

(2006) 01 DEL CK 0140

In the Delhi High Court

Case No : OMP No. 370 of 2005 and is No's. 9113 and 9609 of 2005

Interior's India

APPELLANT

Vs

Balmer Lawrie and Co. Ltd. and Another

RESPONDENT

Date of Decision : 12-01-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : AIR 2007 Delhi 16 : (2006) 1 ARBLR 482 : (2006) 4 BC 62 : (2006) 129 DLT 547 : (2006) 87 DRJ 712

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Chetan Sharma and Atul Sharma, for the Appellant; Daleep Goswami and Sandeep Kumar for R1, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—The petitioner is a proprietorship concern and is running its business of interior decoration with its office at 3244, Ranjit Nagar, New Delhi. On 22nd July, 2003, the petitioner was awarded a work for interior and partition as stipulated in the order No. CPP/161/T/060. This work was awarded by respondent No. 1 on back to back contract awarded by respondent No. 2 to respondent No. 1 under tender No. DLH/CIVIL/SCOPE/INTERIOR/02 for civil interior/partitioning, electrical, air conditioning, fire fighting system/EPABX network and structured cabling/Access control and other misc work for its office premises stipulated at Scope Minor, Laxmi Nagar, Delhi. The total work awarded by respondent No. 2 to respondent No. 1 was for a total contract value of Rs. 1,86,50,000/-. The parties entered into an agreement. Clause 42 of the tender document/agreement executed between respondent No. 1 and respondent No. 2 provides that in the event of any conflict between the provisions of these presents of the said agreement, the matter shall be liable to be referred to the arbitration in terms of method provided in the said agreement. Respondent No. 1 who had been given the entire work by respondent No. 2 informed the petitioner

that part of the work had been sublet by them to M/s. Mac Associates and M/s. Happle White on floor basis. As M/s. Mac Associates who were allocated the work, were not performing their work as per the conditions stipulated under the agreement, respondent No. 1 offered the interior/renovation and civil work on 9th, 10th and 11th floors to the petitioner at the schedule rate less 16.5% as mentioned in the letter dated 3rd July, 2003. Respondent No. 1 vide their letter dated 22nd July, 2003 issued the work order for a total value of Rs. 1,88,00,000/- to the petitioner for completion of the work within four months from the date of the work order. After receipt of the work order dated 22nd July, 2003, the mobilisation advance was asked for by the petitioner from respondent No. 1 and respondent No. 1 asked for bank guarantee for a sum of Rs. 25 lacs on account of advance mobilisation. Bank guarantee No. 13/03-04 was drawn and submitted by the petitioner through UCO Bank, South Patel Nagar Branch, New Delhi on 18.9.2003. This bank guarantee was renewed from time to time and was discharged on 18.3.2004. It is the case of the petitioner that due to non-action and inaction on the part of respondent No. 2, the work could not be completed within the period of four months but was completed as expeditiously as possible and they handed over the 9th, 10th and 11th floors on 15.12.2003, 22.12.2003 and 30.12.2003 respectively. A satisfactory letter was issued by respondent No. 1 and in fact they also requested the petitioner to take the work of 5th and 6th floors for which a fresh bank guarantee was furnished after taking Rs. 25 lacs as an additional advance for procuring the requisite required material. The petitioner had furnished a bank guarantee of Rs. 20 lacs being bank guarantee No. 16/03-04 drawn on Uco Bank, South Patel Nagar Branch, New Delhi on 21.10.2003. This guarantee was renewed from time to time and is in force. Respondent No. 1 vide their letter dated 20th October, 2003 allocated the composite interior and civil work for the 5th and 6th floors (except the false ceiling and modular furniture) to the petitioner and the petitioner was called upon by respondent No. 1 to give bank guarantee for a sum of Rs. 30 lacs which was furnished by the petitioner being bank guarantee No. 1/04-05 dated 8th April, 2004 and was extended from time to time. The petitioner claims to have completed the work in January, 2004 and vide their letter dated 13th April, 2004, the petitioner reiterated their stand that the work of 9th, 10th and 11th floors allocated to them on 22nd July, 2003 had been completed by them in December, 2003 but the site could not be handed over due to presence of other agencies who were working in the said premises. The respondents in fact were satisfied and happy with the work of the petitioner and even offered the work of the 15th floor of the same building. However, the same was declined by the petitioner as the petitioner was exposed to serious huge losses even because of the breach and inaction on the part of the respondents. But later on, the respondent No. 1 offered improved rates for payment for completion of work of 15th floor which was then accepted by the petitioner and respondent No. 1 placed a fresh work order for 15th floor on 07.08.2004 upon the petitioner. During the execution of work of 15th floor, various letters were written by the petitioner to the respondent informing them again and again that they have completed the work

