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

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Date of Decision: 03.06.2022

+ **FAO (COMM) 90/2022 and CM Nos. 27091/2022,
27092/2022 & 27093/2022**

CONTAINER CORPORATION OF INDIA
LTD.

..... Appellant

Through: Ms Divya Singh and Mr
Paritosh Budhiraja, Advocates.

versus

M/S SHIVAKRITI INTERNATIONAL LTD
& ANR.

..... Respondents

Through: Mr Sanjeev Puri, Senior
Advocate with Mr Prateek
Mishra, Ms Moinmoi Chatterjee
and Ms Tweisha Mishra,
Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (ORAL)

1. The appellant has filed the present appeal impugning an *ex parte* order dated 12.03.2021 passed by the learned District Judge, *inter alia*, directing that the *status quo* be maintained in respect of the Performance Bank Guarantee no. 3178120BG0000192 dated 21.08.2020 and the Security Deposit Bank Guarantee No.3178120BG0000272 dated 06.10.2020 (hereafter '**the PBG**' and '**SDBG**' respectively).



2. Respondent no.1 (M/s Shivakriti International Ltd. – hereafter ‘SIL’) filed a suit, *inter alia*, praying for a decree of permanent injunction restraining the appellant (hereafter ‘Concor’) from invoking and encashing the PBG and SDBG. SIL further sought a decree of permanent injunction restraining respondent no.2 (State Bank of India) from acting upon any letter received from Concor demanding the invocation of the two bank guarantees in question.

3. The case set up by SIL in its plaint is briefly stated as under:

3.1 Concor issued a Letter of Acceptance (LoA) dated 06.02.2017 awarding the work pertaining to Signalling and Telecommunication at Khemli Station on Chittorgarh-Udaipur Section of Ajmer Division on North Western Railway. SIL signed the said LoA on 01.03.2017. In terms of the LoA work was to be commenced on or before the 15th day of the issuance of the LoA.

3.2 On 04.03.2017, SIL furnished a Performance Bank Guarantee issued by State Bank of India for a sum of ₹34,64,482/- being 5% of the contract value. Thereafter, on 23.03.2017, Concor and SIL entered into a formal contract. It was stipulated that the work would be completed within a period of six months from the date of commencement (that is, six months from the 15th day of issuance of LoA). SIL claims that Concor had failed and neglected to perform its obligations under the contract and consequently, the work could not be completed within the stipulated period of time. The time for completing the contract was extended and SIL was constrained to



extend the term of the Performance Bank Guarantee. SIL has averred in its plaint that despite all obstacles, it continued to perform its obligations within the limited scope as available. However, it was unable to perform substantial work due to alleged inaction on the part of Concor. SIL set out various reasons resulting in delay in completion of the said works including the delay for a period of almost 6 months on the part of Concor in deciding the supervising agency; design and drawings submitted to the Sr. DTSE Ajmer had not yet been approved; and station building for signalling and telecommunication need had not been handed over as yet. It claims that in the circumstances, it sought a short closure of the contract in question but did not receive any response to the request. It claims that in order to avoid forfeiture of the security deposit and earnest money deposit, SIL sought extension of the contract up to 31.03.2019. The same was granted initially by Concor without levy of liquidated damages.

4. SIL raised Running Bills from time to time. However, there were considerable delays in releasing payment against the said bills. SIL claims that 4th RA Bill for a sum of Rs.55,37,878.83/- was submitted in June 2018 but remained unpaid for several months. In the circumstances, SIL once again sought for short closure of the contract on 'as is where is basis', as it was unable to carry out further works.

5. SIL claims that on insistence of Concor, it continued to extend the term of the Performance Bank Guarantee.



6. Ministry of Finance, Government of India had issued a Circular providing relief to contractors by partial release of bank guarantees to the extent of works already completed. SIL states that it sent a letter dated 09.06.2020 seeking relief in terms of the said Circular. Since it had completed work amounting to ₹4,33,16,276/- out of a total contract value of ₹6,92,89,621/-, SIL requested that the amount of Performance Bank Guarantee be reduced in the same proportion. Since the Performance Bank Guarantee was to cover 5% of the contract value, the same was now required to be reduced to 5% of the value of the remaining works (that is, ₹12,98,667/- being 5% of the remaining work of ₹2,59,73,345/-).

7. SIL states that Concor complied with the Circular issued by Ministry of Finance and permitted SIL to replace the Performance Bank Guarantee with the PBG for a reduced amount of ₹12,98,700/-. Concor also agreed to grant further relief by releasing the security deposit (amount withheld by deduction from the Running Bills) against a Bank Guarantee. SIL submitted the SDBG for a sum of ₹34,64,482/- and the security deposit (retention money) withheld by Concor was released.

8. The averments made in the plaint indicate that there were certain disputes between Concor and SIL regarding execution of the balance works as well as on account of delay in completion of the contract. SIL sent a letter dated 03.03.2021 stating that it would not be possible for SIL to complete the balance work at the rates as agreed between the parties.



9. SIL claims that there has been a considerable delay in execution of the contract for reasons attributable to Concor and in view of rise in the prices of material and resources, it is not feasible to complete the works at the rates as initially agreed.

