IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.05.2018

\+ **O.M.P.(I) (COMM.) 337/2016 & IA Nos. 10273/2016 & 11067/2017**

JKM-NKC (JV) ..... Petitioner

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Tanmaya Mehta, Mr Nitesh Jain and Mr Abhinav Mukhi.

For the Respondent :Mr Sandeep Sethi, ASG with Mr S. K. Maniktala and Mr Nikhil Ramdev.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (a joint venture company) has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the respondent (National Highway Authority of India –hereafter 'NHAI') be restrained from taking any coercive action in respect of the Performance Bank Guarantees (hereafter 'PBGs') and Bank Guarantees issued to secure the Mobilisation Advance provided to the petitioner (ABGs). The PBGs were furnished by the petitioner to NHAI for securing due execution of works, which are described as "Balance work of

construction of 4-laning road from km 165.40 to km 190.587 of Jatinga Junction to Harangajo section of NH-54 in the State of Assam, contract package, EW -II (AS - 21) - (Bal)" (hereafter 'the Project').

2. The petitioner claims that the performance of the contract has become impossible due to several reasons including breach of contractual obligations committed by NHAI on account of inordinate delay in handing over the possession of the Site/Land in full width and land; defective design of the road; non-approval of variation orders and non-payment towards work executed. The petitioner further claims that the strata, through which the project road is traversing, suffers from inherent geographical infirmity and instability, which is rendering the road unsuitable for any construction activity. Therefore, the conception of the Project is inherently defective and, consequently, impossible to execute.

3. Briefly stated, the controversy in the present petition arises in the following context:

3.1 The petitioner is a joint venture company between M/s JKM Infra Projects Limited and M/s NKC Projects Limited. NHAI floated a tender in February, 2011 for the execution of the Project. The petitioner submitted its bid in response to the aforesaid invitation to tender and the same was accepted. A Letter of Acceptance (LoA) dated 11.08.2011 was issued to the petitioner for the contract price of ₹333,83,22,948/-. Pursuant to the LoA, the petitioner and NHAI entered into an agreement dated 30.09.2011 (hereafter 'the Contract').

On the same day, NHAI also issued a Letter of Commencement (LoC) to the petitioner notifying the commencement of work with effect from 29.10.2011 in accordance with the Contract. As per the LoC, Intercontinental Consultants and Technocrats Pvt. Ltd. was appointed as an Engineer (hereafter 'the Engineer') for the Project.

3.2 In terms of the Contract, the petitioner submitted bank guarantees (BGs) – 8 in number – for an aggregate sum of ₹75,11,22,663/-, the details of which are set out below:

S. No.	Particulars	Purpose	Value (Rs.)
1.	Bank Guarantee No. SBH – 2034711BG000013 dated 02.09.2011. Issued by State Bank of Hyderabad	Performance Security	20,02,99,377/-
2.	Bank Guarantee No. SBI 0960111BG0000685 P960111BGOOO0685 dated 03.09.2011. Issued by State Bank of India	Performance Security	13,35,32,918/-
3.	Bank Guarantee No. SBH – 2034711BG0000115 dated 02.09.2011. Issued by State Bank of Hyderabad	Additional Performance Security	3,00,44,906/-
4.	Bank Guarantee No. SBH – 2034711BG0000114 dated 03.09.2011. Issued by State Bank of Hyderabad	Additional Performance Security	2,00,29,938/-
5.	Bank Guarantee No.	Mobilization	09,18,03,881/-

	140GPGE140390001 dated 08.02.2014. Issued by Canara Bank	Advance	
6.	Bank Guarantee No. 140GPGE140390003 dated 08.02.2014. Issued by Canara Bank	Mobilization Advance	09,18,03,881/-
7.	Bank Guarantee No. 140GPGE140390004 dated 08.02.2014. Issued by Canara Bank	Mobilization Advance	09,18,03,881/-
8.	Bank Guarantee No. 140GPGE140390005 dated 08.02.2014. Issued by Canara Bank	Mobilization Advance	09,18,03,881/-
	TOTAL		75,11,22,663/-

3.3 The aforesaid bank guarantees were furnished for securing the mobilization advance and, also, for due performance of the Contract. As per the terms of the General Conditions of Contract (GCC), the Project was required to be completed within 30 months of the date of commencement, that is, by 28.04.2014. Further, NHAI was required to provide the Right of Way (ROW) in full width as per the DPR drawings and in full length for the project road as per Schedule-A of Section - VIII of the GCC.

