

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.03.2018

+ **O.M.P.(I) (COMM.) 319/2017 and CM No. 13474/2017**

DOSHION PRIVATE LIMITED

..... Petitioner

versus

IIC LTD., & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr Devashish Bharuka and Mr Justine George.
For the Respondents : Mr Rajat Navet, Mr Jeevesh Nagrath, Mr Pratham Sharma, Mr Chitvan Singhal and Mr Kushajra Pandit for R-1.
Mr Abhishek Sharma for R-2/IDBI.
Mr Arun Aggarwal and Ms Jyoti Gautam, for R-3 (Dena Bank).

WITH

+ **O.M.P.(I) (COMM.) 320/2017 and IA No. 13465/2017**

**DOSHION VEOLIA WATER SOLUTIONS
PVT. LTD.**

..... Petitioner

versus

**INDIANBULLS INFRASTRUCTURE COMPANY
LTD. & ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr Devashish Bharuka and Mr Justine George.
For the Respondents : Mr Rajat Navet, Mr Jeevesh Nagrath, Mr Pratham Sharma, Mr Chitvan Singhal and Mr Kushajra Pandit for R-1.
Mr Abhishek Sharma for R-2/IDBI.

WITH

+ **O.M.P.(I) (COMM.) 321/2017 and IA No. 13476/2017**

**DOSHION VEOLIA WATER SOLUTIONS
PVT. LTD.**

..... Petitioner

versus

**ELENA POWER AND INFRASTRUCTURE
LIMITED & ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr
Devashish Bharuka and Mr Justine George.
For the Respondents : Mr Rajat Navet, Mr Jeevesh Nagrath, Mr
Pratham Sharma, Mr Chitvan Singhal and
Mr Kushajra Pandit for R-1.

WITH

+ **O.M.P.(I) (COMM.) 322/2017 and IA No. 13468/2017**

**DOSHION VEOLIA WATER SOLUTIONS
PVT. LTD.**

..... Petitioner

versus

**RATTANINDIA NASIK POWER LIMITED
& ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr
Devashish Bharuka and Mr Justine George.
For the Respondents : Mr Rajat Navet, Mr Jeevesh Nagrath, Mr
Pratham Sharma, Mr Chitvan Singhal and
Mr Kushajra Pandit for R-1.
Mr Abhishek Sharma for R-2/IDBI.

WITH

+ **O.M.P.(I) (COMM.) 323/2017 and IA No. 13469/2017**

**DOSHION VEOLIA WATER SOLUTIONS
PVT. LTD.**

..... Petitioner

versus

**INDIANBULLS INFRASTRUCTURE COMPANY
LTD. & ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sachin Datta, Senior Advocate with Mr
Devashish Bharuka and Mr Justine George.
For the Respondents : Mr Rajat Navet, Mr Jeevesh Nagrath, Mr
Pratham Sharma, Mr Chitvan Singhal and
Mr Kushajra Pandit for R-1.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that respondent no.1 (IICL) be restrained from pursuing its request for invocation of the bank guarantees, which were furnished by the petitioner in terms of the contracts entered into between the parties. The controversy involved in all the petitions is common. It is also pointed out that the pleadings in these petitions are similar.

2. In view of the above, this Court would refer only to the facts as relevant to OMP (I) (Comm) 319/2017 for addressing the controversy raised in these petitions. The counsel appearing for the parties also agree that the decision in the said matter would be determinative of the other petitions as well.

3. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:-

3.1 The petitioner company is engaged in the business of waste management and providing water solutions etc. The petitioner claims that it has significant reputation in the field of its business. Respondent no.1 (hereafter 'IICL') is engaged in the field of generation of thermal power, renewal energy, mining etc.

3.2 The petitioner was issued a Letter of Award (LoA) dated 15.10.2010 awarding the contract for design, engineering, manufacture, testing, supply, transportation, transit insurance, civil works including laying of GRP pipeline, commissioning and demonstration of performance guarantees of cross country pipeline of diameter 1200 mm and length 32.5 kms (hereafter referred to as "the work of cross country pipelines"). In terms of the LoA, the total contract price was ₹46.50 crores.

