

\$-25 & 24

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

Date of decision: 16th August, 2018

+ O.M.P.(I) (COMM.) 329/2018 & IA 10927/2018

(24) O.M.P.(I) (COMM.) 328/2018 & IA 10926/2018

LARSEN & TOUBRO LTD.

..... Petitioner

Through: Mr.Atul Sharma, Mr.Ravi Varma,
Mr.Suadat Kirmani, Mr.Abhinav
Sharma & Mr.Lakshay Khanna,
Advs.

versus

DELHI METRO RAIL CORPORATION LTD. & ANR.

DELHI METRO RAIL CORPORATION LTD. & ANR.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. These petitions have been filed by the petitioner seeking an order restraining the respondent no. 1 from invoking and/or encashing the Performance Bank Guarantee(s) furnished by the petitioner in terms of the Contract(s) executed between the parties. As common questions are involved in these petitions, the facts are taken from OMP (I) (COMM) 329/2018.

2. The petitioner had been awarded the work of construction of elevated viaduct, 6 elevated stations viz Aluva, Pulinchodu, Companypady, Ambattukavu, Muttom, Kalamassery (from chainage -120.000m to 7055.218m) including architectural finishing works of stations and

connecting elevated viaduct and ramp to depot at Muttom on Aluva-Petta line'. The petitioner had submitted the Performance Bank Guarantee in question in compliance with the terms of the Agreement executed between the parties. The time for completion of the project was 24 months from the commencement date, however, admittedly there was delay in completion of the work, which the petitioner contends was for reasons attributable to the respondent no. 1. The respondent no. 1 had granted extension of time for completion of the work by various letters from time to time out of which the first extension of time was granted without levy of liquidated damages while on the other three occasions the respondent no. 1 levied the liquidated damages (in OMP (I) (COMM) 328/2018 the first extension was granted without levy of liquidated damages while the subsequent two were granted reserving the right to levy liquidated damages and the last was with levy of liquidated damages).

3. The respondent no. 1 vide its letter dated 20.06.2018, relying upon Clause 8.5 of the General Conditions of Contract and Appendix-2B of Employer's Requirement levied liquidated damages of Rs. 14,60,82,088/- on the petitioner. By another letter of 20.06.2018 the respondent no. 1 called upon the petitioner to pay a further amount of Rs. 6,98,99,899.37/- as damages on account of "risk and cost".

4. Further correspondence ensued between the parties and the respondent no. 1 by its letter dated 02.08.2018, while rejecting the representation of the petitioner, threatened invocation of the Bank Guarantee(s) in accordance with Clause 13.2.7(ii) of the General Conditions of Contract. The petitioner had therefore filed the present petition seeking

interim relief against such invocation and encashment of the Bank Guarantee(s).

5. Learned counsel for the petitioner submits that the work in question has been completed by the petitioner on 25.11.2017 and in fact, has been handed over to the respondent no. 1. He further submits that the disputes between the parties are pending in Conciliation in accordance with the contract and therefore, the respondent would not be justified in invoking the Bank Guarantee(s). In fact, in such Conciliation proceedings there is no claim raised by the respondent no. 1 for the liquidated damages or towards risk and cost. Further, relying upon the judgment of the Supreme Court in *State of Karnataka vs. Shree Rameshwara Rice Mills Thirthahalli*, (1987) 2 SCC 160 and of this Court in *Vishal Engineers & Builders vs. Indian Oil Corporation Limited*, (2012) 1 Arb LR 253 (DB), it is contended that the respondent no. 1 cannot adjudicate on the issue of defaults and recover liquidated damages by invoking the Performance Bank Guarantee(s) as the question whether the petitioner is in default of its obligations under the contract and/or is liable to pay any liquidated damages or any amount as risk and cost are to be determined by the Arbitral Tribunal in accordance with the contractual terms.

6. I have considered the submissions made by the learned counsel for the petitioner, however, do not find any force in them. The Bank Guarantee(s) in question are unconditional in nature and *inter alia* record as under:-

“5. After the Contractor has signed the aforementioned Contract with the Employer, the Bank is engaged to pay the Employer, any amount up to and inclusive of the aforementioned full amount upon written order from the Employer to indemnify the Employer for any liability of damage

resulting from any defects or shortcomings of the Contractor or the debts he may have incurred to any parties involved in the Works under the Contract mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The Bank will deliver the money required by the Employer immediately on demand without delay and demur and without reference to the Contractor and without it being necessary to prove to the Bank the liability or damages resulting from any money so demanded notwithstanding any dispute / disputes raised by the Contractor in any suit or proceedings pending before any Court, Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal.”