3.4 On 21.09.2013, the petitioner sent a notice informing NHAI about the defect in designing of the road work. Thereafter, several other communications were sent by the petitioner to NHAI requesting for extension of time for completion of Project. Subsequently, the aforesaid difficulties cited by the petitioner were referred to Central

Road Research Institute (CRRI) by NHAI for review and re-design of 12 stretches totaling to a length of 4.610 Km. CRRI, in its report, stated that the Project area is geographically very sensitive being crossed by series of faults and suggested remedial measures for improvement.

3.5 Thereafter, the petitioner sent letters dated 31.10.2014 and 05.11.2014 to NHAI, pointing out the hitches in completion of the Project including not handing over possession of encumbrance free site; Defective Design; Overlapping of Right of Way (ROW) of the Road and Railway; inadequate ROW; and Non approval of Variation orders.

3.6 On 08.11.2014, the Engineer issued a letter to the petitioner threatening to invoke the BGs citing slow progress of work as the primary reason and also on account of the mobilization and machinery advance already given to the contractor to speed up the progress of the work.

3.7 Apprehending action pursuant to the aforesaid letter dated 08.11.2014, the petitioner filed a petition before this Court (being OMP No. 1529/2014 captioned *M/s JKM-NKC (JV) v. National Highway Authority of India & Ors.*) seeking a direction to restrain the respondents from taking any coercive action pursuant to the letter dated 08.11.2014. The said petition was dismissed as withdrawn by an order dated 02.12.2014 by this Court.

3.8 Thereafter, NHAI again issued a communication dated 21.08.2015 to the petitioner for encashment of BGs against the machinery advanced. Consequently, the petitioner filed a suit (being CS(OS) No. 2615-2616/2015 captioned *M/s JKM-NKC (JV) v. National Highway Authority of India & Ors.*) before this Court again seeking restraint on invocation of BGs. The said suit was disposed of by an order dated 31.08.2015 in view of the withdrawal of the invocation letter by NHAI with respect to the subject BGs.

3.9 In the meanwhile, the petitioner filed a claim on 01.08.2015 before the Dispute Review Board (DRB) amounting to ₹113.61 crores at the rate of 18% p.a. future interest towards losses incurred due to delay in handing over the unencumbered possession of Site and non-fulfillment of other obligations by NHAI. Resultantly, an amount of ₹19.76 crore along with 15% future interest was recommended by DRB in favour of the petitioner on 31.12.2015.

3.10 Subsequently, both the parties invoked the arbitration clause in terms of the Contract. The petitioner also appointed its nominee arbitrator by a letter dated 27.02.2016 but, on the other hand, NHAI failed to do so.

4. On 13.04.2016, the Engineer sent a show cause notice in relation to slow progress of the work. The aforesaid notice was replied to by the petitioner on 02.05.2016 citing heavy rains as the main reason for the aforesaid delay in works. Thereafter, the petitioner sent a letter dated 12.08.2016 for release from performance of the Contract

claiming breach of the Contract on part of NHAI. Consequently, the Engineer sent a communication on 13.08.2016 to NHAI for taking appropriate action against the petitioner for making default in performance of the Contract.

5. This led the petitioner to file the present petition.

6. In the meanwhile, the petitioner raised further disputes, including a claim to the effect that the performance of the Contract was frustrated. On 31.08.2016, this Court noted that in terms of the Contract, the disputes between the parties were required to be considered in the first instance by the Engineer and then referred to the DRB. This Court directed NHAI to constitute a DRB if not constituted earlier and further directed the DRB to consider the possibility of resolution of the disputes which had been referred to the Engineer.

7. Pursuant to the directions passed by this Court, further disputes raised by the petitioner were considered by the DRB. The disputes between the parties were referred to the DRB in three successive tranches and since the same have remained unresolved, have been referred to arbitration.

8. As noticed above, one of the disputes referred to the DRB was also with regard to the question whether the Contract had become impossible to perform as was claimed by the petitioner. After considering the disputes, the DRB was of the opinion that the contract between the parties had become impossible to perform to the full stretch being outside the control of the parties except the operations

that had been acquired to the fullest extent. The DRB also recommended that the petitioner be relieved of its responsibility after it completes the portions including structures by implementing CRRI recommendations wherever the land is available. It is relevant to note that before the DRB, the petitioner had claimed that 11.66 kms of land stretch was available; however, according to NHAI, the said stretch was 18.696 kms. Both the parties did not accept the recommendation of the DRB and this Court is informed that the disputes have been referred to arbitration.

