

(1996) 08 DEL CK 0030

In the Delhi High Court

Case No : First Appeal No. 274 of 1996

National Building Corporation Ltd.

APPELLANT

Vs

GEC Alsthom HVDC India Ltd.

RESPONDENT

Date of Decision : 30-08-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1996) 4 AD 789 : (1996) 2 BC 285 : (1997) 70 DLT 267 : (1996) 38 DRJ 753

Hon'ble Judges : S.N. Kapoor, J;R.C. Lahoti, J

Bench : Division Bench

Advocate : Altaf Ahmed, Ravindra Kumar, D.A. Dave and Shishir Sharma, for the Appellant;

Judgement

S.N. Kapoor, J.

(1) This Fao is directed against an order dismissing is 1758/96 in Suit No. 442/96. This is was filed to seek injunction restraining the defendant/respondent No.1 from invoking and encashing the two bank guarantees furnished by the defendant/respondent No.2, State Bank of Patiala.

(2) The respondent/defendant No.1 accepted tenders of the plaintiff along with respondent No.2 M/s Damodar Tech. International Pvt. Ltd. for the construction of its Bhadravati project awarded to the defendant/respondent No.1 by M/s Power Grid Corporation (India) Ltd. The plaintiff/appellant were awarded civil engineering and building works while the electrical and mechanical works were to be performed by the said Damodar Tech. International Pvt. Ltd. The contract was signed and executed on 17th February 1995 between defendant/respondent No.1 on the one hand and the plaintiff/respondent No.3 on the other. The defendant/respondent No.1 have issued letter of intent dated 29th December 1984. The scheduled date of start of work was 1st January 1995 and work was scheduled for completion to reach 15th November 1996. There were different dates for different sections. The construction work was to be completed by 31st March

1996. Section I was to be completed on 15th September 1995; section 2 by 27th October 1995; section 3 by 15th December 1995 and section 4 by 31st March 1996. And the whole of the work was to be completed by 15th November 1996. These scheduled dates were required and could be rescheduled in the event of certain contingencies.

(3) According to the plaintiff/appellant, the entire delay was caused on account of delayed instructions by the defendant/respondent Ho.I. The defendants just in order to save their own skin invoked two bank guarantees on 13th January 1996, gave 14 days notice pursuant to clause 3.1 of the contract. However, they actually entered the site on 2nd February 1996 though the validity of the said legal notice lapsed both by way of lapse of time and conduct of the defendant/respondent No.1 as they continued to take work right up to 2nd February 1996 itself. Even as late as 2nd February 1996, the plaintiff was called upon to submit their programme for the next three months. They got the bank guarantees renewed and delivered on 2nd February 1996 itself before actually determining the contract. The defendant/respondent No.1 with fraudulent intention, caused and encouraged the plaintiff/appellant to invest and spend substantial amounts of money during the period of notice and after lapse of that period, till 2nd February 1996 without even clearing their running account bills during this period.

(4) Out of the two bank guarantees, one related to contract performance guarantee and the other was advance payment guarantee. According to the case of the appellant/ plaintiff, the bank guarantee in respect of advance payment lapsed on 25th January 1996 while the performance guarantee also lapsed and that was also got renewed. The bank guarantees were extended on the basis that there was no valid invocation of the two expired bank guarantees. The said performance guarantee was given in respect of 10% of the value of the contract and the value of the contract was Rs.10,62,15,765.00 as represented but actually identified to the tune of Rs.8,88,55,765.00 . The advance payment bank guarantee related to the advance of Rs.1,06,21,577.00 . A sum of Rs.43,13,393.00 had already been recovered earlier. Thus, leaving only a sum of Rs.63,08,223.00 as outstanding against the appellant at the time of invoking the bank guarantee. According to the appellant, these two bank guarantees could be invoked on 13th January 1996 only in respect of Rs.88,85,57j6.00 plus 73,08,223.00 at the most. Though Shri Altaf Ahmad further disputed invocation of the bank guarantee in respect of two advances which were said to be ultra virus the contract. The next limb of the argument was that on 31st January 1996. an interim certificate No.5 was issued by the engineer of the defendant/respondent No.1 which indicated that an amount of Rs.1,25,18,230.00 was payable to the appellant/plaintiff on the basis of this interim certificate after deduction of advance payment at the rate of 10% i.e. Rs.43,13,354.00 as also 5% retention retained by the employer. Consequently, the advance payment guarantee amount of R-1,06,21,577 stood reduced to a value of Rs.63,08,223.00 The invocation of this advance payment bank guarantee for a sum of Rs.8() lacs

was thus vitiated on this account also. The defendant/respondent fraudulently obtained performance guarantee of Rs-1.06 crores instead of Rs-88,85,576. In the memo of appeal, various details have been given to indicate how more than the amount claimed by the respondent No.1 by invoking two bank guarantees, had already been adjusted. The respondent No.1 have wrongly and prematurely invoked two bank guarantees.

