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

% *Date of Decision: 17.04.2023*

+ **FAO(OS) (COMM) 68/2023 and CM No.18631/2023**

**GANNON DUNKERLEY AND
COMPANY LTD.**

..... Appellant

Through: Mr Rajshekhar Rao, Senior
Advocate with Mr Arjun Syal,
Mr Manjira Dasgupta, Mr
Bhargav and Mr Shreyas Das,
Advocates.

versus

**MINISTRY OF ROAD TRANSPORT AND
HIGHWAYS & ORS.**

..... Respondents

Through: Ms Reema Khorana and Mr
Vikash Kumar, Advocates for
R-1.
Mr Sarfaraz Khan, Advocate for
R-3/UCO Bank.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

ORDER

% **17.04.2023**

VIBHU BAKHRU, J. (ORAL)

1. Issue notice. The learned counsel for the respondents accept notice.
2. The appellant (hereafter 'GDC') has filed the present appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an order dated 12.04.2023 (hereafter 'the

impugned order’) passed by the learned Single Judge and further praying that respondent no.1 (hereafter ‘**NHIDC**’) be restrained from invoking the bank guarantees issued by GDC: Bank Guarantee (No.5031316BG0000009) dated 24.02.2016 for a sum of ₹22,06,27,500/- issued by the State Bank of India, Patiala (respondent no.2); Advance Payment Bank Guarantee (No.0607017BG1000040) dated 16.05.2017 for a sum of ₹6,47,17,400/- issued by the State Bank of India; and, Advance Payment Bank Guarantee (No.1908IGFIN000719) dated 28.03.2019 for a sum of ₹9,70,76,100/- issued by the UCO Bank (respondent no.3).

3. The impugned order is not on record. The learned counsels for the parties state that the same has not been uploaded and hence is not available to the parties. However, they state that the impugned order merely directs relisting of the petitions filed by GDC under Section 9 of the A&C Act, *inter alia*, seeking interim measure of protection, restraining NHIDC from invoking the aforementioned bank guarantees.

4. Mr. Rajshekhar Rao, the learned senior counsel appearing for GDC, contends that NHIDC had been restrained from invoking the bank guarantees in question pursuant to an ad-interim order passed by the Gauhati High Court in W.P.(C) No.2969/2022 captioned ***M/s Gannon Dunkerley & Co. Ltd. v. Union of India & Ors.*** The said writ petition was withdrawn on 13.02.2023, however, the parties had agreed that NHIDC will not take any coercive steps for a period of two months from the date of the said order. In the meanwhile, GDC moved this Court under Section 11 of the A&C Act, seeking appointment of an

arbitrator (ARB.P. No.1073/2022) and also filed an application under Section 9 of the A&C Act [OMP(I)(COMM) No.384/2022] seeking interim measures of protection.

5. The said petitions were listed before the learned Single Judge on 03.03.2023 and were adjourned to 12.04.2023.

6. In the meanwhile, GDC filed another petition under Section 9 of the A&C Act [OMP(I)(COMM) No.103/2023] praying that NHIDC be restrained from invoking, encashing and/or taking any coercive steps in relation to the aforementioned bank guarantees. The said petition was listed before the learned Single Judge along with ARB.P. No.1073/2022 and OMP(I)(COMM) No.384/2022 on 12.04.2023. However, these petitions were adjourned as the matters could not be taken up on account of paucity of time.

7. GDC is, essentially, aggrieved, as the interim protection afforded to it by the order dated 13.02.2023 passed by the Gauhati High Court, in respect of the bank guarantees in question, has not been extended and has since lapsed.

8. Mr. Rao contends that oral requests were made to the learned Single Judge to take up the application under Section 9 of the A&C Act at an earlier date, however, the said request has not been acceded to. He submits that in the circumstances, GDC has no other remedy except to approach this Court.

