

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 04th January, 2018

Pronounced on: 10th January, 2018

+

O.M.P.(I) (COMM.) 470/2017 & IA No.15620/2017

ULTRATECH CEMENT LIMITED

..... Petitioner

Through : Mr.Sandeep Sethi, Sr Advocate
with Mr.Rishi Agrawala,
Ms.Malavika Lal, Ms.Niyati
Kohli, Advocates with Mr.Subodh
Sista, AR in person.

versus

**JAIPRAKASH ASSOCIATES
LIMITED & ANR.**

..... Respondents

Through : Mr.A.S.Chandiok, Sr Advocate
with Mr.Pawan Upadhyay,
Ms.Anisha Upadhyay, Mr.Rajesh
Chhetri, Advocates for respondent
No.1.
Mr.Lalit Chauhan & Ms.Sonal
Gupta, Advocates for respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The brief facts as alleged by the petitioner are as follows:-

a) On 31.03.2016 a Master Implementation Agreement was executed between the petitioner and respondent No.1 broadly outlining the arrangement between the parties vide a Scheme of Arrangement, which was finalized by them and requisite petition

seeking sanction was filed before the NCLT at Mumbai and Allahabad Benches in April, 2006;

b) on 15.02.2017 the NCLT Mumbai Bench sanctioned the Scheme of Arrangement between the petitioner and respondent no.1 and Allahabad Bench also sanctioned it on 02.03.2017;

c) on 23.03.2017 the petitioner vide its representations dated 23.3.2017 informed the General Manager, District Industrial Centre, Akbarpur, Uttar Pradesh of the transfer of the leasehold property and licenses of the respondent No.1 to itself pursuant to sanction of Scheme of Arrangement by the NCLT Bench at Mumbai. A similar letter was also issued by the petitioner for the Grinding Unit at Sikandarabad, District Bulandshahar;

d) on 29.06.2017 the Board of Directors of the petitioner and respondent No.1 in their meeting held on 29.6.2017 declared the scheme to be effective and all identified assets of the transferor were deemed vested into the petitioner with effect from 29.6.2017. The petitioner and the respondent executed an Escrow Agreement pursuant to which, the petitioner deposited ₹323,12,36,547/- with the Escrow Account to facilitate respondent No.1's seeking a letter of release of charge or No Objection Certificate for its loan availed from UPFC and PICUP in respect of its Tanda and Sikandrabad Grinding Units and other properties defined as condition subsequent -1 in Recital C of the Escrow Agreement;

e) on 26.10.2017 the State Government of Uttar Pradesh vide letter bearing reference No. 1196/77-6-17-11(M)/17 accorded its approval to UPFC informing of its decision to transfer the

liabilities of the respondent No.1 under the Loan Agreements in favour of the petitioner;

f) on 03.11.2017 UPFC after receiving approval from the State Government informed the Petitioner of its decision to transfer the loan to the petitioner. The petitioner was informed the bank guarantees of the respondent No.1 would have to be furnished by the petitioner in order to secure the interest free loans in the format provided;

g) on 10.11.2017 impugned letters were issued by the Respondent No.1 to the respondent No.2 instructing the respondent No.2 to release an amount of ₹288,73,95,000/- towards loan facility for Tanda grinding Unit and ₹34,38,41,5471- towards the Sikandrabad Grinding Unit totaling to ₹323,12,36,547/-. The petitioner on same date and on 11.11.2017 issued letter to the respondent No.2 informing the development pursuant to failure of respondent No.1 to fulfill the condition subsequent 1 as per the Escrow Agreement, whereby requesting the respondent No.2 to return the amount to the petitioner; and hence the present petition.

2. The respondent No.1 has also filed IA No.15620/2017 under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act') seeking directions for release of part of the amount lying in the Escrow Account in favour of UPFC.

3. It is the case of the petitioner there were two loans taken by respondent No.1 from the Pradeshhiya Industrial and Investment Corporation of UP Limited (hereinafter referred as 'PICUP') and

another from Uttar Pradesh Finance Corporation (hereinafter referred as 'UPFC') to the tune of ₹322 Crores approx which was secured either by the Bank Guarantees or by fixed charge. These were interest free loans under the development plan by the development banks considering the nature and location of the industry which were repayable after ten years.

