of public funds in the execution of the Project and is now being burdened with the threat of encashment of about Rs. 28 crores. It is therefore clear from the above facts that special equities are wholly in favour of the Plaintiff herein who has performed its obligations under the Contract. Further, it is quite clear that the Plaintiff has incurred huge costs in execution of the contract. It is evident that through this fraudulent invocation of the Performance Bank Guarantee, Defendant No. 1 is deliberately burdening the Plaintiff with more losses than already being faced by the Plaintiff due to the Fault and conduct of Defendant No. 1. The encashment of the said Performance Bank Guarantee would amount to a double burden upon the Plaintiff in the present circumstances. Hence, the present suit is a fit case for the Hon'ble Court to prevent the encashment of the Performance Bank Guarantee and consequently declare the invocation of the same as fraudulent and therefore void.

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30 That the Plaintiff has approached this Hon'ble Court since the bank guarantee has been invoked on the basis of false and illegal termination of contract and it would be difficult for the Plaintiff to approach the Courts at London at such short notice.

31. That although the exclusive jurisdiction for the Performance Bank Guarantee has been conferred on the Hon'ble Commercial Courts at London and the said Bank Guarantee is governed by and has to be construed in accordance with the English laws, it is impossible for the Plaintiff to seek any relief qua the Bank Guarantees in London at such short notice.

32. That aggrieved by the alleged aforesaid invocation by Defendant No. 1 communicated to the Plaintiff through the email dated 9th March 2017, the closest connection for jurisdiction to the Performance Bank Guarantee lies under the jurisdiction of this Hon'ble Court. That the Plaintiff having no other jurisdiction to approach at such short notice has approached this Hon'ble Court through the present Suit. Hence, the present suit.

33. That this Hon'ble Court has pecuniary and territorial jurisdiction to entertain the present Suit as the Performance Bank Guarantee has been issued by Defendant No. 3 on behalf of the Plaintiff in favour of Defendant No. 2 within the territorial jurisdiction of this Hon'ble Court. Also, the alleged invocation of the Performance Bank Guarantee by Defendant No. 1 through Defendant No. 2, communicated to the Plaintiff through Defendant No. 3, through the email dated 9th March 2017 received by the Plaintiff from Defendant No. 3 has also been done within the territorial jurisdiction of this Hon'ble Court. Additionally, the contract dated 21st April 2015 was executed on behalf of the Plaintiff through its office at New Delhi. Further, the Plaintiff's office at New Delhi was the chief co-ordinator of the Project and the communications and the contract dated 21st April 2015 were also being managed by the Office of the Plaintiff at New Delhi. Also, all the negotiations and several meetings pertaining to the contract and the project have taken place between the parties through the Office of the Plaintiff in New Delhi and most of the correspondence pertaining to the present contract have been exchanged from the said office at New Delhi."

10. During the pendency of the said suit, and after the respondent banks, namely, AKBank T.A.S. and Bank of Baroda had entered appearance and objected to grant of ex-parte injunction, the appellant/plaintiff had moved an application for amendment of the plaint. The application is rather vague and states that the appellant/plaintiff wanted to amend averments made in paragraphs 25

and 31 of the plaint that the bank guarantee given by the third respondent-Bank of Baroda in favour of the second respondent-AKBank T.A.S. is governed by the English law. In paragraph 31 of the plaint, the appellant/plaintiff, while accepting the position that the performance bank guarantee was governed by English law and had conferred exclusive jurisdiction to the Commercial Court at London, it was pleaded that it was impossible for them to seek relief in respect of the bank guarantees in London at a short notice. The prayer made in the application was that the appellant/plaintiff should be allowed to plead and state that the Delhi High Court being the court of natural jurisdiction was forum conveniens to the parties. It was submitted that the statements or admissions were on point of law and were not binding and hence amendments should be allowed.

11. As noticed above, this application I.A. No.1152/2017 was dismissed by the Single Judge vide order dated 5th September, 2017 for several reasons as set out in the said order. One of the grounds given was that the admissions made by the appellant/plaintiff were significant and were not relating to question of law as it did not relate to interpretation of document, but was on statement of facts. However, the second impugned order dated 19th September, 2017, would show that the learned single Judge has dwelt and dealt with a number of aspects including the question of exclusive jurisdiction conferred on the Commercial Courts at London under the bank guarantees and the effect thereof.

12. Learned counsel for the appellant/plaintiff referred to the judgment of the Supreme Court in *Modi Entertainment Network and*

Anr. Vs. W.S.G. Cricket PTE. Ltd. (2003) 4 SCC 341 and referring to paragraph 26 of the judgment submits that the courts would normally give effect to the intention of the parties as expressed in the agreement, except when there are strong reasons to justify disregarding the contractual obligations of the parties. It is accordingly submitted that as the two banks, namely, AKBank T.A.S. and Bank of Baroda are already present before the Delhi High Court, and therefore this Court would be the forum conveniens and court of natural jurisdiction.

13. We have considered the said contention but do not find any merit and would agree with the findings recorded by the single Judge in the order dated 19th September, 2017. The accepted and admitted position is that that counter bank guarantee given by the third respondent-Bank of Baroda in favour of the second respondent-AKBank T.A.S. with regard to territorial jurisdiction had stipulated as under:-

“THIS COUNTER GUARANTEE IS GOVERNED BY ENGLISH LAW PLACE OF JURISDICTION IS COMMERCIAL COURT IN LONDON.”

