

(2018) 03 MP CK 0033

In the Madhya Pradesh High Court

Case No : ARBITRATION REVISION NO. 04, 01 OF 2018

M/S. Makhija Construction Company

APPELLANT

Vs

Madhya Pradesh Rural Road Development Authority And
Another

RESPONDENT

Date of Decision : 15-03-2018

Acts Referred:

Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 — Section 7, 19

Citation : (2018) 03 MP CK 0033

Hon'ble Judges : VIRENDER SINGH, J; PANKAJ KUMAR JAISWAL, J

Bench : Division Bench

Advocate : Gaurav Chhabra, V. P. Khare

Final Decision : Dismissed

Judgement

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As common question of law and facts are involved in both these revision, therefore, they are heard analogously and are being disposed of by this".....

common order.Â For the sake of convenience, facts are taken from Arbitration Revision No.03/2018.".....

2. The undisputed facts of the case are that the petitioner's tender for construction/up-gradation of rural roads under Pradhan Mantri Gram Sadak.....

Yojana (PMGSY) Package No.3904 Districtâ?"Shajapur (M.P.) including maintenance for five years was accepted by the respondents' authority.....

Thereafter the petitioner entered into the contract with the respondents vide agreement bearing No.02/2002-03 dated 22.04.2002. The tender amount.....

of the work was Rs.400.83 lacs. The period for completion of the work was 9 months including rainy season. The work was completed on.....

30.12.2003. As per condition No.7.8 of NIT and Clause 19 of the agreement,

50% amount of security deposit was released after 36 months of the" ,,,,,

completion of the work if the maintenance of road was carried out by the contractor and the 50% of the bank guarantee was released after 36 ,,,,,

months. Thereafter the petitioner submitted bank guarantee Nos.41/13, 41/14, and 41/15 dated 9.7.2007 for Rs.7 lakhs each totaling to Rs.21 lacs for" ,,,,,

the remaining maintenance period of 24 months. The said bank guarantees were valid up to 8.1.2009. The validity of the same had been extended up ,,,,,

to 8.10.2009 as per directions of this Court in order dated 16.12.2008 passed in Writ Petition No.7530/2008. Clause 7.8 of the NIT and Clauses 16 and ,,,,,

19-B of the Agreement reads as under:- ,,,,,

7.8-PERFORMANCEÂ ARANTEE/MAINTENANCE GUARANTEE: The work under this contract shall be expected to be defect free till 60 ,,,,,

months from the date of completion. The security deposit will not be returned after completion of work. The contractor shall be responsible for the ,,,,,

performance for the work carried out by him for a period of 60 months from the date of completion of work and he shall also be liable for routine ,,,,,

maintenance of the road for full period of the maintenance guarantee i.e. 60 months. The maintenance shall be done as per the Ministry of Surface ,,,,,

Transport, Government of India Publication 7.8Manual for maintenance of road and as per Indian Road Congress Publication ITC 82-1982" ,,,,,

7.8Code of practice for maintenance of bituminous surfaces of Highways7.8. During this period the contractor shall have to carry out all necessary ,,,,,

repairs/maintenance within 15 days of receipt of such communication from the Engineer/Employer failing which repairs will be carried out by the ,,,,,

department and cost will be recovered from any sums that may be due or at any time become due thereafter or from the security deposit. ,,,,,

50% amount of Performance security will be referred after 36 months of the completion and taking over of the work and remaining 50% amount of ,,,,,

Performance Security will be released after 60 months from the date of takeover if no defects are noticed or defects are rectified or repairs and ,,,,,

routine maintenance is carried to the ,,,,,

satisfaction of General Manager.7.8 ,,,,,

7.8Clause 16 7.8" If any time before the security deposit is refunded to the contractor, it shall appear to the Employer or his subordinate or Engineer" ,,,,,

in charge of the work, that any work has been executed with unsound, imperfect

or unskillful workmanship or with materials of inferior quality, or that" ,,,,,

any materials or articles provided by him for the execution of the work are unsound, or of a quality inferior to that contracted for, or are otherwise not" ,,,,,

in accordance with the contract, it shall be lawful for the Engineer to intimate this fact in writing to the contractor and then notwithstanding the fact" ,,,,,