of 5th, 6th , 9th, 10th and 11th floors and they were entitled to a sum of Rs. 55,25,180.54/- in terms of their bill dated 19th August, 2004 for claim of additional items, increased measurements and other extra items as desired by the respondent. Despite reminders, no amount was paid to the petitioner. Vide their letter dated 15th December, 2004, the respondent instead of paying the amounts to the petitioner, asked the petitioner to extend the bank guarantee of Rs. 20 lacs furnished by them. The bank guarantee No. 16/03-04 dated 21.10.2003 was amended to the extent that the word mobilisation advance was deleted and the word security deposit was incorporated. Remaining terms of the bank guarantee remained to be the same. Vide their letter dated 05.04.2005, the respondent No. 1 called upon the petitioner to extend both the bank guarantees for a sum of Rs. 20 and Rs. 30 lacs respectively. The said letter reads as under:-

Ref: CPP/BL/BG/ONGC-scope

Date : April 5, 2005

M/s Interior's India

3244, Ranjit Nagar

New Delhi - 110008

Dear Sir,

Sub: Extension of Bank Guarantee No. 16/03-04 dt. 21-10- 03 for Rs. 20,00,000.00 valid up to 31.03.05 - Civil & Interior Work W.O. No. CPP/161/T-059 & T/160 dt 22.07.03 for ONGC Scopeminar, Laxmi Nagar, Delhi.

You have submitted the Bank Guarantee No. 16/03-04 dated 21.10.03 for Rs. 20,00,000.00 (Rupees twenty lakhs only), validity of said Bank Guarantee extended up to 31.03.05 and claim period till 30.06.05.

In view of above, you are requested to take immediate action for further extension of the above Bank Guarantee up to 30.09.2005 and thereafter a claim period of 90 days from the date of expiry i.e. 31.12.05. By a copy of this letter we are advising your banker also asking them to invoke the same in our favor in case you fail to approach them for extension of BG immediately.

Thanking you,

Yours faithfully,

For Balmer Lawrie & Co. Ltd.

SD/-

(G. Banerjee)

Sr. Manager (A&F)-CPP

Cc: UCO BANK

Shopping Complex South,

Patel Nagar Branch, New Delhi 110008

The above Bank Guarantee was issued by you in our favor on behalf of M/s. Interior's India for an amount of Rs. 20,00,000.00 and the validity of the same extended till 31.03.05 with a claim period of 30.06.05. We have requested M/s Interior's India to extend the validity of the same from 30.03.05 to 30.09.05 and thereafter a claim period of 31.12.05. In case they fail to approach you in time, please treat this as lodge of our claim on the subject Bank Guarantee for invoking the same by Demand Draft in favor of M/s Balmer Lawrie & Co. Ltd. payable at Kolkata, West Bengal. The Demand Draft may please be sent to G.Banerjee, Sr. Manager (A&F), CPP, Balmer Lawrie & Co. Ltd. 21, N.S. Road, Kolkata - 700001.

Cc: Mr. Amrit Mukhopadhyay - We need your assistance for liason with the contractor for encashment/extension of the said Bank Guarantee.

2. The said letter was replied to by the petitioner as follows:-

Dated : April 08,2005

M/s. Balmer Lawrie & Co. Ltd.

Project Division,

21, Netaji Subhas Road,

Kolkata - 700 001.

Kind Attn : Mr. Guatam Benerjee, Sr. Mgr (A&F)-CPP

Dear Sir,

Re: Extension of Bank Guarantee

Civil & Interior Work for Scope Minar, Laxmi Nagar, Delhi for ONGC W.O. No. CPP/161/T-063 and T-064 dated July 22, 2003.

We are surprised to see your letters Ref:CPP/BL/BG/ONGC - Scope dated April 05, 2005, wherein you have asked for the extension/invoking of our bank guarantees dated 21.10.2003 and 08.04.2004 for Rs. 20 Lac and Rs. 30 Lac respectively. We stated that the above demand is without jurisdiction and contrary to the terms of the tender.

