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

% *Date of Decision: 03rd December, 2021*

\+ LPA 461/2021

NCUBATE INDIA SERVICES PRIVATE LIMITED FORMERLY NCUBATE LOGISTICS AND WAREHOUSING PVT LTD & ANR. ..... Appellants

Through: Mr. Ritin Rai, Senior Advocate with Mr. R. Jawahar Lal, Mr. Siddharth Bawa, Mr.Anuj Garg, Mr. Mohit Sharma and Mr. Aman Shukla, Advocates.

versus

UNION OF INDIA THROUGH: ITS SECRETARY & ORS. ..... Respondents

Through: Mr. P.S. Singh, Senior Panel Counsel for UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

D.N. PATEL, CHIEF JUSTICE (ORAL)

CM APPL. 43220/2021 (Exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

LPA 461/2021

1. Being aggrieved and feeling dissatisfied by the judgment dated 08.02.2021, passed by the learned Single Judge in W.P.(C) 7302/2013, Original Petitioners have preferred the present Letters Patent Appeal.

2. Writ petition was filed by the Appellants before the learned Single Judge seeking the following reliefs :-

> *"A. Issue a Writ of Certiorari or any other appropriate Writ, Order or Direction, thereby quashing and setting aside the impugned letters, including the letter dated 03.06.2013 issued by Respondent No. 5, and also the letter issued by the General Manager on behalf of the Respondent No. 3 to 5 dated 29.06.2013 and the letter dated 26.07.2013 issued by the Respondent No. 2 being unreasonable, unfair and arbitrary; and,*
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> *B. Issue a Writ of Mandamus or any other appropriate Writ, Order or Direction, thereby directing the Respondents to honor all the four bank Guarantees as such a total of Rs. 7,00,00,000/- (Rupees Seven Crores only) in favour of the petitioner which includes First Bank Guarantee for an amount of Rs. 2,00,00,000/- issued on 14.02.2013 bearing No. 1436/ILG/12/2013, Second and Third Bank Guarantees for an amount of Rs. 2,00,00,000/- and Rs. 1,00,00,000/- issued on 06.03.2013 bearing No. 1436/LG/18/13 & No. 1436/LG/19/13, and fourth Bank Guarantee for an amount of Rs. 2,00,00,000/- dated 26.03.2013 bearing No. 1436/LG/26/13, each issued by the Respondent No. 5 in favour of the Petitioner Company; and,*
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> *C. Issue an appropriate Writ, Order or Direction, including the writ of mandamus thereby directing the respondents to pay of suitable compensation and damages as well as interest @-18% on the amount of Rs.7,00,00,000/- (Rupees Seven Crores only), being the amount of all four Bank Guarantees issued by the Respondent No. 5 in favour of the Petitioner Company for the period from the date of invocation i.e. 01.06.2013 until the Bank Guarantee is honoured;*

and,
Pass any other or further order (s), which this Hon'ble court may deem fit and proper, in the facts and circumstances of the present case, in the interest of justice."

3. From the pleadings set out in the writ petition and the present appeal, it emerges that the Appellants had filed the aforementioned writ petition seeking directions to the Respondents to honour 2 Bank Guarantees dated 14.02.2013 and 26.03.2013 and 2 Bank Guarantees both dated 06.03.2013, for a total sum of Rs.7 Crores, issued by Indian Overseas Bank (IOB) in favour of Appellant No.1.

4. It was the case of the Appellants in the writ petition that Ncubate, part of the SAR Group of Companies is engaged in import sourcing, warehousing, distribution, etc. of various goods, such as, electronics, water purifiers. Global Brands Enterprise Solutions Pvt. Ltd. (GBESPL) had the marketing and distribution rights for India of electronic consumer goods under the name 'AKAI'. On 05.05.2012, GBESPL and Ncubate entered into Import and Sourcing Agreement, whereby Ncubate was engaged as GBESPL supplier and was to source, import and warehouse the products to GBESPL, based on Purchase Orders placed and/or instructions given by GBESPL, by issuance of Letter of Credit to Ncubate's vendors. Ncubate incurred substantial financial expenditure on account of the inventory procured pursuant to Purchase Orders and monies recoverable from GBESPL against the goods sold. To safeguard Ncubate, GBESPL was required to provide security deposit of Rs.5 Crores to Ncubate along with furnishing an unconditional and irrevocable Bank Guarantee ("BG") for an amount of Rs.20 Crores in favour of Ncubate.