that the work materials articles complained of any have been inadvertently passed, certified and paid for, the contractor shall be bound forthwith to" ,,,,,

rectify or remove and reconstruct the work so specified in whole or in part as the case may require, or if so required shall remove the materials or" ,,,,,

articles so specified and provide other proper and suitable materials or articles at his own proper charge and cost; and in the event of his failing to do ,,,,,

so within a period to be specified by the Engineer in writing as aforesaid. The Engineer may rectify or remove and, re-execute the work or remove" ,,,,,

and replace the materials or articles complained of as the case may be at the risk and expense in all respects of the contractor, which shall be" ,,,,,

recovered from the Security Deposit, performance Security of the Contractor.â??" ,,,,,

â??Clause 19(b): The contractor shall be responsible regarding the performance of the work carried out by him till the period of 60 months from the ,,,,,

date of completion of work. ,,,,,

The contractor shall have to carry out all necessary repairs within 15 days on receipt of such communication from the Engineer Employer failing ,,,,,

which repairs will be carried out by the department and cost will be recovered from any sums that may be then due or at any time become due ,,,,,

thereafter or from the security deposit 50% amount of Performance security will be released after 36 months of the completion and taking over of the ,,,,,

work and remaining 50% amount of Performance Security will be released after 60 months from the date of takeover if no defects are noticed or ,,,,,

defects are rectified are rectified to the satisfaction of the Project Manager. ,,,,,

The work shall after the expiration of the defect liability period be delivered to the employer in the condition as required by the contract, FAIR WEAR" ,,,,,

AND TEAR EXPECTED.â?? ,,,,,

3. As per condition No.7.8 of the NIT and Clause 19B of the agreement it is mandatory that during the period of contract, the contractor shall have to" ,,,,,

carry out all necessary repairs/maintenance within 15 days of receipt of

communication from the Engineer/ employer, failing which repairs and" ,,,,,,

maintenance work would be carried out by the department and the cost of the same would be recovered from the petitioner.,,,,,,

4. The payments made to the petitioner from time to time during the period of 9 months for completion/construction of roads includes the payment of ,,,,,,

maintenance of the roads till the period of 60 months from the date of completion of the work. The same Clause also provides that petitioner will have ,,,,,,

to carry out all the necessary repairs within 15 days of the receipt of the said communication from the respondent Authority/Consultant. In the event ,,,,,,

of failure of the petitioner to carry out the said maintenance and repairs, it is specifically provided in the said clause that the respondent authorities are" ,,,,,,

entitled to get the maintenance work executed by some other agency and recovery the cost of the same from the petitioner that may be then due or at ,,,,,,

any time become due thereafter or from the security deposits of the petitioner.,,,,,,

5. The case of the respondents that after completion of the work they have to maintain the roads for a period of 60 months i.e. with effect from ,,,,,,

1.1.2004 to 30th December, 2008. The petitioner â?" contractor maintained the roads and rectified the deficiencies during the first 36 months after the" ,,,,,,

completion of construction of roads in a proper and satisfactory manner but he completely abandoned the work thereafter for the period from ,,,,,,

31.12.2006 to 30.12.2008. On 16.1.2006 notice was issued to the petitioner to maintain the roads strictly as per terms and conditions of the agreement ,,,,,,

and carry out necessary repairs and maintain it properly and thereafter reminders were issued from time to time, the details are as under:-" ,,,,,,

1) Agreement No.2/2002-03, Dated 22-04-2002." ,,,,,,

2) This Office Notice No.58, Dated 16-01-2006." ,,,,,,

3) This Office Notice No.539, Dated 19-04-2006." ,,,,,,

4) This Office Notice No.1243,Dated 29-08-2006." ,,,,,,

5) This Office Notice No.1470, Dated 26-10-2006." ,,,,,,

6) This Office Notice No.1681, Dated 28-09-2006." ,,,,,,

7) This Office Notice No.2231, Dated 06-01-2007." ,,,,,,

1,"Restoration of rain cuts

and dressing of hard

shoulders as per clause
1902 of the
Specifications.",Once after rains,,,
2,"Making up of hard
shoulders as per clause
1903 of the
Specifications.", "As and when
required" ,,,
3,"Maintenance of
Bituminous surface
road and/or gravel road
and/or WBM road
including filling pot
holes and patches
repair etc. as per clause
1907 of the
Specifications.", "As and when
required." ,,,
4,"Maintenance of drains
as per clause 1907 of
the
Specifications.",Twice in a year,,,
5,"Maintenance of
culverts and causeways
as per clause 1908 and
1909 of the
Specifications.",Twice in a year,,,
6,"Maintenance of road
signs as per clause 1910
of the Specifications.", "Maintenance as

and when
 required.",,,

7,"Maintenance of road
 protection work as per
 the Specifications.","Maintenance as
 and when
 required.",,,