We were awarded the above contracts non July 22, 2003 in the sums of Rs. 1.865 Crores and 1.88 Crores for a total sum of Rs. 3.745 Crores. As per the terms of the contract we were required to give bank guarantee i.e. one for advance and the other for defects liability period.

1)A sum of Rs. 20 Lacs was given to us as advance. Please note that, as on date the entire advance received by us stands adjusted long back against the running

bills rather a sum of Rs. 39.91 Lacs as per our bills raised to you stands unpaid till date. Hence, there is no question of extending this bank guarantees on this ground.

2) Regarding the second bank guarantee on account of defects liability period, we have to state that as per the Tender Clause No. 34 the contract is to keep the bank guarantee time for 12 months from the date of virtual completion. The above work was completed by Dec 2003 and was physically handed over before March 04 in total, which is now more than 1 year.

Whatever minor additions/alterations which was required during this period were attended to the full satisfaction of your engineers. No claim whatsoever was raised and nothing is claimed & pending then. Now, that more than 1 years has expired after handing over, we find no reason to extend the bank guarantees.

You will appreciate, we have always carried out the work in a most diligent manner and there has been no misunderstandings. It is fact that there should be no cause of harassment to us on account of unpleasant exchange of correspondence. In view of the above, you are requested to please withdraw your letter in this regard immediately.

Yours faithfully,

For INTERIOR'S INDIA

Sd/-

(Jagmohan Bawa)

CC:Mr. Amrit Mukherjee

CC:Manager, UCO Bank

3. According to the petitioner, various disputes have arisen between the parties in regard to the dues payable to the petitioner as well as in relation to invocation of the two bank guarantees afore-referred. The petitioner claims to have invoked the arbitration agreement between the parties and has filed the present petition u/s 9 of the Arbitration & Conciliation Act wherein the petitioner prays for the following reliefs.

a. restrain the respondent No. 1 from invoking/asking for extension of bank guarantees bearing nos: 16/03-04 dated 21.01.03 issued towards the advance mobilisation for a sum of Rs. 20 lacs drawn on UCO Bank, South Patel Nagar Branch, New Delhi, respectively in respect of work orders No's. CPP/161/T-059 & CPP/161/T-060;

b. restrain the respondent No. 1 from invoking/asking for extension of bank guarantees bearing nos: 1/04-05 dated 08.04.04 issued towards the retention amount for a sum of Rs. 30 lacs drawn on UCO Bank, South Patel Nagar Branch, New Delhi, respectively in respect of work orders No's. CPP/161/T-059 & CPP/161/T-060;

c. restrain respondent No. 1 from deducting any amount from any contract between the parties i.e. petitioner and respondent No. 1;

d. pass any other order or orders which this Hon"ble Court may deem fit and proper may also be passed in the interest of justice.

4. As is obvious from the above narrated facts, the petitioner had furnished the bank guarantee which was amended at the behest of the respondent. Vide letter dated 23rd August, 2005 this bank guarantee was threatened to be invoked in the event the petitioner did not extend the bank guarantee. The petitioner reacted to the said letter vide letter dated 1.9.2005 and said that the bank guarantee was extended up to 31st December, 2005. Vide letter dated 11.11.2005, the respondent No. 1 invoked the bank guarantee by writing the following letter to the bank:-

Ref. CPP/BG/INTERIOR

Date: 11-11-2005

The Sr. Manager

UCO Bank

South Patel Nagar,

New Delhi- 110008

Dear Sir,

Sub: Claim against Bank Guarantee

Ref:Bank Guarantee No. 01/2004-05 dt. 08.04.2004 for Rs. 30,00,000/- (Rupees thirty lacs only)

Please refer to Bank Guarantee No. 01/2004-05 dt. 08.04.2004 for Rs. 30,00,000.00/- (Rupees thirty lacs only) issued in favor of Balmer Lawrie & Co. Ltd. on behalf of M/s Interior"s India, 3244, Ranjit Nagar, New Delhi 110008.

We would request you to invoke the above Bank Guarantee and treat this as lodge of our claim on the subject Bank Guarantee for invoking the same by Demand Draft in favor of M/s Balmer Lawrie & Co. Ltd. payable at Kolkata, West Bengal. The Demand Draft may please be sent to : G. Banerjee, Sr. Manager (A&F), CPP, Balmer Lawrie & Co. Ltd., 21, N.S. Road, Kolkata - 700001.

