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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **OMP(I) COMM 236/2020, I.As. 7043/2020 & 7044/2020**

PT HEXING TECHNOLOGY & ORS. Petitioners

Through: Mr. Sudhanshu Batra, Sr. Adv. with
Mr. Ravi Varma, Mr. Suadat Kirmani,
Mr. Abhinav Sharma & Ms. Suditi
Batra, Advs.

versus

ENERGY EFFICIENCY SERVICES LTD & ANR. Respondents

Through: Mr. Samdarshi Sanjay, Adv. for R-1

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

ORDER
% **18.08.2020**

This matter is being heard through video-conferencing.

I.As. 7043/2020 & 7044/2020 (for exemption)

Exemption allowed subject to all just exceptions.

Applications are disposed of.

OMP(I) COMM 236/2020

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

“In view of the facts and circumstances as stated above, it is most

respectfully prayed that this Hon'ble Court may be pleased to pass an order:

a) restrain by an ad-interim ex-parte injunction, the Respondent No. 1, its agents, officers, employees, etc. from invoking and/or encashing the Bank Guarantee No. 84730BG19007674 dated 18.04.2019 issued by the Respondent No. 2 which is valid up to 04.03.2022 with claim period up to 04.03.2023 for the amount, i.e., USD 40,82,925.00 which was submitted by the Petitioner; and/or

b) restrain by an ad-interim ex-parte injunction, the Respondent No. 2 from making payment of the amount to the Respondent No.1 under the Bank Guarantee 84730BG19007674 dated 18.04.2019; and/or

c) confirm the ad-interim ex-parte orders passed in terms of (a) and (b) above; and/or

d) pass any such other or further orders as may be deemed fit by this Hon'ble Court in the facts and circumstances of the present case.”

2. It is the case of the petitioners and so contended by Mr. Sudhanshu Batra, learned Sr. Counsel that on March 08, 2018, respondent No. 1 floated a tender for procurement (supply and, integration and commissioning) of 50,00,000 smart meters for pan India, which was split into three Implementation Partners for procurement of 25,00,000, 15,00,000 and 10,00,000 smart meters. Pursuant to the bid submitted by the petitioners, and petitioners having been found successful, they were issued a Letter of

Award for supply of smart meters, the contractual value of which is Rs. 344,47,50,000/- on December 04, 2018.

3. It is the case of the petitioners that it duly furnished the Bank Guarantee No. 84730BG19007674 issued by the respondent No. 2 for USD 40,82,925.00, in favour of the respondent No.1 with validity period up to March 04, 2022 and claim period up to March 04, 2023. Mr. Batra submitted that on May 17, 2019 petitioners and the respondent No.1 executed a contract in that regard. On November 05, 2019, petitioner No. 1 submitted the delivery plan commencing from November 19, 2019 till September 10, 2020 to the respondent No. 1 for its approval. He states that the respondent No.1 approved the delivery plan submitted by the petitioner No.1. According to him, in January, 2020, the respondent No. 1 vide its e-mail dated January 02, 2020 directed the petitioners to divert in total 60000 meters to Andaman Island. The respondent No. 1 also directed that the officials of the petitioner No. 2 would assemble the meters, insert SIM cards, and place seals at the warehouses in Andaman.

4. Mr. Batra stated that the petitioner No.1 raised an issue that because of the environment condition in Andaman, they are considering implementation of special coating and capacitor optimisation of the meters and the earliest delivery would be possible only in April, 2020. In response to the said e-mail, the respondent No. 1 disregarding the genuine reasons quoted by the petitioners, pressured the petitioners to comply with its stated timeline of February, 2020. That apart, he stated that because of the coronavirus, which led to the respective Governments declaring it as an epidemic and imposing several restrictions, which also is the case in China and Indonesia, the same had affected the manufacturing and supply of the

smart meters to India. He also stated that on January 30, 2020 World Health Organization also declared the outbreak of the epidemic coronavirus as a “Public Health Emergency of International Concern”. He also referred to the notification dated February 19, 2020 of the Govt. of India whereby it was clarified that disruption of supply chains due to novel coronavirus would be covered under ‘force majeure’ event. He laid stress on the fact that on March 13, 2020 the petitioner intimated the respondent No. 1 that around 10,000 meters are ready, out of which 9,000 are at Lucknow warehouse, on which stickers of the names of DISCOMs have also been pasted and another 1,00,000 meters are still in the Custom department’s warehouse at Delhi owing to the issue of Goods and Services Tax refund. He also stated that that around 1,000 meters are put on hold in Delhi as the respondent No.1’s warehouse in Lucknow is facing space constraints. That apart, many of its employees are stuck in China owing to visa restrictions.

