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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO.851 OF 2019

Beacon Trusteeship Limited and anr … Petitioners
V/s.
Earthconinfracon Private Ltd
and others … Respondents

Mr. Vishal Kanade a/w Mr. Abhishek Adke, Mr. Vikran Zunjarrao i/by Zunjarrao & Co.,for the Petitioners.
Mr. Shyam Dewani a/w Ms. Shantala Sankrit & Chirag Chanani, for respondent Nos. 2 to 6.

CORAM : G. S. KULKARNI, J.

DATE : 17th September, 2019.

P.C. :

1] Heard Mr. Kanade, learned counsel for the petitioners and Mr. Shyam Dewani, learned counsel for respondent Nos. 2 to 6. Respondent No.1 has been ordered to be sent to Corporate Insolvency Resolution Process (CRIP), by an order passed by National Company Law Tribunal, New Delhi.

2] Mr. Kanade, learned counsel for the petitioners at the outset submits that the petitioners are pressing for interim measures against respondent Nos. 3 to 6, who are the guarantors.

3] Respondent No.1 availed financial facilities for investment in the construction project being undertaken by respondent No.2 at Noida. The project consisted construction of 17 towers. Respondent No.1 intended to purchase 268 units in the said project and accordingly required financial facilities.

4] Accordingly a Debenture Trustee Appointment Agreement dated 13th June, 2017 which came to be executed between the petitioners and respondent No.1. Also a Debenture Trust Deed came to be executed on the same day. The amounts came to be disbursed under these primary documents and other consequential documents executed between the petitioners and the respondents. It is not in dispute that an amount of Rs.52.50 crores came to be disbursed in favour of respondent No.1. The case of the petitioners is that there was a default on the part of respondent No.1 in repayment of the debt which has also been admitted by respondent No.1. Correspondence to that effect is placed on record. However, despite assurances, respondent No.1 could not repay the amounts to the petitioners. It appears to be also not in dispute that respondent No.3 is the corporate guarantor and respondent Nos. 4 to 6 are personal guarantors. The reading of the Deeds of Guarantees, placed on record would reveal that the liability of guarantors is co-extensive with the liability of the principal-borrower respondent No.1. Learned counsel for the petitioner has referred to clause 2 of the Deed of Personal Guarantee entered between the petitioners and respondent Nos. 3 to 6 which reads thus :-

> **"2. GUARANTEE AND INDEMNITY**
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> 2.1 **Guarantee**
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> For good and valuable consideration being the investment in the Debentures of the Company by the Debenture Holders in terms of the Debenture Trust Deed (the receipt and sufficiency of which are acknowledged), the Guarantors hereby jointly and severally guarantee to and covenant with the Debenture Trustee for the Issuer and on behalf of each other that:
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> 2.1.1 in the event of either the Company or the other Obligors not performing or observing any of their respective terms and conditions under the Transaction Documents, or if either the Company and/or the other Obligors commit any breach of any of the terms and conditions thereof;
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> 2.1.2 if either the company or the other Obligors commit any default in timely payment of the Secured Obligations; or
>
> 2.1.3 on the occurrence of an event of default under the terms of the transaction documents:
>
> then and in that event and without prejudice to any other rights

and remedies of the Debenture Trustee/Finance Parties to take any other action, the Guarantors hereby irrevocably and unconditionally as primary obligors and as for their own debt and not merely as surety jointly and severally guarantee to the Debenture Trustee/Finance Parties (I) the due and punctual performance of all the obligations to be performed by the Company and/or the Obligors under or pursuant to each of the Transaction Documents, including without limitation amounts payable to the Facility Agent; and (ii) the due and punctual payment by the Company and/or the Obligors of all of the Secured Obligations. The Debenture Trustee shall be entitled to call upon the Guarantee to make payments as stated in the notice of demand in the form and manner set out in the Second Schedule hereto ("Notice of Demand". The Guarantors shall, on receipt of the Notice of Demand by the Debenture Trustee, without any demur, contest or delay, pay to the Debenture Trustee/Finance Parties within a period of 3 (three) days from the date of such Notice of Demand, the outstanding Secured Obligations along with all interest Default Interest, charges, costs, charges expenses payable by the Company and/or Obligor to the Finance Parties or any part thereof ("Guarantee Amount") as if it were the principal obligor.

2.2 The guarantors have further executed a demand promissory note in the form set out in the Third Schedule hereunder ("DPN") and a letter of continuity in the form set out in the Fourth Schedule hereunder ("LOC") in favour of the Debenture Trustee as security for the guarantee obligations assumed by the

Guarantor in terms of this Guarantee. Upon failure by the Guarantors to pay to the Debenture Trustee/Finance Parties, the Guarantee Amounts under the terms herein above, the Debenture Trustee/Finance Parties may present the DPN for payment of the Guarantee Amounts.

2.3 Any demand given or made by the Debenture Trustee to any of the Guarantors shall be final conclusive and binding evidence, that the Guarantors' liability hereunder have accrued and that the extent of the Guarantors' liability is the amount shown therein. For avoidance of doubt, the demand made or given by the Debenture Trustee shall be conclusive notwithstanding any difference or any dispute that may arise or has arisen between the Debenture Trustee and/or the Company, Obligors and/or any of the Guarantors or arbitration or any other legal ;proceedings, pending before any court, tribunal, arbitrator or lany other authority. Such demand shall be made by delivery of a Notice of Demand by the Debenture Trustee to the Guarantors. Such Notice of Demand shall be final, conclusive and binding evidence, against each of the Guarantors of the amount for the time being due from the Guarantors in any action or proceeding brought on this Deed against any of the Guarantors.

