$~28

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

\+ O.M.P.(I)(COMM.) 480/2018

PUNJ LLOYD LIMITED & ANR. ..... Petitioners

Through: Mr.Dayan Krishnan, Sr. Adv. with Mr.Mrinal Bharti, Mr.Vivek Jain, Mr.Manish Shekhavat, Ms.Aakashi Lodha, Mr.S.Seshadri, Advs.

versus

STATE BANK OF INDIA & ORS. ..... Respondents

Through: None

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

<u>O R D E R</u>

% **21.12.2018**

<u>IA 17829/2018</u>

Exemption allowed subject to all just exceptions.

<u>OMP(I)(Comm.) 480/2018</u>

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners *inter alia* praying for the following reliefs:

> *"A. Restrain/injunct the Respondent No. 1 to 3 jointly and severally, including their employees, representatives, agents, successors and assigns from releasing any payment to Respondent No.4 under the aforesaid Counter Bank Guarantee (Para 6 of the Application) issued by them to Respondent No.4 pending the hearing and final disposal of the resolution of the dispute /arbitration proceedings;"*

2. It is the case of the petitioners that the petitioners have been engaged by PRPC Refinery and Cracker SDN. BHD ("owner") for

Engineering, procurement, construction and commissioning of Rapid Tank Farm for Refinery and Petrochemicals Integrated Project Awards in accordance with the terms and conditions of EPCC Contract Rapid Project Package 22 dated 09.09.2014. In terms of Clause 5 of the EPCC Contract, the petitioners have furnished a Performance Bond through respondent no.4 to the owner. Against the said Performance Bond, respondent nos.1 to 3 issued irrevocable Standby Letters of Credit in favour of the respondent no.4. In turn, Bank of Baroda issued a Counter Guarantee dated 19.12.2014 to the respondent no.1 for USD 1,250,000.00 and IDBI Bank issued a Counter Guarantee dated 20.12.2014 to the respondent no.1 for USD 14,000,000.00.

3. It is the case of the petitioners that though the petitioners have completed 99.54% of the work, the petitioners received an intimation from respondent no.4 regarding the invocation of the Performance Bond by the owner vide owner's letter dated 13.12.2018 to respondent no. 4. The petitioners immediately requested respondent no.4 to hold the said encashment till they hear from the owner on the representation of the petitioners. However, on 20.12.2018, the petitioner no.1 received communication from respondent nos.1 to 3 that respondent no.4 has called upon them to make the payment under the Counter Bank Guarantees. It has been noticed by the petitioners that respondent no. 4 has also debited the amount in relation to the Performance Bond from the account of petitioner no.2.

4. The present petition has therefore, been filed by the petitioners seeking an order of restraint against respondent nos.1 to 3 from

releasing any payment to respondent no.4 under the aforesaid Counter Bank Guarantees issued by them to respondent no.4.

5. The learned senior counsel for the petitioners has contended that as the petitioners have completed 99.54% of the work, the invocation of the Performance Bond by the owner is unjustified. Equally, if respondent nos.1 to 3 are allowed to release the payment in favour of respondent no.4, the petitioners would suffer grave irretrievable injury.

6. I have considered the submissions made by the learned senior counsel for the petitioners, however, find no merit in the same.

7. In the present case, the owner is not even a party to the present petition. In any case, the question whether the petitioners have completed 99.54% of the work or not is not a dispute that can be adjudicated in the present petition or be considered relevant for the purpose of the order prayed for by the petitioners. Admittedly, the Counter Bank Guarantees issued by respondent nos. 1 to 3 in favour of respondent no.4 are unconditional and unequivocal in nature. The same having been invoked by respondent no.4 in accordance with the terms thereof, cannot be injuncted by this Court.

8. In any case, there is no averment made in the petition alleging any fraud or irretrievable injustice being caused to the petitioners. As explained in the repeated judgments of the Supreme Court, including in ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.***, (2016) 10 SCC 46, Bank Guarantee is a separate contract and is not qualified by the contract under which it is given and 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. The Court relied on its earlier judgment in ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co,.*** (2007) 8 SCC 110, which had held as under:-

> *"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 realize 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 realization 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."*

9. In the present case, the petitioners have therefore, failed to make out any case justifying grant of injunction in their favour.

10. In view of the above, I find no merit in the present petition, and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

DECEMBER 21, 2018
RN