8,"Maintenance of 200 m
 and Kilo meter Stones
 as per clause 1912 of
 the
 Specifications.","Maintenance as
 and when
 required.",,,

9,"White washing of guard
 stones." ,Twice in a year,,,

10,"Re-fixing displaced
 guard stones." ,Once in a year,,,

11,"Cutting of unwanted
 branches of tree, shrubs
 and trimming of grass
 and weeds etc. as per
 clause 1914 of the
 Specifications." ,,,,

12,"White washing of
 parapets of C.D. Works." ,Once in a year,,,

13,Maintenance of side,Once in a year,,,
 ,slops of embankment,,,,

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7. Learned Counsel for the petitioner has submitted that after the completion of work under contract, the petitioner has maintained the roads for a" ,,,,,,

period of five years till 29.12.2008 as per terms and conditions of the contract. The action of the respondents to encash the bank guarantee is illegal.,,,,,,

No material has been produced before the M.P. Arbitration Tribunal to prove that the petitioner had failed to maintain the work for a period of two ,,,,,,

years i.e. from 30th December, 2006 to 29th December, 2008 (24 months) and in absence of the petitioner the same was awarded to some other" ,,,,,,

contractor at the risk and costs of the petitioner. He further submitted that this fact was also not considered by the learned Arbitration Tribunal andÂ ,,,,,,

action of the respondentsÂ for encashment of bank guarantee was illegal and without considering the aforesaid the learned Arbitration Tribunal ,,,,,,

dismissed the reference Case of the petitioner.,,,,,,

8. Per contra, Shri V. P. Khare, learned Counsel for respondentsâ?"Madhya Pradesh Rural Road Development Authority has submitted that the" ,,,,,,

petitioner had maintained the aforesaid road for three years but remaining two years the petitioner had not maintained the aforesaid roads and thus ,,,,,,

violated the condition No.7.8 of the NITÂ and Clause 19 (B) of the condition of contract. The payment made to the petitioner from time to time ,,,,,,

during the period of 9 months for completion/construction of roads includes the payment of maintenance of the roads till the period of 60 months from ,,,,,,

the date of completion. He submitted that the petitioner has performed the work of profitable and left the work of non profitable. From 31.1.2007 to ,,,,,,

11.8.2008 notices were issued to the petitioner and in all these letters petitioner was constantly directed by the respondent No.2 regarding periodical ,,,,,,

and routine maintenance of roads constructed under Package No.3904 of the PMGSY within 15 days from the receipt of the notices otherwise the ,,,,,,

work would be taken up departmentally and the cost and expenditure to be incurred on it would be adjusted against its security deposit. Thereafter, the",,,,,
respondent No.2 had sent the letter dated 13.2.2008 to the Bank of India for encashment of the bank guarantee. It is also submitted that the petitioner,,,,,
had filed a Writ Petition No.7530 of 2008 against the encashment of the bank guarantee and the same was decided on 16.12.2008 with a direction to,,,,,
the respondent No.1â?"C.E.O. to re-consider the matter. The petitioner had submitted the application under Clause 24 of the agreement and the,,,,,
C.E.O. after giving due opportunity to the parties decided the same by order dated 17.4.2009. The order of 17.4.2009 was impugned in Reference,,,,,
Case No.59 of 2009 filed by the petitioner under Section 7 of M.P. Madhyastham, Adhikaran Adhiniyam, 1983. All those claims were considered and",,,,,
rejected by the learned Tribunal vide impugned order.,,,,,

9. The Arbitration Tribunal after considering pleadings, documents and affidavits of both the side and further considering the notices and provisions of",,,,,

