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

\+ O.M.P.(I) (COMM.) 421/2019, IAs 16017/2019 and 16018/2019

VIL LIMITED ..... Petitioner

Through: Mr. Gaurav Mitra, Mr. Simron Jyoti Singh and Ms. Shriya Ray Chaudhari, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through: Mr. Abhay Gupta, Mr. Pranay Sharma and Mr. Ankur Mittal, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

<u>O R D E R</u>

% **18.11.2019**

<u>IA 16017/2019 (for exemption)</u>

Exemption allowed subject to all just exceptions.

Application stands disposed of.

<u>O.M.P.(I) (COMM.) 421/2019</u>

1. This petition has been filed by the petitioner with the following prayers:

> *"In view of the above-mentioned facts and circumstances, it is most respectfully prayed that this Hon 'ble Court may be pleased to:*
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> *a. Issue an order of interim injunction granting stay on the illegal termination of Contract*

Agreement dated 25.10.013 by the Respondent vide its letter dated 01.10.2019.

b. Issue an order of interim injunction restraining the Respondent Authority, till the conclusion of arbitration proceedings and/or till such other time as the Hon'ble Court deems fit, from invoking/ enchasing the following bank guaranties i.e.

I. BG No: 0960113BG0000819 dated 22.11.2013 to the tune of Rs.20,92,50,000.00, lying with State Bank of India, New Delhi;

II. BG No. OGT0005170009160 dated 24.01.2017 for Rs.2,79,00,000/- lying with Indusind Bank Limited, New Delhi

III. BG No.4044IPEBG180049 dated 28.06.2018 for Rs.2,79,00,000/-lying with Bank of India, Kolkata.

IV. BG No.4044IPEBG180050 dated 28.06.2018 for Rs.2,79,00,000/-lying with Bank of India, Kolkata.

c. Issue an order of interim injunction restraining the Respondent and its representatives, agents, attorneys, men employees and assigns from misappropriating or dealing with the goods, articles, materials, machineries, drawings etc of the Petitioner Company lying on the project site.

d. Pass any such further and/or other orders as this Hon'ble court may deem fit and proper in the interest of justice.

2. In substance, the petition has been filed seeking stay of the termination of the contract agreement dated October 25, 2013 and restraining the respondent till the conclusion of the arbitral

proceedings from invoking / encashing the bank guarantees.

3. The primary submissions made by Mr. Gaurav Mitra, learned counsel appearing for the petitioner are against the invocation of the bank guarantees. It is his submission that the invocation of the bank guarantees is contrary to the agreement executed between the parties inasmuch as the termination has been effected by the respondent without following the procedure contemplated in the agreement. His submission in this regard is by drawing my attention to Clause 23.1.1 to state that the petitioner is entitled to sixty days cure period to remove any of the defaults. That apart, in terms of Clause 23.1.2, the contractor is required to give termination notice of 15 days to the petitioner to make a representation and after the expiry of 15 days, take a decision whether or not to issue termination notice. It is only thereafter, respondent can invoke the bank guarantees as is clear from clause 23.6.1(b). He states, this procedure having not followed, the encashment of bank guarantees is illegal. That apart, it is his submission that irretrievable injury shall be caused to the petitioner if the stay is not granted inasmuch as the petitioner being in NCLT under the IBC, 2016, wherein a Resolution Professional has been appointed, if the amounts are taken away by the respondent, then the chances for a resolution process shall get reduced.

4. I am not in agreement with both the submissions made by Mr. Mitra for the simple reason any invocation of bank guarantees has to be in accordance with the terms. The terms of the bank guarantees are reproduced as under:

> *"1. The Bank hereby unconditionally and irrevocably undertakes to pay to the Authority, upon its mere first written demand and without any demur, reservation, recourse, contest or protest, and without any reference to the Contractor, such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.*
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> *2. A letter from the Authority, under the hand of an officer not below the rank of General Manager in the National "Highways Authority of India that the Contractor has committed default in the due and faithful performance of all or any of its obligations for under and in accordance with the agreement shall be conclusive, final and binding on the Bank. The bank further agree that the authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank, notwithstanding any differences between the Authority and the Contractor, or any dispute between them pending before any Court, Tribunal, arbitrators or any other authority or body, or by the discharge of the Contractor for any reason whatsoever."*

5. A perusal of the aforesaid conditions would demonstrate that the bank has unconditionally and irrevocably undertaken to pay to the respondent upon the first written demand, without demur, reservation, recourse, contest or protest and without any reference to the contract. It is also a part of the condition that the authority shall be the sole judge as to whether the contractor has committed any default. The bank guarantees being unconditional, the stay of the same cannot be granted. The terms and conditions of the contract agreement are

independent and separate from the terms and conditions of the bank guarantees. It is the conditions of the bank guarantee which have to be seen to come to a conclusion whether the invocation is just and proper. The position of law with regard to invocation of unconditional bank guarantees is well settled by the Supreme Court, which includes the case of ***Vintec Electronics Pvt. Ltd. HCL Infosystems Ltd. (2008) 1 SCC 544.*** The relevant portion of the judgment reads as under:

> *"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un- conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corporation v. Sumac International Ltd. MANU/SC/0380/1997:AIR1997SC1644 , this Court observed that:*
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> > *The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee*

> *would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.*

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Limited (Now Reliance Energy Ltd.) v. Fenner India Ltd. and Anr. MANU/SC/0741/2006 : AIR2006SC1148 this Court held:

> *10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non- intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or*

'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corporation v. Sumac International Ltd. MANU/SC/0380/1997 : AIR1997SC1644 (hereinafter 'U.P. State Sugar Corpn') this Court, correctly declare that the law was 'settled'.

13. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company MANU/SC/3256/2007 : AIR2007SC2798 , this Court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner:

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(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain

enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

14. In Mahatama Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Anr. MANU/SC/2980/2007 : AIR2007SC2716 , this Court observed:

Para 22. If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

Para 28. What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it *is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one."*

6. In so far as the plea of Mr. Mitra that the petitioner shall suffer irretrievable injury is concerned, the said submission also does not appeal to the court. The pendency of the proceedings before NCLT shall have no bearing in so far as the invocation of the bank guarantees is concerned. It is not the case of Mr. Mitra that if the claims made by the petitioner are allowed by the Arbitral Tribunal, the decree cannot be executed against the NHAI.

7. Even the prayer for stay of termination of contract cannot be granted as during the submissions, this prayer was not even pressed for. In any case, it is not the case of the petitioner that there is no power with the respondent to terminate the contract. It is for the petitioner to challenge the termination before the Arbitral Tribunal.

In view of above, I do not see any merit in the petition. The same is dismissed.

IA 16018/2019 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 18, 2019/*jg*