9. The dispute between the parties arises in relation to an agreement

dated 09.02.2016 (hereafter ‘**the Agreement**’) entered into between the parties for “*Four Laning of NH37 of Demow (Km 534.800) to End of Moran Bypass (Km 561.700) under SARDP-NE, Phase – A on EPC Mode in the state of Assam*”.

10. GDC was required to complete the works under the Agreement within a period of thirty-six months from the appointed date, which was fixed as 16.05.2016. However, according to GDC, since 90% of the highway was not handed over to it, the appointed date was required to be extended.

11. The parties entered into a Supplementary Agreement on 23.02.2017, *inter alia*, fixing the appointed date as 17.08.2016.

12. NHIDC alleges that GDC had failed to maintain the highway in question or to achieve the agreed milestones within the stipulated period of time. It claims that in order to ensure maintenance of the existing highway, it was left with no other option but to engage another agency for performing the said works at the risk and costs of GDC.

13. NHIDC claims that in view of the failure on the part of GDC to meet the contractual obligations, it issued a Cure Notice dated 09.10.2020 under Article 23.1.2 of the Agreement. It alleges that GDC failed to increase the pace of works and this led NHIDC to issue a show cause notice (SCN) dated 14.08.2021 setting out various defaults on the part of GDC.

14. GDC responded to the said SCN disputing the allegations.

However, NHIDC did not accept the explanations as provided by it.

15. NHIDC issued another SCN dated 27.04.2022 calling upon GDC to show cause why it should not be declared a 'non-performer', which was followed by a letter dated 27.04.2022 declaring GDC as a non-performer.

16. Thereafter, NHIDC issued a Termination Notice dated 30.05.2022 terminating the Agreement with GDC. Aggrieved by the same, GDC filed a petition before the Gauhati High Court [W.P.(C) No.3689/2022], *inter alia*, impugning the Termination Notice dated 30.05.2022 and further seeking an order restraining NHIDC from taking any action in furtherance of the said notice. GDC also sought an order directing NHIDC not to encash the bank guarantees furnished by it.

17. Certain interim orders were granted by the Gauhati High Court in the aforementioned writ petition. However, the said writ petition was withdrawn on 13.02.2023.

18. In the meanwhile, GDC issued a letter dated 22.07.2022 setting out its various claims and calling upon NHIDC to resolve the said disputes by conciliation in terms of Article 26.3 of the Agreement. Thereafter, by a notice dated 30.07.2022 issued under Section 21 of the A&C Act, GDC invoked the arbitration clause under the Agreement. GDC suggested the names of three former Judges of this Court and called upon NHIDC to nominate any one of them as the Sole Arbitrator to adjudicate the disputes between the parties.

19. Mr. Rao contends that the delay in execution of the projects was entirely for reasons attributable to NHIDC and were beyond the control of GDC. He submits that the execution of the works was delayed right from the inception as NHIDC had failed to handover the work fronts (the length of extant highway) as agreed in terms of the Agreement. He submitted that various authorities including the independent engineers had made recommendations in favour of GDC and had accepted that the delay in execution of the works was not attributable to GDC. He submitted that notwithstanding the same, NHIDC had proceeded to terminate the Agreement. He submitted that GDC was ready and willing to perform the Agreement; however, NHIDC had effectively prevented it from doing so. He submits that in the circumstances, invocation of the bank guarantees would be fraudulent, as there was no failure on the part of GDC to perform the Agreement. He also submits that the two of the subject bank guarantees were against funds advanced by NHIDC, which were to be recovered from the Interim Payment Certificates (Running Bills) for the works executed.

20. He also referred to GDC's letter dated 12.08.2022 claiming that a sum of ₹16,52,47,047/- is due and payable on account of the work done and funds withheld. He submitted that NHIDC was required to process the said bills and any unrecovered advance to be adjusted from the amount due on account of the works executed but not paid. He referred to Article 23.5 of the Agreement and contended that NHIDC was required to value the unpaid works and pay the same after adjusting any other amount payable or recoverable from GDC. He submitted that,

thus, any amount so advanced which remained unrecovered could be adjusted from the value of unpaid works in terms of Article 23.5 of the Agreement.