14. The learned single Judge referring to the decision of the Supreme Court in **Swastik Gases Pvt. Ltd. vs. Indian Oil Corporation Ltd.**, 2013 (9) SCC 32 has held that intention of the parties when clear and unambiguous with reference to jurisdiction of the courts have to be accepted. Interpreting the said clause, the learned single Judge in our opinion has rightly held, that the aforesaid clause in the counter bank guarantee given by the third respondent-Bank of Baroda in favour of the second respondent-AKBank T.A.S. confers jurisdiction

to the Commercial Courts at London and, therefore, excludes jurisdiction of other courts. Reference in this regard was made to the judgment in *A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem*, (1989) 2 SCC 163. Single Judge has also referred to the decision in *Owners of Cargo lately Laden on Board the Ship or Vessel Eleftheria vs. The Eleftheria (Owners)*, 1969 (2) Weekly Law Reports 1073, which was relied upon by the Supreme Court in the case of *Modi Entertainment Network* (supra). In fact, in paragraph 11 of *Modi Entertainment Network* (supra), the Supreme Court had referred to the well settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which the Code applies, but cautioned that this principle would not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. It was held that in such cases, the English Courts do permit invoking of their jurisdiction. Thus, it was held that the parties to contract may agree to have their disputes resolved by a foreign court termed as a 'neutral court' or 'court of choice' creating exclusive or non-exclusive jurisdiction.

15. We also find that as per the principal contract between the appellant/plaintiff and the first respondent, it was agreed:-

“Article 37 – Settlement of disputes

37.1. Ankara courts are responsible for the settlement of disputes arising from implementation of this contract.”

16. The performance bank guarantee was given pursuant to Article 11 of the principal agreement. The performance bank guarantee dated 21st April, 2015 was given by the second respondent-AKBank T.A.S. in Turkey and not in or from India.

17. The impugned order has referred to several judgments of the Supreme Court including *South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd.*, (1996) 3 SCC 443 and a Division Bench judgment of this Court in *Hellenic Electricity Distribution Network Operator vs. Bharat Heavy Electricals Limited*, (2016) 157 DRJ 71, which highlights the principle that a bank guarantee is an independent contract between the issuing bank and the beneficiary and has no concern with the main contract between the beneficiary and the party at whose instance the bank guarantee has been issued, but in the context of jurisdiction reference could be made to the mother contract. In *Hellenic Electricity Distribution Network Operator* (supra) it was observed -

" The independence of a contract for guarantee simply means that the dispute concerning the bank guarantee has to be resolved in terms of the bank guarantee i.e the bank guarantee is the complete contract between the bank issuing the guarantee and the beneficiary. But since the bank guarantee flows out of the mother contract the jurisdictional issue has to be resolved in the context of the cause of action arising under the contract for the reason a guarantee is invocable, though in terms of the guarantee, but in relation to the main contract. To wit. Instant guarantee is a performance guarantee. The performance of the contract by the plaintiff has to be in terms of the contract. The bank guarantee simply states that a demand by the beneficiary, alleging non-performance, would require the bank to pay under the bank guarantee.

13. In the decision reported as (1996) 3 SCC 443 South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. noting that the contract between the parties was executed at Bombay and had to be performed at Bombay, it was held that merely because the bank guarantee was executed by a bank at Delhi in terms of the mother contract would not constitute a cause of action at Delhi to lay a suit to injunct the bank from paying under the guarantee and to restrain the beneficiary from

enforcing the right under the guarantee. Concerning jurisdiction under the Consumer Protection Act, in the decision reported as (1999) 8 SCC 357 Union Bank of India v. Seppo Rally OY the Supreme Court held that the consumer fora at the place where the office of the party at whose instance the bank guarantee was furnished would have no jurisdiction to entertain a complaint concerning the bank guarantee furnished by the branch of the bank from the place where the office of the party concerned was situated."

18. The bank guarantees nevertheless are a separate and independent contract and when the said bank guarantees are invoked, normally courts do not injunct or restrain the said invocation, except in cases of three exceptions, namely, fraud which vitiates the very foundation of the bank guarantee, special equities and irretrievable injury. Once the documents are in order, the bank giving the guarantee must honour and make payment.

19. In spite of the fact that the appellant/plaintiff had enjoyed the ex-parte interim stay order passed on 10th March, 2017, the impugned order, while upholding the objection raised by the second and third respondent on the question of territorial jurisdiction, extends the said interim order for a further period of 45 days to enable the appellant/plaintiff to approach the Court of competent jurisdiction. We are requested that this time may be extended by a further period of 15 days. We are not inclined to do so for the appellant has enjoyed the stay order from 10th March, 2017 and the impugned order has liberally extended the injunction order up to 14th November, 2017. These are matter in which the appellant/plaintiff must proceed with alacrity and swiftness, and any further indulgence and liberal approach may not be warranted, for the matter relates to encashment of bank guarantee.

20. In view of the aforesaid position, we do not find any merit in the present appeals and the same are dismissed without any order as to costs.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

OCTOBER 17, 2017
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