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

Date of decision: 15th April, 2023

\+ **W.P.(C) 4644/2023 and CM APPL. 17915/2023, 17916/2023**

CHANDRALEKHA CONSTRUCTIONS PRIVATE LIMITED ..... Petitioner

Through: Mr. Rachit Batra, Advocate (M: 9818383584).

versus

NBCC (INDIA) LIMITED ..... Respondents

Through: Mr. Anil K. Airi, Sr. Advocate with Mr. Ravi Krishan Chadana and Mr. Mudit Ruhella, Advocate with Mr. Mudit Bhatnagar SBG Head, Delhi and Mr. A.K Singh, Zonal Incharge (M: 9711752002).

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. This hearing has been done through hybrid mode.

2. The present writ petition has been filed by the Petitioner-Chandralekha Constructions Pvt. Ltd. challenging the invocation of two bank guarantees. The total sum of the bank guarantees sought to be invoked by the Respondent- National Buildings Construction Corporation Ltd. (hereinafter *'NBCC'*) is Rs. 1,55,25,000/-. The details of the BGs are as follows:

Bank Guarantee	*Amount*
BG 03871PBG1902003	*Rs. 77,62,500/-*
BG 03871PBG1902004	*Rs. 77,62,500/-*

Total amount	*Rs. 1,55,25,000*

3. A tender dated 15th November 2018 was floated by the NBCC for construction of a residential complex for the National Investigation Agency ('NIA') in Delhi. The Petitioner was declared the successful tenderer vide letter 22nd January 2019 and was awarded the contract by the NBCC. The total value of the contract is Rs. 62,10,00,000/- (Rupee Sixty Two Crores Ten Lakhs Only). In terms of the letter of award dated 22nd January, 2019, the completion of the work contract was scheduled to be within 18 months. The said letter of award is as follows:-

> *"**Performance Guarantee:** Pursuant to GCC(Section-3) clause No. 2.0 of the contract, you are required to furnish irrevocable Performance Guarantee for an amount equal to 5% (Five Percent Only) of contract value within 30 days from the issue of this letter of award.*
> ***Time Schedule:** The Time of 18 (Eighteen) Months allowed for execution of the work shall be reckoned from the 10th day after the date of issue of letter of award. You are also required to submit Completion Schedule of the Project within 10 (Ten) days from the date of issue of LOA. This will be duly got approved from NBCC. This approved completion schedule shall form a part of the agreement."*

4. The Petitioner could not complete the work within the stipulated time of 18 months. The claim of the Petitioner is that the work was delayed due to COVID-19 pandemic. In the meantime, the NBCC has been repeatedly emphasizing on the early completion of the work. However, vide letter dated 28th February, 2023, provisional extension of time was granted by the NBCC

to the Petitioner in respect of the work up to 31st May, 2023. The said letter is relevant for the present purposes and is extracted below:-

> *"Sub: **Provisional extension of time***
> *Reference your letter no. NIA/NBCC/CCPL/004/2022-23 dated 27.02.2023, in connection with the grant of extension of time for completion of the work. i.e. Construction of NIA Head Quarter Residential Complex at village Rajpurkhurd, New Delhi.*
> *The date of completion for the above mentioned work, is 31.07.2020 as stipulated in the agreement, dated 21.02.2019.*
> *Extension of time for completion of the above mentioned work is granted upto 31.05.2023 provisionally, without prejudice to the right of the NBCC to recover compensation for delay in accordance with the provision made in the Clause of the said agreement dated 21.02.2019. It is also clearly understood that the NBCC shall not consider any revision in contract price or any other compensation whatsoever due to grant of this extension.*
> *Provided that notwithstanding the extension hereby granted, time is and shall still continue to be the essence of the said agreement."*

5. According to the Petitioner, post the issuance of a letter dated 28th February, 2023, meetings were also held between the parties and thereafter, the Petitioner vide letter dated 25th March, 2023accepted the completion of the entire work by 31st May, 2023. There was a performance plan which was also attached with the said letter dated 25th March 2023 and specific dates were given in the said plan as to when each of the sub-items of the work contract was to be executed as well. The ld. Counsel for the Petitioner, Mr. Rachit Batra submits that ninety percent of the total work which was to be carried out by the Petitioner, is complete, and more than Rs. 2 crore

worth the raw material is lying at the work site.

6. Ld. Counsel for the Petitioner also relies upon Clause 2.2 of the General Conditions of Contract ('GCC') to argue that without notice, the bank guarantee invocation could not have taken place. At this stage, the invocation of the bank guarantees without notice, when around ninety percent of the work is completed, is arbitrary.

