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

\+ **<u>O.M.P.(I) (COMM.) 15/2018 & IA No. 408/2018</u>**

AFCONS INFRASTRUCTURE LTD. ..... Petitioner

Through: Mr Darpan Wadhwa, Sr. Advocate with Mr Pallav Pandey, Mr Sharad Sharma and Mr Tanmay nandi, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD. ..... Respondent

Through: Mr Shiv Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **05.04.2018**

<u>VIBHU BAKHRU, J</u>

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia,* praying as under:-

> "A. Restrain the Respondent, its principal officers, servants, agents, and any other and all others acting for and on their behalf from acting on its letters dated 29.12.2017 and 9.1.2018.
>
> B. Restrain the Respondent, its principal officers, servants, agents, and any others acting for and on their behalf from encashing the Bank Guarantee no. 003GM07160900013 dated 30.3.16.

C. Restrain the Respondent, its principal officers, servants, agents, and any other and all others acting for and on their behalf from acting on its letter dated 9.1.2018

D. Direct the Respondents, its principal officers, servants, agents, and any others acting for and on their behalf to maintain status quo and refrain taking any steps pertaining to the Bank Guarantee no. 003GM07160900013 dated 30.3.16, and Bank Guarantee no. 003GM07151980001 dated 17.07.2015;"

2. The petitioner had furnished the aforementioned Bank Guarantees (Bank Guarantee No.003GM07151980001 dated 17.07.2015 and 003GM07160900013 dated 30.03.2016) in the sum of ₹20 crores each as security for the two *ad hoc* payments that were disbursed to the petitioner against certain claims, which were at the material time under consideration of the Delhi Metro Rail Corporation Limited (the respondent – 'DMRC'). The petitioner had raised claim on account of additional payments due on account of variation in time schedule in providing access to various sites, and variation in items. While the said claims were pending consideration, DMRC disbursed a sum of ₹20 crores each against the aforementioned bank guarantees. The Bank Guarantee (Bank Guarantee No. No.003GM07151980001 dated 17.07.2015) was furnished against claims made in respect of (i) change in time schedule; and (ii) Change in alignment. Subsequently, the said claims were not accepted by DMRC, and the petitioner was called upon to refund the sum of ₹20 crores disbursed to the petitioner

against the said Bank Guarantee dated 17.07.2015. It is stated that the petitioner deposited a sum of ₹20 crores with DMRC on 05.01.2018 and DMRC had not encashed the said Bank Guarantee. It is also stated on behalf of DMRC that the said Bank Guarantee has since expired. It is claimed on behalf of DMRC that a further sum of ₹7,93,19,452.05/- is due as interest on the sum of ₹20 crores as advanced. However, this Court is not called upon to address the said issue, as the scope of the present petition is limited to the encashment of the bank guarantees in question. The learned counsel appearing for DMRC states that the said bank guarantee (BG No.003GM07151980001) cannot be invoked as the same has expired. Since, the validity of the Bank Guarantee. No.003GM07151980001 has already expired, no orders are required to be passed in regard to the said Bank Guarantee.

3. The only controversy that remains to be addressed is with regard to the Bank Guarantee No. 003GM07160900013 dated 30.03.2016.

4. Briefly stated, the said controversy arises in the following context:

4.1 The petitioner was awarded a tender for construction for part of the Metro Line in relation to an elevated viaduct, elevated ramp and six elevated stations, in response to a bid submitted by it. The parties, thereafter, entered in to a contract dated 28.06.2012 (hereafter 'the Contract'). In terms of the Contract, the work was to be completed within the time period of 27 months. The petitioner claims that the project was delayed on account of delay on the part of DMRC to provide access to various land sites. It is further stated that there were certain additional changes, such as change in the width of depot line, change in alignment etc., on account of which the petitioner is entitled to additional payments. The petitioner raised additional claims in respect of the said changes.

4.2 While the aforesaid claims were pending consideration, the petitioner sent a letter dated 09.07.2015 to DMRC requesting for release of an *ad hoc* amount against the variations and change in time schedule and change in alignment. DMRC agreed to the said request and released a sum of ₹20 crores against the security of a Bank Guarantee (Bank Guarantee No. 003GM07151980001 dated 17.07.2015).

4.3 Thereafter, on 23.03.2016, the petitioner also requested DMRC for release of *ad hoc* payment against various bills submitted with regard to variation in change in time schedule and change in alignment and unforeseen physical conditions.

4.4 By a letter dated 30.03.2016, DMRC communicated its agreement to provide the *ad hoc* payment subject to the following conditions:-

> "1. The above ad hoc payment will be against the equivalent amount of Bank Guarantee (BG).
>
> 2. In case the claims are settled with value of less than Rs.43.56 crore (i.e. present case of 20 crore +

23.56 crore already paid), the balance amount will be refunded by you with the interest rate "SBI PLR + 2 %".

