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

\+ **O.M.P.(I) (COMM.) 200/2018 & IA No.5987-88/2018 & CAV 410/2018**

SIMPLEX PROJECTS LIMITED ..... Petitioner

Through: Mr S. D. Singh, Mr Rahul Kr. Singh and Ms Surabhi Shukla, Advocates.

versus

INDIAN OIL CORPORATION & ANR. ..... Respondents

Through: Mr Abhinav Vasisht, Sr. Advocate with Mr Amit Meharia, Ms Tannishtha Singh and Ms Priya Chauhan, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **02.05.2018**

VIBHU BAKHRU, J

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) stay the operation of the impugned letter No.BGR/P.1/BS-VI/ SPL/BG Encashment/22 dated 26.4.2018 whereby the respondent no.1 had invoked the Bank Guarantee

No.00291GPER010017 dated 12.04.2017 for a sum of Rs.6,97,63,744.63 valid upto 05.01.2020;

(b) issue the directions to the respondent no.1 herein not to insist for the encashment of the bank guarantees by staying the operation of the impugned letter No.BGR/P.1/BS-VI/SPL/BG Encashment/22 dated 26.4.2018;

(c) restrain the respondent no.2 from encashing the Bank Guarantee No.00291GPER010017 dated 12.04.2017 for a sum of Rs.6,97,63,744.63 valid upto 05.01.2020."

2. The learned counsel appearing for the petitioner contended that the aforesaid bank guarantee was furnished to secure the mobilization advance that was to be provided to the petitioner. He states that in terms of the contract the petitioner was entitled to avail the mobilisation advance to the extent of 10% of the entire contract value, which was to be disbursed in two tranches. While respondent no.1 (Indian Oil Corporation Limited) has disbursed the first tranche, it failed to disburse the second tranche. Thus, respondent no.1 has only provided a sum of ₹3,11,73,006/- as mobilization advance but has failed to provide the balance amount. He further states that the principal grievance of the petitioner is that even though respondent no.1 has not disbursed the full mobilization advance – against which the bank guarantee of a sum of ₹6,34,21,613.34/- was furnished – yet respondent no.1 is seeking to invoke the bank guarantee in question for the entire amount. He submits that respondent no.1 is a state instrumentality and this act of the respondent would entitle the petitioner to seek interdiction of the invocation of bank guarantee on the ground of special equities.

3. Next, he submits that the bank guarantee in question has not been invoked by the person in whose favour it was issued. He submits that the bank guarantee was issued in favour of the Indian Oil Corporation Limited (IOCL), New Delhi but has been invoked by officers at Branch Office of IOCL at Bongaigaon Refinery. He also referred to the decision of this Court in ***Hindustan Construction Co. Ltd. & Anr. v. M/s Satluj Jai Vidyut Nigam Ltd.: 2006 (1) ArbLR 16 (Del)*** in support of his contention and drew the attention to paragraph 35 of the said decision, whereby a Coordinate bench of this Court had observed as under:-

> "24. …….. The cumulative effect of the above analysis of the case is that the respondents have not invoked the bank guarantees in terms of the clause, the action of the respondent in insisting upon encashment of bank guarantees is bound to cause irretrievable injustice and injury to the applicants, who otherwise have a case of special equities in their favour."

4. Mr Vasisht, learned Senior Counsel appearing for IOCL countered the aforesaid submissions. He has handed over photocopy of the Special Conditions of Contract (SCC) which forms integral part of the contract entered into between the parties, and drew the attention of this Court to paragraph 7.2.7 of the SCC which entitles the petitioner to provide a Composite Bank Guarantee to cover mobilization advance as well as the security deposit. He submitted that the contention that the bank guarantee in question was furnished only against mobilization advance is incorrect.

5. I have heard the learned counsel for the parties.

6. The law relating to the bank guarantee is now well settled. The Supreme Court, in the case of ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others**: (1994) 1 SCC 502***, had expressly provided that the invocation of the bank guarantees can be interdicted only in exceptional circumstances where the parties are able to establish a case of egregious fraud, special equities and irretrievable injury. This decision was subsequently followed by the Supreme Court in ***Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others**: (1995) 6 SCC 68*, wherein the Supreme Court held as under:-

> "5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a Bank Guarantee/irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v. Bank of India and ors.* [1981 (2) SCC 766], *U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.* [1988 (1) SCC 174], *General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd. and anr.* [1991 (4) SCC 230] and the decision of the Court of Appeal in England in *Elian and Rabbath v. Matsas and Matsas* [1966 (2) Lloyd's Report 495] and a few American decisions, this Court in *Svenska Handelsbanken v. M/s. Indian Charge Chrome And Others* [1994 (1) SCC 502], laid down the law thus:-

> "...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."

