

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

+ **RFA No. 460/2018**

% **29th May, 2018**

NAVAL SCIENCE & TECHNOLOGICAL LABORATORY & ANR.

..... Appellants

Through: Ms. Madhuri Dhingra and
Mr. Ajay Digpaul, Advocates.

versus

M/S TSL DEFENCE TECHNOLOGIES PVT. LTD. & ANR.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No.22668/2018 (for exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

**C.M. Appl. Nos.22667/2018 (for condonation of delay in filing) &
22669/2018 (for condonation of delay in re-filing)**

2. For the reasons stated in the application, delays of 89 days in filing and 6 days in re-filing the appeal is condoned.
C.M.s stand disposed of.

RFA No. 460/2018 and C.M. Appl. No. 22666/2018 (for stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no. 2 in the

suit impugning the judgment of the Trial Court dated 23.9.2017 by which the trial court has decreed the suit filed by the respondent no. 1/plaintiff and thereby restrained the appellant no.1/defendant no. 2 from invoking the two bank guarantees dated 4.1.2005 and 9.3.2005 for amounts of Rs.2,24,000/- and Rs.22,40,000/- respectively.

4. At the outset, I would like to express an angst as to how this suit has not only proceeded for framing of issues, but evidence being led by both the parties, inasmuch as a very limited issue was called for decision in the present suit was as to whether the beneficiary of the bank guarantees, being the appellant no. 1 herein and the defendant no. 2 in the suit, had validly invoked the bank guarantees in terms of the requirements of the bank guarantees. For this purpose only the invocation letter along with the language of the bank guarantees had to be seen and nothing else, and which invocation letter and bank guarantees are admitted documents. The judgment therefore would have been passed in this suit at the stage of pleadings itself, but however, the suit which was filed on 30.4.2007 continued for ten years before passing of the impugned judgment dated 23.9.2017 decreeing the suit.

5. Another disturbing aspect to be noted is that for some unknown reason some litigants do not understand, and surprisingly they are not even so advised by the Advocates, that by encashing a bank guarantee rights on merits are not decided because allowing encashment of bank guarantees only has the effect of moneys remaining in the hands of the beneficiary or not remaining in the hands of the beneficiary, only till the disputes on merits are decided either in a suit or in arbitration proceedings. The claim of the appellant no.1/defendant no. 2, if it existed for a monetary relief against the respondent no. 1/plaintiff, then that aspect had to be urged and got decided by filing of a suit or in arbitration proceedings, so that the bank guarantee amount could be recovered if not by encashment of the bank guarantees but by a money decree passed, but I am indeed surprised to know that appellant no.1/defendant no. 2 has not initiated main recovery proceedings, either in the nature of filing of a suit or arbitration proceedings, to claim amounts from respondent no. 1/plaintiff on account of the appellant no.1/defendant no.2 suffering loss because of breach of contract by the respondent no. 1/plaintiff/successful tenderer for the project of design, development, fabrication and supply of 30 ± 1KW integrated Rim driven BLDC for

Propulsion Motor (2500 rpm) and Controller assembled with accessories.

6. With the aforesaid angst having been expressed, let us turn to the only relevant issue for determination and which is that whether the invocation letter for the two subject bank guarantees being the letter dated 13.4.2007 Ex.PW1/13, was or was not in accordance with the terms of the bank guarantees. This relevant letter Ex.PW1/13 and the relevant clauses of the bank guarantees dated 4.1.2005 and 9.3.2005 are reproduced as under:-

"Invocation Letter dated 13.4.2007 :-

To,

The Chief Manager,
Syndicate Bank,
Hauz Khas Branch,
2, Kaushalya Park, Hauz Khas Branch,
NEW DELHI-110 016

Sub:CANCELLATION OF BANK GUARANTEE/LODGING CLAIM.

Dear Sir,

Please refer to the under mentioned Bank Guarantees issued by your Bank on behalf of M/s TSL Defence Technologies Pvt. Ltd. New Delhi (having its branch office at Bangalore):

Sl. No.	Bank Guarantee No.	Amount	Valid upto
1	01/2005 dated 4.1.2005	Rs.2,24,000.00	31-5-2007
2	1/05 dated 9.3.2005	Rs.22,40,000.00	31-5-2007

2. NSTL. Visakhapatnam – Defence Research & Development Orgn. awarded contract No. NSTL-149/MD/305/04-05/EPG/DC/436 dated 14-2-2005 to M/s TSL Defence Technologies Pvt. Ltd. Bangalore. An administrative decision is taken not to deal with M/s. TSL Defence Technologies Pvt. Ltd. for any sort of Defence transaction. Creditability of firm has been a criteria to award/continue contractual obligations. But here is departure, as communicated, on the part of firm.