4. It is alleged vide the Scheme of Arrangement sanctioned by the Courts above, these loans were to be transferred to the petitioner but the respondent No.1 instead of allowing the petitioner to take the benefit of interest free loan amounts for a period of ten years rather wrote to the different banks for invocation of its bank guarantees and repaid part of the loan amount and now is seeking a direction to pay ₹126,37,95,000/- to the UPFC despite the liabilities of respondent No.1 have since been transferred and taken over by the petitioner herein on 29.06.2017.

5. The learned senior counsel appearing for the petitioner referred to the Definitions given in the Scheme of Arrangement especially clause 1.1.(k) which says *closing date shall have the meaning set forth in clause 10.1*. Further definitions are:

"1.(w) "JAL Business" means the business of manufacturing, sale and distribution of cement and clinker manufactured at the JAL Cement Plants, including all rights to operate such business, its movable or immovable assets, captive power plants, DG sets, coal linkages, rights, privileges,

liabilities, guarantees, land, leases, licenses, permits, mining leases, prospecting licenses for mining at limestone, letters of intent for mining of limestone, tangible or intangible assets, goodwill, all statutory or regulatory approvals, logistics, marketing, warehousing, selling and distribution networks (marketing employees, offices, depots, guest houses and other related facilities for the JAL Business), employees, existing contracts including fly-ash contracts, railway sidings, fiscal incentives in relation to the JAL Business, more particularly described in Schedule I hereto.
xxxx

1.(ii) 'JAL Non RTL Lenders' means the lenders and creditors of Transferor1 from whom the Transferee shall assume the JAL Non RTL liabilities, in terms of clause 10.3(g) on the Closing Date.

(jj) 'JAL Non RTL Liabilities' means such amount of liabilities out of JAL Financial indebtedness and the JAL Net Working Capital, owed by the Transferor1 to the JAL Non RTL Lenders to be assumed by the Transferee on the Closing Date, provided however that in no event the aggregate of the JAL RTL and JAL Non RTL Liabilities shall exceed Rs.10369,00,00,000 (Rupees Ten thousand Three hundred and Sixty Nine Crores)''

10 CLOSING

10.1 Closing shall be on a date mutually agreed between the Transferor 1, Transferor and Transferee.....xxx.

10.2 All transactions to be completed on the Closing Date shall be deemed to occur simultaneously and no transaction shall be

deemed to have been consummated unless all such transactions have been consummated. It is clarified that the issue of the JAL Securities and the JCCL Securities to the Transferor1 and the Transferor2 respectively shall happen on the Closing Date and the transfer of the JAL Business and the JCCL Business to the Transferee shall be deemed to be complete and absolute with effect from the Closing Date.

10.3 On the Closing Date, each of the following shall be undertaken in the sequence stipulated hereunder:-

(a) to (f) xxx xxx

(g) the Transferee shall assume the JAL RTL, JCCL RTL, JAL Non RTL Liabilities and JCCL Non RTL Liabilities on the Closing Date.

(h) xxx xxx

10.14 Interest free loan/VAT deferment in respect of Sikandarabad, Tanda and Bagheri grinding units will not form a part of the JAL Business and the JCCL Business, subject to receiving the no-objection certificates from the appropriate state government agencies/departments confirming that the Encumbrance over the assets of the JAL Business and the JCCL Business will be released on or prior to the Closing Date. Any such Encumbrance will be unconditionally and irrevocably released within 30 (thirty) days from the Closing Date.

If such no-objection is not received prior to the Closing Date, interest free loan/VAT deferment In respect of Sikandarabad,

Tanda and Bagheri grinding units will form a part of the JAL Business and the JCCL Business and the bank guarantees submitted by the Transferor1 and the Transferor2 shall be replaced by the Transferee on the Closing Date. In such case, interest free loan/VAT deferment shall be considered for computation of JAL Financial Indebtedness and the JCCL Financial Indebtedness and will be treated as JAL Non RTL Liabilities and the JCCL Non RTL Liabilities respectively.”

