

\$~1

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

+ **FAO(OS) (COMM) 159/2019 & CMs 31057/2019, 31059/2019 and 33321/2019**

M/S UMAXE PROJECTS PVT. LTD. Appellant
Through: Mr. Viplav Sharma, Advocate

versus

AIR FORCE NAVAL HOUSING BOARD & ANOTHER
..... Respondents
Through: Mr. R.K. Handoo, Advocate

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
25.07.2019

%

1. This is an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereafter referred to as the "Act") against order dated 11th July, 2019 passed by learned Single Judge in O.M.P. (Comm.) (I) No. 206/2019 whereby the petition of the Appellant under Section 9 of the Act seeking interim measures in the nature of restraining Respondent No.1 from invoking/encashing the five bank guarantees for an amount of Rs.3.76 crores along with related prayers was dismissed.

2. The prayers in the present appeal are:

“a. Set aside the Impugned Order dated 11.7.2019 passed by the ld. Single Bench in OMP (I) (Comm) 206 of 2019;

b. ex parte stay the effect and operation of Impugned Order dated 11.7.2019 passed by the Id. Single Bench in OMP (I) (Comm) 206 of 2019;

c. Allow relief of an interim measure by passing urgent suitable injunctive orders against the wrongful, illegal fraudulent invocation of subject Bank Guarantees by respondent No. 1 and thereby, restrain the said Respondent No. 1, its employees, agents and all persons acting for and on its behalf from invoking/encashing subject bank guarantees (Documents 6 Colly and Document 7) as detailed in paragraph 2 (v) above and thereby, preserve the same under the authority of this Hon'ble Court pending final outcome of the arbitration proceedings which the Appellant hereby, undertakes to commence by issuing the Notice of the Arbitration;

d. detain, preserve and secure the amounts aggregating subject bank guarantees (Documents 6 Colly and Document 7) as detailed in paragraph 2(v), if encashed/paid by Respondent No. 2 to Respondent No. 1 under the unlawful and fraudulent invocation wrongly and unlawfully encashing the subject Bank Guarantees, under the authority of this Hon'ble Court;

e. pass mandatory injunction directing the Respondent No.1 to forthwith process and release of payments to Appellant against its' RA Bill No. 64 and claims for extra work as submitted vide letters dated 23.8.2018 (Document 9) which as per the subject Arbitration Agreement, the Appellant is entitled to receive for completing the remaining 5% of 'finishing work' of the subject Dehradun Project;

f. Pass appropriate injunction orders against Respondent No.1 its' employees, servants, agents and any person acting for and on its behalf restraining them from contacting/engaging/hiring any of Appellant 's vendors, suppliers, labourers, employees which were involved in the 'subject Projects:

g. Pass appropriate injunction orders against Respondent No.1 its' employees, servants, agents and any person acting for and on its behalf restraining them from causing any obstruction in Appellant deploying its' security to guard its men, material and work done by it at the Project site and to secure the same until final resolution of the matter;

h. Pass appropriate injunction orders against Respondent No.1 its' employees, servants, agents and any person acting for and on its behalf restraining them from creating any third party(ies) rights to the execution/completion of balance 5% work at the Project, which the Appellant seeks to immediately complete upon the release of its' payments as per Contract;

i. Pass any further order or orders/direction or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

3. The brief facts are that Appellant is a large scale construction company. Respondent No.1, Air Force Naval Housing Board (hereinafter referred as "AFNHB") is a society registered under the Societies Registration Act, 1860. In or around 2010, Respondent No. 1 invited tenders for construction of 430 Dwelling Units (DUs) of three different types, including civil and architectural works, internal, and external sanitation & plumbing works, internal electrical works, internal and external fire fighting, roads, external development work, main gate and guard room, boundary wall, sewage treatment plant, rain water harvesting etc. near Jhajjar Village at Prem Nagar, Dehradun ('Dehradun Project') for Rs.98.00 Crores. The Appellant submitted its bid and was awarded the contract and a formal agreement was executed for the said project (Dehradun Agreement). Clause 18 of this agreement contains the arbitration clause. For the purposes of ensuring execution of contract work under the subject Contract and for other

collateral purposes, the Appellant furnished the following Bank Guarantees (BGs):

Sl. No.	BGB No.	Amount	Validity
1.	104800070005512	1,60,00,000	28 Aug 19
2.	104800070005810	50,00,000	24 Sep 19
3.	104800070005910	46,02,000	24 Sep 19
4.	104800070005710	70,00,000	24 Sep 19
5.	104800070005610	50,00,000	17 Sep 19

4. As per the case of AFNHB, the Appellant did not complete the work in specified time, and violated terms of the contract, hence, the BGs provided by the Appellant to AFNHB were invoked. The Appellant immediately preferred a petition under Section 9 of the Act before the learned Single Judge, seeking interim measures to restrain AFNHB from invoking the BGs. The said petition was dismissed by the learned Single Judge by the impugned order.

5. While filing the appeal, it was mentioned that the learned Single Judge on 11th July, 2019 had orally announced that the petition was dismissed and that Respondent No.1 may encash the BGs in accordance with law. On the first date i.e. 12th July, 2019, when the appeal was taken up for hearing, this Court was informed by Id. Counsel for AFNHB that the BGs have been encashed after passing of impugned order dated 11th July, 2019. On the next date of hearing, 25th July 2019, Mr. Handoo, learned counsel for the Respondent No.1 informed this Court that the Arbitrator has been appointed by AFNHB in this matter. Copy of a letter dated 24th July, 2019 addressed to the learned Arbitrator has been placed on record.

