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

% *Date of Judgment: 09 February, 2021*

+ **O.M.P.(I)(COMM.) 53/2021**

M/S BSP - SHC (JV)

..... Petitioner

Through: Mr Vishnu Mehra, Advocate.

versus

DEDICATED FREIGHT CORRIDOR CORPORATION
OF INDIA LIMITED AND ANR.

..... Respondents

Through

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 A&C Act'), *inter alia*, praying as under:

“i. In view of the above facts and circumstances mentioned hereinabove, it is most respectfully prayed that the Hon'ble Court may graciously be pleased to allow the present petition and restraint by way of injunction the Respondent No. 1 from invoking and encashing the following Bank Guarantees:

(i) Performance bank Guarantee No. 0767ILG004020 dated 14.08.2020 amounting to Rs. 1,59,88,000/- issued by Respondent No. 2.

ii) Bank Guarantee No. 0767ILG004220 dated 24.08.2020 amounting to Rs. 2,56,39,000/- deposited in lieu of release of Security Deposit.

iii) Bank Guarantee No. 0767ILG001519 dated 12.09.2019 amounting to Rs. 66,00,000/- and Bank Guarantee No. 0767ILG001719 dated 27.09.2019 amounting to Rs. 48,87,569/- deposited for the release of mobilization advance.

Till the (i) Appointment of the Arbitrator for Adjudicating the disputes (ii) Till the Arbitral Award is passed and (iii) Till the enforcement of the award in accordance with Section 36 the Arbitration & Conciliation Act, 1996 as amended;

ii. Hon'ble Court may graciously be pleased restraint by way of injunction the Respondent No. 2 Bank from remitting the Following Bank guarantees to the Respondent No. 1:

(i) Performance bank Guarantee No. 0767ILG004020 dated 14.08.2020 amounting to Rs. 1,59,88,000/- issued by Respondent No.2.

ii) Bank Guarantee No. 0767ILG004220 dated 24.08.2020 amounting to Rs. 2,56,39,000/- deposited in lieu of release of Security Deposit.

iii) Bank Guarantee No. 0767ILG001519 dated 12.09.2019 amounting to Rs. 66,00,000/- and Bank Guarantee No. 0767ILG001719 dated 27.09.2019

amounting to Rs. 48,87,569/- deposited for the release of mobilization advance.

Till the (i) Appointment of the Arbitrator for Adjudicating the disputes (ii) Till the Arbitral Award is passed and (iii) Till the enforcement of the award in accordance with Section 36 the Arbitration & Conciliation Act, 1996 as amended;”

2. The respondent is a Government of India Enterprise and it had issued a Notice Inviting Tender (NIT) on 02.02.2016 for construction of 2 Nos. Two Lane ROB's (including the approaches & LHS) in lieu of Level Crossing No. 104 and 108 at Km. 555/4-5 at Sirohi Road Yard & Km. 565/0-1 at Banas Yard of Madar-Palanpur Section of Ajmer Division of North Western Railways. The said two Road Over Bridges are hereafter referred to as 'ROB 104' and 'ROB 108'.

3. The petitioner submitted its tender for the aforesaid works and was declared successful. The respondent issued a Letter of Acceptance (LOA) dated 26.05.2016. The agreed contract value was fixed at ₹41,77,29,781.72/-. Subsequently, the agreement dated 04.07.2016 was executed between the parties. In terms of the NIT, the petitioner submitted a performance bank guarantee in the sum of ₹2,08,86,500/- being 5% of the contract value. The petitioner states that in addition to the above, it also furnished a security deposit being 5% of the contract value.

4. The petitioner claims that it commenced the construction works and also provided bank guarantee (Bank Guarantee No.

1002816BG000177) in lieu of the security deposit.

5. The petitioner claims that it sought advance for mobilisation of its resources and a sum of ₹2,29,75,138/- was released to the petitioner on its furnishing two bank guarantees in the sum of ₹1,14,87,569/- each.

