(1994) 03 DEL CK 0027

In the Delhi High Court

Case No : OMP No. 180 of 1993

Ansal Properties and Industries Ltd. APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 22-03-1994

Acts Referred:

Citation : (1994) 2 AD 68 : (1994) 2 ARBLR 484 : (1994) 54 DLT 307 : (1994) 29 DRJ 66

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : Mukul Rohtagi, Promode Sehgal and M. D. Adkar, for the Appellant; D.K. Kapur and Sanat Kumar, for the Respondent

Judgement

Sat Pal, J.—This is a petition filed on behalf of M/s. Ansal Properties and Industries Ltd. (hereinafter referred to as the petitioner) u/s 41 of the Arbitration Act, 1940 read with Schedule-11 thereof and Section 151 of the CPC against the respondents and in this petition it has been prayed that respondents by themselves, their employees or agents be restrained from invoking and encashing the bank guarantee No. 13/90 dated 10.9.1990 for Rs. 13,07,000/- valid up to 30.6.1994 and bank guarantee No. 3/89 dated 20th January, 1989 for Rs. 25,99,000/- valid up to 30th April, 1994 furnished by the petitioner.

2. Briefly stated the facts of the case are that on or about 15th February, 1988, the respondent No. 2 acting for and on behalf of President of India invited sealed tenders for the designs and construction of viaducts, side and catch water drains and each work in formation in cuttings and in embankment in Zone No. E-11 on Jammu-Udhampur rail link project. Pursuant to the acceptance of the tender of the petitioner, an agreement was entered into on February 22, 1989 between the President of India acting through respondent No. 2 and the petitioner for the aforesaid work subject to the general conditions of the Contract-1971 and the special conditions of contract and Standard Specifications of Northern Railway 1987.

3. As per clause 47 of the special conditions, the petitioner was entitled for mobilisation advance up to the maximum of 10% of the value of the contract against the bank guarantee. In accordance with the aforesaid clause, the petitioner furnished a bank guarantee No. 3/89 dated 20th January, 1989 for Rs. 25,99,000/- through New Bank of India, Rajinder Nagar Branch, New Delhi (respondent No. 4) to secure repayment of mobilisation amount whereby and whereunder the said bank agreed to pay to the respondent No. 1 an amount not exceeding Rs. 25,99,900/- against any loss or damage caused to or suffered by the Government by reason of any breach of the petitioner or any of the terms and conditions for repayment of the advance as mutually agreed and set forth in the agreement. The said bank guarantee bearing BG No. 3/89 reads as under :

Bank Guarantee No. 3/89

(1) In consideration of the President of the Republic of India (hereinafter called the Government) having agreed under the terms and conditions of letter No. 74-W/8/54/WA dated 22.11.1988 made between Northern Railway and Ansal Properties & Industries Ltd. for design and construction of Viaduct, side and catch water drains and earthwork in formation in cuttings and embankment in Zone No. E-11 from Km. 12.600 to Km. 13.220 on Jammu-Udhampur Rail Link Project (hereinafter called the said "said agreement") to accept from Ansal Properties & Industries Ltd. hereinafter called the "said contractor" a guarantee bond for Rs. 25,99,000/- (rupees twenty five lakhs, ninety nine thousand only) against repayable mobilization advance amounting Rs. 25,99,000/- (rupees twenty five lakhs ninety nine thousand only) agreed to be given to the said contractor as per accepted conditions of the contract, we, New Bank of India, Rajinder Nagar Branch, New Delhi (hereinafter called "the Bank") do hereby undertake to pay the Government an amount not exceeding Rs. 25,99,000/- (rupees twenty five lakhs, ninety nine thousand only) against any loss or damage caused to or suffered or would be caused to or suffered by the Government by reason of any breach by the said Contractor of any of the terms and conditions for repayment of the advance as mutually agreed and set forth in the agreement.

(2) We, New Bank of India, Rajinder Nagar Branch, New Delhi, do hereby undertake to pay the amount/s due and payable under this guarantee without any demur, merely on a demand from "the Govt." stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by a reason of any breach by the said Contractor of any of the terms or conditions for advance and its repayment contained in the said Agreement or by reason of the said Contractor 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. 25,99,000/- (Rupees twenty five lakhs ninety nine thousand only).

(3) We, New Bank of India, Rajinder Nagar, Branch, New Delhi, further agreed that the Guarantee herein contained will remain in full force and effect till the

advance granted with interest is fully repaid and that it shall continue to be enforceable till the Chief Engineer/Construction, N. Rly, Kashmere Gate, Delhi-6 certifies that the terms and conditions for repayment of advance contained in the said agreement have been fully and properly carried out by the said contractor(s) and accordingly discharges the guarantee.