6. Mr. Viplav Sharma, learned Counsel for the Appellant, submitted that apart from praying for the interim relief of restraining AFNHB from encashing the BGs, he has also prayed that proceeds of the BGs be retained, preserved and secured by AFNHB during the pendency of arbitral proceedings so that Respondent No.1 is not able to utilise the said amount.

7. This prayer is liable to be rejected at this stage on the ground that if in any case the learned Arbitrator decides the matter in favour of the appellant, then, at that stage the Arbitrator may order for refund of the amount recovered by AFNHB on encashing the BGs, with or without interest, as the case may be. Both the parties will get a chance to put forth their respective cases before one learned Arbitrator in support of their respective claims/counter-claims.

8. Learned counsel for the Appellant has fairly admitted that although AFNHB has power to invoke and encash the BGs, but his objection is that the letter sent by Respondent No.1 to the Bank is not as per the terms of the contract between the parties. He has referred to the conditions mentioned in the contract for the invocation of the BGs.

9. This Court finds that the learned Single Judge had dealt with these very objections regarding compliance with the conditions for invocation of the BGs and held as under:

"10. The counsel for the Appellant has strongly contended that the aforesaid invocation is improper as it does not specifically make a declaration as required under first clause of the bank guarantee. I am however not convinced with the arguments of

the Appellant. The invocation letter clearly makes a statement to the following effect "***contractor has been found wanting in execution and timely completion of the project***". This according to me is sufficient compliance for invocation of the bank guarantee as per the terms of the bank guarantee. The language of the bank guarantee clearly envisages that for invocation, Respondent No. 1 is only required to state that there has been a breach on the part of the Appellant. The bank guarantee in first clause, relied upon by the Appellant has several conditions which are all disjointed with the word "or". It is not necessary that all the conditions are necessarily required to be met for invocation of the bank guarantee. Even if one such condition is mentioned in the invocation letter, it would be sufficient compliance. It is also significant to note that one such condition is "***by reason, of the Contractor's failure to perform the said agreement***". The wordings of this condition are wide enough and envisage that any failure on part of the contractor would be sufficient to invoke the bank guarantee. In the invocation letter it is categorically stated that the 'contractor has been found wanting in execution'; and this means that there was a failure to perform on its part. The second clause of the bank Guarantee is independent and it stipulates "***That it will, in the event of the contractor, failing to honor any of the condition stipulated in its agreement or in the event of the contractor not completing the work as per specification and drawing, or in the event of the contractor committing breach of the contract or any provision thereof or in the event of the contract failing. To renew this guarantee, at any time during the course of contract and settlement of account including the period covered by its extension, pay to AFNHB without any Demur on mere demand by DG AFNHB, the sum or sums which in the opinion of DG AFNHB, the contract is liable to pay AFNHB***". There is no stipulation of the beneficiary having suffered a loss or damage and pre-requisite for invocation. Moreover, what is essential is the substance rather than the reproduction of words. The Bank Guarantees were linked to performance of the contractor and thus failure or breach on its part would justify the invocation and restraining the same

would defeat the purpose for which the bank guarantee was furnished." (emphasis in original)

10. In view of above, the BGs can be invoked if the Appellant has not duly performed the contract. In the BG invocation letter dated 27th June, 2019, it is stated by AFNHB that:

"1. This office is holding the following BGB of M/s Umaxe Projects, who is executing the Dehradun Phase-II Project on our behalf:

Sl. No.	BGB No.	Amount	Validity
1.	104800070005512	1,60,00,000	24 Aug 19
2.	104800070005810	50,00,000	24 Sep 19
3.	104800070005910	46,02,000	24 Sep 19
4.	104800070005710	70,00,000	24 Sep 19
5.	104800070005610	50,00,000	17 Sep 19

The Contractor has been found wanting in execution and timely completion of the project. In accordance, therefore, with the contract agreement, this communication be treated as "NOTICE FOR ENCASHMENT" and proceeds be forwarded to the Board through RTGS."

11. This letter clearly shows that the BGs have been rightly invoked as the Appellant was found wanting in execution and timely completion of the project.

12. As far as other reliefs are concerned; the Appellant may move an appropriate application before the learned Arbitrator in accordance with law.

13. Learned counsel for the Appellant has relied upon *State Bank of India v. Labour Enforcement Officer (Central) (1993) 10 SCC 258* to bring home his argument that since there are earlier pronouncements of learned Single Judges of this Court, including *Ansal Properties and Industries v. Union of India 1994 II AD Delhi 68*, which hold that where invocation letter written to the bank is not as per the terms of the contract, then injunction can be granted against encashment of BGs, so if the ld. Single Judge had divergent view, then the learned Single Judge ought to have referred the matter to a larger bench. In our view there was no such occasion as the learned Single Judge has rightly held that the invocation letter was as per terms of the contract between the parties.

14. In view of above, this Court finds no infirmity in the impugned order of learned Single Judge. It is needless to say that the views expressed here are only for disposal of the appeal and the learned Arbitrator has to decide the reference and the application for interim relief, if moved, without being influenced by the views expressed in this order or the order of the learned Single Judge.

15. The appeal is accordingly dismissed. The pending applications are also disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 25, 2019/mk