9. The petitioner claims that, thereafter, on 07.02.2017, a review meeting was held by NHAI for reviewing 34 delayed projects including the project in question and, in the said meeting, a decision was taken that instead of four laning of the stretch of road, the Project be implemented in two parts of two lane each. The petitioner claims that the decision taken at the said review meeting clearly indicates that the Contract as awarded to the petitioner was impossible to perform and that NHAI had played a fraud on the petitioner.

10. In the meanwhile, by a letter dated 06.01.2017, NHAI terminated the Contract awarded to the petitioner.

11. At the outset, it was suggested by the learned counsel for the petitioner that since an arbitral tribunal has been constituted, the present petition be referred to the arbitral tribunal to be considered as an application under Section 17 of this Act. This Court does not

consider it apposite to accept the aforesaid contention, as this matter has been pending before this Court for a considerable period of time.

Submissions

12. Mr Tanmaya Mehta, learned counsel appearing for the petitioner contended that the Contract had stood frustrated as it was impossible to perform and, therefore, the parties were released and discharged all their contractual obligations in terms of Clause 66.1 of the Contract. He further argued that NHAI had played a fraud while awarding the Contract, as NHAI was fully aware that the Contract could not be executed due to the inherent defects in the conception of the Project and also because NHAI had not acquired adequate land for construction of the road.

13. He submitted that NHAI was required to provide a total length of 25.187 kms within a period of 12 months from the commencement of the work, however, even after five-and-a-half (5-1/2) years, NHAI was only been able to provide 11.667 kms of land and that also in 28 small non-contiguous stretches and, therefore, NHAI is in breach of the terms of the Contract.

14. Mr Mehta also contended that the performance of the Contract had been frustrated due to several reasons including the topography of the place that did not permit construction of the road on the stretches as provided to the petitioner. This was due to percolation of the rain water down the hill slopes. He further submitted that the land was unsuitable and prone to landslides. He stated that the CRRI was

appointed to examine the site, and the recommendations of the CRRI clearly substantiated that there were inherent flaws in the design of the Project.

15. Mr Mehta relied on the decision of the Division Bench of this Court in ***Jainsons Clothing Corporation v. State Trading Corporation of India Ltd. and Anr.: 30 (1986) DLT 359*** and on the strength of the said decision contended that if non-performance of a contract is the result of frustration, then it is not a case of non-performance but a case in which the performance is excused by law. In such circumstances, bank guarantees cannot be invoked. Lastly, Mr Mehta submitted that based on the recommendations of the DRB, a sum of ₹33.5 crores was due to the petitioner. He referred to Sub-Clause 67.1 of the Conditions of Particular Application (CoPA) and submitted that the recommendations of the DRB were binding till the conclusion of the arbitral proceedings. He submitted that, therefore, the petitioner was not entitled to invoking the BGs.

16. Mr Sethi, learned counsel appearing on behalf of NHAI countered the submissions made on behalf of the petitioner. He submitted that the petitioner had repeatedly assured that the Contract would be completed but had failed to do so. He further submitted that the petitioner had completed only a miniscule part of the stretch of the road handed over to it. Mr Sethi also disputed the contention that the Contract was frustrated. He submitted that merely because the contractor discovers the execution of the Contract had become onerous, did not lead to the conclusion that it is impossible to perform.

He further submitted that the petitioner's reliance on the CRRI report to state that the Contract was impossible to perform cannot be accepted; as even after receiving the said report, the petitioner had held out assurances that it would complete the Contract. He referred to the petitioner's letter dated 02.05.2016, whereby the petitioner had reiterated that it would complete the Project within two years time from 23.12.2015. He also referred to the letter dated 12.08.2016, whereby the petitioner had asked for additional costs for performance enhanced costs for performance of the Contract.

Reasons and Conclusions

17. The law relating to the bank guarantees is now well settled. The invocation of the bank guarantee cannot be interdicted except in exception circumstances such of egregious fraud which would result in irretrievable injustice. In ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Others: (1994) 1 SCC 502***, the Supreme Court had held that confirmed bank guarantees/irrevocable letters of credit cannot be interfered with unless there is fraud and irretrievable injustice involved in the case. The Court further observed that fraud has to be an established fraud. In ***Larsen &Tourbo Limited v. Maharashtra State Electricity Board and Others: (1995) 6 SCC 68***, the Supreme Court referred to its earlier decision in ***Svenska Handelsbanken*** (*supra*) and 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, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd.*, *General Electric Technical Services Co. Inc v Punj Sons (P) Ltd.* and the decision of the Court of Appeal in England in *Elian and Rabbath v Matsas and Matsas* and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* [AIR 1994 SC 626], 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...
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> …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…
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> ...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.""

