

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

% **Date of decision: 3rd December, 2020.**

+ **FAO(OS) (COMM) 123/2020 & CMs No.24784/2020 (for interim relief) & 24785/2020 (for leave to file certain documents handed over during the course of arguments)**

**CRSC RESEARCH AND DESIGN INSTITUTE
GROUP CO. LTD.**

.....Appellant

Through: Mr. Sudhanshu Batra, Sr. Adv. with
Mr. Krishna Vijay Singh, Mr. Manish
Dembla and Mr. Nachiketa Goyal,
Advs.

Versus

**DEDICATED FREIGHT CORRIDOR CORPORATION
OF INDIA LIMITED & ORS.**

.....Respondents

Through: Mr. Tushar Mehta, Solicitor General
of India with Ms. Garima Prashad,
Mr. Abhishek Kumar Tripathi, Ms.
Ankita Pandey & Mr. Imtiyaz, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This appeal, under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, impugns the judgment dated 30th September, 2020 of the Single Judge of this Court of dismissal of OMP(I)(COMM) No.184/2020 filed by the appellant, seeking interim measure of restraining

invocation/encashment of four Advance Payment Bank Guarantees of a total value of approximately Rs.38.06 crores and one Performance Bank Guarantee for Rs.23.55 crores, issued by the respondent No.2 Standard Chartered Bank Limited, Mumbai and the respondent No.3 Industrial and Commercial Bank of China Limited, Mumbai Branch respectively, at the instance of the appellant, in favour of the respondent No.1 Dedicated Freight Corridor Corporation of India Limited, in pursuance to the contract dated 3rd October, 2016 entered into by the respondent No.1 with the appellant for "Design, Supply, Construction, Testing and Commissioning of Signaling, Telecommunication and Associated Works of Double Track Railway Lines Under Construction, on a Design Build Lump Sum Basis, for Mughalsarai-New Bhaupur section of Eastern Dedicated Freight Corridor".

2. During the pendency of the OMP aforesaid before the Single Judge, the respondent No.1 had made a statement before the Single Judge that the Bank Guarantees (BGs) will not be encashed. Fearing that on dismissal of the OMP vide the impugned judgment, the respondent No.1 will invoke and encash the BGs, the appellant got the appeal listed on 1st October, 2020, on urgent mentioning, and the same was received by us at 1543 hours. None appeared for the respondent No.1 on that date and on being informed of the undertaking before the Single Judge and that after the dismissal of the OMP, the BGs had been invoked but the monies thereunder not been released by the respondents No.2&3 Banks in favour of the respondent No.1 till then, vide order dated 1st October, 2020, the respondents No.2&3, if had not already released the monies, were restrained from releasing the monies of the BGs in favour of the respondent No.1 and the appeal was posted to 6th October, 2020. Thereafter the appeal was adjourned to 11th November,

2012, 12th November, 2020 and 24th November, 2020 and the interim arrangement continued.

3. On 24th November, 2020, we heard the senior counsel appearing for the appellant and the Solicitor General for the respondent No.1.

4. The senior counsel for the appellant, during his arguments spanning over one hour, took us through various clauses of the contract between the appellant and the respondent no.1 and the correspondence exchanged between them. Significantly, during the entire arguments, attention to the BGs, which in law constitute a contract between the bank issuing the guarantee and the beneficiary of the guarantee, independent of the contract between the beneficiary of the guarantee and the person at whose instance the bank has issued the guarantee, was not drawn. The Single Judge however, in paragraphs 35 to 37 of the impugned judgment itself, has reproduced the relevant terms of the four identically worded Advance Payment Bank Guarantees and of the Performance Bank Guarantee and a bare perusal whereof makes the reason, why the senior counsel for the appellant did not refer thereto, obvious. Under the Advance Payment Guarantees, the respondent no.2 Standard Chartered Bank agreed and irrevocably undertook to pay to the respondent no.1, any sum not exceeding the value of the guarantees, upon receipt from the respondent no.1, of demand supported by a statement, whether in the demand itself or in a separate signed document accompanying the demand, that the appellant had used the advance payment for purposes other than the costs of mobilization in respect of the works or had failed to repay the advance payment in accordance with the contract conditions. It was not the argument of the