6. The petitioner claims that it being conscious of its contractual obligations has kept the bank guarantees alive. The earlier performance bank guarantee issued by the State Bank of India was replaced by a bank guarantee furnished by Punjab National Bank (Bank Guarantee No. 0767ILG004020 dated 14.08.2020). The said bank guarantee was valid till today (that is, 09.02.2021). Although the initial performance bank guarantee was in the sum of ₹2,08,86,500/-, respondent no.1 had agreed to accept a reduced amount in view of the circulars issued by the Central Government in the wake of the outbreak of Covid-19. As of today, the petitioner has submitted four bank guarantees: (i) performance bank guarantee No. 0767ILG004020 for a sum of ₹1,59,88,000/- issued by Punjab National Bank (respondent no. 2); (ii) bank guarantee No. 0767ILG004220 dated 24.08.2020 in the sum of ₹2,56,39,000/- furnished in lieu of the security deposit; (iii) bank guarantee no. 0767ILG001519 dated 12.09.2019 for a sum of ₹66,00,000/- against mobilisation advance; and (iv) bank guarantee no. 0767ILG001719 dated 27.09.2019 in the sum of ₹48,87,569/- against release of mobilisation advance.

7. Admittedly, there has been delay in execution of the works

relating to ROB 104 and ROB 108. The petitioner claims that delay in execution of the works is entirely for the reasons attributable to respondent no.1. The petitioner claims that initially there was a delay in providing General Arrangement Drawings which, according to the petitioner, were finally furnished on 21.09.2016. The petitioner further claims that there were also delays on account of various hurdles such as shifting of overhead electricity lines; shifting of level crossing; arrangement for traffic diversion etc. In addition to the above, the petitioner claims that there has been a significant delay as the respondent no.1 has not yet acquired the necessary land for construction of the ROB 104 and ROB 108. The petitioner also claims that there have been various modifications that were insisted upon by the respondent no.1 and that too delayed execution of the work as well.

8. Mr Mehra, learned counsel appearing for the petitioner earnestly contends that respondent no.1 is solely responsible for the delay in execution of the works and respondent no. 1 has failed to acquire the land for the project, which is a fundamental requirement for carrying on the works.

9. He further submits that since there was no deficiency in performance of the contract on the part of the petitioner, respondent no.1 had also extended the time for completion of the contract without levy of any liquidated damages.

10. It is seen that by a letter dated 09.01.2020, the contract awarded

to the petitioner was extended till 31.03.2020 without levy of any penalty (liquidated damages). Thereafter, by a letter dated 27.10.2020, the contract was further extended till 30.01.2021.

11. By a letter dated 25.01.2021, respondent no.1 had issued a seven days prior notice in terms with Clause 62 of the Standard General Conditions of the Contract alleging that despite of repeated instructions, the petitioner had failed to show adequate progress in completing the works. Respondent no.1 also alleged that several meetings have been held for the review of the progress of the works and although the petitioner had made certain commitments, it had failed to live up to the same. Respondent no.1 put the petitioner to notice that on it failing to show adequate progress, it would terminate the contract in terms of Clause 62 of the Standard General Conditions of the Contract and complete the balance works without the petitioner's participation.

12. The petitioner responded to the said notice dated 25.01.2021 by its letter dated 03.02.2021, *inter alia*, stating that it had arranged for adequate labour and more than 45 workmen were working on the site on different activities. It was also provided the list of the works executed on that date, that is, on 03.02.2021. In addition, the petitioner stated that 55 more workmen would reach the site in a day or two. The petitioner further requested respondent no.1 to hand over the entire land to it.

13. On the same date, that is on 03.02.2021, respondent no.1 issued

a 48 hours notice in terms of Clause 62 of the Standard General Conditions of Contract putting the petitioner to notice that if it fails to make good progress, the contract would be rescinded and the work would be completed without the petitioner's participation. It also put the petitioner to notice that its security deposit would be forfeited and the performance guarantee would be invoked.

14. The petitioner responded to the said notice by its letter dated 05.02.2021, *inter alia*, asserting that it would complete the work of ROB 104 in the month of March 2021 and any precipitate steps by respondent no.1 would adversely impact the completion date. It also alleged that respondent no.1 had failed to hand over the entire land for completion of ROB 108. According to the petitioner, sufficient number of labourers were working at the site. And, the petitioner called upon respondent no.1 to recall its notice.

