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

% *Date of Judgment: 7th January, 2021*

+ **O.M.P.(I) (COMM.) 3/2021&I.A. 195/2021 & I.A. 196/2021**

DADHEECH INFRASTRUCTURES
PRIVATE LIMITED

..... Petitioner

Through: Mr Sehagiri Vadhamani,
Advocate.

versus

DTE GEN MD ACCN PROJECT & ANR. Respondents

Through: Mr Chetan Sharma, ASG with
Ms Monika Arora, Advocate
for UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the respondent may be restrained from invoking and encashing the Performance Bank Guarantees – Bank Guarantee No.0770171GPER0040 for an amount of ₹11,00,00,000/- and Bank Guarantee No. 0770171GPER0042 for an amount of ₹2,91,00,000/-

(hereafter referred to as the ‘Performance Bank Guarantees’) . The petitioner further prays that the respondent may be enjoined from encashing the Retention Guarantees being the Bank Guarantees furnished by the petitioner against disbursal of Retention Money, being Bank Guarantee No. 0770171GPER0037 for a sum of ₹20,76,000/-; Bank Guarantee No. 0770171GPER0039 for a sum of ₹2,07,50,000/-; and Bank Guarantee No. 0770171GPER0041 for a sum of ₹1,80,00,000/- (hereafter referred to as ‘Retention Bank Guarantees’). In addition, the petitioner also prays that respondent no.1 be restrained from giving effect to letter bearing no. 84828/MAP/PHASE-II/PKG- 25/R&C/1656/E8 dated 04.01.2021 unlawfully cancelling the Contract Agreement No.DG MAP/PHASE-II/PKG-25 (R&C) 01 of 2013-14 (hereafter ‘the Contract’).

2. The petitioner was awarded the Contract for construction of dwelling units including allied services at Ahmedabad, Gandhinagar and Chiloda (“DGMAP/PHASE-II/PKG-25(R&C)/01 OF 2013-2014: COMPLETION OF BALANCE WORKS OF CONSTRUCTION OF DWELLING UNITS INCLUDING ALLIED SERVICES FOR OFFICERS & JCOS/OR AT AHMEDABAD, GANDHINAGAR ANP CHILODA” as detailed in Tender Enquiry vide letter no. 84828/MAP/PH-11/PKG-25/R&C/27/EB DT 12.07.2012 as amended by letters dated 02.08.2013, 12.08.2013, 19.08.2013 and 22.08.2013)

3. The petitioner had tendered for the aforesaid works pursuant to notices inviting tenders issued by respondent no.1. The petitioner’s

tender was accepted and by a letter dated 11.10.2013, respondent no.1 informed the petitioner that it had accepted the petitioner's offer for completing the works for a sum of ₹2,78,16,52,390.08/-. The said parties also signed a formal Contract.

4. In terms of the said Contract, the petitioner furnished the two Performance Bank Guarantees, as mentioned above. Certain interim payments were made to the petitioner after retaining a specified proportion in terms of the Contract. The said retention money was also disbursed against Retention Bank Guarantees.

5. The works were to be executed within a period of twenty-four months. Admittedly, the execution of the works has been delayed and according to the petitioner, about 62% of the works are complete. The petitioner claims that the delay in completion of the Contract is not on account of any reason attributable to the petitioner but mainly on account of delay on the part of respondent no.1 in performing its obligations. The petitioner states that there was a considerable delay in handing over of the Site and the period of twenty-four months would not commence only when the complete Site was handed over to the petitioner. In addition, respondent no. 1 had also delayed handing over drawings. The petitioner states that it had sent letters setting out the reasons for the delay and seeking extension of time for completion of the Contract. However, instead of addressing the issues and extending the term of the Contract, respondent no.1 had blamed the petitioner for not maintaining adequate progress.

6. It is apparent that disputes arisen between the parties in relation to the execution of the said Contract. According to respondent no.1, the petitioner has failed to perform the Contract, therefore, it has terminated the same by its letter dated 04.01.2021.