(4) We, New Bank of India, Rajinder Nagar Branch, New Delhi further agree with the Govt. that the Govt. shall have the fullest liberty without or consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said agreement and to forbear or enforce any of the terms and conditions relating to the said agreement and we shall not he relieved from our liability by reason of any such variation, or for any forbearance, act or omission on the part of the Govt. or any indulgence by the Govt. to the said Contractor or by any such matter or thing whatsoever which under the law relating to sureties would, but for the said reservation would relieve us from the liability.

(5) Notwithstanding any thing to the contrary contained herein the liability of the Bank under this guarantee will remain in force and effect until such time as this guarantee is discharged in writing by the Government or until the Advance with interest is repaid by the Contractors to the Government whichever is earlier and no claim shall be valid under this guarantee unless notice in writing thereof is given by the Government.

(6) The advance will carry an interest of 10% per annum and the Railway reserve the right to recover mobilisation advance with interest from the guarantor Bank, if progress of work is not according to the terms of agreement.

(7) We, New Bank of India, Rajinder Nagar Branch, New Delhi also agree that the Government''s right to recover from us under the terms of the guarantee shall not be affected or suspended by reason of the fact that any dispute or disputes have been raised by the said Contractor with regard to his liability pending before any Arbitrator or Tribunal or Court with regard thereto or in connection therewith. We further undertake not to withhold payment at the instance or request or as a consequence of any action by the Contractor.

(8) We, New Bank of India, Rajinder Nagar Branch, New Delhi, lastly undertake not to revoke this guarantee except with the previous consent of the Govt. in writing.

(9) This Guarantee shall not be revoked by any change in the Constitution of the Bank and/or of the Survey.

(10) Notwithstanding anything to the contrary contained herein unless a demand of claim under this Guarantee is made only in writing on or before 21st day of December, 1990, we shall be discharged from all liabilities under the guarantee thereafter.

Dated 20th day of January, 1989 For and on behalf of 4. Clause 5 of the

Special Tender Conditions and instructions to tenderers provided for furnishing of security deposit upon acceptance of tender. Under clause 5, the successful bidder was required to furnish security deposit of Rs. 13,07,000/-. In consideration of the respondent No. 1 having agreement to exempt the petitioner company from the demand for the payment of security deposit for the due fulfillment by the petitioner on the terms and conditions of the agreement, the petitioner furnished a Performance Guarantee No. 13/90 on 10th September, 1990 through New Bank of India, Rajinder Nagar, New Delhi (respondent No. 4) whereby and whereunder the respondent Bank agreed to pay the amounts due and payable under the guarantee without any demur, merely on demand from the Government through Chief Accounts Office, Northern Railway, Kashmere Gate, Delhi stating that the amount claimed was due by way of loss suffered by the Government by reasons of any breach by the petitioner of any of the terms and conditions contained in the agreement dated 22.2.1989 or by reason of petitioner''s failure to perform the said agreement. The said bank guarantee bearing BG No. 13/90 reads as under :

Guarantee Bond No. 13/90

(1) In consideration of the President of India (hereinafter called "The Government") having agreed to exempt M/s. Ansal Properties and Industries Ltd. having its Registered Office at 115-Ansal Bhawan, 16-Kasturba Gandhi Marg, New Delhi (hereinafter called "the said Contractor") from the demand for the payment of security deposit for the due fulfillment by the said Contractor on the terms and conditions of the Agreement dated 22.2.1989 made between Northern Railway, Administration and Ansal Properties and Industries Ltd., (hereinafter called "the said Agreement") on production of a Bank Guarantee for Rs. 13,07,000.00 (Rupees Thirteen Lacs Seven Thousand only), we New Bank of India, Rajinder Nagar, New Delhi (hereinafter referred to as "the Bank") do hereby undertake (and promise) to pay to the Government an amount not exceeding Rs. 13,07,000.00 against any loss or damage caused to or suffered by the Government by reasons of any breach by the said Contractor of any of the terms or conditions contained in the said Agreement.

(2) We, New Bank of India, Rajinder Nagar, New Delhi further agree (and promise) to pay the amounts due and payable under this guarantee without any demur, merely on demand from the Government through the Financial Adviser and Chief Accounts Officer, Northern Railway, Kashmere Gate, Delhi-6 stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor 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 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. 13,07,000.00.

(3) We, New Bank of India, Rajinder Nagar, New Delhi, further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said agreement and that it shall continue to be enforceable till all the dues of the Government under or by virtue of the said Agreement have been fully paid and its claims satisfied or discharged or till Chief Engineer/Construction, Northern Railway, Ministry of Railways certifies that the terms and conditions of the said Agreement have been fully and properly carried out by the said contractor and accordingly discharges the guarantee. Unless a demand or claim under this guarantee is made on us in writing on or before 2 months after the date of completion of the contract, we shall be discharged from all liability under this guarantee thereafter.