21. We have heard the counsel for the parties.

22. As noted at the outset, the controversy in the present appeal relates to three bank guarantees, *namely*, one Performance Bank Guarantee (No.5031316BG0000009 dated 24.02.2016 for a sum of ₹22,06,27,500/-) and two Advance Payment Bank Guarantees (Guarantee No.0607017BG1000040 dated 16.05.2017 for a sum of ₹6,47,17,400/- and Guarantee No.1908IGFIN000719 dated 28.03.2019 for a sum of ₹9,70,76,100/-) to secure the funds advanced by NHIDC.

23. In terms of Article 7.1 of the Agreement, GDC was obliged to furnish an unconditional bank guarantee in the form as set out in Schedule-D to the Agreement. And, GDC had furnished the Performance Bank Guarantee (No.5031316BG0000009 dated 24.02.2016 for a sum of ₹22,06,27,500/-) as agreed. In terms of Article 7.3.1 of the Agreement, the parties had agreed that NHIDC would be entitled to “*encash and appropriate*” the relevant amounts from the performance security as damages for the contractor’s default.

24. It is apparent from the facts and submissions as noted above that disputes have arisen between the parties regarding the performance of the Agreement. Whereas NHIDC claims that GDC has defaulted in performing the Agreement in accordance with its terms; GDC disputes the same. Undeniably, the performance of the contract has been

delayed. In terms of the Agreement, the works were required to be completed within a period of 36 months, which has since expired. According to NHDC, GDC has barely completed 77% of the agreed works. Whilst, NHDC claims that the delay is on account of the failure on the part of GDC to mobilize the sufficient resources and properly plan the execution of the works; GDC claims that the delay in execution of the works is on account of delay in handing over the works front and for other reasons attributable to NHDC and for reasons beyond its control.

25. Clearly, NHDC cannot be interdicted from invoking the bank guarantees pending resolution of the said disputes. The performance bank guarantee is an unconditional one and it is trite law that unconditional bank guarantees cannot be interdicted on account of contractual disputes. A bank guarantee can be interdicted only in exceptional cases of egregious fraud and special equities.

26. In *UP State Sugar Corporation v. Sumac International Ltd.:* 1997 (1) SCC 568, the Supreme Court had held as under: -

“16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot

make invocation of the bank guarantees fraudulent..”.

[underlined for emphasis]

27. In *Svenska Handelsbanken v. M/s Indian Charge Chrome & Ors.: (1994) 1 SCC 502*, the Supreme Court held as under:

“60.... 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....

72.... 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...”

28. The aforesaid view was also reiterated by the Supreme Court in *Larsen & Turbo Limited v. Maharashtra State Electricity Board & Ors.: (1995) 6 SCC 68*.

29. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company: (2007) 8 SCC 110*, the Supreme Court referred to its earlier decisions and summarized the principles for restraining enforcement of the bank guarantee or letter of credit in the following words:

“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 realise 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 realisation 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.”

30. In the present case, we are unable to accept that GDC has established any case of egregious fraud or special equities that would warrant an interim order restraining NHIDC from invoking the Bank

Guarantees.

31. The Advance Bank Guarantees (No.0607017BG1000040 dated 16.05.2017 for a sum of ₹6,47,17,400/- and No.1908IGFIN000719 dated 28.03.2019 for a sum of ₹9,70,76,100/-) were furnished by GDC to secure the funds advanced by NHIDC in terms of Article 19.2 of the Agreement. In terms of Article 19.2.6, each installment of the advance payment is required to be repaid within a period not later than three sixty-five days from the dates of advance payments. According to NHIDC, GDC has failed to repay the advance and therefore, it is entitled to encash the bank guarantees.