Your action in this regard will be highly appreciated.

Thanking you,

Yours faithfully,

For Balmer Lawrie & Co. Ltd.

Sd/-

(G. Banerjee)

Sr. Manager (A&F)

Cc: UCO Bank

Head Office,

10, BM Sarani,

Kolkata 700001.

5. The petitioner is aggrieved from invocation of the said bank guarantee. According to the petitioner, the bank guarantee has been invoked arbitrarily, without any basis and, in fact, the petitioner has to take huge sums from the respondent and the respondent with an intent to withhold such payments has, as a counter blast, invoked the bank guarantee in question. It is also the argument of the petitioner that the bank guarantees furnished, were initially performance guarantees and the petitioner had completed the work satisfactorily as is even evident from the various letters placed on record and there was no occasion with the authorities to invoke the bank guarantees. According to the petitioner, they have to take more than Rs. 54 lacs from the respondent. While relying upon the statement of accounts of the respondent itself dated 22nd July, 2003 relating to the submission of the final bill by the petitioner to the respondent on 11th August, 2005 even the gross cumulative bill certified for payment clearly shows that Rs. 54, 77, 790.80/- is payable to the petitioner.

6. On the other hand, the learned counsel appearing for the respondent/non-applicant who had filed is 9609/2005 for vacation of the interim injunction argued that the bank guarantee is unconditional and there are defects in the work executed by the petitioner which are in relation to material as well as execution of the work. The sub-standard goods have been supplied by the petitioner and this has been duly verified by the authorities. The certificate issued by the Shriram Institute for Industrial Research dated 22.9.2003 shows that the test reports do not conform to IS standards. Vide their letter dated 26.9.2003, respondent No. 1 had informed the petitioner that they should not use the balance quantities of the lot which were sub-standard and besides this, various defects were pointed out from time to time, copies of which have been filed on the record. It is argued on behalf of the respondent that as there are serious disputes between the parties in relation to the execution of the work and otherwise for payment which are even admitted by the petitioner, the respondent No. 1 has every right to invoke the bank guarantee as it is an independent contract and is not dependent upon the determination of disputes stated in the petition. It is further argued on behalf of the respondent that the petitioner is causing commercial duress and arm-twisting so as to prevent encashment of bank guarantee. There are serious disputes between the parties. The invocation of bank guarantee by the respondent is fully justified and pendency of disputes by invocation of arbitration agreement is not a ground for preventing

encashment of the bank guarantee. No irretrievable injustice or prejudice would be caused to the petitioner, as if ultimately the petitioner succeeds in their claim, they can be paid their dues without any problem. Another preliminary objection was taken by the respondent that there is no arbitration agreement in writing between the parties as such provisions of Section 9 of the Act cannot be invoked.

7. Before merits of these contentions are discussed, the court may refer to a recent judgment of this court in the case of Hindustan Construction Co. Ltd. and another v. Satluj Jal Vidyut Nigam Ltd. (OMP 213/2005 decided on 24.11.2005) where the court held as under:-

12. The various judgments relied upon by the learned counsel appearing for the parties would show that the law in relation to encashment of bank guarantee has attained wider dimensions with the passage of time. Originally, the only exception carved out to encashment of bank guarantee unconditionally was, fraud. However, subsequent judicial pronouncements have extended this scope by adding other class of cases which would fall in this exception - Cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee being not in terms of the bank guarantee itself. It is very difficult to draw any straitjacket formula which would universally apply to all the cases. The Court would have to examine each case in order to find out whether the case falls in any or more of the afore-stated classes.

13. In the case of Hindustan Steelworks Construction Ltd. (supra), the Supreme Court stated the principle that in case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The only two exceptions were - fraud, which was not pleaded in that case, and the other was special equities. Special equities were claimed on the basis as to who had committed breach of the contract. Determination of disputes was stated to be not a factor which would be sufficient to make the case as exceptional case justifying interference by the court restraining invocation of the bank guarantee.

14. In the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, , the Supreme Court further added the principle of irreparable injury by proof of special equity to the existing two classes of cases where the court could restrain the encashment of a bank guarantee. It was also stated that at the stage of invocation of bank guarantee, the need for final adjudication and decision on the amount due and payable by the petitioner would not be a condition precedent as it would run contrary to the terms of the special contract i.e. the bank guarantee.