18. In ***U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.: (1988) 1 SCC 174***, Justice Sabyasachi Mukherji referred to an earlier decision in ***United Commercial Bank v. Bank of India: AIR 1981 SC 1426*** and held as under:-

> "On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere."
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> Justice Jagannath Shetty in his concurring opinion further explained that:
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> "The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused."

19. This Court is not persuaded to accept that in the present case the petitioner has established a case of an egregious fraud. In the present case, the only averment made by the petitioner in the petition in support of its allegation of fraud is regarding the fraudulent execution of the Contract by NHAI is set out below:

> "The Contract was executed concealing the material facts of non acquisition of complete site, land and defective faulty designs. It is submitted that the Respondent completely ignored and brushed aside all the representations of the Petitioner in this regard. It is further stated that the action of the Respondent in procuring the bank guarantees is fraudulent. The Respondent induced the petitioner to submit the bank guarantees on the basis of erroneous information and misrepresentations made under the contract."

20. In the additional affidavit filed on behalf of the petitioner, it has been further stated that "In view of the said change in the very nature

and object of the project by the Respondent in the review meeting dated 07.02.2017, it is exceedingly clear that the respondent had played fraud over the Petitioner & that the present project so awarded to the Petitioner was in executable and impossible to perform in its form due to its inherent defects and further due to inordinate delays on part of the Respondent". However, the petitioner has also inserted a hand written line after the words "exceedingly clear" which reads as *"the respondent had played fraud over the Petitioner &that the present project……"*

21. The petitioner has sought to develop a case that NHAI was fully aware that the Project was not feasible due to geological condition and the topography of the area and therefore, in its review meeting held on 07.02.2017 (after the Contract with the petitioner had been terminated on 06.01.2017), the fundamental design of the Project was changed. And, NHAI has now decided to have two separate parts of two lane each instead of having a singular stretch of four lanes.

22. It was also argued on behalf of the petitioner that the topography and the geology of the area in question were known to NHAI and it was not feasible to construct a four-lane highway to be constructed. Further, at one part, a railway line was existing at the place where the road had to be widened. It was contended on behalf of the petitioner that in this view, the petitioner had been induced into entering into the Contract. The aforesaid contentions have been seriously disputed.

23. After considering the averments made and the case set up, this Court is unable to accept that the petitioner has established a case of egregious fraud. Mere bald allegations that the petitioner had been induced to enter into the Contract is not sufficient. The petitioner claims to be an experienced contractor and, thus, it is expected that the petitioner would have satisfied itself as to the topography of the area where the road was to be constructed.

24. It is also relevant to note that there is already an existing road in the area, which was required to be maintained and during the execution of the Project. In order to accept the petitioner's contention that the petitioner has been deliberately defrauded, this Court would have to accept that NHAI, being fully aware that the road could not be widened, decided to embark on a fraudulent scheme so as to induce a contractor to part with the bank guarantees in order that the same could be encashed to unjustly enrich NHAI. In furtherance of this exercise NHAI invited tenders from willing bidders knowing fully well that the Project as envisaged could never be completed. NHAI then advanced mobilization advance for the petitioner to mobilize the resources. NHAI also acquired land over substantial stretch of the site to cause an unjust loss to the successful contract as a part of its devious plan. Plainly, this Court is not persuaded to accept the same.

25. At the present stage, NHAI disputes that there is any inherent defect in the design of the Project. However, even assuming that the petitioner may be able to establish, in the course of the arbitral proceedings, that there was some inherent defect in the design of the

Project; the same would not mean that the Contract entered into with the petitioner is vitiated by fraud. At this stage, NHAI disputes that the Contract as awarded was not feasible. However, this is a dispute that is required to be determined by the arbitral tribunal.

26. Although, it has been averred in the petition that a fraud has been played on the petitioner, it is seen that the averments made in this regard are also bereft of any particulars.

