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

% *Date of Judgment: 1st January, 2018*

\+ **FAO(OS)(COMM) /2018**

SINTEX OIL AND GAS LIMITED ..... Appellant

Through Mr. Harish Malhotra, Senior Advocate with Ms. Shivani Kher and Mr. Ashwani Aman, Advocates

versus

UNION OF INDIA & ORS. ..... Respondents

Through Mr. Jasmeet Singh, CGSC

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

This matter has been listed at the residence upon mentioning and is being taken up on account of urgency expressed.

Registry is directed to register the FAO and the applications.

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1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The challenge in this appeal is to an order dated 22.12.1017 passed by the learned Single Judge of this Court by which a petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking stay of

invocation of two bank guarantees has been dismissed and the interim order granted on 13.09.2017 was vacated.

4. The brief facts of this case as noticed by the learned Single Judge are that the appellant was awarded "S" Type Block in Cambay Basin to undertake the exploration activities under the 'Production Sharing Contract between the Government of India and Esveegee Steel (Gujarati) Private Limited'. 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 appellant 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 appellant contends that on grant of PEL, the appellant 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 appellant 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 appellant 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 appellant 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 appellant may damage their crops resulting in loss of livelihood.

5. Mr. Harish Malhotra, learned Senior Counsel appearing on behalf of the appellant submits that the learned Single Judge has failed to take into account that it was the responsibility of the respondent no.1 to provide to the appellant access to the area and ensure proper ingress and egress. Mr. Malhotra, learned Senior Counsel has drawn the attention of the Court to Article 9.1 of the Agreement. It is contended that the appellants were unable to carry out their work on account of hurdles being faced by them from the local villagers. It is contended that the learned Single Judge has failed to notice that various injunction orders were passed which prevented the appellant from carrying out any activities or execution of work in the village. Additionally, communications were addressed to the appellants by the Sarpanch of various villagers which prevented the appellants from carrying out their activities. It is also submitted that the learned Single Judge has failed to appreciate that on account of the orders of injunction dated 24.12.2014, 18.03.2015, 18.04.2015 and 07.07.2017 and the various communications received, it was humanly impossible for the appellants to carry out the exploratory activities. Mr. Malhotra also contends that any steps taken by the appellant would have led to civil disturbances. The learned Senior Counsel submits that in this backdrop, the invocation of the bank guarantee would be covered in the wider definition of fraud and the respondents cannot be allowed to

enrich itself, especially when the appellants have invested more than Rs.17.0 Crores in the project and, in return, has not received a single penny as the appellants were entitled to share in the royalty after the petrol is explored. The learned Senior Counsel submits that, in any case, no prejudice is likely to be caused to the respondents as both the bank guarantees are valid upto 08.04.2018 and even otherwise, the appellants are willing to make a statement that they would keep the bank guarantees alive till the matter is adjudicated by the panel of arbitrators. Mr. Malhotra also submits that the appellants have invoked the arbitration clause and appointed their arbitrators. He further submits that he has received information that the respondents have also appointed their arbitrators, but no formal communication has been received.

6. Mr. Jasmeet Singh, learned CGSC has also appeared in the matter. He submits that there is no infirmity in the impugned order passed by the learned Single Judge. He submits that a bank guarantee is an independent contract between the beneficiary and the appellant and having regard to the nature of bank guarantee which is an unconditional bank guarantee, the Bank has no concern with the *inter se* disputes between the parties and the bank guarantee is liable to be encashed. He further submits that the respondents have already suffered an irreparable loss on account of the fact that the appellant has failed to adhere to the time-line and no activities were carried out uptil 14.10.2014, the initial exploration period and even upto 14.04.2015, which is the extended period. Mr. Jasmeet Singh further submits that the injunction orders, as rightly noticed by the learned

Single Judge, only relate to 0.08% of the total area allotted to the appellant and which is only a small area involved in the litigation. He further submits that communications, if any, from the Gram Panchayat were not binding on the appellants, but the appellants for the reasons best known to them, did not complete the minimum work programme under the production sharing contract. It is also contended by the counsel for UOI that the petition under Section 9 of the Arbitration and Conciliation Act and the grounds of appeal have not alleged any fraud much less a fraud of egregious nature. The counsel submits that it is no longer *res integra* that Courts should be slow in granting stay of bank guarantees. It is also contended that the learned Single Judge has correctly applied the law to the facts of the present case and vacated the injunction granted.

7. We have heard the learned counsel for the parties and considered their rival submissions.

8. The first question which arises for consideration is as to whether the appellant had tendered an unconditional bank guarantee or not. The subject matter of Section 9 petition relates to two bank guarantees. The first bank guarantee is for a sum of Rs.8,30,00,000/-, being bank guarantee no.PBGI00701700138 dated 23.03.2017 and the second bank guarantee is for a sum of Rs.4,33,62,231/-, being bank guarantee no.PBGI00701600310 dated 07.06.2016(amended on 23.03.2017). The terms of the bank guarantees, as stated, are identical. The relevant paragraphs of the bank guarantee in the sum of Rs.8,30,00,000/-, read as under:

> "2. We RBL Bank Limited, a Company incorporated under the Indian Companies Act, 1913, and governed by the Banking