15. In the case of UP State Sugar Corporation (supra), the Supreme Court after detailed discussion of the law on the subject while spelling out the principles guiding invocation of bank guarantee and the circumstance where the court would or would not grant an injunction held as under:-

There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. In *Bolivinter Oil SA v. Chase Manhattan Bank* (1984) 1 All ER 351; All ER 352

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.

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others*, . This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corporation v. First National Bank of Boston* 566 Fed Supp 1210 . On the question of fraud this Court confirmed the observations made in the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the *Itek Corporation Case* 566 Fed Supp 1210. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favor of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm

to the plaintiff. This contention was upheld. To avail of this exception, Therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek case* 566 Fed Supp 1210 there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

15. Our attention was invited to a number of decisions on this issue/ among them, to *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, and *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, as also to *National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another*, . The latest decision is in the case of *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, where this Court has summed up the position by stating: (SCC p.741, para 13)

The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.

The other recent decision is in *Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another*,

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....

16. In the case of *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering works (P) Ltd. and Anr. (supra)*, 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 Vs. M/s. Indian Charge Chrome and*

others, Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., and AIR 1997 1644 (SC) . The general principle which has been laid down by this Court has been summarised in the case of AIR 1997 1644 (SC) as follows: (SCC p.574, para 12)

The law relating to invocation of such bank guarantees is by now well settled. When 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 the 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 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 discharged.

The aforesaid passage was approved and followed by this Court in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*,

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the

amount from the beneficiary, by way of restitution.

17. In the case of Hindustan Construction Co. Ltd. (supra), the Supreme Court while specifying the need for invoking the bank guarantee strictly as per terms of the bank guarantee and by the authority competent to do so held as under:-

8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as for example, construction contracts, bank guarantees are usually required to be furnished in favor of the Government to secure payments made to the contractor as advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government advance", the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank (1984) 1 All ER 351 was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favor the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, , Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., , National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, , State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, , Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, as also in AIR 1997 1644 (SC) the same principle has been laid down and reiterated.

9. What is important, Therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, Therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, Therefore, will have to be in accordance with the terms of the bank

guarantee, or else, the invocation itself would be bad.

21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of Chief Engineer" in the bank guarantee nor is it provided therein that Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the performance guarantee" to the Executive Engineer.

18. Still further, in the case of Federal Bank Ltd. (supra), the Supreme Court while cautioning the court not issuing injunction restraining encashment of a bank guarantee, specified the same principles i.e. fraud and irretrievable damage as exception to the Rule and further clarified that relationship between the bank issuing letter of credit or paying bank is that of principal and agent. It was affirmed that to bring the case within the exception of fraud, the averment should be clear and that there was knowledge to the bank of the fraud played.

19. In the case of Daewoo Motors India Ltd. (Supra), the Supreme Court held that for encashment of bank guarantee, the bank cannot have any valid resistance, except of course, in a case of fraud. The bank guarantee furnished by the bank is an unconditional and absolute bank guarantee. It was also stated that once it becomes apparent that there was default to fulfill its obligation as specified in the bank guarantee, invocation of bank guarantee would be proper.

20. On the analysis of the above law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited categories:-

- i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.
- ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.
- iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.
- iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

21. The exceptional cases would be few but it could never be stated as an

absolute proposition of law that under no circumstances the court could injunct encashment/invocation of a bank guarantee which might have been furnished by a party as an independent contract. A beneficiary is not vested with an unquestionable or unequivocal legal right to encash the bank guarantee on demand. The obligation of the bank furnishing the bank guarantee to pay would be subject to a limited exceptional circumstance afore-noticed. As a matter of rule, the bank would be under obligation to encash the bank guarantee, once it is invoked in its terms. The exceptions afore-noticed are merely indicative of the kind of cases where the court may injunct encashment of a bank guarantee. It is neither possible nor permissible to exhaustively classify the cases where the court would not interfere and where the court would judicially intervene in such matters. Every case would have to be decided keeping in view its peculiar facts and circumstances. Despite the principal contract and bank guarantee being *Ejusdem negotii*, the bank guarantee is an independent and self-contained contract enforceable on its own terms. Except in the exceptional cases where definite material is available before the court to *prima facie* satisfy itself that on the basis of the pleadings of the parties; documents supporting has such a plea; the case falls in one or more of the categories afore-indicated, the bank guarantee would be encashable *per se*. It has an obligation which is not dependent upon adjudication of main disputes. The concept of irretrievable injustice, or damages, or special equities would come into play where the parties to a contract having been provided with internal adjudicative mechanism, attempts to frustrate results of such an internal adjudication by recourse to encashment of bank guarantee, particularly when under the terms and conditions of the contract, including the terms of the guarantee, such determination is "final", of course subject to the limitations spelled out in such contracts. An attempt to over-reach the process of adjudication with intent to cause irreparable prejudice to the other side would be a circumstance which would influence the decision or tilt the special equities in favor of the applicant before the Court.

