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

% *Date of Judgment: 19th May, 2021*

+ **O.M.P.(I) (COMM.) 158/2021**

KUBER ENTERPRISES Petitioner
Through Mr Tarkeshwar Nath, Advocate.

versus

DOOSAN POWER SYSTEMS INDIA
PVT LTD Respondent
Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through videoconferencing]

VIBHU BAKHRU, J. (ORAL)

IA Nos. 6495/2021, IA 6496/2021

1. Allowed, subject to all just exceptions.

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2. The petitioner has filed the present petition under Section 9(1) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, praying as under:-

“i) Direct the Respondent not to invoke
and/or encash the Performance Bank

Guarantees No. 003GT02180720033 of Rs. 1,18,75,000/- dated 13.03.2018. till further orders;

- ii) Direct the Respondent not to encash the HDFC bank cheque bearing No. 000209 amounting to Rs. 1,18,75,000/- till further orders;
- iii) Restrain the Respondent from taking any coercive steps against the Petitioner in relation to the Contract dated 27.12.2017.”

3. Mr Nath, learned counsel appearing for the petitioner has, essentially, stressed on two reliefs. First, that this Court should restrain the invocation of the bank guarantee in question (Performance Bank Guarantee No. 003GT02180720033 of ₹1,18,75,000 – hereinafter ‘the Bank Guarantee’); and second, that the respondent be directed not to encash the cheque furnished by the petitioner (Cheque bearing No. 000209 amounting to ₹1,18,75,000/-) till further orders.

4. On 27.12.2017, the parties had entered into an Agreement (Contract No: DPSI-HO-Jawa-15 – hereafter ‘the Agreement’) whereby the respondent sub-contracted CHS Civil Works of Jawaharpur Super Thermal Power Station (2 x 660 MW Project) to the petitioner. In terms of Clause 9.1 of the Agreement, the petitioner furnished the Bank Guarantee as a Performance Guarantee. The petitioner claims that it also issued a cheque for an equivalent value.

5. Clause 9.1 of the Agreement is relevant and set out below:-

“9.1 Performance Bond

a) The Subcontractor shall submit to the Contractor as a guarantee of the faithful performance of the obligations under this Subcontract and a guarantee of the quality of Works and materials provided by the Subcontractor, an unconditional Performance Bond acceptance to the Contractor In the following manner

- Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value.
- In leu of Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value, Signed Cheque without date equivalent to Two point Five percent (2.5%) of Contract Value and Five Percent payment hold from progressive payment.
- Contractor shall return the cheque and hold amount once Subcontractor submits Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value.

The Performance Bond shall expire after expiry date of Warranty Period as defined in Clause 12 [WARRANTY] in this Sub-contract. Such guarantee shall be binding notwithstanding any variations, alterations or extensions of time that may be given or be agreed upon. No interest shall be paid for this bond.

b) The Performance Bond shall be provided by a first class bank of the Country at Contractor's

discretion in the form attached hereto acceptable to the Contractor.”

6. The petitioner claims that the scope of the work was considerably enhanced and the petitioner requested the respondents to correspondingly enhance the value of the Agreement. It is stated that on 08.01.2019, a meeting was held between the parties to sort out the issue of additional financial implication and thereafter, on 21.08.2019, to commensurate with the enhanced scope of work, the value of the Agreement was revised to ₹66.26 crores.

7. The petitioner claims that there was significant delay in making the payments under the Agreement and the petitioner continued to pursue the respondent for making the payment for extra work executed by it. The petitioner has also annexed several letters along with the petition to the aforesaid effect.

8. By a letter dated 02.04.2021, the respondent reminded the petitioner that the completion date of the Agreement is 30.06.2021 and substantial works are to be completed within the said period. It also cautioned the petitioner that in the event the contract was not completed within the said period, liquidated damages would be imposed and the Performance Bank Guarantee (referred to as Bond) would be invoked in accordance with the Agreement. It also pointed out that the delay in execution of the contract would lead to termination of the Agreement. On the same date – that is 02.04.2021 – the respondent sent another letter informing the petitioner that the petitioner had been unable to complete the contracted works within the

contracted period. It also, accordingly, stated that the Contractor (the respondent) would perform certain works specified therein directly. In other words, the scope of the work contracted to the petitioner was sought to be reduced. The respondent also asked the petitioner to hand over equipment and manpower relating to ‘dewatering works’.

9. The petitioner responded to the said letter and disputed the allegations made therein. It claimed that there was no delay on its part and the delay had been caused due to both, huge variation in quantity and value of various structures added within the scope of the contract. The petitioner claimed that there were also delays in release of drawings, nonetheless, the petitioner had endeavored to complete the works within the specified period.

10. Thereafter, on 10.04.2021, the petitioner issued a request for settlement of issues in terms of Clause 25 of the Agreement.

11. This Court has examined the averments made in the present petition and there is no ground alleging any fraud on the part of the respondent. Mr Nath, learned counsel appearing for the petitioner, submits that the petitioner is not seeking an order restraining invocation of the Bank Guarantee on the ground of any alleged fraud. He states that the petitioner rests its case only on the ground of special equities. He submits that the petitioner had invoked clause 25 of the Agreement and sought an amicable resolution of the disputes. However, the respondent has not joined the said resolution process and this, itself, is a ground of special equities in favour of the

petitioner. He submits that since the petitioner has invoked the disputes resolution clause and the respondent has not offered an amicable resolution of the disputes, the same would provide the petitioner sufficient grounds for seeking interdiction of the Bank Guarantee. He also relied on an order dated 31.12.2020 passed by this Court in ***O.M.P. (I) (COMM) 442/2020 captioned ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr.*** He also relies on the decision of a Division Bench of this Court in ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd. : 2020 SCC OnLine (Del) 1214***, which was referred by a Coordinate Bench of this Court in ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr*** (*supra*).