Clause 7.8 of the NIT and Clause 19-B of the condition of contract and recorded the finding in para 8.17 of the impugned order and came to the,,,,,

conclusion that petitioner failed to fulfill the responsibilities regarding the performance of the work carried out by it under Package No.3904 from 30th,,,,,

December, 2006 to 29th December, 2008 (24 months). The Adhikaran has further ordered in para 10.6 that under such circumstances, the",,,,,

respondents are ordered to adjust the amount which they have incurred to get the rectification work done by the debitable agency of Package,,,,,

No.3904, from the Bank guarantees of Rs.21 lakhs of the petitioner. After adjustment of the above expenditure if any amount is left, the same be",,,,,

released to the petitioner.,,,,,

10. As per performance guarantee, the Contractor shall be responsible regarding performance of the work carried out by him till the period of 60",,,,,

months from the date of completion of contract. During the period from 2006 to 2008 total 13 notices were issued to the petitioner and finally the,,,,,

respondents had issued a notice dated 23.10.2008 indicating therein to complete the periodical and routine maintenance as per Clause 7.8 of the,,,,,

agreement and prayed for dismissal of the arbitration revisions.,,,,,

11. We have heard the learned Counsel for the parties and perused the record.,,,,,

12. The petitioner-contractor has furnished the unconditional bank guarantee. Copy of one of such Bank Guarantee, reads as under:-",,,,,

1. In consideration of the Chief Executive Officer/General Manager Madhya Pradesh Rural Road Development Authority (herein after called",,,,,

the Authority) having agreed to grant M/s Makhija Construction Company, 404, Alankar Point A. B. Road, Indore (herein after called "the",,,,,

said Contractor(s)) from the demand, under the terms and conditions of an Agreement dated 06/04/02 made between General Manager, M.P.",,,,,

R.R.D.A. PIU DEWAS and M/s Makhija Construction Company for Construction and maintenance of Rural Roads under Pradhan Mantri Gram",,,,,

Sadak Yojana Pkg. No.3904 (herein after called "the said Agreement") of security deposit for the due fulfillment by the said Contractor(s) of the",,,,,

terms & conditions contained in the said agreement on production of Bank Guarantee for Rs.7,00,000/- (Rupees Seven lack only. We Bank of India,",,,,

Khajrana Branch (herein referred to as "the Bank") do hereby undertake to pay to Authority an amount not exceeding Rs.7,00,000/- (Rupees",,,,,

Seven lacs only) against any loss or damage caused to or suffered or would be caused to or suffered by the Authority by reason of any breach by the",,,,,

said Contractor(s) of any terms and conditions contained in the said agreement.",,,,,

2. We Bank Of India, Khajrana Branch, do hereby undertake to pay the amount due and payable under this Guarantee without any demure merely on",,,,,

a demand from the Authority stating that the amount claimed is due by way of loss or damage caused to or suffered by the Authority by reason of",,,,,

any breach by the said Contractor (s) of any of the terms or condition contained in the said agreement or by reason of any of the Contractor(s) failure",,,,,

to perform the said agreement. Any such demand made on the Bank shall be conclusive as regard 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.7,00,000/- (Rupees Seven lack only).",,,,,

3. We, Bank Of India, Khajrana Branch, 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 be continue to be enforceable till all dues of the Authority under or by",,,,,

virtue off the said Agreement have been fully paid and its claim satisfied or till Authority certifies that the terms of the said Agreement have been fully",,,,,

and properly carried out by the said Contractor(s) and accordingly discharges the Guarantee. Unless a demand or claim under this Guarantee is made,,,,,

on in writing on or before 08/07/2008 we shall be discharged from all liability under this Guarantee thereafter,,,,,