3.3 In terms of the contract, the petitioner furnished seven bank guarantees for securing advances (advance bank guarantees) and securing the performance of the contract (performance guarantees). The details of the bank guarantees furnished by the petitioner are set out below:-

“

Sl. No.	Bank Guarantee No.	Amount (in Rs.)	Issued by
1	110375IBGA00001	80,91,000/-	IDBI Bank (Respondent No.2)
2	1103751BGA00033	13,42,000/-	IDBI Bank,

			(Respondent No.2)
3	110375IBGA00034	19,75,000/-	IDBI Bank (Respondent No.2)
4	110375IBGP00102	36,96,507/-	IDBI Bank (Respondent No.2)
5	110375IBGP00103	30,46,500/-	IDBI Bank (Respondent No.2)
6	117015IGBER0041	1,61,81,994/-	Dena Bank Ltd. (Respondent No.3)
7	117015IGBER0042	2,29,25,000/-	Dena Bank Ltd. (Respondent No.3)
	Total	5,72,58,001/-	

”

3.4 The petitioner claims that it completed substantial work to the extent of about 80% by 2013-14 but the balance work could not be completed, as IICL ran into financial difficulties and was unable to make regular payments in terms of the contract between the parties. The petitioner avers that IICL got the remaining work executed from other agencies.

3.5 The aforementioned bank guarantees furnished by the petitioner were kept alive and were extended from time to time.

3.6 The petitioner further claims that it is entitled to receive an amount in excess of ₹7 crores from IICL. The petitioner also sought the aforesaid amount by a letter dated 02.03.2014.

4. IICL has invoked the aforementioned bank guarantees by separate letters (all dated 21.08.2017) addressed to the concerned

banks in respect of each bank guarantee.

5. The banks (respondent nos. 2 and 3) have honoured their commitment and have remitted the funds to IICL either directly or by way of demand drafts. This has led the petitioner to file the present petitions. The petitions were listed before this Court on 25.08.2017. However, prior to the same, the IICL had already invoked the bank guarantees in question and the concerned banks (respondent nos. 2 and 3) have remitted the amount to IICL either directly or by way of bank drafts.

6. On 25.08.2017, this Court passed an *ad interim* order directing IICL to keep the amounts recovered from encashment of the bank guarantees separately and not appropriate or deal with the same.

Submissions

7. Mr Sachin Datta, the learned Senior Counsel appearing for the petitioner advanced contentions essentially on two fronts. First, he submitted that the bank guarantees were conditional and the invocation of the bank guarantees in question were not in terms of the said bank guarantees. In particular, he referred to the Bank Guarantee No. 110375IBGA00001 and referred to the paragraph of the said bank guarantee, which is set out below:-

“The Guarantor shall, upon receipt of written demand made by the Employer, without proof or conditions or without recourse or demur or protest or enquiry pay forthwith in full without any deduction the sum claimed in the written notice or

such sum not exceeding the sum of Rs.1,61,81,994/- (Rupees one crore sixty one lakhs eighty one thousand nine hundred ninety four only) ("Guarantee Amount") as may be specified in such demand, in the event of the Contractor failing or neglecting to execute fully efficiently and satisfactorily the Contract in accordance with with terms and conditions contained therein. ”

8. Mr Datta contended that in view of the plain language of the bank guarantee, the same could be invoked only if the petitioner is found to have failed or neglected to execute the contract satisfactorily. He submitted that the bank guarantees were conditional and unless the aforesaid condition was established, the guarantees could not be invoked. He referred to the letters invoking the bank guarantees issued by IICL and emphasized that IICL had merely stated that they have “*opted to invoke the abovementioned bank guarantee*”. He earnestly contended that such invocation was not in terms of the bank guarantees, as no assertion had been made that the petitioner had failed to execute the contract in question.

9. He referred to the decision of the Supreme Court in ***Hindustan Construction Co. Ltd. v. State of Bihar & Ors. : (1999) 8 SCC 436*** and submitted that in that case, the Supreme Court had considered a similarly worded bank guarantee and had held that it was a conditional bank guarantee.

10. Second, Mr Datta contended that there were special equities in favour of the petitioner. He contended that the bank guarantees had not been invoked for almost four years and invoking the same, without

any further development, was fraudulent. He submitted that the financial status of IICL and its group companies was precarious and if the petitioner is not secured at this stage, it would not be able to recover the amount even if it succeeds before the Arbitral Tribunal. He contended that in the circumstances, the balance of convenience was squarely in favour of the petitioner and irretrievable injury would be caused if the relief, as sought for by the petitioner, is not granted.

11. Mr Rajat Navet, the learned counsel appearing for the respondents countered the submissions made on behalf of the petitioner. He submitted that the bank guarantees in question were unconditional and apart from the bank guarantee no. 110375IBGA00001, all other bank guarantees also included a clause, which obliged the bank to pay the amount demanded, to the maximum of the sum specified, notwithstanding, the dispute raised by the contractor in any suit or proceeding. He submitted that, admittedly, the petitioner had not completed the work in question and, thus, there is no doubt that IICL was entitled to encash the bank guarantees in question. He further submitted that some of the bank guarantees were to secure the amounts advanced by IICL, and there could be no doubt that IICL was entitled to recover the same.