senior counsel for the appellant, that the demand made by the respondent no.1 as beneficiary, on the respondent no.2 as the guaranteeing bank, was not as provided in the Advance Payment Guarantees. Similarly, under the Performance Bank Guarantee, the respondent no.3 Industrial and Commercial Bank of China Ltd. agreed and irrevocably undertook to pay to the respondent no.1, any sum not exceeding the amount of the bank guarantee, upon receipt from the respondent no.1 of a demand supported by statement, whether in the demand itself or in a separate signed document accompanying the demand, that the appellant was in breach of its obligations under the contract, without being required to prove or to show grounds for the demand or the sums specified. It was also not the argument of the senior counsel for the appellant, that invocation of the Performance Bank Guarantee was not in the said terms.

5. The BGs are thus, unequivocal, absolute and unconditional, whereunder the respondents No.2&3 Banks have undertaken to pay the amount not exceeding the amount of the BGs, to the respondent No.1, on demand and without any demur, without reference to the appellant and notwithstanding the disputes between the appellant and the respondent No.1.

6. During the hearing, we interrupted the senior counsel for the appellant to enquire, whether not all the arguments which he was making and which, are recorded in the impugned judgment to have been made before the Single Judge also and which have been dealt with by the Single Judge, in view of the law laid down by the Supreme Court with respect to interference with such BGs, have no meaning and are irrelevant and whether it is essential that before an Appellate Court, there is a complete replay of the hearing before

the First Court, with the Appellate Court being required to deal with each and every argument, as already dealt with by the Single Judge and all of which results in delay and which delays often lead to the beneficiary of the BGs receiving the monies under the BGs, long after the date of invocation of the BGs, defeating the very purpose of obtaining the BGs. When the BGs are furnished in pursuance to public projects, such delays also lead to public works being held up, causing loss and inconvenience, though to no one in particular but to the general public at large, who on successful completion of the said public works are beneficiary thereof. We further observed that we ourselves felt it to be a waste of time, to write lengthy judgments on a subject, law with respect where to is not *res integra* and permits of no ambiguity. To be fair to the senior counsel for the appellant, after our said observation, he confined his arguments to little over one hour instead of the length it would have gone to, as begun.

7. The settled law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is (a) 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; (b) the Bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer; (c) the very purpose of giving such a bank guarantee would otherwise be defeated; (d) the Courts should therefore be slow in granting an injunction to restrain the realization of such a bank guarantee; (e) the Courts have carved out only two exceptions i.e. (i) a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee – if there is such a fraud of which the beneficiary

seeks to take the advantage, he can be restrained from doing so; fraud has to be an established fraud which the bank knows of and the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge; and, (ii) 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 effect the bank and its customers 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; it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

8. We are of the view that in view of ambiguous position of law with respect to interference with encashment of BGs and considering the paucity of time with the Courts, a time has come for confining the hearings in such matters to the minimum possible time, of not more than 15-30 minutes.

9. In ***Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd.*** (1997) 6 SCC 450, a three Judge Bench of the Supreme Court observed:

“It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.”

Though the Courts cannot restrain parties and counsels from filing cases, notwithstanding the settled position in law and notwithstanding majority of the cases not having even an arguable case, but the Courts certainly, by expediting the disposal of such cases and by minimizing the time for which the parties approaching the Court are able to stall encashment, can send a signal to the litigants, that no purpose will be served in approaching the Courts in such cases. It cannot be lost sight of that by approaching the Court, the plaintiffs / petitioners, though not able to succeed ultimately, often succeed in delaying encashment, thereby gaining vital time, to favourably negotiate with the beneficiary of the guarantee and to arrange their affairs, to bear the impact of invocation of bank guarantee, with the beneficiary of the guarantee, though ultimately succeeding, receiving the same amount which should have been received several years / months earlier, immediately on invocation.