7. In the present case, the bank guarantee furnished by the petitioner is a Composite Bank Guarantee – as is apparent from the recitals of the bank guarantee – wherein it is expressly stated that "*And Whereas* the c*orporation has agreed to accept a single undertaking from Bank to cover both the said advance and the Security Deposit*".

8. It is also relevant to state that in terms of Clause 2.1.1.0 of the General Conditions of Contract (GCC) – which forms an integral part of the contract between the parties) – the petitioner was obliged to provide 10% of the total contract value for due performance of its obligations.

Clause 2.1.1.0 reads as under:-

> "2.1.1.0 The CONTRACTOR shall furnish Security Deposit in the amount equivalent to 10% (ten percent) of the total contract value. Such Security Deposit is to be held by the OWNER as security for the due performance of the CONTRACTOR's obligation under the contract."

9. It is also relevant to refer to clause 7.2.7 of the SCC, which reads as under:-

> "**7.2.7 COMPOSITE BANK GUARANTEE**
>
> Bidder has option to submit the Composite Bank Guarantee to cover Mobilization Advance and Security Deposit as per format for Composite Bank Guarantee enclosed in Annexure-A-XI to SCC.
>
> The CONTRACTOR shall at the request of the OWNER suitably extend the validity of the Bank Guarantee (s) for such period or periods as may be required failing which, without prejudice to any other right or remedy available to the OWNER, the OWNER shall be entitled to en-cash the Bank Guarantee(s). No payments, under the contract will be released, if the validity of the BG expired within the next 30 days from the date of payment."

10. A conjoint reading of Clauses 2.1.1.0 and 7.2.7 and the recitals of the bank guarantee in question, clearly indicate that the bank guarantee in question was furnished not only to secure respondent no.1 for the

mobilization advance provided to the petitioner but also as the security for due performance of the petitioner's obligation. It was agreed between the parties that the amount of mobilization recovered from the running bills would be adjusted towards retention of security deposit. The security deposit would continue to be maintained for a period of three months beyond the defect liability period. This is clear from sub clause (a) and (d) of Clause 2.1.2.0 of the GCC, which reads as under:-

> "2.1.2.0 In case Mobilisation Advance is paid to the CONTRACTOR under the provisions of Clause 6.4.6.0 hereof, it shall be permissible for the CONTRACTOR to furnish a Composite Bank Guarantee to cover both Mobilisation Advance as well as Retention Monies forming part of the Security Deposit, which shall be subject to the following conditions:
>
> a) The Composite Bank Guarantee will be for a value equivalent to the advance or 10% (ten percent) of the Total Contract Value, whichever is greater, and shall be kept valid upto 3 (three) months beyond the expiry of the Defect Liability Period;
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> XXXX XXXX XXXX
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> (d) Initially, the composite Bank Guarantee will be entirely reckoned towards Mobilisation Advance and progressively, the portions of Composite Bank

> Guarantee, vacated by the recoveries effected towards Mobilisation Advance, shall be reckoned towards Security Deposit, such that after the Mobilisation advance stands fully recovered with interest accrued thereon, the entire composite Bank Guarantee shall be reckoned to cover the Security Deposit for the Work. The initial Security Deposit furnished by the Contractor under (b) above shall be refunded/returned after recovery of Mobilisation Advance is effected from the R.A. Bills upto an aggregate amount equivalent to the Initial Security Deposit."

11. In the present case, there are serious disputes as to whether the petitioner has performed its obligation under the contract. This Court is not called upon to examine and finally adjudicate the said disputes. However, since it is apparent that there are disputes between the parties regarding the performance of the contract, the invocation of the bank guarantee cannot be interdicted. This is particularly so as it is unconditional bank guarantee. The Supreme Court has repeatedly held that the invocation of bank guarantees cannot be interdicted pending adjudication of the contractual disputes between the parties (See: ***Hindustan Construction Co. Ltd. v State of Bihar & Ors.: (1999) 8 SCC 436***).

12. The reliance placed by the learned counsel for the petitioner on the decision of the Coordinate Bench of this Court in ***Hindustan Construction Co. Ltd. & Anr. v. M/s Satluj Jai Vidyut Nigam Ltd (supra)*** is misplaced. There is no material to indicate that the interdiction of the invocation of bank guarantee in question is not in terms thereof.

13. In view of the above, the present petition is dismissed. The pending applications are disposed of. The caveat stands discharged. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 02, 2018
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