5. A connected submission of Mr. Batra is that vide order dated March 24, 2020, the Govt. of India ordered a complete lockdown for three weeks, which was extended from time to time. Resultantly, all the procurement activities were stopped and even presently, the situation in the country is nowhere near normalcy. He stated that on April 14, 2020, the parties held a virtual meeting wherein the petitioners informed the respondent No. 1 that the supply to the respondent No. 1 would be resumed in the same lot quantities post lockdown and 1,10,000 meters are already in Delhi at custom department’s warehouse and another 1,50,000 meters are ready to be supplied. He also referred to a meeting dated May 14, 2020 wherein the petitioners intimated the respondent No.1 that it will supply 1,00,000 meters in June 2020, another 1,00,000 meters in July 2020 and 2,50,000 meters

from August 2020 onwards. On the same date, the petitioner No. 1 vide an email furnished the updated supply plan to the respondent No. 1, wherein the supplies were to be completed by December 2020. He also referred to another virtual meeting on May 21, 2020 wherein it was, inter-alia, decided the supply would now be completed by June 2021 and the petitioners were asked to submit an updated supply plan accordingly. It is the submission of Mr. Batra that the respondent No.1 agreed to the revised delivery schedule completion by June 2021, owing to the coronavirus pandemic. Accordingly, vide its email dated May 26, 2020 the petitioner No. 1 furnished the updated supply plan to the respondent, wherein the supply completion date was extended to June 2021. He stated that in fact, it is the respondent No.1 through its e-mail dated March 26, 2020 stated that owing to spread of Covid-19, the installation works at many locations have been stopped/severely delayed. Accordingly, the respondent No. 1 instructed the petitioners to halt the supply of smart meters till further notice. This aspect has been acknowledged by the petitioners vide e-mail dated June 25, 2020, wherein they have highlighted that the supply plan confirmed by the parties during the meeting on May 14, 2020 will be impacted due to the spread of Covid-19. In substance, it is his plea that the petitioners have been diligently carrying out the works that are possible during the current times and keeping the respondent No. 1 updated about the progress. The parties had agreed to the updated schedule of delivery up to June 2021, and thereafter, the respondent No.1 issued instructions to stop further supply of the contracted meters. However, to the surprise of the petitioners, the respondent No.1 issued letter dated August 13, 2020, whereby they by invoking Clause 13 of the LoA, stated that they are annulling the LoA as the

validity of the said LoA expired on March 04, 2020, on account of the alleged breach committed by the petitioners by not adhering to the timelines and non-responsiveness to meet its contractual liabilities. According to him, the respondent No. 1 further informed the petitioners that it is forfeiting the CPG No. 84730BG19007674 dated April 18, 2019. On the basis of the submissions noted above, Mr. Batra though conceding that the terms of the bank guarantee are unconditional and to be paid on demand, stated that it is a case of special equities / fraud where the respondents having agreed to extend the term of supply upto June, 2021, cannot now take the plea of breach of terms of LoA / delay in supply. He stated that the petitioners are ready and willing to keep the bank guarantee alive till such time the issue is decided in the arbitration.

6. On the other hand, Mr. Sanjay, learned counsel appearing for the respondent No.1 would contest the submissions made by Mr. Batra by stating that since beginning the petitioners have not been adhering to the terms of the LoA. The petitioners have not even submitted the bank guarantee for the complete amount as the same is short by Rs. 4 Crores That apart, he stated that from time to time the respondent No.1 has been calling upon the petitioners to comply with the terms of the LoA. Despite such communications, they have defaulted. He by drawing my attention to the impugned letter, has stated that the same clearly reflects that till August 13, 2020, the petitioners have only supplied 9980 numbers of meters, which is negligible and also, the supplied meters have problematic firmware due to which data collection issues have arisen. In fact, it is his submission that the BIS certificate, which the petitioners have to furnish for LTCT meters have not been done, which surely demonstrate that they are not meeting the

mandatory requirement of the LoA. He stated that the bank guarantee being unconditional and payable on demand and the position of law being well settled, it is not a case of special equities and this Court would not like to grant the reliefs as sought for by the petitioners in the present petition.

