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

% *Date of Judgment: 14th March, 2018*

+ **FAO(OS) (COMM) 44/2018, CM APPL 9633/2018 (stay)**

VAYAM TECHNOLOGIES LTD Appellant

Through Mr. Anish Agarwal, Mr. Shantanu
Sagar & Mr. Jeewesh Prakash, Advs.

versus

HEWLETT PACKARD FINACIAL SERVICES (INDIA) PVT LTD

..... Respondent

Through Mr. Arvind Nigam, Sr. Adv. with Mr.
Vikas Mehta, Mr. Mikhil Sharda &
Mr. B. Mithun Shashank, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. This is an appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act against the order dated 08.03.2018 passed in O.M.P. (I) (COMM.) 300/2017 filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996. The appellant herein had sought a direction prohibiting the respondent from invoking the bank guarantees.
2. The necessary facts to be considered for disposal of this appeal and as noticed by the learned Single Judge are as under:-
3. The case of the appellant is that on 20.07.2012 a Master Rental and Financing Agreement (hereinafter referred to as the 'Master

Agreement') was entered into between the appellant and respondent. The Agreement provided the charging structure for the parties to enter into various lease schedules whereby rent was payable monthly in advance for equipment taken on lease by the appellant from the respondent. There was an arbitration clause in the said Master Agreement. Pursuant to the Master Agreement, between 2012-2013, 35 loan financing schedules were entered into between the parties for taking on lease certain equipments. Pursuant to the lease, payments were required to be made by the appellant in agreed installments to repay the finance provided by the respondent. As a sequitur to the said Master Agreement and Loan Financing Schedules, the appellant gave various bank guarantees in favour of the respondent from different banks, namely, Axis Bank Ltd., Dena Bank, IDBI Bank Ltd. and Canara Bank. The bank guarantees have been extended from time to time.

4. It is the case of the appellant that it had continued to make various payments to the respondent pursuant to the Master Agreement and the Schedules. However, due to financial difficulties and hardship, the appellant had not been able to repay the full amounts. Accordingly, on 22.07.2014, the parties entered into a Deed of Rescheduling to reschedule the financing provided by the respondent to the appellant. Another Deed of Rescheduling to reschedule the financing was entered into on 29.10.2015. On 28.06.2017, the respondent sent a termination notice to the appellant whereby it terminated the said agreements and pursuant to termination, claimed a sum of Rs. 75,31,56,758/- as outstanding dues. The bank guarantees were also

sought to be invoked, which led to filing of a petition under Section 9 of the Arbitration and Conciliation Act, 1996 by the appellant.

5. The learned Single Judge has dismissed the application under Section 9 of the Arbitration and Conciliation Act, 1996, primarily on the ground that the admitted liability of the appellant towards the respondent is Rs.85,87,63,675/-. Reliance was placed on the deed of rescheduling dated 29.10.2015 and e-mails dated 26.10.2015, 26.12.2016 and 29.12.2016 addressed by the appellant to the respondent. The learned Single Judge has also considered the fact that the amount due and payable by the appellant is much more than the amount of the unconditional and irrevocable bank guarantee invoked by the respondent on 09.08.2017.
6. In our view, the appellant has failed to establish or even plead a fraud of an egregious nature. The law relating to bank guarantee is well settled. It has been repeatedly held that the Court should be slow in granting stay pertaining to irrevocable and unconditional bank guarantee.
7. This Court in the case of **SINTEX OIL AND GAS LIMITED v. UNION OF INDIA & ORS**, FAO (OS) (COMM) – 3/2018 decided on 01.01.2018, has considered various decisions of the Supreme Court of India and held that in the absence of fraud of an egregious nature having been pleaded, stay of bank guarantee cannot be granted. This Court has held as under:

“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.

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.”
8. At this stage, learned counsel for the appellant submits that a sole Arbitrator has been appointed with the consent of the parties. He submits that the encashment of the bank guarantee should be without prejudice to the rights and contentions of the appellant as well as the

pleas which the appellant would be entitled to raise before the Arbitrator. He further submits that it should be clarified that any observations made by the learned Single Judge and this Court would not come in the way of the Arbitrator while deciding the claims between the parties.

9. Having regard to the stand taken by the appellant, the present appeal is dismissed as not pressed. However, we make it clear that any observations made by the learned Single Judge and this Court would not come in the way of the arbitrator while deciding the disputes between the parties. The parties would be free to raise all the legal objections and pleas available to them in accordance with law before the arbitrator.

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10. The application stands disposed of in view of the order passed in the appeal.
11. Copy of order be given Dasti under the signature of the Court Master.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MARCH 14, 2018

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