3. It is, therefore, requested to treat this communication as our claim and arrange payment of Rs.24,64,000-00 (Rupees twenty four lakhs sixty

four thousand only) in terms of the aforesaid Bank Guarantees and proceeds may please be remitted by way of demand draft in favour of Director, NSTL, Visakhapatnam drawn on SBI, Maharaipata Branch, Visakhapatnam. Your customer is being appraised of the fact separately.

4. An immediate action is requested.

Thanking you.

Yours faithfully,
for & on behalf of the President of India,
sd/-
(Director)”

Relevant Clause of bank guarantee dated 4.1.2005:-

“3. In consideration thereof, we hereby at the request of the contractor, expressly, irrevocably and unconditionally undertake and guarantee to pay on written demand, without demur and without reference to the contractor, an amount not exceeding Rs.2,24,000/- (Rupees Two lacs twenty four thousand only) against any loss of damage caused to or suffered or would be caused to you by reason of any breach by the said contractor of any of the terms and conditions contained in the said contract or by reason of the contractor’s failure to perform the said agreement. Your demand shall be conclusive evidence to us as regards the amount due and payable by the Bank under this guarantee. However, liability under this guarantee shall be restricted to an amount not exceeding Rs.2,24,000/- Payment by us to you will be made within thirty (30) days from receipt of your written request making reference to this guarantee and on demand.”

Relevant clauses of bank guarantee dated 9.3.2005:-

“3. In consideration thereof, we hereby at the request of the companies expressly, irrevocably and unconditionally undertake and guarantee to refund to you on demand and without demur and without reference to the contractor the said payment of Rs.22,40,000/- (Twenty Two lakhs Forty Thousand only) on receipt of your intimation that the contractor has not fulfilled the condition of the contract and is not in a position to supply the said stores as per the terms and conditions contained in the said contract.”

7. The law with respect to what should be the cause of action contained in an invocation letter, invoking and seeking encashment of the bank guarantees, is contained in the judgment of the Supreme Court reported as *Hindustan Construction Co. Ltd. v. State of Bihar and Others (1999) 8 SCC 436*, and as followed by a

judgment passed by this Court in *Puri International (P) Ltd. v. National Building Construction Co. Ltd*, 66 (1997) DLT 698. These judgments have been referred to and relied upon by the trial court in para 45 of the impugned judgment. As per these two judgments unless the invocation letter of the bank guarantees is in accordance with the requirements of the bank guarantees, moneys cannot be paid under the bank guarantees.

8. I have already reproduced above the invocation letter as well as the relevant terms of the bank guarantees. The relevant terms of the bank guarantees require that the invocation letter must state that moneys to be paid by the bank/defendant no. 1/respondent no. 2 is on account of damage caused or suffered or would be caused to the appellant no.1/defendant no.2 by reason of breach of the contractor/respondent no. 1/plaintiff or the failure of contractor/respondent no. 1/plaintiff to perform the agreement entered into between the parties. Unfortunately, the invocation letter is grossly deficient because the invocation letter seeks invocation of bank guarantees not for the reasons as stated as per the bank guarantees, but on the ground that the bank guarantees are invoked on account of the respondent no. 1/plaintiff being a concern with whom

the Government could not deal as the name of the respondent no. 1/plaintiff is put in the list of prohibited entities with which Government cannot do business.

9. Unfortunately, the concerned authority which invoked the bank guarantee has proceeded on an elementary lack of knowledge of the requirements of the law pertaining to invocation of the bank guarantees, and it is for this reason that appellant no. 1/defendant no.2 is unnecessarily suffering. Also, as stated above, the appellant no.1/defendant no.2 is suffering because no one has bothered to give a legal advice to appellant no. 1/defendant no.2 that appellant no. 1/defendant no.2 should have instituted substantive proceedings in the nature of a suit for recovery of money or arbitration proceedings to recover the amounts from the respondent no. 1/plaintiff on account of breach of contract, if any, by the respondent no. 1/plaintiff, and therefore as of today any claim of the appellant no. 1/defendant no.2 against the respondent no. 1/plaintiff/contractor would be grossly barred by limitation.

10. In view of the aforesaid discussion, I do not find any merit in the appeal and the same is hereby dismissed.

MAY 29, 2018/ AK.

VALMIKI J. MEHTA, J