5. On 07.05.2012, an addendum to the Agreement dated 05.05.2012 was executed and subsequent thereto, 4 BGs in a sum of Rs.7 Crores were issued by IOB at the instance of GBESPL, in favour of Ncubate. GBESPL also entered into a National Distribution Agreement dated 05.05.2012 with Savoir Faire Services Pvt. Ltd., a Group Company of Ncubate, whose name was subsequently changed to Global Brands Enterprise Solutions and Distributions Pvt. Ltd. (GBESDPL). According to the Appellants, for more than a year, in performance of its contractual obligations, Ncubate took significant exposure on account of GBESPL's business activity and as on the date of filing of the writ petition, the financial liability of Ncubate and Group Companies for transacting business on behalf of GBESPL was to the tune of Rs.21 Crores and as of May, 2013, a total of Rs.26,74,58,000/- was payable by GBESPL to Ncubate.

6. According to the Appellants, when GBESPL failed to clear the dues, despite opportunities, Ncubate invoked the 4 BGs vide letter dated 01.06.2013. Vide letter dated 03.06.2013, IOB, however, took a stand that the BGs were fraudulently issued and, therefore, the amounts could not be remitted in favour of Ncubate. This compelled the Appellants to file a writ petition seeking quashing of the letter dated 03.06.2013 and a direction to the Respondents to honour the 4 BGs. It needs a mention that during the pendency of the writ petition, IOB also filed a suit being CS(COMM) 829/2016 seeking a declaration that the 4 BGs were unenforceable, and also permanent injunction restraining Ncubate and GBESDPL from encashing the BGs. GBESPL was also impleaded as a Defendant.

7. Learned Single Judge decided the writ petition and the suit by a common judgment. Writ petition was dismissed on the ground that disputed questions of facts were not capable of decision while exercising jurisdiction under Article 226 of the Constitution of India, while the suit was disposed of, observing that Ncubate, as a beneficiary of the BGs, having not sued for recovery of monies under the BGs, was not entitled to recovery thereof and that on the basis of documents, there was sufficient material before the Court to hold that IOB stood discharged from its obligations under the BGs, owing to concealment and misrepresentation and the evident collusion and fraud practice in issuance of the BGs. Relevant would it be to note that the challenge in the present appeal is to the extent of dismissal of the writ petition being WP(C) 7302/2013.

8. Contention of the learned Senior Counsel for the Appellants is that Respondent No.5 herein/IOB had issued 4 BGs to the tune of Rs.7 Crores at the instance of GBESPL and the beneficiary was Appellant No.1, a body corporate, who was engaged in a contractual business transaction, under duly executed Agreements for import and supply of electronic goods by the Appellants. The BGs were unequivocal, irrevocable and unconditional and the amounts under the BGs were payable on a mere demand by the beneficiary without any further proof/requirement. Since GBESPL defaulted in the payment obligations, Appellants were constrained to invoke the BGs, as an amount of nearly Rs.27 Crores was payable to Appellant No.1. Instead of honouring the BGs, IOB strangely refused to remit the amounts on the ground that GBESPL had played fraud on IOB in collusion with Appellant No.1.

9. It is further submitted that the learned Single Judge has erred in dismissing the writ petition, on the ground that it involved disputed questions of facts as also observing that Appellant No.1 is not entitled to enforcement of the BGs on account of concealment, collusion and fraud in issuance of the BGs. Once the Agreements between the parties were legal and enforceable and monies were outstanding to the Appellants, IOB was not legally entitled to question the mode and performance of the Agreements and to refuse payment under the BGs, particularly, when the BGs were unconditional and irrevocable. The Contract of Guarantee is an independent contract. Appellant No.1 has no role to play in issuance of BGs and was only a beneficiary.

10. During the course of hearing, a pointed query was put by the Court to the learned Senior Counsel appearing on behalf of the Appellants as to the period of validity of the BGs and whether the BGs were kept alive during the pendency of the writ petition as also the current status of the validity of the 4 BGs. In response, learned Senior Counsel categorically submitted that the 3 BGs out of four were valid for a period of one year while 1 BG was valid for three years, from the date of issuance, and that none of the BGs are presently valid. It is also fairly submitted that during the pendency of the litigation before the learned Single Judge, there was no interim order directing the IOB or the Guarantor to keep the BGs alive.

