HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.(C) No. 2116 of 2019

Ansh Hi Tech Ventures Pvt. Ltd. Through Its Managing Director Abhijeet Singh, S/o H.M.P. Singh, Aged About 42 Years, 29-C, Light Industrial Area, Bhilai, District Durg, Chhattisgarh.

---- Petitioner

Versus

1. Bank Of India Through Assistant General Manager Bhilai Branch, Civic Centre, Indira Palace, Bhilai, District Durg Chhattisgarh.
2. LNV Technology Private Limited Through Manager Project Management, Vth Floor, Sigapi Acchi Building, 18/3 Rukhmani Lakshmipatathi Road, Behind Air India Building Complex, Egmore, Chennai, Tamil Nadu, Pin 600008.

---- Respondents

For Petitioner	:	Mr. Yashwant Thakur, Advocate
For Respondent No.1	:	Mr. Anand Shukla, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

25.06.2019

Heard.

1. By way of the instant writ petition, the petitioner prays for following reliefs :

   (i) To kindly set aside the memo dated 21.06.2019 (Annexure P-1) issued by the respondent Bank of India Bhilai Branch, whereby the Bank has intimated of invocation of Advance Bank Guarantee for Rs.10,88,863/-.

   (ii) To kindly make any other order that may be deemed fit and just in the facts and circumstances of the case including awarding of the costs to the petitioner.

2. Learned counsel for the petitioner would submit that by the document Annexure P-1, the petitioner was informed that the Bank Guarantee No. ABG-9300IPEBG180032 has been invoked which was Advance Bank Guarantee for Rs.10,88,863/- and the petitioner was required to ask to pay the amount. He submits that the petitioner and the respondent No.2 entered

into an agreement of supply of certain commercial goods wherein the petitioner was a supplier. It is stated as per the terms of payment 10% of the basic order value was to be received by the petitioner which was in lieu of the raw material which would be procured and further in order to ensure the supply, the petitioner was to furnish the advance Bank Guarantee. It is submitted that the further terms of payment was that 80% of the order value shall be released by Cheque after materials are supplied and the balance of 10% of the order value shall be released by way of Performance Bank Guarantee. It is further contended that the terms of the original agreement was further changed and amount of Rs.1 Crore and odd was reduced to Rs.32 Lakhs.

3. Learned counsel for the petitioner further referred to the terms of the Advance Bank Guarantee which is invoked and would submit that it was condition president that the respondent was to establish that the amount claimed is due by way of non-fulfillment of the purchase order. However, in this case, the supply having been made, the terms to invoke the Bank Guarantee already expired. He further submits that in order to invoke the Bank Guarantee, the necessary condition should have been fulfilled and reference was made to *(1999) 8 SCC 436 {Hindustan Construction Co. Ltd. v. State of Bihar & Others}* and submits that under the circumstances if the original condition of non-fulfillment is not clear then in such case the order staying the Bank Guarantee can be very well passed.

4. Per contra, the learned for the respondent No.1 opposes the argument and submits that in case the Bank Guarantee is invoked, the Bank is under obligation to honour the same. He further referred to Clause 9 of the agreement and submits that any dispute arising out of the agreement, the petitioner should have invoked the arbitration clause.

5. Heard learned counsel appearing for the parties and perused the documents.

6. The commercial terms and condition which has been relied on by the petitioner contains an arbitration clause which purports that if at any time any controversies or any matter arising out of the purchase order, either party may invoke the arbitration clause. Though it has been contended that by the time the arbitration clause would be invoked, the Bank Guarantee may be encashed.

7. Be that as it may, the Supreme Court in case of ***Adani Agri Fresh Ltd. v Mahaboob Sharif and Others***[1], the Supreme Court applied its previous decisions rendered in ***Vinitec Electronics Private Ltd. v HCL Infosystems Ltd.***[2] and ***U.P. State Sugar Corporation v Sumac International Ltd.***[3] in para 9 and thereafter, concluded thus in para 10 :

> "10. Based on the judgments rendered by this Court, more particularly, the judgments referred to hereinabove, it was the vehement contention of the learned counsel for the appellant, that the terms and conditions of a "deed of guarantee" could not be injuncted from being given effect to, on the basis of the principle adopted in determining "prima facie case", "balance of convenience" and "irreparable loss", which are the usual parameters on the basis whereof injunctions are granted. Insofar as the injunction of an unconditional bank guarantee is concerned, it was submitted that the same could be granted only if the court was satisfied about the commission of a flagrant fraud, at the hands of one or the other contracting parties, or alternatively if the Court was satisfied that an irreparable injury or some irretrievable injustice would be caused to the party concerned."