27. The petitioner has essentially founded its claim on the basis that it would not be possible to perform the Contract and, therefore, the petitioner is excused from performing the Contract. It was earnestly argued on behalf of the petitioner that since the performance of the Contract is excused on account of impossibility, the question of invoking performance bank guarantees does not arise and, therefore, the invocation of the same must be interdicted. Mr Mehta had also earnestly contended that since the performance of the Contract has been rendered impossible due to various reasons, the Contract itself is void by virtue of Section 2(g) of the Indian Contract Act, 1872. He had also relied on the decision of the ***Jainsons Clothing Corporation v. The State Trading Corporation of India Ltd. and Anr.: (1986) 30 DLT 359 (DB)*** in support of his contention that a performance bank guarantee cannot be invoked if the non-performance of the contract is as a result of frustration because such non-performance is excused in law.

28. The aforesaid contentions are also unpersuasive. NHAI has not accepted that the performance of the contract is impossible. Thus, the question whether the performance of the Contract has been frustrated on account of impossibility is contentious matter that is required to be adjudicated by the arbitral tribunal.

29. It is also well settled that the bank guarantees cannot be interdicted on account of pending disputes. Thus, notwithstanding, the disputes between the parties, an unconditional bank guarantee cannot be interdicted. In ***U.P. State Sugar Corporation v. Sumac International Ltd.: AIR 1997 SC 1644***, the Supreme Court has observed as under:-

> "12. The law relating to invocation of such bank guarantees is by now well settled. 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."

30. A similar view was also expressed by the Supreme Court in ***Hindustan Construction Company Ltd. v. State of Bihar and Others: 1999 8 SCC 436***, wherein the Court had observed as under:-

> "8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in

> terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary."

31. It is also relevant to note that the decision of the Division Bench of this Court in ***Jainsons Clothing Corporation*** (*supra*), which was relied upon by the petitioner, was set aside by the Supreme Court in the ***State Trading Corpn. of India Ltd vs Jainsons Clothing Corpn. : (1994) 6 SCC 597*** and the Supreme Court had reiterated the principles as enunciated in its earlier decision in ***U.P. State Sugar Corporation*** (*supra*).

32. The petitioner had relied upon the report of the Central Road Research Institute (CRRI) submitted under the cover of a letter dated 31.03.2015 in support of its contention that the CRRI had, on investigation, found that the Project was not feasible and required remedial measures. However, it is noticed that even after receipt of the said report, the petitioner had not taken a stand that it was impossible for the petitioner to perform the Contract. On the contrary, the petitioner had reiterated its commitment that it would fulfill the Contract. In a meeting held on 23.12.2015, the petitioner had assured that the work would be completed within a period of two years. This was also reiterated by the petitioner by its letter dated 02.05.2016, wherein it stated as under:-

> "We committed to Hon'ble minister of Road Transport and Highway in the meeting on dated 23.12.2015 to complete the project within two years of time and we assure you that we will not We committed to Hon'ble minister of Road Transport and Highway in the meeting

on dated 23.12.2015 to complete the project within two years of time and we assure you that we will not leave any stone unturned in competing the project within above committed period."

33. This Court is refraining from expressing any opinion as to the said issue as, clearly, the same is a contentious one and any expression by this Court is likely to prejudice either party in the arbitration proceedings. However, suffice it to say since the issue whether the performance of the Contract is frustrated is itself a disputed question and the PBGs furnished by the petitioner cannot be interdicted pending resolution of such disputes.

34. It is also relevant to note that ABGs were issued to secure the mobilization advances provided to the petitioner and, therefore, the said ABGs can only be invoked to the extent of the unrecovered advances. Mr Sethi had also submitted that the said ABGs would not be invoked only to the extent of the advances have not been recovered from the interim bills submitted by the petitioner. NHAI is bound down to the same.

35. It was contended on behalf of the petitioner that the DRB had recommended payment of a sum of approximately ₹33.5 crores to the petitioner and, therefore, the PBGs cannot be invoked. It was also contended that the recommendations of the DRB would be binding till the conclusion of the arbitral proceedings. There is some controversy with regard to the aforesaid assertion inasmuch as it is contended on behalf of NHAI that the DRB's report indicates that even after the credit is given for the sums recommended in favour of the petitioner, a

large amount of ₹108 crores would still be payable by the petitioner. The calculation sheets annexed to the recommendations of the DRB dated 06.02.2018, which has been handed across by the learned counsel for NHAI, does support the contentions advanced on behalf of the respondent. However, since the parties have already referred the disputes to arbitration and the recommendations of the DRB have not been accepted, there is no conclusive decision as to whether any sum is payable. The recommendations of the DRB have not attained finality.

36. The petition is, accordingly, dismissed. All pending applications are also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 14, 2018
RK