10. Since the time of the observations quoted above of the Supreme Court, there has been another vital development. The law relating to arbitration has been overhauled and the Commercial Courts Act, 2015 has been enacted, both to expedite adjudication of commercial disputes. The Commercial Division of this Court, in this case, was approached by way of a petition under Section 9 of the Arbitration Act, for interim measures. In exercise of the said jurisdiction, the Commercial Division of this Court is not seized with adjudication of the substantive dispute between the appellant, at whose instance the BGs were furnished, and the respondent no.1, in whose favour the BGs were furnished. The said substantive dispute is to be decided in arbitration. This vital difference is to be kept in mind while exercising jurisdiction under Section 9 inasmuch as any interpretation

given by this Court to the terms of the contract, even though may be said to be on a *prima facie* view of the matter, has a potential of influencing the Arbitral Tribunal. Not only so, the grant / non-grant of interim measures under Section 9 is essentially discretionary and the scope of interference in appeal under Section 37 is much more limited than in an appeal arising from an interim order in a suit. Even in an appeal against an interim order in a suit, the scope of interference, as per the dicta in ***Wander Ltd. Vs. Antox India P. Ltd.*** 1990 (Supp) SCC 727 is confined to cases where the Single Judge has exercise the discretion vested in him arbitrarily or capriciously or perversely or where the Single Judge has ignored settled principle of law regulating grant or refusal of interlocutory injunctions and does not extend to substituting own discretion for the discretion exercised by the Single Judge.

11. The senior counsel for the appellant, without controverting that the BGs are absolute, unequivocal and unconditional, contended that since the BGs are in pursuance to a contract, it becomes essential to peruse the terms of the contract. It was the contention of the senior counsel for the appellant, that the respondent No.1 has not acted in terms of the contract in the matter of invocation of the BGs and thus a case of fraud is made out. It was argued that the contract has been terminated and the BGs encashed only on the ground of delay on the part of the appellant in executing the works under the contract but the respondent No.1 has given repeated extensions of time to the appellant for completion of the contract, admitting that the delay was attributable also to the respondent No.1 as well as the prevalent Covid-19 pandemic. It is further argued that the decision to terminate the contract was made public before the contract was actually terminated. It was thus

contended that the invocation is fraudulent. It was further argued that monies are already due from the respondent no.1 to the appellant and if the respondent no.1 were to also receive the monies under the BGs, the same would put more burden on the appellant. However, not confining the claim for stay of encashment of BGs to the ground of fraud, it was also contended that the ground of special equities is made out, inasmuch as once the BGs are encashed, the appellant would be barred from bidding for any World Bank contract, causing irreparable injury to the appellant. Reliance was placed on judgment dated 26th July, 2007 of the Division Bench of this Court in FAO(OS) No.77/2006 titled **Satluj Jal Vidyut Vikas Nigam Ltd. Vs. Hindustan Construction Company Ltd.**, judgment of the Division Bench of this Court in **Satluj Jal Vidyut Nigam Ltd. Vs. Jai Prakash Hyundai Consortium** 2006 SCC OnLine Del 339 [Special Leave Petition (SLP) (Civil) No.5456/2006 whereagainst was dismissed on 3rd April, 2006], judgment of the Single Judge of this Court in **Continental Construction Ltd. Vs. Satluj Jal Vidyut Nigam Ltd.** 2006 SCC OnLine Del 56 and judgment of the Single Judge of this Court in **Larsen & Toubro Ltd. Vs. Experion Developers Pvt. Ltd.** 2019 SCC OnLine Del 9097.

12. Needless to state, the Solicitor General controverted each of the factual averments on merits made by the senior counsel for the appellant and has drawn our attention to the earlier notices issued by the respondent No.1 to the appellant, complaining of delay. It is further the contention that since the award of the contract in the year 2017, only 22% of the work has been physically completed and only 14% of financial progress achieved. It is further the contention that the appellant even now is not interested in specific performance of the contract and is making only monetary claims

before the Arbitral Tribunal. It was yet further contended that even the termination of the contract is being challenged only to avoid payment under the bank guarantees and fraud was not even pleaded in the Section 9 petition, which was filed only pleading the ground of special equity. Lastly, it was contended that the sanctity of the bank guarantee will be nullified if encashment thereof is interfered with.