8. In ***Mahatma Gandhi Sahakra Sakkare Karkhane v National Heavy Engg. Coop. Ltd. and Another***[4] the Supreme Court observed that in case of invocation of Bank Guarantee, the fraud, if any, must be of an egregious

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1 (2016) 14 SCC 517
2 (2008) 1 SCC 544
3 (1997) 1 SCC 568
4 (2007) 6 SCC 470

nature as to vitiate the underlying transaction. The Supreme Court observed thus at paras 25, 26 & 27 :

> 25. In the present case the respondent in its application filed under Section 9 of the Arbitration and Conciliation Act, 1996 in the District Court, Bidar mostly highlighted as to how the very vital conditions of the agreement have been breached by the appellant herein by not arranging the funds at the proper time. It is alleged that the appellant did not even complete their obligation in respect of providing storage facilities for valuable goods, etc. It is specifically alleged that required funds were not available with the appellant. On account of non-availability of funds there were two halts of nine months and five months during the execution of the project from 3-12-2001 to 14-8-2002 and from 14-8-2002 to 10-1-2003. It is further alleged that the appellant failed to arrange for all the pre-requisites. It is not necessary for the purpose of disposal of this appeal to notice all the allegations and averments filed by the respondents except to note that the main thrust of the allegations relate to alleged breach of the conditions of the agreement by the appellant. It was further contended that the bank guarantees were conditional bank guarantees and not unconditional. We have referred to the substance of the allegations only to highlight that no factual foundation as such has been laid in the pleadings as regards the allegati on of fraud. In fact there is no serious allegation of any fraud except using the word “fraud”. It is also not stated as to how irreparable loss would be caused in case the appellant is allowed to encash the bank guarantee. The only two exceptions, namely, fraud and irretrievable injury based on which injunction could be granted restraining encashment of bank guarantee are singularly absent in the pleadings. Once it is held that the bank guarantee furnished by the banker is an unconditional one, the appellant in our considered opinion, cannot be restrained from encashing the bank guarantee on the ground that a serious dispute had arisen between

the parties and on the allegations of breach of terms and conditions of the agreement entered between the parties.

26. The High Court in its judgment went to the extent of recording a finding that it cannot be said that there was no delivery, erection and commissioning of plant. The High Court also took the view that the appellant has agreed to invoke the bank guarantee only in case of default on the part of the respondent in delivery, erection, commissioning of the plant. This view of the High Court is totally contrary to the terms and conditions of the bank guarantee executed by the bank in favour of the appellant. It has been specifically agreed by the banker to pay the guaranteed amount to the appellant on demand and "it shall not be open to the guarantor to know the reasons of or to investigate or to go into the merits of the demands or to question or challenge the demand or to know any facts affecting the demand". The bank guarantee further makes it clear that it shall not be open to the guarantor to require the proof of the liability of the seller to pay the amount, before paying the sum demanded. In the process the High Court made the following observations which in our considered opinion are totally untenable and unsustainable being contrary to the terms and conditions incorporated in the bank guarantee. The High Court observed:

"From the facts and circumstances narrated by the petitioner, it is clear that the first respondent could not have invoked the bank guarantee when the setting up of the machinery and commissioning in accordance with the agreement and all these facts therefore show that the invocation of the bank guarantee was fraudulent.

It is further held that since the appellant failed to give any information to the bank as to the fact of any alleged breach of agreement in order to invoke the bank guarantee itself amounts to fraud."

We must however hasten to add that the learned Senior Counsel appearing for the respondent did not support this

> part of the judgment of the High Court.
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> 27. However, Shri Jayant Bhushan, learned Senior Counsel appearing for the respondents contended that invocation of the bank guarantee relating to "delivery and commissioning of the plant" was wholly illegal and the High Court was right in granting the injunction order relating to that guarantee. It was submitted that the said bank guarantee could be invoked only on the failure of the respondent to commission the plant according to the schedule of commissioning in terms of the relevant clauses of the principal agreement entered into between the parties and since the conditions contemplated under those clauses did not exist, the invocation of the guarantee by the appellant itself is bad."

9. In the case in hand, there is no case of fraud has been projected. What was the terms and condition that Bank Guarantee for which breach is committed is a matter of civil dispute for which necessary evidence are to be led. Prima facie after going though the documents and terms of agreement, it also contains arbitration clause and further taking into the principles as has been laid down *supra* by the Supreme Court, I am not inclined to entertain this petition to restrain the encashment of Bank Guarantee.

10. Accordingly, the petition being devoid of merit is dismissed.

Sd/-
Goutam Bhaduri
Judge

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