Reasons and Conclusion

12. At the outset, this Court is unable to accept that the bank guarantees are conditional as contended by Mr Dutta. A plain reading of the bank guarantees in question indicates that the bank had agreed

to pay the amount forthwith as demanded by IICL “*without proof or conditions or without recourse or demur or protest or enquiry*”. These words make it amply clear that the concerned bank was obliged to remit the funds immediately on invocation of the bank guarantees. The contention, that such demand would be honoured only once it was established that the petitioner had failed or neglected to execute the contract satisfactorily, is unmerited. It is well established that a bank guarantee is a separate agreement, which is to be performed on its own terms. A bank cannot be expected to examine or ascertain whether a contract has been satisfactorily performed and it must act on the terms of the bank guarantee. In this case, the concerned banks were obliged to remit the amount without making any enquiry and, thus, the banks have acted in terms of the bank guarantees.

13. Mr Datta contended that since the clause of the bank guarantee as considered by the Supreme Court in ***Hindustan Construction Co. Ltd.*** (*supra*) was similar to the clause as contained in the bank guarantees in question, the bank guarantees must be considered to be conditional bank guarantees as held by the Supreme Court. This contention is not persuasive. A similar contention was also considered by a Coordinate Bench of this Court in ***M/s Rani Constructions Pvt. Ltd. v. M/s Pati-Bel J.V. & Anr. : 2006 (129) DLT 38***. In that case, Court observed that the bank had undertaken the liability not only as a surety but as a primary obligator and the same indicated that the bank guarantee was unconditional. The relevant extract of the said decision is set out below:-

“10. Section 134 of the Indian Contract Act, 1872 provides for the discharge of the surety by release or discharge of the principle debtor. It provides that the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. A bank guarantee is contract of a guarantee where the bank acts as the surety and the surety is normally discharged by virtue of Section 134 when the principal debtor is released. This is the normal position in law. However, the bank guarantees in question disclose that the bank has undertaken the liabilities not merely as a surety but also as a “primary obligator”. In other words, it has undertaken this liability unconditionally and without recourse or reference to the underlying contract between the defendant No.1 and the plaintiff, i.e., between the creditor and the principal debtor even to the limited extent permissible under Section 134 of the Indian Contract Act, 1872. Another important circumstance is that the guarantee itself reveals that the bank is liable to pay on the first demand without the bank having any right of objection. This is equivalent to the expression “without demur” as visualised in the Supreme Court decision in the case of Hindustan Construction Company Ltd (supra). The further expression that the bank is liable to pay without a claim first being made on the contractor (plaintiff) also indicates the same sentiment. All these aspects point in only one direction and that is that the bank guarantees in question are unconditional in terms and not merely because they profess to be so.”

14. In the present case, Clause no. 7 of the bank guarantee no. 110375IBGA00001 expressly provides as under:

“7. The Bank’s obligations under this ABG for the Guarantee Amount are in the nature of primary, independent and absolute obligations and not by way of surety.”

15. In view of the above, there can be little doubt that the bank had undertaken an independent obligation to pay without demur or enquiry as observed. This obligation of the bank was not only as a surety but the “primary, independent and absolute” obligation of the bank.

16. As observed above, a bank guarantee is an independent contract between the bank and the beneficiary and must be interpreted on its own terms. In *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd & Anr.: (1996) 5 SCC 450*, the Supreme Court had explained as under:-

“It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is the pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encasing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate

respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.”

17. As stated above, the banks have accepted the obligation under the bank guarantees as a primary, independent and absolute obligation and such obligation is plainly unconditional.

18. In ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Anr.*** : (2007) 6 SCC 470, the Supreme Court had distinguished the decision rendered by the Supreme Court in ***Hindustan Construction Co. Ltd.*** (*supra*) in the following manner:-

“28. The learned counsel in support of his submission relied upon the decision of this Court in *Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors.* This Court in *Hindustan Construction Co.* having referred to the terms of clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that if the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the “advance mobilisation” then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The court found that the bank guarantee specifically refers to clause (9) of the principal agreement and it is under those circumstances it came to the conclusion that the amount covered by the bank guarantee becomes payable and the same could be invoked only in the circumstances referred to in clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement

without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgment this Court observed that:

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. *The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.*” (emphasis supplied)

What is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee to be an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee.”