2.4 The obligations of the Guarantors hereunder are independent of the obligations of the Company and/or of the other Obligors, and a separate action or actions may be brought or prosecuted against the Guarantors alone or any of them or jointly with the Company. Further, the parties hereby agree that the obligations of the Guarantor are not limited to the obligations under the DPN.

5] There are familiar clauses in the other deeds of guarantees executed with the other respondents/guarantors.

6] As pointed out by Mr. Kanade, learned counsel for the petitioners, an amount of Rs.63 crores is due and payable under the Deeds of Personal Guarantee executed by respondent Nos. 3 to 6 as admittedly there was a default on the part of respondent No.1 in making repayment. It is submitted that in pursuance of clause 2.1.3 (*supra)* of the Deeds of Personal Guarantee, the petitioners issued a demand notice dated 9.1.2019 to respondent Nos. 3 to 6 and thereafter on 5.7.2019 demanding payment of Rs.62.74 crores being the amount payable as on 3rd July, 2019, constituting the amounts to be paid by respondent No.1 in terms of the redemption of the debentures, as per Debenture Trust Deed. There was no response by these respondents to these demand notices. Accordingly the present petition is filed seeking interim reliefs pending arbitral proceeding.

7] Mr. Kanade, learned counsel for the petitioners would submit that in the facts and circumstance of the case, the petitioners would pray for interim relief in terms of prayer clause (b) against respondent Nos. 4 and 5 and in terms of prayer clause (c) and (d) against respondent Nos 3 to 6.

8] Learned counsel for respondent Nos. 2 to 6, while opposing the petition, would refer to the reply affidavit of Mr. Naved Akhtar, dated 10th August, 2019, as also a second affidavit again of Mr. Naved Akhar dated 7th September, 2019. The affidavit as filed by Mr. Naved Akhar, as verified is made on behalf of respondent Nos. 1 to 3. However, before the verification clause respondent Nos. 4, 5 and 6 have put their signatures. However, there is no verification of this affidavit on behalf of respondent Nos. 4 to 6 as. Thus, this cannot be said to be an affidavit of respondent Nos. 4, 5 and 6. there is nothing on record to show that respondent Nos. 4, 5 and 6 authorized Mr. Naved Akhar to make any affidavit. It would be required to be taken that respondent Nos. 4, 5 and 6 have not filed any reply on oath. The case of the petitioners as pleaded out in the petition, thus, remains uncontroverted by respondent Nos. 4 to 6.

9] Be that as it may learned counsel for respondent Nos. 2 to 6, however, submits that the only defence of his clients to this proceeding is as to what is stated in both these affidavits which are made on behalf of respondent Nos. 1 to 3. He submits that there is sufficient security in the form of assets, namely the flats in the proposed construction. It is his repeated submission submission that an amount of Rs.25 crores is also lying in the Escrow Account and considering this, no relief be granted to the petitioners.

10] Mr. Kanade, learned counsel for the petitioners, however, would contend that the flats in question of which security is being offered by respondent Nos. 3 to 6 are only paper assets, in inasmuch as the entire project is at a standstill. There is no occupation certificate as also there is no environmental clearance qua these buildings in which this security is being offered. In regard to the amounts, in the Escrow account, Mr. Kanade, learned counsel for the petitioners, would submit that only an amount of Rs.12.67 crore is available in the Escrow Account. He submits that such defence cannot be heard from respondent Nos. 3 to 6 as there respondents have executed personal guarantees under which they are independently liable to make payment of the amount due and payable .

11] Having heard learned counsel for the parties. Perused the papers and more particularly reply affidavit filed by respondent Nos. 1 to 3, it appears to be quite clear that respondent Nos. 3 to 6 have failed to perform their obligations under the Deeds of Personal Guarantees as noted above. They have not even responded to the demand notices much less making payment on receipt of the said notice. Prima facie there appears to be no intention on the part of respondent Nos. 3 to 6 to discharge their liability. In this view of the matter, the petitioners have made out a prima facie case. There is no dispute in regard to the amounts which are disbursed and the liability of respondent Nos. 3 to 6 under the Deeds of Guarantee. The balance of convenience also lies in favour of the petitioners. The petitioners are, thus, entitled to interim measures pending arbitral proceeding.

12] Accordingly there shall be interim order in terms of prayer clause (b) against respondent Nos. 4 and 5 and in terms of prayer clauses (c) and (d) against respondent Nos. 3 to 6 which reads thus :-

> "(b) restrain the respondent Nos. 4 and 5 from in any manner selling, transferring or creating any right, title or interest in favour of anyone else in respect of the pledged shares more particularly described in Exhibit "M";
>
> (c) direct the Respondents to disclose on oath and/or on affidavit the details of all their movable and immovable assets with a clear bifurcation setting out the movable and immovable properties on which charge/mortgage has been created and those which are free from any charge /mortgage;
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> (d) restrain Respondent Nos. 3 to 6 by themselves, their employees, servants and/or agents or otherwise howsoever by an order and injunction, from in any manner selling, transferring,

> disposing of, or alienating or encumbering or mortgaging or charging or parting with possession of or transferring, or inducting anyone else into or creating any right, title or interest or license in favour of anyone else in respect of their movable and immovable properties".

13] It is clarified that, if any, agreements are already entered and registered by respondent No.3 with the third parties, in any of it's projects, this order shall not come in the way of such third parties.

14] The petition is accordingly disposed of with liberty to the petitioners to file such further appropriate proceedings if need so arises including the other reliefs as prayed for in this petition. No costs.

[G. S. KULKARNI, J]