32. According to GDC, it is not disputed that in terms of the Agreement, it was required to repay the advance received. GDC claims that the advances were for performance of the contract and the amount was required to be adjusted from the value of the work done. It claims that since NHIDC is responsible for preventing GDC for completing the works, it is not entitled to recover the advances.

33. Mr. Rao also referred to a letter dated 12.08.2022 sent by GDC claiming that an amount of ₹16,52,47,047/- was due and payable from NHIDC but the said amount has not been paid.

34. It is relevant to refer to Article 23.5 of the Agreement which reads as under:

“23.5 Valuation of Unpaid Works

23.5.1 Within a period of 45 (forty-five) days after Termination under Clause 23.1., 23.2 or 23.3, as the case may be, has

taken effect, the Authority's Engineer shall proceed in accordance with Clause 18.5 to determine as follows the valuation of unpaid Works (the "**Valuation of Unpaid Works**").

- (a) value of the completed stage of the Works, less payments already made:
- (b) reasonable value of the partially completed stages of works as on the date of Termination, only if such works conform with the Specifications and Standards; and
- (c) value of Maintenance, if any, for completed months, less payments already made,

and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement; and (ii) all taxes due to be deducted at source."

35. Whilst NHIDC is entitled to encash the bank guarantees against advances paid to GDC to the extent of any amount outstanding against advances or interest on termination of the Agreement; it is also obliged to pay an amount equivalent to the "Valuation of Unpaid Works" after adjustment of any amount recoverable from GDC.

36. Ms Reema Khorana, learned counsel appearing for NHIDC, contends that the representative of GDC had been called for the joint measurement for determining the same amount but GDC had failed to cooperate with NHIDC.

37. Mr. Rao countered the aforesaid submissions. He submitted that GDC had sought orders for valuation of the unpaid works by filing a petition under Section 9 of the A&C Act, which is pending.

38. After some arguments, the learned counsels appearing for the parties have agreed that a joint inspection be conducted on 27.04.2023. GDC shall depute a responsible officer for the said purpose, to be available at the site.

39. As noted herein before, the law relating to restraining invocation of bank guarantees is well settled. Undisputedly, the Advance Bank Guarantees can be invoked for recovering the advance amount and interest outstanding and payable by GDC. However, the limited exercise which NHIDC is required to do is to ascertain the amount recoverable from GDC. In the circumstances, this Court also considers it apposite to direct that NHIDC complete the exercise of joint inspection and determine the value of the unpaid works within a period of two weeks thereafter. NHIDC shall be at liberty to adjust the outstanding amount of advance and interest against the termination payment as determined by it. NHIDC shall be at liberty to encash the Advance Bank Guarantees for any amount remaining due from GDC. In the meanwhile, GDC shall ensure that the two Advance Bank Guarantees furnished against the advances are kept alive.

40. NHIDC is not interdicted from invoking the Performance Bank Guarantee and is at liberty to do so.

41. It is clarified that any dispute regarding the quantum of the termination payment shall not be a ground for NHIDC to refrain from encashment of the Advance Bank Guarantees. The Advance Bank Guarantees may be invoked for recovery of any amount of advance and

interest that remains outstanding after adjustment against the termination payment, which according to NHIDC, is payable.

42. This order is passed in the peculiar circumstances of the case. It is clarified that any observations made in this order are solely for the purpose of considering the interim measures of protection as sought by GDC. Nothing stated in this order shall be construed as an expression of opinion (*prima facie* or otherwise) on the merits of the disputes between the parties. All rights and contentions of the parties are reserved.

43. It is conceded by Mr. Rao that in view of the aforesaid order, GDC petition under Section 9 of the A&C Act [OMP(I)(COMM) No.103/2023] does not survive and the same would stand disposed of.

44. NHDIC is at liberty to apply.

45. The present appeal is disposed of in the above terms.

VIBHU BAKHRU, J

TUSHAR RAO GADELA, J

APRIL 17, 2023

‘gsr’