4. We, Bank Of India, Khajrana Branch, further agree with the Authority that the Authority shall have the fullest liberty, without our consent and",,,,,

without affecting in any manner obligations here under, vary any of the terms and condition of the said agreement or to extend time of performance by",,,,,

the said contractor(s) from time to time or to postpone for any time or from time to time any of the powers exercisable by the Authority against the,,,,,

said Contractor(s) and to fore-bear or enforce any of the terms and conditions relating to the said Agreement and we shall not be relieved from our,,,,,

liabilities by reasons of any such variation of extension having granted to the said Contractor(s) for any forbearance act, or commission on the part of",,,,,

the Authority or any indulgence by the Authority of the said Contractor(s) or by any such matter or thing whatsoever which under the law relating to,,,,,

sureties would but for this provision have effect of so relieving us.,,,,,

5. We, Bank Of India, Khajrana Branch, hereby also undertake to have the signature of Branch Manager issuing the Bank Guarantee verified from the",,,,,

local branch of the Bank in M.P.,,,,,

6. We, Bank, Of India, Khajrana Branch, hereby unequivocally undertake that if the Authority invokes the Guarantee the Bank, Khajrana, will make",,,,,

the payment to the Authority without any reference and demure.,,,,,

7. We, Bank Of India, Khajrana Branch, lastly undertake not to revoke this Guarantee during its currency except with the previous consent of the",,,,,

Authority in writing.â??,,,,,

13. From the perusal of the aforesaid, it is clear that Bank Guarantee which was originally furnished by the petitioner was unconditional. The law on",,,,,

the subject is well settled. The Hon'ble Supreme Court has said that commitments of banks must be honoured free from interference by the Courts.,,,,,

An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with. In order to,,,,,

restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and",,,,,

there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the,,,,,

very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.,,,,,

Paras 53 to 55 of the law laid down in the case of U. P. Cooperative Federation Ltd. Versus Singh Consultants and Engineers (P.) Ltd, are relevant",,,,,

which reads as under:-,,,,,

53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of the",,,,,

banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since",,,,,

the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should",,,,,

not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before",,,,,

declining to pay. The nature of the fraud that the courts talk about is fraud of an 'egregious nature as to vitiate the entire",,,,,

underlying transaction". It is the fraud of the beneficiary, not fraud of somebody else. If the bank detects with a minimal investigation the fraudulent",,,,,

action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult",,,,,

for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach",,,,,

the court for an injunction.,,,,,

54. The court, however, should not lightly interfere with the operation of an irrevocable documentary credit. In order to restrain the operation",,,,,

of an irrevocable letter of credit, performance bond or guarantee, there should be a serious dispute to be tried and there should be a good",,,,,

prima facie acts of fraud. As Sir John Donaldson, M. r. said in Bolivinter Oil SA v. Chase Manhattan Bank.",,,,,

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." "" ,,,,,

55. From the above discussion, what appears to me is this: The sound banking
system may, however, require more caution in the issuance of" ,,,,,

irrevocable documentary credits. It would be for the banks to safeguard
themselves by other means and generally not for the court to come to their ,,,,,

rescue with injunctions unless there is established fraud. In the result, this
appeal must be allowed. The judgment and order of the Allahabad High" ,,,,,

Court dated February 20, 1987 must be set aside and the order of learned Civil
Judge, Lucknow dated August 8, 1986 restored.â??" ,,,,,

14. From the aforesaid, we are of the view that the petitioner has not fulfilled the
responsibility regarding the performance of the work carried out by it" ,,,,,

for the period of two years i.e. from 30th December, 2006 to 29th December,
2008 (24 months)." ,,,,,

15. From the record it is also clear that the petitioner was notified defects and
deficiencies by the respondents as regards the maintenance of roads of ,,,,,

package No.3904 from time to time but despite receipt of notices, the petitioner
failed to carry out all necessary repairs within 15 days from the" ,,,,,

receipts of communication from the Engineer in charge of the respondent
No.1. ,,,,,

16. The jurisdiction of this Court under Section 19 of the M.P. Madhyastham
Adhikaran Adhiniyam, 1983 is limited. This Court cannot exercise the" ,,,,,

powers of Appellate Court. Findings recorded by the Tribunal are neither perverse
nor illegal. In revision findings of fact cannot be interfered, though" ,,,,,

different view may be possible. The Tribunal has not misconducted itself or the
proceedings. ,,,,,

17. On due consideration of the aforesaid and the law laid down by the Apex
Court in respect of encashment of unconditional and unequivocal bank ,,,,,

guarantee, no case is made out to interfere with the impugned order. 18.
Consequently, Arbitration Revision No.3/2018 and Arbitration Revision" ,,,,,

No.4/2018 are, accordingly, dismissed but without any order as to costs." ,,,,,

A copy of this order be retained in A. R. No.4 of 2018. ,,,,,