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

\+ **O.M.P. (I) (COMM) 216/2023, I.A. 12465/2023**

Date of Decision: 12.07.2023

IN THE MATTER OF:

M/S MANTENA VSISHTA BRIDGE JV & ORS. ..... Petitioner

Through: Mr. Amarjit Singh Chandhiok, Sr. Advocate with Mr. Abhimanyu Redhu, Mr. Shivam Kapoor, Mr. R.V.Yogesh, Ms. Snighda Singh, Ms. Twinkle Rathi, Mr. Kotte Venkata Pawan Kumar, Mr. Vineet Kumar, Mr. Siddharth Chopra and Mr. Gitesh Chopra, Advocates

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD & ANR...... Respondents

Through: Mr. Debal Kumar Banerji, Sr. Advocate with Ms. Ruchira Gupta and Mr. Deep Narayan Sankar, Advocates for respondent No.1

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J. (ORAL)

1. The matter is received by way of '*Supplementary Cause List'* on account of urgent mentioning.

2. The instant petition has been filed by the appellants under Section

9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act') thereby seeking ex-parte ad interim injunction restraining respondent No.1 (hereinafter referred to as 'NHIDC') from invoking and encashing the Performance Security Bank Guarantee No. 0910318BG0000055 dated 12.01.2018 in the sum of Rs.11,49,30,000/- issued by respondent No.2 (hereinafter referred to as 'SBI').

3. Briefly, the facts in a nutshell are that on 11.01.2016 NHIDC issued 'Notice Inviting Bid' for construction of a major bridge over middle strait creek connecting South Andaman and Baratang Islands in the Union Territory of Andaman & Nicobar Islands on EPC basis. The petitioner No.1, claiming itself to be a joint venture formed by petitioner Nos. 2 and 3 (hereinafter referred to as 'Contractor'), submitted its bid and was awarded a letter of Award by NHIDC on 18.12.2017. Subsequently, an Engineering, Procurement and Construction Agreement was entered into between the parties on 02.01.2018 (hereinafter referred to as the 'Contract').

The petitioners initially filed a petition bearing W.P.(C) 9111/2023. The same was withdrawn with liberty to file the present petition.

4. Mr. Amarjit Singh Chandhiok, learned Senior Counsel for the petitioners contends that the Performance Security Bank Guarantee was conditional and the terms of the Contract being inbuilt in the bank guarantee, the merits of the dispute need to be looked into. As per Clause 23.6.2 of the Contract, on termination of the Contract, NHIDC is required to return the performance security etc. He submits that the petitioner No.1 was prevented from meeting its contractual obligations

on account of non-availability of stone aggregate as a result of the order dated 15.06.2020 passed by the National Green Tribunal (hereinafter referred to as 'NGT'), Principal Bench, New Delhi in O.A. No. 33/2019 (EZ). It is submitted that vide aforesaid order, NGT had directed the Andaman & Nicobar Island Pollution Control Committee to ensure that no stone mining be allowed till the time a study report by an expert institute is carried out on the aspect of potentiality of stone availability and amount to be expected. Learned Senior Counsel contended that the aforesaid directions by the NGT amounted to a *Force Majure* event in terms of Clause 21.1(d) of Article 21 of the Contract. As the study report is still awaited, the Contractor could not fulfil its contractual obligations. It is further contended that aforesaid order amounted to change in law in terms of Clauses 19.17 and 21.4 (a) of the Contract.

5. Learned Senior Counsel also referred the letters dated 11.12.2019, 12.12.2019 and 13.12.2019 issued by NHIDC to submit that on account of stone scarcity, discussions were held to procure stone aggregate from the mainland to accelerate the project, and it was decided that financial implications of procurement from the mainland should not exceed 5% of the contract value/revised contract value.

6. In nutshell, it was contended on behalf of the Contractor that the delay in execution of work on its part was entirely attributable to the order passed by the NGT which prevented it from procuring the stone aggregates, and thus a case of special equity is made out.

7. Mr. Debal Kumar Banerji, learned Senior Counsel for respondent No. 1 appearing on advance notice, on instructions, states that the said bank guarantee has already been invoked today. Copy of the invocation

letter dated 12.07.2023 has been handed over in Court today and is taken on record.

8. Learned Senior Counsel, while negating the petitioners' submissions that passing of the order by NGT amounted to a *Force Majure* event, contended that the said order was confined only to stone mining whereas in terms of the Contract, the Contractor had the option to procure stone aggregates from the mainland as well as local suppliers at Port Blair. He also referred to Clause 10.1(d) of the Contract whereby the Contractor was required to make its own arrangements for quarrying of materials needed for the project. He has further referred to the report of the Expert Committee constituted to review of projects of Andaman & Nicobar Islands to submit that the Contractor failed to carry out its contractual obligations under the Contract which resulted in termination of the Contract.