7. It is also submitted by the ld. counsel for the Petitioner, that 38th RA Bill has also been submitted to the Respondents on 31st March 2023 which has been approved and payment is to be issued for more than a crore of rupees. It is only in order to avoid the said payment that the BGs are sought to be encashed.

8. Mr. Anil K. Airi, ld. Sr. Counsel, on the other hand, submits that in the present case, the delay of the execution of the work contract has been considerable, considering the nature of the project, which involves construction of a residential complex for the NIA. Since the tender has already been awarded and sufficient time has elapsed, it is under extreme urgency that the Petitioner-contractor is being pushed to complete the work. In fact, as per Mr. Airi, ld. Sr. Counsel, the payments of the RA Bills are also not being made directly to the Petitioner-contractor but to the vendors of the Petitioner in order to ensure that the work is not delayed in any manner.

9. Further, subsequent to the letter dated 28th February 2023, various letters written by the NBCC are relied upon including a letter dated 7th March, 2023. The said letter dated 7th March 2023, would show that in terms of the works which were to be completed as per the agreed performance plan, the Petitioner-contractor has not been able to execute the

same. For example, for Block 1-the date of completion was 28th February, 2023, Block 2-the date of completion was 10th March, 2023, for Block 3 & External Development & Horticulture- 30th March, 2023. However, these deadlines have not been met. According to the ld. Counsel for the NBCC, as against the required manpower of 250 persons, less than 100 are at the site and the above four agreed sub-project works would also not be completed by 31st March, 2023. It is under these circumstances the NBCC had decided to invoke the performance bank guarantees which are irrevocable bank guarantees.

10. The ld. Counsel for the NBCC, relied upon following decisions in ***Union of India v. Puna Hinda (2021) 10 SCC 690***, ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 8 SCC 110***, ***Indrajit Power Private Ltd. v. Union of India 2020 SCC OnLine Del 2441***, ***State of U.P v. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22*** to argue that the invocation of the bank guarantee have been made in accordance with the contract, and admittedly, there has been a delay in execution of the works by the Petitioner. Finally he submits that the extension of the contract which has been granted without prejudice, cannot come in the way of the NBCC's right to encash the bank guarantee.

11. Heard. The Court has perused the matter. Clearly, the final performance plan which was agreed by the Petitioner required certain works to be completed by 31st May 2023, in terms of the letter dated 25th March, 2023. It is the case of the NBCC that the said works which were to be completed have also not been completed. Moreover, in the opinion of this Court, the COVID-19 pandemic cannot be used as a blanket reason to delay projects, especially, infrastructure projects, inasmuch as these are time-

sensitive in nature. There is clearly no doubt that the extensions granted to the Petitioner have been agreed to by the NBCC, and they have been granted without prejudice to the rights and contentions of the NBCC to take action if the agreed deadlines are still not met. Performance bank guarantees of this nature, are meant to ensure that the performance of the contract is done in accordance with the terms and conditions laid down therein. In the said bank guarantees, it is clearly stipulated that the same are irrevocable and unconditional, drawn in favour of NBCC. The said clause is set out below:-

> *"2.2 NBCC reserve the right of forfeiture of the one or more performance guarantee(s) on the pro-rata basis of the elapsed contract period in the event of the contractor's failure to fulfill any of the milestones/ contractual obligations i.e. defaults in commencing the work, fails to maintain the required progress in terms of relevant clause of GCC & SCC, in case of bad work or work not done as per specifications etc. or all performance guarantees in the event of termination of contract as per terms and conditions of contract .*
> *<u>If the Contractor commits any default as aforesaid, the NBCC shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the performance guarantee(s) absolutely (notwithstanding and/or without prejudice to any other provisions in the contract) by giving the notice in writing in addition to action taken under other provisions contained in this contract or otherwise</u>.*

12. The Supreme Court in ***Himadri Chemicals (supra)*** held as follows:

> "*10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation v. Sumac International Ltd. AIR 1997 SC*

1644, this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned."

13. The bank guarantees being unconditional, in terms of the decision of the Supreme Court in ***Himadri Chemicals (supra)*** which has discussed the

applicable law in this matter, the Court does not find that the conditions of fraud and irretrievable injury satisfied in the present case.

14. The letter dated 7th March, 2023 which has not been placed before the Court by the Petitioner, clearly records the reasons and the steps that the NBCC intends to take in terms of the contract. The said letter is sufficient notice in terms of Clause 2.2 of the GCC.

15. Under these circumstances, no interference is called for in the invocation of the said bank guarantees in writ jurisdiction. The rights and remedies of all parties are left open. The Bank is free to remit the amount to NBCC.

16. With these above terms, the present petition with all pending applications, if any, is dismissed.

PRATHIBA M. SINGH, J.

APRIL 15, 2023
mr/dn