3. The above amount will be utilized only for this Project (CC-15)."

4.5 The petitioner acknowledged the above communication by a letter dated 30.03.2016. The contents of which are set out below:-

"Kind Attn : Mr. R. P. Kaushar

Name of Work : Contract No. CC-15 Part Design & Construction of elevated viaduct and construction of elevated stations including architectural finishing, water supply, sanitary installation and external development work etc.

Sub : Release of Ad-hoc payment against submitted variations on change in time Schedule, change in alignment, Unforeseen physical conditions etc.

Ref: Our letter No. DMRC/CC-15/3561/BKA/2510 dated 23rd Mar 2016.

DMRC letter No. DMRC/PM-7C/CC-15/56 dated 30th Mar2016.

Dear Sir,

We thank you for your approval to release Rs. 20 Crores ad-hoc payment on account of our subject claims. Necessary Bank Guarantees is being submitted to your good office separately.

Further we are pleased to reconfirm that :

1. In the event of part of this ad-hoc payment remaining unadjusted after due diligence, the unadjusted amount can be recovered from our due payments including levying contractual interest charges on the unadjusted amount.

2. The above amount will be utilised only for this project.

Kindly arrange to release the amount and oblige.

Thanking you and assuring you of our best services at all times."

4.6 In terms of the above, the petitioner furnished a Bank Guarantee (Bank Guarantee No. 003GM07160900013) dated 30.03.2016.

4.7 The claims made by the petitioner were partly accepted to the extent of ₹2,32,54,393/- and by a letter dated 29.12.2017, DMRC called upon the petitioner to refund the balance amount of ₹17,67,45,606.38/- (that is, ₹20,00,00,000/- – ₹2,32,54,393.62/-) along with interest.

5. The petitioner apprehends that the said amount would be recovered by invoking the Bank Guarantee and, therefore, has filed the present petition.

6. Mr Darpan Wadhwa, the learned Senior Counsel appearing on behalf of the petitioner contended that the invocation of the said Bank Guarantee was fraudulent and not in terms of the letter dated 30.03.2016. He submitted that the recovery could be made only after the claims were settled. He stated that the expression "settled" is also

used in the dispute resolution clause and unless the claims are finally decided, it would not be open for DMRC to seek recovery of any part of the amount disbursed against additional claims by invoking the bank guarantee.

7. Next, he submitted that the petitioner and DMRC had a long standing commercial relation and the petitioner's dues towards DMRC, if any, were fully secured. He earnestly contended that the petitioner was not a fly by night operator and, therefore, there was no reason for DMRC to insist on invocation of the Bank Guarantee.

8. This Court is unable to accept the aforesaid contentions. The Bank Guarantee in question (Bank Guarantee No. 003GM07160900013 dated 30.03.2016) is an unconditional Bank Guarantee. Paragraph 5 of the said Bank Guarantee reads as under:-

> "5. We, The YES Bank Limited, 11/48, Shopping Centre, Diplomatic Enclave, Malcha Market, Chanakyapuri, New Delhi – 110021 Do Hereby The Unconditionally, Irrevocably And Without Demur Guarantee And Undertake To Pay The Employer Immediately. On Demand Any All Monies Payable By Contractor To The Extent Of Rs. 20,00,00,000/- (Rupees Twenty Crores Only) As Aforesaid Without Any Demur; Reservation, Context, Recourse Or Protest And/Or Without Any Reference To Contractor, Any Such Demand Made By The Employer On The Bank Shall conclusive And Binding Notwithstanding Any Difference Between Employer And Contractor On Any Dispute Pending Before Any Court, Tribunal,

> Arbitrator, And Any Other Authority, We Agree That The Guarantee Herein Contained Shall Be Irrevocable And Shall Continue To Be Enforceable Till Employer Discharges This Guarantee."

9. The law relating to bank guarantees is now well settled. The invocation of an unconditional bank guarantee cannot be interdicted except in exceptional circumstances of an established fraud and special equities so as to prevent irretrievable justice. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502***, the Supreme Court had held as under:-

> "...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...
>
> ...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...
>
> ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

10. The aforesaid view was reiterated by the Supreme Court in ***Larsen & Toubro Limited v Maharashtra State Electricity Board and Others: (1995) 6 SCC 68.*** (Also see ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268***)

11. In the present case, although the petitioner had contended that the invocation of the Bank Guarantee in question is fraudulent, this Court is unable to accept the same. The contention that the Bank Guarantee in question could not be invoked unless the claims were finally settled under the disputes resolution clause is, plainly, a contentious issue. The Bank Guarantee in question, being an unconditional bank guarantee, cannot be interdicted on account of any such disputes between the parties. It is settled law that a bank guarantee is an independent agreement and must be performed on its own terms (See ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd & Anr.: (1996) 5 SCC 450***).

12. The contention, that the petitioner is not a fly by night operator and the dues, if any, owed to DMRC are fully secured, is also wholly irrelevant while considering the issue of interdicting encashment of a Bank Guarantee.

13. In view of the above, the present petition is unmerited and is, accordingly, dismissed. The pending application also stands disposed of.

VIBHU BAKHRU, J

APRIL 05, 2018
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