(4) We, New Bank of India undertake to renew the Guarantee or extend the period of guarantee on the expiration of the aforesaid period for such period and from time to time within two months before the expiry of the period or extended period of guarantee on being called upon by the Government to do so, provided the maximum period of guarantee including the extended period shall not exceed two years from the date of expiry i.e., 10.9.1991. If the guarantee is not extended or renewed, we the New Bank of India shall pay to the Government the full amount of guarantee on demand and without demur provided further the request in writing is made to the Bank two months before the date of expiry of the guarantee or extended period of guarantee.

(5) We, New Bank of India, Rajinder Nagar, New Delhi, further agree with the Government that the Government shall have fullest liberty without our consent and without effecting in any manner out of obligations hereunder to vary any of the terms and conditions of the contractor from time to time or to postpone for any time or from time to time any of the powers exercisable by the Government against said Contractor and to forebear or enforce any of the terms and conditions of the said agreement and we shall not be relieved from our liability by reason of any such variation or extension being granted to the said Contractor for any forbearance, act or commission on the part of the Government or any indulgence by the Government to the said contractor or by any such matter or thing whatsoever which under the law relating to sureties but for the said reservation would relieve us from the liability.

(6) This guarantee will not be revoked by any change in the constitution of the Bank and/or of the surety.

(7) We, New Bank of India, Rajinder Nagar, New Delhi, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the Government in writing.

(8) Notwithstanding anything to the contrary contained herein before the liability of the bank under this guarantee will not exceed Rs. 13,07,000/- (Rupees Thirteen Lacs Seven thousand only) and will remain in force and effect until such time as this guarantee is discharged in writing by the Government or until

validity for one year from the date of issue extendable for further period at the request of Northern Railway or 10.9.1991, whichever is earlier and no claim shall be valid under this guarantee unless notice in writing thereof, is given by the Government within two months from the date aforesaid.

Date this 10th day of September 1990.

5. The respondents by their letter dated 26th November, 1993 addressed to the respondent No. 4 invoked both the bank guarantees and requested the respondent No. 4 to encash the both as the petitioner had failed to execute the contract. The said letter of invocation is reproduced hereinbelow :

Northern Railway

Construction Ac/s Office,

Kashmere Gate, Delhi.

No. 89/Const./BG/Encashment. Dated 26.11.1993.

The Manager, New Bank of India, Shankar Road, New Rajinder Nagar, New Delhi.

Sub : Encashment of Bank Guarantees.

Please arrange to encash the following BGs issued by your Bank on account of M/s. Ansal Properties and Industries Ltd., 115, Ansal Bhawan, 16, Kasturba Gandhi Marg New Delhi-110001, as M/s. Ansal Properties and Industries Ltd. have failed to execute the contract as per terms and conditions of the contract.

-- B.G. No. Date Validity or extension Amount -- 1. 5/89 20.1.1989 30.4.1994 25,99,000 2. 13/90 14.9.1990 30.6.1994 13,07,000 --------- 39,06,000 --

Both B.Gs. have been extended up to 30.4.1994 and 30.6.94. Originals have already been sent to your Bank which may please be connected at your end with the originals.

A Bank draft in favor of FA & CAO/C, N. Rly., K. Gate, Delhi for the total amount of Rs. 39,06,000/- may be handed over to Shri T. R. Dham, Senior Section Officer whose specimen signatures are attested below.

Please acknowledge receipt

(RAJEEV DUTT)

DA : Two Extensions for DY. FA. & FAO/C. BG No. 5/89 dated 20.1.1989 N. Rly., K. Gate Delhi for Rs. 25,99,000/-.

Two Extensions for B.G. No. 13/90 date 14.9.1990 for Rs. 13,07,000/- as detailed above. Specimen Signature Attested

6. Aggrieved by the letter dated 26.11.1993 issued by the respondent No. 2 to

the respondent No. 4 invoking the two bank guarantees, the present petition has been filed by the petitioner.

7. Mr. Rohtagi, learned senior counsel, appearing on behalf of the petitioner submitted that the invocation of both the bank guarantees is not in accordance with the terms of the bank guarantee. In this connection, he drew my attention to para 2 of both the bank guarantees wherein it has been stated that the respondent No. 4 undertakes to pay the amount/s due and payable under this guarantee without any demur, merely on demand from the Government stating that "the amount claimed is due by way of loss and damages caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor of any of the terms and conditions for advance and its repayment contained in the said Agreement or by reason of the said Contractor failure to perform the said Agreement." Learned counsel submitted that the letter of invocation did not state that the amount claimed by the respondents 1 to 3 was due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the Contractor. He, Therefore, contended that since no loss or damage was stated to have been ensued or would be caused, the invocation of the bank guarantees was contrary to the terms of the bank guarantees. In support of this contention, learned counsel placed reliance on three judgments of this court reported in the case of M/s. Mahalingam Shetty & Co. Ltd. v. National Projects Construction Corporation Ltd. 1990 (3) DL 110, V.K. Constructions Works Ltd. Vs. The Bank of Rajasthen Ltd. and Another, , and S. Kartar Singh v. UOI 1986 (2) Arb LR 63.