(5) The learned counsel for the respondent also referred to U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, , Svenska Handelsbanken Vs. Mis Indian Charge Chrome & ors., (1994) I Scc 502 and General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, . It is not necessary to deal with all these authorities individually as the latest judgment of the Supreme Court has very succinctly dealt with and laid down law on the, point in Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, as under:

"BEFORE we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforce ment of a bank guarantee/irrevocable letter of credit. After survey of the earlier decision of this Court in United Commercial Bank v. Bank of India, Up Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd., General Electric Technical Services Co. Inc. v. Punj Songs (P) Lid. and the decision of the Court of Appeal in England in Elian and Rabbath v. Mulsas and Matsas and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome, laid down the law thus (SCCp.523-27, paras 60-72) ...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud... ...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms... ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

(6) Shri Altaf Ahmad, the learned senior counsel and Additional Solicitor General appearing on behalf of the plaintiff/appellant has been very fair in putting forth his legal propositions. He has very fairly conceded that the injunction against the enforcement of bank guarantee was not to be granted on the general principles of injunction but special considerations have to be kept in view .The injunction could be granted only in cases of fraud committed by the beneficiary of the bank guarantees or irretrievable injustice or on the ground of special equities. The fraud in relation to underlying contract was not required to be seen in this respect. The concerned bank was also not concerned with the subsequent events indicating an unjustified invocation of bank guarantee. But he submitted that the

court must look into the subsequent event also and then consider whether in the light of subsequent events, it would cause irretrievable injustice to the plaintiff/appellant specially on account of special equities in the present case.

(7) The sum and substance of the contention of the learned counsel for the respondent Mr Dushyant Dave was that once a bank guarantee was invoked, the subsequent events could not be seen by the banker and banker was not concerned with the underlying contract also. The amount which was said to have been recovered was actually not recovered in View of the clause 63.3 of the Conditions of Contract which reads as under:

"63.3 If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay to the Contractor any further amount (including damages) in respect of the Contract until the expiration of the Defects Liability Period and thereafter until the costs of execution) completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly."

(8) As the employer defendant/respondent No.1 was not liable to pay to the plaintiff/ appellant, any further amount in respect of contract until the expiration of the defects period or liability period, the amount could not said to have been recovered for the amount is not payable at the moment. Both the parties' counsel have taken us through running bills No. 1 to 5.

(9) The learned counsel for the respondent filed the following statement indicating that special advances given by the defendant/respondent had already been adjusted in respect of first four items but the amount was not recovered in respect of latter three advances mentioned as items No.5,6 & 7: Special ADVANCES/LOANS Made By Defendant NO.1

Sr.No.	Date	Subject	Amount in References
1.	15/17.6.95	Special Advance. Nbcc in urgent need of funds. Nbcc letter Attached	25,00,000
2.	15.6.95	Special Advance. Ad-hoc payment	25,00,000
3.	10.11.95	Special Advance. Nbcc 20,00,000 cash flow problem. Recovered	20,00,000
4.	28.11.95	Special Advance. 19,77,400	19,77,400
5.	28.10.95	Special Advance. Requested progress payment for	20,00,000
6.	6.12.95	Special Advance. Repayment to	20,00,000

Recovery details:
1. Recovered against bill No. 2.
2. Recovered against Bill No.3.
3. Recovered against Bill No.4.
4. Recovered against Bill No.4.
5. Not RECOVERED.
6. Recovered against Bill No.4.

Plaintiff's claim: 1.1.96 Requested payments Nbcc letter for aluminium sheeting 1.1.96 Recovered against Bill No.4 . 5. . 28.10.95 Special Advance. 20,00,000 Requested progress payment for See Reply Structural Steel work. Docs p312 Not RECOVERED. 6. 6.12.95 Special Advance. Repayment to 20,00,000 Defendant No.3 of Defendant Sec Reply No.3's Temporary Loan to the Does p312 plaintiff.