11. We have heard learned Senior Counsel appearing on behalf of the Appellants and looked into the facts and circumstances of the case.

12. There is no dispute that the 4 BGs in question were executed on different dates in the year 2013. BG dated 14.02.2013 was valid upto 13.02.2016, 2 BGs both dated 06.03.2013 were valid upto 05.03.2014 and

BG dated 26.03.2013 was valid upto 25.03.2014. There was no interim order directing IOB/Guarantor Bank by the learned Single Judge to keep the BGs alive during the pendency of the litigation. Resultantly, none of the 4 BGs are currently valid and hence, no orders can be passed directing their encashment. It is a settled law that a Bank Guarantee, which is no longer valid and whose life has expired, cannot be encashed at the instance of a beneficiary and, therefore, no such directions can be given by this Court to the Respondents.

13. We are also in agreement with the view taken by the learned Single Judge that the relief sought in the writ petition entailed adjudication of disputed questions of fact, which cannot be done while exercising jurisdiction under Article 226 of the Constitution of India. Learned Single Judge has observed that on the basis of documents on record, it cannot be conclusively established, whether monies under the BGs are due to Ncubate or whether the BGs were obtained by misrepresentation/concealment. According to the learned Single Judge, IOB had placed sufficient material on record raising suspicion on the aforesaid counts and the questions that thus arose could not be answered without examination and cross-examination of witnesses. Learned Single Judge has also noted that the remedy available to Ncubate, on failure of IOB to honour the BGs, is to file a suit, which they failed to do. Reliance was placed by the learned Single Judge on the judgment of the Hon'ble Supreme Court in ***Thansingh Nathmal vs. Superintendent of Taxes, Dhubri, AIR 1964 SC 1419*** and ***Suganmal vs. State of Madhya Pradesh, AIR 1965 SC 1740*** holding that jurisdiction under Article 226 of the Constitution is not intended as an alternate remedy for relief which is to be sought through a civil suit and

ordinarily a writ petition should not be entertained in cases where money is sought to be recovered requiring elaborate evidence and examination of witnesses.

14. We find no infirmity with the said view. It is a settled law that disputed questions of facts ought not to be decided in a writ petition and particularly, in matters relating to recovery of monies when the appropriate remedy is to file a suit for recovery, a writ jurisdiction cannot and should not be exercised as an alternate remedy. IOB had seriously disputed the enforcement of the BGs on the ground of fraud and collusion. IOB also filed a civil suit being CS (COMM) 829/2016 seeking a declaration that the BGs were unenforceable. In view of the serious contest by IOB and in the light of the documents placed on record, as noted by the learned Single Judge, it was known to the Appellants that there was a serious suspicion being raised on the genuineness of the BGs, which could only be resolved by leading evidence, yet the Appellants chose to continue with the writ remedy instead of filing a suit where evidence could be led to prove their claim and/or to disprove the stand of the Bank. In view of the aforementioned judgments of the Hon’ble Supreme Court, we see no reason to interfere with the impugned judgment insofar as the learned Single Judge has dismissed the writ petition.

15. As far as the suit filed by the IOB, being CS(COMM) 829/2016, is concerned, we are informed that the Appellants had already preferred the Regular First Appeal and the same will be decided in accordance with law by the concerned Court.

16. In view of the aforesaid facts and reasons, no error has been committed by the learned Single Judge while deciding W.P.(C) 7302/2013

vide judgment and order dated 08.02.2021, with respect to encashment of the BGs.

17. Liberty is granted to the Appellants to resort to appropriate remedy available in law, with respect to recovery of the alleged amounts, if any and/or enforcement of the BGs. The learned Single Judge has in para 49 of the impugned judgment, noted that the limitation for filing a suit has expired. However, if the Appellants are advised to take recourse to the remedy of filing a suit, the same shall be decided by the Competent Court, in accordance with law, keeping in mind the provisions of the Limitation Act, 1963.

18. There is no merit in the appeal and the same is accordingly dismissed, with liberty as aforementioned.

CHIEF JUSTICE

JYOTI SINGH, J

DECEMBER 03, 2021/sn