It was thus contended that the Contractor has failed to make out a case of special equity and thus, the Performance Security Bank Guarantee being unconditional, its invocation cannot be stayed.

9. In rejoinder, Mr. Chandhiok, learned Senior Counsel contended that recently NHIDC has floated a new tender wherein, acknowledging the non-availability of stone aggregates has permitted the bidder from arranging the same from mainland India as well as Asian countries. The tender conditions further bar the Contractor from procuring the stone aggregates available locally in Andaman & Nicobar Islands.

10. Law relating to grant or refusal of injunction to restrain enforcement of a bank guarantee is well settled. The person seeking injunction is required to establish a *prima facie* case of fraud and special

equities in the form of preventing irretrievable injustice between the parties. As such, a bank guarantee can be interdicted only in exceptional cases of egregious fraud, irretrievable injustice or special equities.

11. In UP State Sugar Corporation *v.* Sumac International Ltd. reported as **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.."*.
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> *(underlined for emphasis)*

12. In Svenska Handelsbanken *v.* M/s Indian Charge Chrome & Ors. reported as **(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....*
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> *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..."*

13. The aforesaid view was also reiterated by the Supreme Court in

<u>Larsen & Tourbo Limited *v.* Maharashtra State Electricity Board & Ors.</u> reported as **(1995) 6 SCC 68**.

14. In <u>Himadari Chemicals Industries Ltd. *v.* Coal Tar Refining Company</u> reported as **(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:*
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> *(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."

15. Notably, the petitioners have pitched their case only on the ground of special equity. The Performance Security Bank Guarantee was furnished by the Contractor for due and faithful performance of its obligation under and in accordance with the Contract during the construction period/defects liability period and maintenance period (as defined in the Contract) in the sum of Rs.11,49,30,000/-. The relevant portion of the Bank Guarantee reads as under :-

"1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Contractor's obligations during the {Construction Period/Defects Liability Period and Maintenance Period} under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation recourse, contest or protest, and without any reference to the Contractor, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

2. A letter from the Authority, under the hand of an officer not below the rank of General Manager in NHIOCL, that the Contractor has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the

Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in default shall be final and binding on the Bank, notwithstanding any differences between the Authority and the Contactor, or any dispute between them pending before any court, tribunal, arbitrators or any other Authority or body, or by the discharge of the Contractor for any reason whatsoever."

16. A perusal of the clauses of the Performance Security Bank Guarantee would show that the same is unconditional absolute and payable merely on demand and without any demur. In view of the settled law, the same cannot be interdicted. Even if the petitioners' contentions are analysed, on a *prima facie* view, the contention that the passing of the order by NGT resulted in occurrence of a *Force Majure* event is not convincing in view of the fact that the order was confined only to stone quarries whereas the stone aggregates were available not only with the local suppliers, but also on the mainland market. Further, the Expert Committee Report, placed on record by the petitioners, observed that NHIDC had facilitated and supported the Contractor in procuring the necessary permits for quarry operations from the Govt. of Union Territory (U.T.) of A&N, and obtained dedicated quarry block lease from Andaman Administration on preferential basis and allotted the entire permitted aggregate quantity from such quarry to such Contractor. The Committee observed that the Contractor had procured stone from the *Brookshabad* Quarry, located in South Andaman from 2016 till 2022-23. From the data collected, it was observed that the Contractor extracted only 42% of the permitted quantity from the aforesaid dedicated quarry by extracting only 5032 CBM against the allotted aggregate of 12000

CBM. It was further observed that despite availability of adequate quantity of the aggregates in the open market, the Contractor achieved 4.16% in the whole year at the rate of 0.25 % progress a month. For the period between January, 2022 till May, 2023 the Contractor used merely 4612 MT of aggregates for the project, which was less than 50% of the permitted quantity from the dedicated quarry block and less than 1% of the aggregate available in open market.

Pertinently, the Committee Report though placed on record by the petitioners, has not been challenged by them. In the totality of facts, this Court is of the considered opinion that the Performance Security Bank Guarantee being unconditional absolute, and petitioners having failed to make out an exceptional case of special equity, the Bank Guarantee cannot be interdicted. Resultantly, the petition fails and is accordingly dismissed alongwith pending application.

17. Needless to state that the above observations, which are on a *prima facie view* of the material placed on record, have been made only for the purpose of disposal of the present petition and would not tantamount to an expression on the merits of the disputes between the parties.

(MANOJ KUMAR OHRI)
JUDGE

JULY 12, 2023
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