13. The senior counsel for the appellant rejoined by contending that the fear of the respondent No.1 can be assuaged by keeping the BGs alive till the arbitral award is pronounced. Else, he again contended that monies are already due to the respondent No.1 to the appellant and for which claim is being made before the Arbitral Tribunal and if the appellant is compelled to also make a claim for the amount illegally recovered by the respondent No.1 under the BGs, the claim before the Arbitral Tribunal would go up further.

14. We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a *prima facie* opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No.1 by encashment of BGs. If any interim relief is also claimed in the said substantive proceedings, the need for taking a *prima facie* view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs. In the said proceedings, no question of

taking a *prima facie* view arises and the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice. Needless to state that from the entire arguments of the senior counsel for the appellant, no case of fraud of egregious nature in the matter of making/obtaining of the BGs is made out. All that emerges is that there are disputes between the appellant and the respondent No.1 and it is not even whispered that the respondent No.1 built the entire charade of entering into the contract, only to obtain BGs and to profiteer from the appellant. With respect to the ground urged by the senior counsel for the appellant, of special equities, the Solicitor General has stated that the appellant is a Chinese entity and if ultimately in arbitration, which has already commenced between the parties, the monies are found due to the respondent No.1 from the appellant, the respondent No.1 would have no means or ways available to it for recovering the same from the appellant and/or to enforce the arbitral award in China. On the contrary, it is contended that the respondent No.1 is a Public Sector Undertaking and the monies, if ultimately found due to the appellant from the respondent No.1, can always be recovered by the appellant from the respondent No.1.

15. Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the appellant, we are afraid, fails to

qualify so. The Single Judge has written at length on the subject and save for as aforesaid, we need not say more.

16. Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof. It is always open to such person to sue for recovery of the amount wrongfully recovered. What has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. There is not even a whisper to this effect, neither in the pleadings nor in the arguments.

17. No case, thus, to interfere with the judgment of the Single Judge is made out.

18. We however further asked the counsels, whether not in such matters, the party which has obtained an *ex parte* order of injunction restraining encashment of the bank guarantee, should be burdened with interests for the period it succeeds in stalling payment under the bank guarantee.

19. While the senior counsel for the appellant stated that it is always in the discretion of the Court, the Solicitor General stated that evolving such a practice would have a salutary effect on such litigation.

20. It is settled position in law that the Court which grants a interim relief, while finally deciding the matter, should balance the equities emerging from the interim order. Here, the appellant, by filing the Section 9 petition and thereafter by filing this appeal after dismissal thereof, has delayed the realization of the monies under the bank guarantee by the respondent no.1. The monies so realized after dismissal of this appeal would be the same

which would have been realized had there been no stay. We are of the view that the appellant, besides suffering encashment of bank guarantee should pay to the respondent no.1 interest for the period the encashment of the BGs and realization of monies thereunder remained stayed. In the facts and circumstances of the present case, interest @ 11% per annum is deemed appropriate, recoverable by the respondent no.1 from the appellant, and if not paid by the appellant within the stipulated time, with further interest @ 14% per annum.

21. Thus while dismissing this appeal, we direct the appellant to, within 60 days hereof, pay to the respondent no.1, interest @ 11% per annum on the amount of the BGs, from the date of grant of stay by the Commercial Division, till the date monies under the BGs are received by the respondent no.1. If payment is not so made within 60 days, the same will be realizable by the respondent no.1 from the appellant together with further interest @ 14% per annum, with effect from 60 days thereafter, either as a decree of this Court or at the time of enforcement/adjustment of the arbitral award. We further burden the appellant with costs of this appeal, quantified at Rs.5 lacs.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

DECEMBER 03, 2020
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