6. I may also refer to relevant clauses of Escrow Agreement dated 29.06.2017 noted as under:-

“Recitals

C. JAL has informed UTCL that letter of release of charge or no objection certificate for loans amounting to Rs.323,12,36,547 (Rupees three hundred and twenty three crores twelve lakhs thirty six thousand five hundred and forty seven) availed from Uttar Pradesh Financial Corporation ("UPFC") in respect of its Tanda Grinding Unit and from the Pradeshiya Industrial & Investment Corporation of Uttar Pradesh Limited ("PICUP") in respect of its Sikandarabad Grinding Unit (UPFC and PICUP are collectively referred to as the "Lenders") cannot be obtained prior to the Closing Date. JAL and UTCL have agreed that JAL shall obtain and provide to UTCL release letter from UPFC for release of charge on Tanda Grinding Unit and no objection certificate from PICUP for Sikandarabad Grinding Unit within 1 (one) month from the Closing Date ("Condition Subsequent1").

6. RELEASE OF THE AMOUNTS IN THE ESCROW ACCOUNT

6.1 JAL has provided bank guarantees to (i) UPFC for Rs.162,36,00,000 (Rupees one hundred and sixty two crores and thirty six lakhs); and (ii) PICUP for Rs.34,38,41,547 (Rupees thirty four crores thirty eight lakhs forty one thousand five hundred and forty seven), totaling to an amount of Rs.196,74,41,547 (Rupees one hundred and ninety six crores seventy four lakhs forty one thousand five hundred and forty seven) as per details in Annexure 1B hereto; In the event the Lenders invoke the bank guarantees, JAL undertakes that it shall submit evidence to UTCL and the Escrow Bank that the said bank guarantees have been invoked in the form at Annexure 2A hereto.

6.2 Within I (one) Business Day from the receipt of the notice as per Annexure 2A the Escrow Bank shall release an amount of Rs.126,37,95,000 (Rupees One Hundred Twenty Six Crores Thirty Seven Lakhs Ninety Five Thousand) out of the Escrow Amount¹ to UPFC in the manner set out in the said notice in the form at Annexure 2A hereto.

6.3 Upon JAL claiming fulfillment of the Condition Subsequent¹, JAL shall notify UTCL thereof and provide supporting evidence and documents for unconditional release of charge in respect of Tanda grinding facility from UPFC and issue of unconditional no objection certificate by PICUP for transfer ,of Sikandrabad grinding facility. Upon notification by JAL

of fulfillment of the Condition Subsequent1, UTCL shall within 3 (three) Business Days notify to JAL whether the Condition Subsequent I has been fulfilled to the satisfaction of UTCL. In the event UTCL does not notify to JAL regarding fulfillment or non fulfillment of the Condition Subsequent1 within the aforesaid period of 3 (three) Business Days, the said Condition Subsequent1 shall be deemed to be fulfilled. Provided that in the event UTCL notifies to JAL that the Condition Subsequent1 has not been fulfilled to the satisfaction of UTCL, along with valid reasons, then Parties hereby acknowledge and agree that JAL shall not issue any notice pursuant to Clause 6.4 below and the process set out in this Clause 6.3 shall be repeated until the Condition Subsequent1 is fulfilled to the satisfaction of UTCL in accordance with this Clause 6.3.

6.4 In the event the Condition Subsequent1 has been fulfilled to the satisfaction of UTCL or deemed fulfilled in accordance with Clause 6.3, then within J (one) Business Day of the notification by UTCL under Clause 6.3 of its satisfaction of fulfillment of Condition Subsequent1 or after the expiry of the aforesaid period of 3 (three) Business Days, JAL shall issue a notice to the Escrow Bank in format annexed hereto as Annexure 3.

6.5 Within I (one) Business Day from the receipt of the notice as per Annexure 3, the Escrow Bank shall release the balance amount of the Escrow Amount1 along with the interest thereon to JAL by way of credit

to the bank account of JAL as mentioned in the said Annexure. Accordingly, the said Condition Subsequent1 shall be fulfilled and discharged.”

7. The learned senior counsel for the petitioner then referred to a letter dated 21.12.2017 written by respondent No.1 to respondent No.2 mentioning the respondent No.1 had requested vide letters dated 11.11.2017 to UPFC and PICUP to encash bank guarantees and the Bank guarantees of ₹162,36,00,000/- and ₹34,38,41,547/- have been encashed by UPFC and PICUP.

It is argued this act of the respondent was highly malafide when as per scheme of arrangement dated March 2016, the liabilities of respondent No.1 were since transferred to the petitioner herein, the respondent No.1 had no business to request the banks to invoke the bank guarantees and adjust the money thereof against interest free loans which were for ten years and thus caused loss to the petitioner. The respondent further had no authority to direct the ICICI bank to get release a amount of ₹126,37,95,000/- to UPFC since the said Escrow Account was valid only till 30 days after the scheme came into operation on 29.06.2017.