7. Clause 13.2.7(ii) of the General Conditions of Contract also empowers the Engineer to invoke the Performance Bank Guarantee incase the contractor fails to pay any amount determined under any of the clauses/conditions of the contract. Clause 13.2.7 is reproduced hereinbelow:-

“13.2.7 The Engineer shall not make a claim under the Performance Security except for amounts to which the DMRC is entitled under the contract(Not withstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:

- i) Failure by the contractor to extend the validity of the Performance Security as described herein above, in which event the Engineer may claim the full amount of the Performance Security.*
- ii) Failure by the contractor to pay DMRC any amount due, either as agreed by the contractor or determined under any or the Clauses/Conditions of the agreement, within 30days of the service of notice to this effect by Engineer.*
- iii) The contractor being determined or rescinded under provision of the GCC the Performance Security shall be forfeited in full and shall be absolutely at the disposal of the DMRC.”*

8. Therefore, as the respondent no. 1 is entitled to invoke the Bank Guarantee(s) for recovery of the amount remaining due from the contractor, at this stage the invocation of the Bank Guarantee(s) cannot be restrained on the grounds which are being urged by the petitioner, the same relating to the question whether or not the petitioner is in default of the contractual terms. Once the Bank Guarantee(s) are found to be unconditional in nature, the respondent no. 1 would be within its right to invoke the same, albeit in terms of the Bank Guarantee(s).

9. The law of injunction in the case of bank guarantee is no longer res integra. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.***, (1997) 6 SCC 450, Supreme Court reiterated this law as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] and U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows: (SCC p. 574, para 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. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351, CA] are apposite:

“... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the

bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.”

(emphasis supplied)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] 22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.”

10. In ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.***, (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

“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.

xxxxxx

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.”

11. Recently this Court in ***M/s. Classic Ksm Bashir JV vs. Rites Ltd. & Ors.***, 2018 SCC OnLine Del 9056 rejected the argument of the appellant therein that in case of undetermined or inchoate sums claimed by the principal on account of damages, performance guarantee cannot be invoked at all. It was held that this would be too broad a proposition to be accepted. The bank guarantee being an independent contract, is to be governed by its own terms. Paragraph 10 of the judgment is quoted hereinunder:-

“10. The reliance placed upon the case ‘Gangotri Enterprises Limited (supra), in this Court's opinion, is not justified. The Court

was largely persuaded to hold that the invocation was wrongful on account of the fact that the bank guarantee, which was invoked, in fact, related to a third contract between the same parties. Clearly, that revealed utter non-application of mind on the face of the record. The point emphasised by the learned senior counsel that in the case of undetermined or inchoate sums claimed by the principal on account of damages, performance guarantee cannot be invoked at all, is too broad a proposition to be accepted. The performance guarantee mandates the bank to honour without demur any demand by the principal, who is the real beneficiary of any sums, claimed by it as due under the contract. In other words, the bank cannot adjudicate as to whether the claim by the beneficiary was in fact determined by it in accordance with the underlying contract between it and a third party. To allow a wide application of such proposition is fraught and would ultimately undermine the basis on which the bank guarantees are in fact issued. It has been repeatedly emphasised that the guarantee is an independent contract and has only a referential connection to the contract between the two parties, who agree upon the execution of performance of a particular contract for which the bank guarantee is issued. A contract of guarantee and divorced from the obligations of the parties towards each other, in their bilateral enforcement. If one keeps these principles in mind, the fact that some amount of guess work at the stage of invocation by way of estimation as to the ultimate damages is entered into, is the basis for the claim from the bank under the guarantee which might be justified either in full or in part in arbitral proceedings ought not, in the opinion of the Court, be the basis for interdicting the invocation of the guarantee, which is otherwise lawful.”

12. In view of the above, the judgments in ***Shree Rameshwara Rice Mills (Supra)*** and ***Vishal Engineers (Supra)*** relied upon by the learned counsel for the petitioner, would not be applicable to the facts of the present case. Both these judgments were not dealing with a case of bank guarantee but with contractual rights of the party under the principal agreement. As held

by the Supreme Court, Bank Guarantee being an independent agreement, is to be governed by its own terms.

13. In the present case, the Bank Guarantee(s) provide that the bank shall deliver the money to the respondent no. 1 without the respondent no. 1 having to prove to the bank the liability or damages claimed by it and notwithstanding any dispute raised by the contractor. Therefore, merely because the right of the respondent no. 1 to levy liquidated damages and/or amount thereof are disputed by the petitioner or are pending conciliation, the invocation of the Bank Guarantee(s) cannot be restrained.

14. I therefore find no merit in the present petitions and the same are accordingly dismissed and with no order as to cost. No observation made by me hereinabove shall, however, influence any forum or authority adjudicating/conciliating the disputes between the parties.

NAVIN CHAWLA, J.

AUGUST 16, 2018/rv