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HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on 25-9-2018 in WPC No.2694 of 2018
Order Reserved on 26-9-2018 in WPC No.2707 of 2018
Order delivered on : 15/01/2019

WPC No. 2694 of 2018

1. M/s Anil Buildcon (India) Private Limited Flat No. 104, 1st Floor, Lovina Court Mungeli Naka, Bilaspur, Chhattisgarh. Acting In The Premises Through Its Director Shri Anil Kumar Verma, S/o Shri Jagdish Verma, Aged About 60 Years R/o 14/1152, Vinoba Nagar, Bilaspur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Public Works Department, Indravati Bhawan, Mantralaya, New Raipur, Chhattisgarh.

2. The Engineer In Chief Public Works Department, New Raipur, Chhattisgarh.

3. The Chief Engineer Public Works Department Surguja, Range, Ambikapur, District Surguja, Chhattisgarh.

4. The Executive Engineer Public Works Department Manendragarh, District Koria, Chhattisgarh.

5. The Manager State Bank Of India Branch Bilaspur, Galaxy Heights, Vyapar Vihar, Bilaspur, Chhattisgarh.

---- Respondent

WPC No. 2707 of 2018

1. M/s Anil Buildcon (India) Private Limited Flat No. 104, 1st Floor, Lovina Court Mungeli Naka, Bilaspur, Chhattisgarh. Acting In The Premises Through Its Director Shri Anil Kumar Verma, S/o Shri Jagdish Verma, Aged About 60 Years R/o 14/1152, Vinoba Nagar, Bilaspur, Chhattisgarh.

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Versus

1. State Of Chhattisgarh Through The Secretary, Public Works Department, Indravati Bhawan, Mantralaya, New Raipur, Chhattisgarh.
2. The Engineer In Chief Public Works Department, New Raipur, Chhattisgarh.
3. The Chief Engineer Public Works Department Surguja, Range, Ambikapur, District Surguja, Chhattisgarh.
4. The Executive Engineer Public Works Department Manendragarh, District Koria, Chhattisgarh.
5. The Manager State Bank Of India Branch Bilaspur, Galaxy Heights, Vyapar Vihar, Bilaspur, Chhattisgarh

---- Respondent

For Petitioner	Shri Goutam Khetrapal, Advocate
For Respondent/State	Shri A.S. Kachhawaha, Addl. Adv. General
For Respondent/SBI	Shri P.R. Patankar, Advocate

C A V Order

By

Prashant Kumar Mishra, J.

1. In WPC No.2694 of 2018 petitioner has sought quashment of the communication dated 4-9-2018 (Annexure – P/1) issued by the Executive Engineer, Public Works Department, Korea Division, Manendragarh, addressed to the respondent No.5 State Bank of India invoking encashment of bank guarantees in contract No.10/DL year 2014-15 and No.11/DL year 2014-15. The same communication has again been assailed in WPC No.2707 of 2018, therefore, both the writ petitions are

decided by the common order, albeit they are reserved on different dates.

2. The petitioner entered into two different contracts with the Public Works Department bearing contract No.10/DL year 2014-15 and No.11/DL year 2014-15 for construction of road and has executed Bank Guarantee for Rs.95.00 lacs on dated 20-12-2017 and for Rs.62.50 lacs on dated 21-10-2016, respectively. Both the Bank Guarantees are valid on the date of invocation. On allegation that an amount of Rs.38.19 lacs in contract No.10/DL year 2014-15 and Rs.14.54 lacs in contract No.11/DL year 2014-15 is to be recovered from the petitioner the Department proceeded to recover the amount by invoking the Bank Guarantee.

3. The petitioner would contend that it has executed the entire contract satisfactorily; therefore, invocation of Bank Guarantee is entirely arbitrary and unreasonable. It is also stated that the impugned invocation of Bank Guarantee is in violation of principles of natural justice.

4. Having heard learned counsel for the petitioner, it is significant to notice that in both the writ petitions there is no averment by the petitioner that the obtainment of Bank Guarantee itself or its invocation is a result of fraud or that it would result in irretrievable harm or injustice to the

petitioner. The entire petitions are based on pleadings that having executed the contract satisfactorily there is no foundation for invocation of Bank Guarantee or that it is in violation of principles of natural justice.

5. The law as to when a restraint order can be issued against the Bank or beneficiary of the Bank Guarantee is well settled. Such restraint for invoking the Bank Guarantee is permissible when there is such a fraud of which the beneficiary seeks to take advantage or where allowing invocation of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

6. In **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

1 (2016) 14 SCC 517
2 (2008) 1 SCC 544
3 (1997) 1 SCC 568

> "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.

7. 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 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

4 (2007) 6 SCC 470

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 allegation 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."

8. In the case at hand, the entire copy of Bank Guarantee has not been placed on record. What is filed as Annexure – P/7 is only part and parcel of Bank Guarantee. Since the entire Bank Guarantee has not been filed, in absence of any pleading by the petitioner that the Bank Guarantee was not unconditional, it is to be treated to be an unconditional Bank

Guarantee.

9. It is settled law that Bank Guarantee itself is a separate contract than the main contract in which the Bank Guarantee has been submitted. Thus, a party to the contract cannot be permitted to invoke violation of principles of natural justice because relation between the parties *qua* the Bank Guarantee is contractual in nature and principles of natural justice are not attracted when the unconditional Bank Guarantee is invoked by its beneficiary.

10. In view of the settled legal position no case for interference is made out in both the writ petitions. Accordingly, both the writ petitions are dismissed.

11. There shall be no order as to cost(s).

Sd/-
Judge
(Prashant Kumar Mishra)

Gowri