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

ARBITRATION PETITION (L) NO.1199 OF 2019

Asap Fluids Pvt. Ltd. ...Petitioner
V/S.
Sun Petrochemicals Pvt. Ltd. & Anr. …Respondents

Mr. Aashish Kamat a/w. ms. Debashree Mandpe, Ricking Dang i/b. Ganesh & Co. for Petitioner.
Mr. Aditya Udeshi, Darshan Ashar i/b. Sanjay Udeshi & Co. for Respondent No.1.

CORAM : G.S. KULKARNI, J.
Date : 09th OCTOBER 2019.

ORAL ORDER :

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, whereby the petitioner has prayed for interim measures pending the arbitral proceedings.

2. The grievance of the petitioner in regard to wrongful invocation of one of the bank guarantees in question, stated to be contrary to the terms of the bank guarantee, and further an invocation to make good a purported claim for damages in invocation of the other two bank guarantees under the contract itself has not fructified under the letter of intents.

3. This Court (S.C. Gupte J) considering the urgent ad-interim application as moved on behalf of the petitioner, by an order dated 04

October 2019 granted an ad-interim protection to the petitioner in terms of prayer clause (a), inter-alia observing that the invocation is not in terms of the bank guarantees, inasmuch as there is no indication of the contract being breached, which can be the only basis for invocation of the Bank guarantees.

4. On behalf of Respondent a reply affidavit dated 04 October 2019 is filed.

5. Mr. Kamat learned counsel for the petitioner has drawn my attention to the various clauses of the Bank Guarantee and more particularly in regard to the invocation of the bank guarantee Clause (2) of the bank guarantee provides as under :

> *"(2). In response to the request made by Contractor, we State Bank of India, constituted under the State Bank of India Act, 1955 having The Central Office at Nariman Point, Mumbai and among other places its branch office at Trade Finance Central Processing Centre, Mafatlal Chambers, 1st Floor, C/D. Wing, N M Joshi Marg, Lower Parel, Mumbai – 400 013 (hereinafter referred to as the "Guarantor") hereby irrevocably and unconditionally guarantee in favour of Company, the payment of amounts (without any withholding, deduction or set off) upto Indian Rupees 16,00,000/- (INR Sixteen Lakh Only) being 10% of the estimated / Annualized Contract value, as guarantee for the obligations of the Contractor to perform the Work in accordance with the Contract. The sum shall become payable by us immediately on first demand by Company without proof or conditions notwithstanding any dispute or protest by the Contractor or any other third party. Multiple demands may be made in respect of our guaranteed obligations."*

6. Mr. Kamat has also submitted that the other two Bank Guarantees dated 28 March 2018 for Rs.3,00,000/- each, pertain to the LOI which has not fructified into a contract so as to have any cause for the

respondent to invoke these bank guarantees. It would be necessary to note the contents of the invocation letter dated 27 September 2019, which clearly does not specify any breach under the contract dated 06 October 2016. The invocation letter reads thus:

> "Our Company (Sun Petrochemical Pvt. Ltd.) has decided to invoke following Bank Guarantee (BG) issued by your Bank branch on behalf of M/s. ASAP FLUIDS PRIVATE LIMITED (applicant and your constituent):

Bank Guarantee Number	Date of issue	Bank Guarantee	Date of Expiry
0505016BG0002219	24.08.2016	16,00,000.00	10.10.2019
0505018BG0001094	28.03.2016	3,00,000.00	30.06.2020
0505018BG0001082	28.03.2018	3,00,000.00	30.06.2020
TOTAL RS.		**22,00,000.00**	

> Photo copies of all three bank Guarantees (BG) enclosed herewith for your references.
>
> We hereby serve a demand notice to credit the proceed of above said bank guarantees to our bank account as per detail given hereunder:

Beneficiary's Name	Sun Petrochemicals Pvt. Ltd.
Beneficiary's Bank Name	Yes Bank
Branch	Andheri (East)
Beneficiary's Bank Account No.	007881400000114
Beneficiary's Bank IFSC	YESB0000078

> "

