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

\+ OMP(I)(COMM) 280/2020, IA 8100/2020

UNITED CONSTRUCTIONS

..... Petitioner

Through: Mr. Vatsal Kumar, Adv.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Nikhil Goel, CGSC with Mr. Vinay Mathew, Adv. for R-1

Mr. Ateev Mathur, Adv. with Mr. Amol Sharma, Adv. for R-2 / HDFC

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

ORDER

% **14.09.2020**

This matter is being heard through Video Conferencing.

IA 8100/2020

Exemption allowed subject to all just exceptions.

Application is disposed of.

OMP(I)(COMM) 280/2020

1. The present 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 be pleased to:

a) Restrain the Respondent from enchasing bank guarantee amounting to Rs. 4,59,01 ,450/-(Rupees Four Crore Fifty-Nine Lakhs One Thousand Four Hundred and Fifty Only) issued by Respondent no. 2;

b) Direct the Respondent No.2 bank to not to remit any amount to Respondent no. 1 under the bank guarantee as mentioned above or to issue any pay order, draft or to transfer through RTGS or NEFT.

c) Such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case be also passed."

2. It is the case of the petitioner and so contended by Mr. Vatsal Kumar, Advocate that a work order sheet dated February 13, 2008 was issued by the respondent No.1 to the petitioner for constructing 'Married Accommodation for Major (192 DU's) including allied external services at Baird Place Package-1' comprising of 6 towers of 32 units each.

3. According to him, bank guarantees for an amount of Rs.4 Crores 29 Lacs were submitted by the petitioner for guarantying the performance. According to him, out of the six blocks, the petitioner has handed over four blocks to the respondent No.1 in the year 2015. In fact, according to him, the said blocks have been occupied by the residents. Even the balance two blocks are ready but unfortunately the possession thereof is not being taken by the respondent No.1 for the reasons best known to them. He states, even if it is said that the two blocks are not complete, when four blocks are complete and are under occupation, there is no reason to invoke bank guarantees for the total amount. In support of his submissions, he has drawn my attention to various documents including the draft minutes of the meeting and the communications issued by the respondent No.1. He also

states, it is a case of dishonesty / fraud having been played by the respondent No.1 on the petitioner. He has also drawn my attention to the terms of the bank guarantees to contend that they are incapable of being acted upon.

4. On the other hand, Mr. Nikhil Goel learned counsel appearing for the respondent No.1 would support the action of the respondent No.1 writing a letter to the respondent No.2 Bank invoking the bank guarantees. He has drawn my attention to page 189 of the documents to contend that the blocks, which have been handed over to the respondents have defects which still have not been rectified by the petitioner. He states that this aspect has been conceded by the petitioner in its communication. That apart, Mr. Goel submits that the issue, which falls for consideration of this Court is in very narrow compass, inasmuch as whether the bank guarantees, which have been invoked by the respondent no.1, is in terms thereof. According to him, it is not the case of the petitioner that the invocation of the bank guarantee is contrary to the terms thereof.

5. Having heard the learned counsel for the parties, insofar as the plea raised by Mr. Kumar in support of his submission that the respondents could not have invoked the bank guarantees, as four blocks have been handed over to the respondents and the blocks are under occupation is concerned, it is the case of the respondent No.1 that defects still exist in the four blocks, which have not been cured. Suffice would it be to state whether defects have been rectified or not is a dispute, which cannot be considered by this Court while considering the impugned action of the respondent No.1 with regard to invocation of the bank guarantees. If there is any dispute between the

parties, that needs to be settled by way of an arbitration. Concedingly, it is not a case of the petitioner nor contended by Mr. Kumar that the invocation of the bank guarantees is contrary to the terms thereof.

6. In fact, I find the terms of the five bank guarantees, which are identical and read as under are clear that the same, shall be honoured, subject to the demand made by the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor of any of the terms or conditions contained in the said agreement or by reason of the contractor failure to perform the said agreement. It is a fact that the invocation letter issued by the respondent No.1 clearly stipulate that there is a breach of terms and conditions by the petitioner.

> *"2. We, Centurion Bank of Punjab Ltd, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the government by reason of any breach by the said contractor of any of the terms or conditions contained in the said agreement or by reason of the contractor failure to perform the said agreement any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee . However, our liability this guarantee shall be restricted to all amount not exceeding Rs.2,24,01,450/- (Rs.Two crores Twenty four lakhs one thousand four hundred and fifty only)"*

7. If that be so, in view of the settled position of law laid down by the Supreme Court in the case of ***U.P. State Sugar Corporation vs. M/s. Sumac International Ltd., (1997) 1 SCC 568,*** the petitioner has not made out any

case for grant of the relief as prayed for. The relevant portion of the said judgment reads as under:

> *"12. The law relating to invocation of such bank guarantees is by now well settled.* <u>*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.*</u> *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.* <u>*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*</u>

<u>supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition.</u> 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)

8. I do not see any merit in the petition. The same is dismissed.

V. KAMESWAR RAO, J

SEPTEMBER 14, 2020/*ak*