8. With regard to mobilisation guarantee learned counsel further submitted that against the total amount of Rs. 25,99,000/- the respondent No. 2 had already recovered a sum of Rs. 19,00,000/- and as such there was special equity in favor of the petitioner-company. He, Therefore, contended that the plaintiff at best could invoke the bank guarantee for the balance amount after the adjustment of Rs. 19.00 lacs which had already been recovered by the respondent No. 2. In support of this contention, learned counsel placed reliance on a judgment of this Court reported in the case of Nangia Construction (India) Ltd. Vs. International Airport Authority of India and Others, .

9. Mr. Kapur, learned senior counsel appearing on behalf of the respondent Nos. 1 to 3 submitted that in terms of the bank guarantees, the bank guarantees could be invoked merely on demand by the Government either stating that the amount concluded was due by way of loss or damages caused to or would be caused to or suffered by the Government or in the alternative by reason of the Contractor''s failure to perform the agreement. He submitted that in the present case the bank guarantees had been invoked by reason of the contractor''s failure to perform the agreement. Learned counsel further submitted that the encashment of the guarantee could not be restrained except in a case of clear fraud or irretrievable injustice. Learned counsel contended that in the present case there is no allegation of fraud or irretrievable injustice and as such the

petitioner company was not entitled to any injunction. Learned counsel further submitted that the failure on the part of the respondents 1 to 3 to specify the remaining mobilisation advance was not relevant to the liability of the bank under the guarantee. In support of his contention, learned counsel placed reliance on two judgments of the Supreme Court reported in the case of Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , and General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, .

10. I have given my thoughtful consideration to the submissions made by learned counsel for the parties and I have perused the records. I have set out in extenso the terms of the bank guarantees and the letter invoking the bank guarantees to highlight as to whether the bank guarantees have been invoked according to its terms. As held by a learned Single Judge of this court in the case of M/s. V. K. Constructions Works Ltd. (supra) a bank guarantee can only be encased as per its terms and the extent of default has to be averred and to that extent it is encashable, nothing more, nothing less and the court will intervene to prevent any action on the part of the beneficiary which may be contrary to the terms of the bank guarantee. In this connection a reference may also be made to the judgment of the Supreme Court reported in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . In this case, the Supreme Court approved the observations of Lord Denning, M. R., that "a bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated without proof or conditions."

11. It is thus clear that the invocation of the bank guarantee must be according to the terms of the bank guarantee. In the present case, both the bank guarantees clearly stipulate that amount of the bank guarantee shall be paid without any demur, merely on demand from the Government through the Financial Advisor and Chief Accounts Officer, Northern Railway, Kashmere Gate, Delhi stating that "the amount claimed is due by way of loss and damage caused to or would be caused to or suffered by the Government by reasons of any breach by the said Contractor of any of the terms or conditions contained in the said agreement or by reason of the said Contractor failure to perform the said Agreement. From this it is clear that the letter of invocation must include an averment that "the amount claimed is due by way of loss and damage caused to or would be caused to or suffered by the Government by reasons any breach by the said Contractor of any of the terms or conditions contained in the said agreement or by reason of the said Contractor failure to perform the said Agreement." From the letter invoking the bank guarantees, I, however, find that there is no averment that the amount claimed is due by way of loss or damage cause to or would be caused or suffered by the Government. The only averment is that the plaintiff had failed to execute the contract as per terms of the

contract. Since both the bank guarantees have not been invoked in accordance with the terms of the bank guarantees, the bank guarantees cannot be permitted to be encashed.

12. The ratio of the judgment of the Supreme Court in the case of Svenska Handelsbanken (supra) and General Electric Technical Services Company Inc. (supra) that the enforcement of the bank guarantee cannot be interfered unless there is fraud and irretrievable injustice, will be applicable only in case bank guarantee has been invoked in accordance with the terms of the bank guarantee. Since in the present case, the bank guarantees have not been invoked as per terms mentioned therein, the ratio of the aforesaid judgments is not applicable. It may be pointed out here that in the aforesaid cases decided by the Supreme Court, the bank guarantee was invoked in accordance with the terms mentioned therein.

13. In view of the above discussion, the petition is allowed and the defendants are restrained from encashing the bank guarantees bearing BG No. 3/89 and BG 13/90 in pursuance of the letter dated 26.11.1993. This, is however, subject to the condition that the petitioner company shall keep the said two bank guarantees alive till the award given by the arbitrator is made rule of the court. The parties are, however, left to bear their own costs.