8. The petitioner relied upon recital C of the Escrow Agreement to say UTCL have agreed that JAL shall obtain and provide to UTCL the release letter from UPFC for release of charge on Tanda Grinding Unit and no objection certificate from PICUP for Sikandrabad Grinding Unit *within one month* from the

closing date which was a condition subsequent 1 and since the respondent no.1 failed to comply with such condition within time therefore this Escrow Agreement lost its effect and the respondent No.1 now cannot urge the respondent No.2 should pay ₹126,37,95,000/- to UPFC.

9. Heard.

10. Per clause 10.4 (supra) it was agreed between the parties the interest free loan/VAT deferment in respect of Sikandrabad, Tanda and Bagheri grinding units will not form part of JAL business and JCCL business *subject to receiving the no objection certificates from the appropriate state government agencies/departments* confirming that the encumbrance over the assets of the JAL business and the JCCL business will be unconditionally and irrevocably released on or prior to the closing date and if such no objection is not received prior to the Closing Date, the interest free loan/ VAT Deferment in respect of these units will form part of JAL business and JCCL business and the bank guarantees submitted by the respondent No.1 shall be replaced by the petitioner on the Closing Date and in such case interest free loan/VAT deferment shall be considered for computation of JAL Financial Indebtedness and will be treated as JAL Non RTL Liabilities and JCCL Non RTL Liabilities respectively.

11. Admittedly, no objection certificate could not be obtained by respondent no.1 prior to the closing date viz., 29.06.2017 but

admittedly the petitioner also did not replace the bank guarantees furnished by respondent No.1 and thus it was only because of this reason the petitioner, respondent No.1 and respondent No.2 entered into an Escrow Agreement dated 29.06.2017 wherein per Recital C (supra) the respondent No.1 was to obtain and provide to the petitioner the *release letter* from the UPFC for release of charge on Tanda Grinding Unit and *no objection certificate* from the PICUP for Sikandrabad Grinding Unit within one month from the closing date, which was a *Condition Subsequent 1*.

12. Though *condition subsequent 1* could not be complied with within a month but it doesnot mean the Escrow Agreement came to an end as claimed by the petitioner. The petitioner too *did not replace the bank guarantees* which were furnished by respondent No.1 to UPFC and PICUP. Now clause 11.7 of the Escrow Agreement note:-

“11.7 Entire Agreement

This Agreement together with the Annexures contains the entire agreement of the Parties hereto with respect to the transactions contemplated under this Agreement and supersedes any prior agreements and undertakings, both written and oral.”

Clause No.7 is qua termination of Escrow Agreement. Clause No.7.1 says *this agreement shall become effective on the effective date and shall continue to be effective and in full force until the Escrow Amount1, the Escrow Amount2 and the Escrow*

Amount3 are released by the Escrow Bank in terms of clause 6 and thereafter this Agreement shall terminate.

13. Then clause No.4.3 notes upon receipt of the escrow amount1, the escrow amount2, the escrow amount3, in the escrow account, the escrow bank shall place the whole of the escrow amounts in separate term deposit for a period of one year at the prevailing interest rate. Upon expiry of the period of such term deposits, the escrow bank shall automatically on the same day and without any further instructions from any of the parties, redeem the term deposits and again place the redemption proceeds of the term deposit along with interest accrued in term deposits etc. Hence, there was never any intention of the parties to terminate the agreement within a month after 29.06.2017.

14. Moreover the respondent no.1 did not act malafide by writing to the banks for encashment of the bank guarantees since the Escrow Agreement enclosed Annexure 2A / a format of the letter from the respondent No.1 informing the petitioner and to the ICICI Bank about the invocation of Bank guarantees by the lenders. The format read as under:-

“ANNEXURE 2A

*Format of letter from JAL informing UTCL and
ICICI Bank about invocation of bank guarantees by
Lenders*

[insert date]

To,

ICICI Bank Limited,

[insert address]

To,

UltraTech Cement Limited

*B Wing, Ahura Centre, 2nd Floor,
Mahakali Caves Road, Andheri (East),
Mumbai - 400 093*

Dear Sirs,

Re: Invocation of Bank Guarantees by Lenders

We refer to the Escrow Agreement dated executed between UltraTech Cement Limited, Jaiprakash Associates Limited and ICICI Bank Limited ("Escrow Agreement").