15. By a letter dated 06.02.2021, respondent no.1 terminated the contract with the petitioner alleging that the petitioner had failed to mobilise sufficient resources / machinery for completing the works relating to ROB 104 and ROB 108. Respondent no.1 further alleged that the petitioner had not addressed the safety concerns as the Girders placed by it were in an unsafe condition since a considerable period of time and the RE wall earthwork had been not placed resulting in unsafe and an inconvenient condition.

16. It is apparent from the above that disputes have arisen between the parties in connection with the contract. The petitioner contends

that invocation of the bank guarantees would cause irretrievable injustice and irreparable loss to the petitioner.

17. It is not disputed by the learned counsel for the petitioner that the bank guarantees furnished by it are unconditional. The law relating to interdicting invocation and encashment of unconditional bank guarantees is well settled. In *Dwarikesh Sugar Industries Ltd. V. Prem Heavy Engineering Works (P) Ltd. And Anr.: AIR 1997 SC 2477*, the Supreme Court held as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502], *Larsen & Toubro Ltd. v. Maharashtra SEB* [(1995) 6 SCC 68], *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] and *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997) 1 SCC 568]. The general principle which has been laid down by this Court has been summarised in the case of *U.P. State Sugar Corpn.* [(1997) 1 SCC 568] as follows: (SCC p. 574, para 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 the 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.”

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351, CA] are apposite:

“... 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 discharged.*”

18. It is also well settled that the bank guarantees cannot be interdicted on account of contractual disputes between the parties. In ***Hindustan Construction Co. Ltd. and Ors. v. State of Bihar and Ors.: (1999) 8 SCC 436***, the Supreme Court had observed that “*a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary*”.

19. The grounds on which a bank guarantee can be interdicted are restricted. The Courts would interfere and injunct invocation/encashment of bank guarantees only in exceptional cases of egregious fraud and irretrievable injustice.

20. In the present case, a plain reading of the present petition does not establish a case of fraud on the part of respondent no.1. There is no averment that a fraud has been committed by respondent no.1. The only averment that seeks to setup a case of fraud reads as under:

“It is additionally submitted that the threatened action is clearly fraudulent as the Respondent No. 1 is seeking to attach premium to its own lapses of not making available

the full land in respect of ROB no. 108 and providing the balance land for ROB 104 only in May, 2019 and ignoring disruption of work due to Corona Virus Driven Nation wide Lockdown from 24.03.2020 till about June, 2020 and resulting into migration of the Labour to their native places.”

21. In *U.P. Cooperative Federation Limited v. Singh Consultants and Engineers (P) 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.”

22. Plainly, the averments made by the petitioner do not disclose any case of fraud, which would warrant interdicting the bank guarantees.

23. Mr Mehra, further submitted that the petitioner was resting its case on the ground that invoking the bank guarantee would result in irretrievable injustice and irreparable loss to the petitioner.

24. In *Svenska Handelsbanken v. M/s. Indian Charge Chrome and Ors.: (1994) 1 SCC 502*, the Supreme Court had observed as under:

“...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.”

25. Thus, the contention that the bank guarantees issued by the petitioner ought to be enjoined on the ground of irretrievable injustice, as advanced by Mr Mehra, is unmerited. Although the petitioner at one place has alleged that the threatened action of respondent no.1 is fraudulent. However, there is no allegation that the contract entered into between the parties is vitiated by fraud. The petitioner’s case is mainly founded on alleged breach of contract on the part of respondent no.1.

26. Merely asserting that an act of terminating the contract or invoking the bank guarantee is fraudulent, without establishing a case of egregious fraud, would be wholly insufficient to secure an order interdicting invocation/encashment of a bank guarantee.

27. In the facts of this case, this Court is unable to accept that any of the grounds for interdicting the bank guarantee have been established. Accordingly, the relief as sought for by the petitioner cannot be granted.

28. In view of the above, the petition is dismissed. Pending applications are also disposed of.

VIBHU BAKHRU, J

FEBRUARY 09, 2021
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