10. SIL claims that it is an MSME and has faced terrible financial difficulties during the pandemic; work at its project had come to a standstill and there was no inflow of any revenue. SIL claims that if in these circumstances, the bank guarantees in question are encashed, it would be unable to recover from the adverse impact and that may result in its closure.

11. SIL claims that the given circumstances give rise to special equities in its favour for interdicting Concor to encash the bank guarantees.

12. It is settled law that unconditional bank guarantees cannot be interdicted except in exceptional cases of egregious fraud and special equities. In *Svenska Handelsbanken v. M/s Indian Charge Chrome and Ors.: (1994) 1 SCC 502*, the Supreme Court 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.”

13. In *Larsen & Toubro Limited v. Maharashtra State Electricity Board and Others: (1995) 6 SCC 68*, the Supreme Court reiterated the law relating to the bank guarantees. The relevant extract of the said judgement is set out below:

“5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee/irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v. Bank of India* [(1981) 2 SCC 766] , *U.P. Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.* [(1988) 1 SCC 174] , *General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd.* [(1991) 4 SCC 230] and the decision of the Court of Appeal in England in *Elia and Rabbath v. Matsas and Matsas* [(1966) 2 Lloyd's Rep 495, CA] and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502] , laid down the law thus: (SCC pp. 523-27, paras 60-72)

“... 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 *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. And Anr.*: AIR 1997 SC 2477, the Supreme Court observed 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 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 charged.”

15. A similar view was also expressed by the Supreme Court in *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company: (2007) 8 SCC 110*. The Supreme Court referred to the earlier decisions and summarized the principles regarding interdiction of a bank



guarantee as under:

“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.”

16. A plain reading of the plaint does not indicate that there was any allegation of fraud that vitiates the contract between the parties. The only averment of fraud made by SIL is in paragraph 31 of its plaint which reads as under:

“31. In view of the above, it is submitted that the Plaintiff has special equities in its favour to restrain the Defendant No. 1 from invoking the bank guarantees. The act of invoking and encashing the bank guarantees would result in fraud being committed on the Plaintiff by the Defendant No. 1 and also irretrievable injustice, especially in view of the prevailing situation due to the pandemic.”

17. A plain reading of the above clearly indicates that there is no allegation that the contract between the parties is vitiated by fraud. The only allegation is that invocation of the bank guarantee would result in a fraud. This is not a ground for interdicting an unconditional bank guarantee. In absence of SIL establishing any fraud of an egregious nature, the question of interdicting an unconditional bank guarantee does not arise.

18. Financial difficulties due to the outbreak of Covid-19 do not give rise to any special equities to interdict an unconditional bank guarantee. More importantly, special equities are not an independent



ground for seeking interdiction of the bank guarantee. 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*, 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.”

[underlined for emphasis]



19. The learned District Judge had not indicated any reasons for granting the extraordinary *ad interim* relief of interdicting the unconditional bank guarantees. The learned District Judge had merely noted the contentions advanced on behalf of SIL. However, as noted above, the averments made in the plaint only indicate certain contractual disputes and it is settled law that unconditional bank guarantees cannot be interdicted on the ground that disputes have arisen between the parties.

20. In view of the above, the impugned order is unsustainable and is liable to be set aside.

21. Mr Puri, learned senior counsel appearing for the respondent had raised an additional ground. He submitted that the Letter of Invocation submitted by Concor was not in terms of the bank guarantees in question. He had handed over a copy of the letter dated 15.03.2021 sent by Concor to SBI invoking the PBG. By the said letter, Concor had requested SBI to invoke the PBG “*due to default by the supplier under the contract*”.

22. This contention was not advanced before the learned District Judge. However, it is merited. Paragraph 2 of the said PBG reads as under:

2. We State Bank of India, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the CONCOR stating that the amount claimed is due by way of loss or damage



caused to or would be caused to or suffered by the CONCOR by reason or breach by the said contractor(s) of any of the terms and 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. 12,98,700/- (Rupees: Twelve Lakh Ninety Eight/. Thousand Seven Hundred only).

[underlined for emphasis]

23. The PBG can be invoked only by a letter in terms of paragraph 2 of the PBG. Since the letter dated 15.03.2021 is not in terms of the PBG, SBI cannot encash the PBG pursuant thereto.

24. Having stated the above, it is also necessary to clarify that Concor is not precluded from issuing a fresh letter invoking the Bank Guarantees.

25. At the conclusion, Mr Puri requested that the Bank Guarantees may not be invoked, and SIL will voluntarily deposit the amount with the Court.

26. In view of the above, the impugned order is set aside. However, considering the statement made by Mr Puri, it is directed that the Bank Guarantees will not be invoked if SIL deposits the entire amount with the Registry of this Court within a period of one week from today. The disbursal of the amount so deposited shall be in accordance with further orders that may be passed by the learned trial court.



27. Concor is at liberty to approach the learned trial court for appropriate orders for release of the amounts as may be deposited by SIL.
28. The appeal is disposed of in the aforesaid terms.
29. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JUNE 3, 2022
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