12. The contentions advanced on behalf of the petitioner are unmerited. The proposition that the reluctance of any party to join a dispute resolution process as claimed by the party under a contract, itself, gives a ground of special equities for interdicting the bank guarantee is fundamentally flawed.

13. The grounds on which a bank guarantee can be interdicted are extremely limited. 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 *Consortium Of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power Transmission Limited: 2014 SCC Online Del 4741*, the Division Bench of this Court had held as under:

“145.The legal position which can be summarized would be that a bank guarantee is an independent contract between the bank and the beneficiary and disputes pertaining to bank guarantees have to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the main contract between the parties. Where a bank guarantee is a conditional guarantee invocation thereof would have to be in strict conformity with the conditions on which the guarantee is issued. In such a case an injunction can be granted against payment under the bank guarantee if it is found that the condition upon which the guarantee was issued has not been complied with or met. But where the guarantee is unconditional and/or the bank has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee the bank is obliged to honour the same for the reason like letters of credit, a bank guarantee if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in

commerce and transaction which is necessary for economic growth. Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

147. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.

148. Contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default. Issues of fraud require pleadings to bring out a case of a fraud of an egregious nature and we do not find any brought out in the pleadings. The irretrievable injury or irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered remediless....”

15. In *BSES Ltd. v. Fenner India Ltd.: (2006) 2 SCC 728* the Supreme Court had observed as under:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are ‘special equities’ in favour of injunction, such as when ‘irretrievable injury’ or ‘irretrievable injustice’ would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568* this Court, correctly declared that the law was ‘settled’.”

16. In *Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268*, the Supreme Court had held 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 counterclaim 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.”

17. It is well settled that a bank guarantee can be interdicted only in exceptional circumstances. Mere contractual disputes cannot be asserted to give rise to special equities. The expression ‘special equities’ is not nebulous. It means peculiar or special circumstances which result in irretrievable injustice. These special equities or special circumstances must be pleaded.

18. Bank guarantees cannot be interdicted on account of disputes between the parties and therefore, any allegation that the respondent has been reluctant to join the proceedings for an amicable resolution

of the disputes in terms of the Contract is not *per se* a ground for interdicting an unconditional bank guarantee.

19. In *Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd.* (*supra*), the division bench of this Court had held that a bank guarantee cannot be interdicted on account of contractual disputes. The relevant extract of the said decision is set out below:-

“9. The law relating to grant of injunctions to restrain the invocation/encashment of unconditional BGs is well settled. BGs are distinct agreements between the banks and its customers and are independent of the main contract between the customer and the beneficiary and therefore, disputes between the latter two will have no bearing on the obligation of the bank giving such a guarantee to honour its invocation by the beneficiary in terms of the bank guarantee, more so when it is unconditional. The courts are slow to restrain the realization of a BG, but have, however, carved out two exceptions to the rule, one being fraud and the other being special equities in the form of irretrievable harm or injustice being caused if encashment is allowed. [SEE : *UP State Sugar Corporation v. Sumac International Ltd.* (1997) 1 SCC 568; *Standard Chartered Bank v. Heavy Engineering Corporation Ltd.* 2019 SCC OnLine SC 1638].

10. Fraud, calling for the intervention of the court, has to be of an egregious nature. There must be fraud established and mere allegations will not suffice. Fraud in connection with a BG should vitiate its very

foundation. It is when the beneficiary seeks to benefit thereby, that the courts will restrain encashment. Fraud must be that of the beneficiary and none else. Injunction can be granted also where the bank itself is proved to have knowledge that the demand for payment of the BG is fraudulent. [SEE : *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* (1988) 1 SCC 174; *Svenska Handelsbanken v. Indian Charge Chrome* (1994) 1 SCC 502].

21. The law relating to encashment of BGs under the second exception has attained wider dimensions over a period of time. The courts were initially very circumspect and required existence of fraud before it prevented encashment of unconditional BGs. Then it looked into the question of who was in breach of the contract to determine the relief to be granted under special equities. Through various judicial pronouncements the scope of what constitutes special equities was expanded to include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself. In the absence of any straight-jacket formula, the courts are required to examine each case to find out whether it falls within these heads.”

20. 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”

21. The order dated 31.12.2020 passed by this Court in ***O.M.P. (I) (COMM) 442/2020 captioned ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr***, is an ad-interim order and is not an authority for the proposition that in all cases where the beneficiary of a bank guarantee is reluctant to amicably resolve the disputes, the bank guarantee in its favour is liable to be enjoined.

22. In the present case, this Court finds no valid grounds for interdicting the invocation of the Bank Guarantee. The petitioner’s prayer in this regard is, accordingly, rejected.

23. Insofar as the petitioner’s claim for return of the cheque is concerned, Mr Nath has pointed out that the respondent was obliged to return the same once the petitioner had furnished the Bank Guarantee. On a pointed query from this Court whether any request had been made by the petitioner for return of the said cheque, Mr Nath fairly states that no such request was made by the petitioner to the respondent.

24. In view of the above, this Court considers it apposite to interdict the respondents from presenting the said cheque for a period of two weeks from today.

25. In the meanwhile, the petitioner is at liberty to request the respondent for return of the cheque. In the event, the respondent fails

to do so, the petitioner would be at liberty to approach this Court to apply afresh. It is further directed that in the event, any request is made by the petitioner to the respondent for return of the cheque, the respondent shall either return the same or respond to the request setting out reasons for its refusal to do so.

26. The petition is disposed of in the aforesaid terms.

MAY 19, 2021
pkv

VIBHU BAKHRU, J

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