Regulation Act, 1949 and having its registered office at 1st Lane, Shahpuri, Kolhapur-416001, Maharashtra, and its Corporate office at One India Bulls Center, Tower 2, 6th Floor, 841, Senapati Bapat Marg, Lower Parel (W), Mumbai 400013, INDIA and having one of its Branch office at RBL Bank Limited, First Floor, VIVA Complex, Opp. Parimal Garden, Nr.JMC House, Ellisbridge, Ahmedabad-380006 (hereinafter referred to as "the Bank", which expression shall unless repugnant to the context or meaning thereof includes all its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay immediately on the first demand in writing and any all money(s) to the extent of Rs.8,30,00,000 (Rupees Eight Crore, Thirty Lakhs only) without any demur, reservation, contest or protest and / or without any reference to the Company. Any such demand made by Government on the bank by serving a written notice shall be conclusive and binding, without any proof, on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the Bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any court, tribunal, arbitrator, sole expert, conciliator or any other authority and / or any other matter or thing whatsoever, as liability under these presents being absolute and unequivocal. We agree that the Guarantee herein contained shall be irrevocable and shall continue to be enforceable until it is discharged by Government in writing or till Expiry date 8 April, 2018 and Claim period 8 June 2018, whichever is earlier. This Guarantee shall not be determined discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractors and shall remain valid, binding and operative against the Bank.

3.The Bank also agree that Government at its opinion shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, without preceding against the Company (Sintex Oil and Gas Ltd) and notwithstanding any security or other guarantee that Government may have in relation to the Company (Sintex

Oil and Gas Ltd.) liabilities.

4.The Bank further agree that Government shall have fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Contract or to extend time of performance by the said Company (Sintex Oil and Gas Ltd.) from time to time to postpone for any time or from time to time exercise of any of the powers vested in Government against the said Company (Sintex Oil and Gas Ltd.) and to forebear to enforce any of the terms and conditions relating to the said Contract and we shall not be relieved from our liability under these presents by reason of any such variation or extension being granted to the said Company (Sintex Oil and Gas Ltd.) or for any forbearance, act or omission on the part of Government or any indulgence by Government to the said Company (Sintex Oil and Gas Ltd.) or any such matter or thing whatsoever which under the law relating to sureties would but for this provision have effect of so relieving us."

9. Reading of the aforesaid bank guarantee would show that the same is an unconditional bank guarantee and upon demand made by the Government on the bank by serving a written notice, the same is conclusive and binding. It is not for the bank to wait for any proof that any amount is payable. The bank guarantee is to be encashed notwithstanding any disputes pending in another Court, Tribunal, Arbitrator, Conciliator, or any authority.

10. The general principle which has been laid down have been summarized in the case of ***U.P. State Sugar Corporation** v. **Sumac International Limited***, reported in (1997) 1 SCC 568, wherein it has been observed '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'.

11. The learned Single Judge has referred to three judgments of the Supreme Court to revisit the law as laid down by the Apex Court with regard to grant of injunctions against invocation of bank guarantees. The law is well-settled that the Court would not grant any injunction against invocation of an unconditional bank guarantee, except where fraud of egregious nature is alleged. The learned Single Judge has referred to the judgments in the case of ***Dwarikesh Sugar Industries Ltd.** v. **Prem Heavy Engineering Works(P) Ltd.***, reported in (1997) 6 SCC 450; ***Vinitec Electronics Private Ltd.** v. **HCL Infosystems Ltd.***, reported in (2008) 1 SCC 544; and ***Gujarat Maritime Board** v. **Larsen and Toubro Infrastructure Development Projects Limited and Anr.***, reported in (2016) 10 SCC 46.

12. Mr. Malhotra, learned Senior Counsel has labored hard to canvass that the appellants were prevented from carrying the work and, thus the case of the appellant would be covered by the 'force majeure' clause being article 31 of the contract as the ingress to the land was to be provided by the respondent as per the agreement. We, however, are unable to accept his submission for the reasons that the power of the Court to entertain such a submission has been frowned upon by the

Apex Court. In the case of ***Gujarat Maritime Board***(supra), it was held as under:

> "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.
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> 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.
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> 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. We may also note that in the grounds of appeal, no plea has been raised with regard to fraud, much less a plea of fraud of an egregious nature, which would vitiate the entire transaction, although in the petition filed under Section 9 a faint plea has been raised, the relevant paras read as under:

"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.
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> 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."

14. In the case of ***Vinitec Electronics Private Ltd.** v. **HCL Infosystems Ltd**.*, reported in (2008) 1 SCC 544, the Supreme Court observed that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. The Apex Court also observed that the allegation of fraud must not be vague and indefinite.

15. Although Mr. Malhotra, the learned Senior Counsel has tried to explain that the injunction might have been for a small parcel of land, but the appellants were not allowed to carry out their activity and letters were sent by the Gram Panchayat and thus, the appellants were helpless. We are unable to accept the submission made by Mr. Malhotra, learned Senior Counsel in view of the settled law. It is not for the Court, at this stage, to adjudicate upon the disputes and differences between the parties. We may note that in the petition under Section 9 only general allegations of fraud have been made,

appellant has failed to elaborate that the nature of fraud of an egregious nature was committed. In the grounds of appeal, no allegation has been made that a fraud was committed.

16. In view of the settled position of law, we are unable to entertain this appeal and we find that the same is without any merit.

17. The appeal is accordingly dismissed.

18. We make it clear that we have not expressed any opinion on the merits of the disputes between the parties and any observations made would not come in the way of the appellant before the arbitrator.

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19. The application stands dismissed in view of the orders passed in the appeal.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

JANUARY 01, 2018
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