Pursuant to Clause 6.1 of the Escrow Agreement, we notify you that pursuant to our letters to PICUP and UPFC to invoke the bank guarantees issued on our behalf in their favor, the PICUP and UPFC have invoked the bank guarantees.

Please find enclosed copies of our letters to PICUP and UPFC to invoke the bank guarantees and the letters from PICUP and UPFC invoking bank guarantees of Rs.196,74,41,547 (Rupees one hundred and ninety six crores seventy four lakhs forty one thousand five hundred and forty seven).

Pursuant to Clause 6.2 of the Escrow Agreement, we hereby instruct the Escrow Bank to Release an amount of Rs126,37,95,000 (Rupees One Hundred Twenty Six Crores Thirty Seven Lakhs Ninety Five Thousand) out of the Escrow Amount to UPFC as follows:

Name of the Bank::

Branch:

Account Title:

Account Number:

Capitalized terms used herein, but not defined herein shall have the meaning assigned to them under the Escrow Agreement.

For and on behalf of Jaiprakash Associates Limited

By: _____

Authorized signatory”

15. Thus, the parties had themselves agreed per Escrow Agreement that respondent no.1 would write such letters to the respondent No.2 and to the petitioner after invocation of Bank Guarantees by the lender and then to invoke clause 6.2 (supra) of

Escrow Agreement. Hence there was neither any default on the part of the respondent No.1 nor it acted mala fide.

16. Admittedly, the bank guarantees - the respondent No.1 had furnished to its lenders had since been encashed and amounts being paid to UPFC and PICUP and now the respondent wished to pay the balance amount of ₹126,37,95,000/- to get release its property from charge and hence had written letter to ICICI Bank for releasing payment of ₹126,37,95,000/- per clause 6.1 and 6.2 (supra) of the Escrow Agreement.

17. A bare perusal of the clause 6.1 and 6.2 of the Escrow Agreement would reveal what was required under the agreement was if the lender invoke the bank guarantees then respondent No.1 would submit evidence of invocation to the petitioner and would inform the petitioner and the ICICI bank in the format-Annexure 2A (supra) and then only per clause 6.2, within a business day from the date of the receipt of the notice per annexure 2A, the escrow bank shall release an amount of ₹126,37,95,000/- out of the Escrow Amount 1 to UPFC in the manner set out.

18. Thus the only evidence required at this stage was the evidence of invocation of the bank guarantees by the lenders of respondent no.1, which evidence was admittedly submitted to the bank and is also filed at pages No.22 to 32 as well as pages 33 to 39 of the documents of the petitioner. Hence, where the evidences qua invocation of the bank guarantees was supplied to Escrow

Bank there was no choice for it except to release the amount of ₹126,37,95,000/- to UPFC without fail. It was only upon fulfillment of the *Conditions Subsequent1* viz., release letter from UPFC for release of the charge on Tanda Grinding Unit and no objection from PICUP for Sikanderpur Grinding Unit, the respondent No.1 was again to inform the petitioner and to provide supporting evidence and documents for such unconditional release of charge from UPFC and issue of unconditional no objection certificate by the PICUP and only then per clause No.6.4 of Escrow Agreement upon issuing notice to the Escrow Bank-in format of annexure P3, the escrow bank was to release the balance amount lying with it along with interest thereon to respondent No.1 by way of credit to the bank account of respondent no.1 and only then the *Condition Subsequent1* was to be fulfilled and discharged.

19. Thus, the plea of the petitioner the Escrow Account became inoperative after a month and on its expiry the assets of JAL along with loans/liabilities stood transferred to petitioner is fallacious. The Escrow was not to terminate after a month but was to terminate per clause 6.5 (supra). Thus there is no reason why respondent no.2 should not comply with the terms of the Escrow Agreement if a request is made in terms of the contract.

20. Considering the terms of clauses No.6.1 to 6.5 (supra) of the Escrow Agreement, the petitioner has no case for injunction and hence the petition is dismissed being devoid of merits.

21. The pending application of the respondent No.1 also stands disposed of.

22. No order as to costs.

YOGESH KHANNA, J

JANUARY 10, 2018

M