19. It is also not disputed that all the bank guarantees in question, other than the bank guarantee no. 110375IBGA00001, also include a specific clause which reads as under:-

“The Guarantor undertakes to pay the Employer the amount so demanded notwithstanding any dispute raised by the Contractor in any suit or proceedings pending before any court or tribunal whatsoever or otherwise; the Guarantor’s liability under this ABG being absolute and unequivocal. The payment so made by the Guarantor under this ABG, shall be a valid discharge of its liability for payment hereunder and the Contractor shall have no claim against us for making such payments.”

20. The aforesaid clause makes it amply clear that the bank was not required to await the decision relating to resolution of any disputes before making the payment under the bank guarantees.

21. In view of the express language of the bank guarantees, the contention that the bank guarantees could only be invoked once it is established that the petitioner had failed and neglected to complete the contract, is bereft of any merit.

22. It is also well settled that invocation of the bank guarantee cannot be interdicted pending resolution of the disputes between the parties. In ***Hindustan Construction Co. Ltd.*** (*supra*), the Supreme Court has also 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.”

23. In ***U.P State Sugar Corporation v. Sumac International***

Limited: AIR 1997 SC 1644, the Supreme Court had held that:

“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.”

24. In **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company: (2007) 8 SCC 110**, the Supreme Court had observed as under:-

“10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In *U.P. State Sugar Corporation Vs. Sumac International Ltd.* [(1997) 1 SCC 568], this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of

Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.”

25. It is also relevant to state that there is no dispute that the petitioner has not completed the contract in question. The entire controversy relates to whether this was for reasons attributable to IICL. Plainly, this Court cannot interdict the invocation of the bank guarantees awaiting resolution of this dispute.

26. The contention, that the letters invoking the bank guarantees are not in its terms, is also unmerited. The bank guarantees do not require IICL to make any specific assertion apart from making an unequivocal demand of a quantified sum.

27. In the present case, as stated above, the letters dated 21.08.2017 sent by IICL for invoking the bank guarantees were similarly worded. The relevant extract of the letter sent to respondent no.2 for invoking the bank guarantee no. 110375IBGA00001 is set out below:-

“In terms of Letter of Award conditions and in accordance with Clause 1 of the Bank Guarantee, we hereby inform you that we have opted to invoke the above mentioned Bank Guarantee and request you to credit the entitle invoked amount of Rs.80,91,000/- (Rupees Eighty Lakhs Ninety One Thousand Only) before the close of today’s business hours, in our

account through RTGS as per the details given below:-

Beneficiary Name	IIC Limited
Credit Account No.	2570340000137
Centre (Location)	Amravati
Bank	HDFC BANK LTD
Branch	Amravati Branch Maharashtra
Account Type	Savings/Current/Over Draft
IFSC Code	HDFC0000257

”

28. It is clear from the above that IICL had specifically stated that the invocation of the bank guarantee in question was in terms of Clause 1 of the bank guarantee, and the petitioner's contention to the contrary cannot be accepted.

29. The next question to be examined is whether the petitioner has made out any other ground for interdiction of the bank guarantees in question. The law relating to the bank guarantees is now well settled and the bank guarantees can be interdicted only in special circumstances such as egregious fraud, special equities and irretrievable injury (See *Svenska Handelsbanken v. Indian Charge Chrome & Ors.: (1994) 1 SCC 502*; also see *Larsen & Toubro Limited v Maharashtra State Electricity Board and Others: (1995) 6 SCC 68*).

30. In the present case, Mr Datta contended that the financial condition of IICL is precarious and, therefore, the invocation of the bank guarantees must be interdicted. The said contention is also unpersuasive. Apart from asserting that the parent/group companies of IICL have suffered a quarterly loss of ₹215 crores for the first quarter of financial year 2017 and has suffered an annual net loss of ₹320.52 crores for the year ended March, 2017 as against a net loss of ₹108.25 crores in the previous fiscal year, the petitioner has not produced any specific material, which would indicate that IICL would be unable to return the amounts collected by invocation of bank guarantees in the event, the petitioner prevails arbitration.

31. More importantly, the fact that an entity has suffered a loss is no ground to interdict invocation of bank guarantees. It is well settled that the bank guarantees can be interdicted only in exceptional cases. In ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268***, the Supreme Court held as under:

“We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to

who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.”

32. In view of the above, the petitions are unmerited and are, accordingly, dismissed. The parties are left to bear their own costs. All the pending applications are also disposed of.

33. It is clarified that this Court has not expressed any opinion on the merits of the dispute between the parties and nothing stated herein should be construed as such.

MARCH 15, 2018

pkv

VIBHU BAKHRU, J