7. Having heard, learned counsel for the parties, the only issue which arises for consideration is whether the petitioners are entitled to the relief as prayed for in this petition inasmuch as respondent no.1 should be restrained from invoking the Bank Guarantee for USD 40,82,925.00 which was submitted by the petitioners pursuant to LoA dated December 4, 2018. Respondent no.1 has expressed its intention to forfeit the Bank Guarantee in view of Clause 13 of the LoA.

8. Mr. Sudhanshu Batra, learned Sr. Counsel appearing for the petitioners has laid stress on the fact that the ground on which the respondents have invoked the Bank Guarantee that the petitioners have caused delay in supplying the meters, is unsustainable as according to him from time to time the respondent no.1 has been extending the time for supply of meters in terms of LoA and as per the last extension, the supply is to be completed by June, 2021. In fact, on that premise, he has pleaded fraud as well as special equities, as grounds to restrain the respondent no.1 from invoking the Bank Guarantee.

9. Suffice it would be to state that the terms of the Bank Guarantee as noted from the record clearly stipulates as under:

***“WE KOTAK MAHINDRA BANK LTD., INCORPORATED
UNDER THE PROVISIONS OF THE INDIAN COMPANIES ACT
1956 HAVING ITS REGISTERED ADDRESS AT 27BKC, C27, G
BLOCK. BANDRA KURLA COMPLEX (EAST) MUMBAI-400051
AND BRANCH ADDRESS AT 23 NARAIN MANZIL***

BARAKHAMBA ROAD DELHI 110001 (HEREINAFTER REFERRED TO AS THE 'BANK' , WHICH EXPRESSION SHALL, UNLESS REPUGNANT TO THE CONTEXT OR MEANING THEREOF, INCLUDE ITS SUCCESSORS ADMINISTRATORS, EXECUTORS AND ASSIGNS) DO HEREBY GUARANTEE AND UNDERTAKE TO PAY THE OWNER, ON DEMAND ANY ALL MONEY PAYABLE BY THE CONTRACTOR TO THE EXTENT OF USD 40,82,925.00 (US DOLLAR FORTY LAKH EIGHTY TWO THOUSAND NINE HUNDRED AND TWENTY FIVE ONLY) AS AFORESAID AT ANY TIME UP TO 04-MAR-2022 WITHOUT ANY DEMUR. RESERVATION, CONTEST. RECOURSE OR PROTEST AND / OR WITHOUT ANY REFERENCE, TO THE CONTRACTOR. ANY SUCH DEMAND MADE BY THE OWNER ON THE BANK SHALL BE CONCLUSIVE AND BINDING NOTWITHSTANDING ANY DIFFERENCE BETWEEN THE OWNER AND THE CONTRACTOR OR ANY DISPUTE PENDING BEFORE ANY COURT, TRIBUNAL. ARBITRATOR OR ANY OTHER AUTHORITY. THE BANK UNDERTAKES NOT TO REVOKE THIS GUARANTEE DURING ITS CURRENCY WITHOUT PREVIOUS CONSENT OF THE OWNER AND FURTHER AGREES THAT THE GUARANTEE HEREIN CONTAINED SHALL CONTINUE TO BE ENFORCEABLE TILL THE OWNER DISCHARGES GUARANTEE OR TILL 04-MAR-2022 (EXPIRY DATE) WHICHEVER IS EARLIER”

The same is unconditional and to be paid on demand without any demur, reservation, contest or without any reference to the contractor. If that be so, any dispute the petitioners may have with the respondent no. 1 would not come in the way of the Bank to honour the guarantee as per its terms. In so far as the plea of fraud is concerned, fraud must be of a very egregious nature which vitiates the entire underlying transaction, which may absolve the Bank from honouring its guarantee. The fraud must be in connection with the Bank Guarantee and to the knowledge of the Bank that any demand for payment already made or which may thereafter be made

will be clearly fraudulent. Such a case has not been set up by the petitioner.

10. In so far as the plea of special equities is concerned, in the facts of this case as pleaded by the counsel for the parties, no special equities exist which may make this Court grant injunction in favour of the petitioners. In this regard, I may refer to the Judgement of the Supreme Court in the case of ***U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568*** wherein in Para 12 and 16 the Supreme Court has held as under:

*“12. 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 override 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. In the case of *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174]* which was the case of a works contract where the performance guarantee given under the*

contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

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16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and,

therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12-4-1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees.”

(Emphasis supplied)

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

V. KAMESWAR RAO, J

AUGUST 18, 2020/ak/jg