Not Recovered 7. 7.8.95) Temporary Loan for purchase of 39,00,000 8.9.95) concrete pump to back-up See Reply 26.9.95) unreliable unit on site. Docs p191. Not Recovered See also Attached Invoices.

(10) After going through the various documents shown by both the parties, it has become apparent that a sum of Rs.79 lacs was adjusted in the running account Bill No.5 and this is apparent from Annexures B & C at p.90 and 91 of the para read with further statement of special advances and loans made by defendant No. 1 at p.96 Annexure B at p.99-A and these are the documents of the defendant/respondent. It is also apparent that the account of special advance of Rs.20 lacs which was said to have not been recovered, has already been recovered vide 4th running bill dated 22nd November 1995. Therefore, at least this amount was not due on 13th January 1996.

(11) As regards other two advances of Rs.20 lacs and Rs.39 lacs, the plea of Shri Altaf Ahmad, learned counsel for the appellant was that these advances had nothing to do with the bank guarantee of mobilisation advance for these advances did not relate to the contract and they were outside the main contract and invocation of bank guarantee was not justified in this regard. In this regard, Shri Altaf Ahmad also referred to a letter dated 7th July 1995 relating to advance payment for purchasing spare parts for concrete pump. He referred to a note thereon indicating that the respondent/ defendant had no obligation to make any advance payments and certainly not for plant which was covered in the preliminaries. On this basis, he submitted that this position was accepted by the defendant/respondent though this above objection was over-ruled and the advance was given. An advance of Rs.39 lacs was given in this regard (Rs.10 lacs on 5th August, Rs.26 lacs on 8th September and Rs.3 lacs on 22nd September and the other advance of Rs.20 lacs related to structural steel work

(12) We could not persuade ourselves to accept the contention of the learned counsel for the appellant for these special advances were given to ensure timely performance of the contract and they were not given in connection with something which had no relation at all with the performance of the contract. As such, this plea has to be rejected.

(13) As regards the next argument that this amount also stood adjusted by the 5th running bill, it was contended that the 5th running bill had not become due for it related to a period up to 19th January 1996 and the employer terminated the contract illegally on 2nd February 1996. A reading of the clause 63.3 of the contract no doubt prohibits payment after termination. But the bill was certified on 31st January 1996 and as the same was certified for payment before actual termination on 2nd February 1996, neither clause 63.2 would be applicable, nor clause 63.3 of the contract would be attracted to the bill. Consequently, the amount of Rs.79 lacs which appears to have been adjusted in the certificate up to 31st January 1996 should be deemed to have been recovered byway of adjustment. It may further be mentioned that after adjusting this amount according to the bill certified by the Engineer of the defendant/respondent, a

sum of Rs.1,06,21,577.00 had further accrued in favor of the plaintiff/appellant.

(14) Like every other contract relating to letter of credit or bank guarantee, the two contracts of bank guarantees in the instant case are trilateral contracts between the bank who furnished the bank guarantees, the beneficiary of the bank guarantees and the plaintiff/appellant who furnished the bank guarantees. As mentioned earlier, these bank guarantees are of two different characters. One is the performance guarantee and the other Advance Payment Guarantee. So far as performance bank guarantee is concerned, at this stage, we are not supposed to go into the question relating to faithful performance of the contract by the plaintiff/appellant. though much could be argued by both sides, for this would require virtual trial and as such must await till the conclusion of the trial.

(15) Though invocation of advance payment guarantee related and confined to advance payments made to the appellant could be justified on 13th January 1996 in the light of the terms of the advance payment guarantee, yet in view of subsequent recovery made by adjustment, special equities having accrued in favour of the appellant.

(16) Advance payment guarantee was invoked for a sum of Rs.80,14,000.00 on 13-1-1996. Thereafter it had already been shown that Rs.20 lacs had been recovered vide Running Account Bill No.4. Running Account Bill No.5 indicated that apart from recovery of advance of gross valuation amounting to Rs.43,13,353.00 following amounts have been adjusted against the bill No.5:-