7. By a letter dated 04.01.2021 addressed to the Andhra Bank (now the Union Bank of India), respondent no.1 has invoked the Bank Guarantees in question: the Performance Bank Guarantees as well as the Retention Bank Guarantees.

8. Mr Sheshagiri, learned counsel appearing for the petitioner submitted that the said invocation is not in terms of the Bank Guarantee, inasmuch as, no loss has been caused to respondent no.1. He also earnestly contended that there has been no breach of the Contract by the petitioner and, therefore, the action taken by respondent no.1 is unsustainable. He submitted that the invocation of the Bank Guarantees in question is predicated on respondent no.1 terminating the Contract. And, since the said termination is illegal and unwarranted, the invocation/encashment of the Bank Guarantees in question are liable to be stayed. He also submitted that the termination the letter (bearing no. 84828/MAP/PHASE-II/PKG- 25/R&C/1656/E8 dated 04.01.2021) terminating the Contract is also liable to be stayed.

9. This Court does not find any merit in the aforesaid contentions. The plain language of the Bank Guarantees in question indicates that the payment of the Guaranteed amounts are not contingent upon cancellation of the Contract. The terms on which the Bank Guarantees

can be invoked are similarly worded. The second Paragraph of one the Performance Bank Guarantees is set out below:-

“2. We Andhra Bank Chowringhee Branch. 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(s) of any of the terms or conditions contained in the said Agreement or by reason of the Contractor(s) 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 .under this guarantee shall be restricted to an amount not exceeding Rs. 11,00,00,000/- (Rupees Eleven Crore Only).”

10. It is clear from the plain language of the Bank Guarantees that they are unconditional and the issuer bank (Andhra Bank) is obliged to pay the amount on the respondent stating that “*the amount claimed is due by way of loss or damage caused or would be suffered by the Government by reason of any breach by the petitioner*”.

11. The letter of invocation dated 04.01.2021 clearly states that the demand is made on account of “*loss/damage, which would be caused to or suffered by the government*”. In this view, this court does not find any merit in the contention that the invocation of the Bank Guarantees is not in terms thereof.

12. The contention that the invocation of the Bank Guarantees

liable are liable to be enjoined as the petitioner disputes that it is in breach of the contract, is also unsubstantial. The law relating to interdicting invocation of the bank guarantee is now well settled.

13. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502***, the Supreme Court had held as under:-

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms... ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.”

14. In ***Larsen & Toubro Limited v Maharashtra State Electricity Board and Others: (1995) 6 SCC 68***, the Supreme Court reiterated the aforesaid view.

15. In ***U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.: 1988 (1) SCC 174***, the Supreme Court had held as under:-

“The nature of the fraud that the Courts talk about is fraud of an “egregious nature as to vitiate the entire underlying

transaction". It is fraud of the beneficiary, not the fraud of somebody else."

16. In ***UP State Sugar Corporation v. Sumac International Ltd.:*** **1997 (1) SCC 568** the Supreme Court authoritatively held that

"..the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain enforcement of bank guarantees"

17. In ***Himadri Chemicals Industries Ltd. v Coal Tar Refining Company:*****2007 (8) SCC 110**, the Supreme Court summarized the principles distilled in earlier decisions in the following words:

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(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.”

18. Although, in ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.***: AIR 1996 SC 2268, the Supreme Court had observed as under:-

“We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the

contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.”

19. It is settled law that invocation of the Bank Guarantees cannot be withheld on account of any disputes between the parties. Thus, the Bank Guarantees are required to be honoured notwithstanding the disputes that have arisen between the parties. In view of the above, the petitioner’s prayer that respondent no.1 be restrained from invoking the Bank Guarantees cannot be acceded to.

20. The petitioner’s prayer that the letter dated 04.01.2021 terminating the Contract be stayed, also unmerited. Indisputably, the Contract is determinable. Interdicting the operation of the letter terminating the Contract, would in effect amount to directing specific enforcement of the Contract, which is impermissible in terms of Section 14 (d) of the Specific Relief Act, 1963.

21. The petition is, accordingly, dismissed. The pending applications are disposed of.

VIBHU BAKHRU, J

JANUARY 07, 2021
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