8. The preliminary objection taken on behalf of the respondent that there is no arbitration agreement in writing between the parties and this petition, thus, is not maintainable, is without any substance and is liable to be rejected at the very threshold. There is no dispute to the fact that the work was allocated to the petitioner by means of a work order dated 22nd July, 2003. This letter clearly provided the entire work shall be carried out as per the terms and conditions as given in the contract between ONGC and Balmer Lawrie. Payment shall be released on back to back basis on receiving payment from ONGC". This is the main stipulation of the work order and it is a one page order. What shall be the specification of the contract, how payments would be made and how the work is to be executed and completed has been spelled out in the main contract between the parties. The contract between respondent Nos. 1 and 2, Therefore, is an integral part of the work order issued by respondent No. 1 in favor of the petitioner. Arbitration Clause being clause No. 42 would equally be applicable in all its force between respondent No. 1 and the petitioner as it would be between

ONGC and respondent No. 1. The conduct of the parties even in their correspondence and when the petitioner invoked the arbitration agreement is not denial of the arbitration agreement. Apparently, there is an arbitration clause (Clause No. 42) which itself is part of the terms and conditions of the main agreement executed between respondent No. 1 and respondent No. 2 which in turn is an integral part of the work order issued by respondent No. 1 to the petitioner. In these circumstances, the objection raised on behalf of the respondent in regard to maintainability of the petition is without any merit and is rejected.

9. The afore-stated judgments which were also relied upon by the respondent clearly enunciate the principle that bank guarantee is an independent contract and is not dependent on the disputes raised in relation to or arising out of the underlining contract. Normally, the obligation of the bank to honour the bank guarantee on demand in its term is unequivocal. This general commercial principle of encashment on demand has very limited exceptions as afore-stated. The question, thus, to be examined is whether the present case falls in any of those exceptions or the facts and circumstances as stated on record constitute a case of exceptional irretrievable injustice or special equities. For this purpose reference has to be made to the terms of the bank guarantee. The relevant parts of one of the bank guarantees reads as under:-

1. In consideration of M/s. Balmer Lawrie & Co. Ltd. having its Registered Office at 21, Netaji Subhas Road, Kolkata - 100001 (Hereinafter referred to as the Company", which expression shall unless repugnant to the context or meaning thereto include all its successors administrators, executors and assigns, and having entered to a contract bearing No. CPP/161/T-059 and 060 dated 22.07.2003 (Hereinafter called the Contract", which expression shall include all the amendments hereto) with M/s Interior"s India having its Head/Registered Office at 3244, Ranjit Nagar, new Delhi (hereinafter referred to as The Contractor"which expression unless repugnant to the context or meaning thereof, shall include all its successors, administrator executor and assigns) and the contract having been unequivocally accepted by the contractor resulting in a contract bearing No. CPP/161/T-059 and 060 dated 22.07.2003 Valued at Rs. 3,74,50,000.00 (Rs. Three Crores, Seventy Four Lacs & Fifty Thousand only) for composite work of Civil, Interior/partitioning other miscellaneous work at Scope Minar (South Towar) Laxmi Nagar, Delhi and the Company having agreed that the contractor shall furnish to the company a performance guarantee for the faithful implementation of the contract for Rs. 30 lacs (Rs. Thirty lacs Only). We Uco Bank having its Registered Office at 10 B.T.M. Sarani, Kolkata - 700001 (hereinafter referred to as the bank which expression shall unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay on demand to the company any money or all monies payable by the contractor to the extent of Rs. 30 lacs (Rs. Thirty lacs Only) in aggregate at any time without any demur, reservation, recourse, contest or protest and without any reference

to the contractor any such demand made by "Company" on the bank shall be conclusive and binding without any proof, on the bank is regards the amount due and payable not withstanding any dispute between Company and the contractor or any dispute/arbitration pending before any court, Tribunal, arbitrator or any other authority. We agree that guarantee herein contained shall be irrevocable and shall continue to be enforceable till it is discharged by Company in writing.