"1.Unrecovered Mobilisation Advance (Total Advance Rs.1,06)621,577.00 less Recovered Advance Rs.43,13,353) - Rs.63,08,223.00 2. Temporary Loan for concrete pump (7.8.95/8.9.95/26.9.95) - Rs.39,00,000.00 3. Special Advance (28.10.95) for 20,00,000 Structural Steel Work -Rs.20,00,000.00 4. Special Advance (6.12.95) or repayment to defendant No.3 of Temporary loan made by defendant No.3 to plaintiff Rs.20,00,000.00 Thus the recovery of Rs.20 lacs as per Running Bill No.4 is virtually admitted and unrecovered mobilisation advance of Rs.63,8223.00 . Temporary loan for concrete pump amounting to Rs.39,00,000.00 ; Special Advance of Rs.20,00,000.00 ; and another Special Advance of Rs.20,00,000.00 for structural steel works also stood adjusted. Thus it is apparent that they have recovered entire amount of advances made."

(17) It would appear that it would lead to irretrievable injustice to allow the encashment of the said bank guarantee, in respect of recovered or adjusted amount.

(18) It is notable that the respondent No.1 has filed an affidavit claiming that the advance payment guarantee was invoked for a sum of Rs.80,14,000.00 , while the performance guarantee was invoked for a sum of Rs-1,06,21,577. This is supported by the letters addressed to State Bank of Patiala dated 13th January at p.396-397 of the documents filed by the defendant. But both the parties have given their own value of the contract for the purpose of invoking performance guarantee. In order to ascertain the value of the contract, one has again to look

at the evidence of both the parties. It is a disputed question of fact which must await trial of the case. Consequently, we feel that it would not be proper for us to go into this question at this stage.

(19) Besides, we will have to keep in mind the distinction between Advance Payment Guarantee and Performance Guarantee. Advance Payment Guarantee covers a specified amount given as advance. In performance guarantee, the amount of compensation/damages is dependent on certain contingencies of noticing the loss and ascertaining the amount of compensation for the defect found in defect liability period and is thus unascertained though compensation/damages for loss is covered only to a limited extent. Purpose of Advance Payment Guarantee is over, the moment amount is recovered, or adjusted and it ceases to be operative. The performance guarantee does not cease to be operative immediately for it depends on contingencies which may happen in a specified future defect liability period.

(20) Even after ignoring the contention of the learned counsel for the appellant about the performance guarantee of a sum equal to 10% of the total value of the contract, one question still stares at us, for a just and equitable answer whether the respondent No.1 should be allowed to take triple advantage, firstly by adjusting the amount of all advances; secondly by retaining over Rs. two crores as per appellant's versions, and over Rs.1.25 crores as we have observed, and thirdly, by encashing advance payment bank guarantee. The unpaid amount of a bill certified on 31st January 1996 by the Engineer of the defendant/respondent No.1 amounts to Rs.1,25,18,230.00 for the work done till 19th January 1996. Had this bill been certified after actual termination on 2nd February 1996 clause 63.3 of the contract would have been attracted and one could say that the amount was not payable "until the expiration of the defendant's liability proved and thereafter until costs of execution, completion and remedying of any defect, damages for delay incompletion (if any) and all other expenses incurred by the employer have been ascertained and the amount thereof certified by the Engineer...". According to the appellant, a sum of Rs.202,54,465.15P. had become due. But claims under numbers 2 to 5 at p.107 have not been certified. Therefore, we are not taking them into consideration. In none of the cases referred to by the learned counsel for the respondent there was any certification similar to the certificate given by the Engineer of the beneficiary of the bank guarantee showing recoveries/ adjustment of the amount of advance given and still leaving the payable amount to the tune of over Rs.1,25,58,230.00 . The moment we take into consideration Vth running bill certified by the Engineer of the defendant, special equities as well as terms of Bank Guarantees require that Advance Payment Bank Guarantees should not be allowed to be encashed by the defendant/respondent No.1. In such circumstances, to allow encashment of the Advance Payment Bank Guarantee would not be justified.

(21) In L& T Vs. Maharashtra State Electricity Board (supra), in similar circumstances the Supreme Court issued an order of injunction for restraining

encashment of one of the five bank guarantees.

(22) Therefore, we are of the opinion that scanner as the performance guarantee is concerned, this case does not appear to be a case of irretrievable injustice and the appellant could have other remedies. But we are of the definite opinion that the advance payment guarantee should not be allowed to be encased in the aforesaid circumstances.

(23) In view of the foregoing, we accept the appeal only partly and restrain the respondent No.1 & 2 from encashing the advance payment bank guarantee SBP/KGM/173/94-95.

(24) Parties are left to bear their own costs.