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

% *Date of Decision: 20.07.2023*

+ **FAO(OS) (COMM) 132/2023**

GANNON DUNKERLEY AND COMPANY
LTD

..... Appellant

Through: Mr. Arjun Syal & Mr. Rohit
Kumar, Advs.

Versus

DOOSAN POWER SYSTEMS INDIA PVT LTD
& ANR

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant (hereafter '**Gannon**') has filed the present intra-court appeal impugning an order dated 05.06.2023 passed by the learned Single Judge, whereby the petition filed by Gannon under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') being OMP (I) COMM. No.193/2023 was rejected.

2. Gannon had filed the aforesaid petition, *inter alia*, praying for directions restraining the respondent No. 1 (hereafter '**Doosan Power**') from invoking, encashing or taking any coercive steps in respect of the Performance Bank Guarantee being Bank Guarantee No.003GM07180750006 dated 16.03.2018 for an amount of



₹5,55,15,625/- (hereafter referred as ‘**the PBG**’) issued by respondent no.2 (hereafter ‘**Yes Bank**’).

3. Gannon had furnished the PBG in connection with a sub-contract agreement for civil, structural and architectural works including Power Block Building, GIS Building and BOP Building which is a part of the 2x660MW Super Critical Thermal Power Station being developed by Doosan Power at Jawaharpur on Engineering, Procurement, Construction (EPC) basis. The contract between Gannon and Doosan Power is hereafter referred to as the Contract.

4. It is Gannon’s case that it had fulfilled its obligations and mobilized the manpower and resources as required for performing the Contract but Doosan Power had failed to fulfil its reciprocal obligations in handing over the encumbrance-free site within time. Admittedly, there were delays in execution of the contract. It is the Gannon’s case that that same was for reasons attributable to Doosan Power including delay in handing over site; delay in release of drawings and the approval of designs; and frequent changes of drawings. Doosan Power disputes the same.

5. It is material to note that it is not Gannon’s case that there has been any egregious fraud which vitiates the Contract entered with Doosan Power. It is also apparent that the disputes between the parties essentially relate to execution of the performance of obligations under the Contract.

6. The PBG submitted by Gannon is an unconditional one. The law



relating to interdicting unconditional bank guarantees is now well settled.

7. In *Svenska Handelsbanken v. M/s Indian Charge Chrome & 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.””

8. In *Larsen & Turbo Limited v. Maharashtra State Electricity Board & Others: (1995) 6 SCC 68*, the Supreme Court observed as under:-

“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, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd., General Electric Technical Services Co. Inc v Punj*



Sons (P) Ltd. and the decision of the Court of Appeal in England in *Eliau and Rabbath v Matsas and Matsas* and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* [AIR 1994 SC 626], laid down the law thus:

“...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.”

9. 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.”

10. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. & Anr.: AIR 1997 SC 2477***, the Supreme Court held 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.”

11. In *BSES Ltd. v Fenner India Ltd.: 2006 2 SCC 728*, the Supreme Court reiterated the law relating to interdiction of unconditional bank guarantees in the following words:

“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’.”

12. In view of the settled law, the relief as sought by Gannon cannot be granted. The case set up Gannon is neither of an egregious fraud nor of any irretrievable harm or injustice.

13. In our view, the learned Single Judge has rightly rejected the petition under Section 9 for seeking interdiction of the PBG.



14. The present appeal is unmerited and accordingly dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 20, 2023
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