4.The bank further agrees that the guarantee herein contained shall remain in full force during the period that is taken for the performance of the contract and it shall be enforceable till all the dues of the company under or by virtue of this contract have been fully paid and its claim satisfied as discharged or till the company discharges the guarantee in writing.

5.We further agree that as between us and the company for the purpose of this guarantee any notice given to us by the company that the money is payable by the contractor and any amount claimed in such notice by the company shall be conclusive and binding on us notwithstanding any difference between the company and the contractor or any dispute pending before any court, tribunal, arbitrator or any other authority. We further agree that this guarantee shall not be affected by any change in our constitution or that of the arbitrator. We also undertake not to revoke this guarantee during its currency.

10. The above bank guarantee has been invoked by the respondent No. 1 vide their letter dated 11.11.2005. This letter of invocation was preceded by other letters written by respondent No. 1 to the petitioner requiring them to extend the bank guarantee as they were intending to invoke the same because of the defective work done and other claims of the respondent against the petitioner including in relation to performance and security. In furtherance to these letters, the petitioner had extended the validity of the bank guarantee and did not approach any court of law at that stage. It is now that the petitioner has woken up to their rights and has attempted to make a case of special equities before the court. In order to justify their attempt to invoke the bank guarantee, the respondent has relied upon even the reports of the experts including ShriRam Institute for Industrial Research. Learned counsel appearing for the petitioner argued that the documents placed on record do not relate to the floors on which the petitioner had executed the work. This is not even factually correct. The reports submitted, are related to the floors on which the petitioner was working. Vide letter dated 29th September, 2003, the petitioner was informed by the respondent that the material used was not in conformity to the IS standards and the balance quantities of lot should not be used and the material used should be replaced. Even respondent No. 2 had written to respondent No. 1 in relation to the defects of the 9th floor. Various other documents have been placed on record including at page 26, 37, 38 and 40 annexed to is No. 9609/2005 which are related to the floors on which the petitioner had admittedly worked and to which the disputes in the present petition relate to.

11. This court would not be concerned in any way with the merit of the disputes

raised between the parties on the basis of the underlining contract in furtherance to which the bank guarantees were furnished. The language of the bank guarantee clearly shows for "furnishing of a performance guarantee by the contractor for the faithful implementation of the contract and undertaking of the bank to pay on demand to the company any or all moneys payable by the contractor to the extent of Rs. 30 lacs in aggregate at any time without any demur, reservation, recourse, contest or pretext and without any reference to the contractor and any such demand made by the company on the bank shall be conclusive and binding without any proof on the bank as regards the amount due and payable notwithstanding any dispute between the company and the contractor. It was an irrevocable bank guarantee. In Clause 5 of the bank guarantee it was specifically stated that any notice given by the company to the bank that the money is payable, the amount claimed in such notice itself, shall be conclusive and binding on the bank notwithstanding any difference between the contractor and the company. The language of the bank guarantee is such that it leaves no option with the bank except to pay the amount despite pendency of the above disputes. The liability to honour the encashment of bank guarantee is unconditional, unequivocal and is not dependent upon happening of any events. Apparently, the bank guarantee has been invoked in terms of the bank guarantee.

12. Learned counsel appearing for the petitioner while heavily relying upon the judgment of the Bombay High Court in *Dai-ichi Karkaria Private Ltd., Bombay Vs. Oil and Natural Gas Commission Bombay* and another, argued that action of the respondent amounts to an economic duress and even alteration in the bank guarantee from performance guarantee to security guarantee demonstrates economic duress and the conscience of the court of equity is shocked by such conduct. The action of the respondent is totally inequitable and thus injunction should be granted.

13. The factual matrix of the case in hand and the judgment relied upon by the counsel for the petitioner are not even similar much less identical. The principle stated in the judgment of the Bombay High Court has to be examined in the light of the judgments of the Supreme Court and in any case the petitioner has not been able to make out any case of irretrievable injustice or exceptional special equities much less fraud or that the bank guarantee has not been invoked in its terms.

14. I find no merit in this petition and the same is dismissed.

15. The OMP and is Nos. 9113/2005 & is 9609/2005 are finally disposed of while leaving the parties to bear their own costs.