7. Moreover, on 30 March 2018 a certificate was issued by the respondents in favour of the petitioner certifying that the work under the contract in question has been successfully completed and also specifying the categories of the work under the contract. The certificate reads thus :

> "This is to certify that, under the above referred contract, M/s. ASAP Fluids Private Limited has successfully completed 7 Workover jobs at Baola and Modhera fields at onshore Gujarat.
> ASAP had provided following Integrated Services to SUNPETRO CHEMICALS PVT. LIMITED at Modhera & Baola fields during course of the above mentioned Workover operations:
> 1. Workover Rig Services
> 2. Drilling Fluid Services with Chemicals

3. Acid Pumping Services
4. Cementing Services
5. Logging & Perforation Services
6. Slick Line Services
7. Retrievable Hydraulic Packer with accessories
8. Providing & Re-jacketing of Sand Screen."

8. Having noted the terms and conditions of the Bank Guarantee and the invocation letter addressed by Respondent No.1 to Respondent No.2 State Bank of India, it is quite clear that invocation is not in the terms of the Bank guarantee as specified in Clause 2 of the Bank Guarantee. The petitioners would be thus correct in their contention that the invocation itself is not in terms of the Bank Guarantees. It would not be legal for the respondent No.1 to invoke the Bank guarantee on such vague premise contrary to the express conditions of the Bank Guarantee.

9. The law in this regard is now well settled. In ***Hindustan Construction Company Ltd. Vs. State of Bihar & Ors.***[1] the Supreme Court held that the bank guarantee could be invoked only in the circumstances referred to in the clause as contained in the bank guarantee, whereunder the amount would become payable. In the present case in Clause (2) of the bank guarantee, it is only when there is a breach of the obligation by the petitioner to perform the work in accordance with the contract it would enable Respondent No.1 to invoke / incash the bank guarantee. As the letter of invocation as noted above does not refer to any breach of the

1 (1999) 8 Supreme Court Cases 436

obligation of the petitioner-contractor to perform the work in accordance with the contract and in fact a completion certificate has been awarded, it needs to be concluded that the invocation is not in accordance with Clause (2) of the bank guarantee under which the amount would be payable. The bank guarantee thus would become payable only when the invocation letter would refer to these eventualities/circumstances as necessary to be conveyed to the bank as agreed in Clause (2) of the bank guarantee.

10. In this context it is necessary to note the observations of the Supreme Court in paragraphs 13 and 14 in ***Hindustan Construction Company Ltd.*** (supra) which reads thus:-

> *“13. The Bank, in the above Guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following :-*
>
> > *"......in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract."*
>
> *14. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "Advance Mobilisation Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer <u>only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan"</u>. It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the*

> *"Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee.*

11. Also there is much substance in the contention as urged by the learned Counsel for the petitioner that neither for the completed work under the contract of 2016 nor under the two letters of intent in respect of which the contracts have not materialized for which the bank guarantees of Rs.3,00,000/- each were furnished by the petitioner, the respondent cannot take a position that it can presume and anticipate damages and accordingly invoke the bank guarantees. In ***M/s.Gangotri Enterprises Ltd. Vs. Union of India & Ors.***[2] the Supreme Court has held that it may not be permissible for the party to the contract to invoke the performance bank guarantee on an apprehension or an assumption of damages. It would be necessary to note the observations of the Supreme Court in paragraphs 42 and 45 which read thus:-

> *"42) On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents*

2 AIR 2016 SC 2199

from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.

… .. .. …

45) In the light of foregoing discussion, we hold that the appellants have made out a prima facie case in their favour for grant of injunction against the respondents so also they have made out a case of balance of convenience and irreparable loss in their favour as was held by this Court in the case of Union of India (DGS&D) (supra). They are, therefore, entitled to claim injunction against the respondent in relation to encashment of Bank Guarantee no. 12/2006 dated 04.08.2006."

12. In the aforesaid circumstances, the petition is required to be allowed in terms of prayer Clause (a). Ordered accordingly.

13. If the Respondent has any claim against the petitioner including a claim in damages the respondent is free to commence arbitral proceedings in a manner known to law. All contentions of the parties in that regard are expressly kept open.

(G.S. KULKARNI, J)