

(2020) 11 DEL CK 0159

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 128 Of 2020

United Construction

APPELLANT

Vs

Union Of India Through Dte. Gen Md ACCN Project & Anr

RESPONDENT

Date of Decision : 23-11-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2020) 11 DEL CK 0159

Hon'ble Judges : Manmohan, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Vadlamani Seshagiri, Basit K.Zaidi, Nikhil Goel, Vinay Mathewa, Amol Sharma

Final Decision : Dismissed

Judgement

,,,,

Manmohan, J",,,,,

CM APPL. 26374-26375/2020,,,,

Allowed, subject to just exceptions.",,,,

FAO(OS) (COMM) 128/2020,,,,

1. Present appeal has been filed challenging the impugned order dated 14th September, 2020 passed by the learned single Judge in OMP(I)(Comm.)",,,,,

No. 280 of 2020 whereby the appellant's petition under Section 9 of the Arbitration and Conciliation Act, 1996 inter alia seeking an injunction to",,,,,

restrain the respondent no.1 from encashing the bank guarantees amounting to Rs. 4,59,01,450/- issued by HDFC Bank was dismissed. Appellant in",,,,,

the present appeal also seeks a direction to respondent no.1 to deposit the Bank Guarantee amounts received by it with respondent no.2 and or with",,,,,

the Registrar of the Delhi High Court with liberty to the appellant to withdraw the same against furnishing a solvent security.,,,,

2. Learned counsel for appellant submitted that the learned single Judge had failed to appreciate that the Bank Guarantees in question were conditional.,,,, guarantees and not unconditional guarantees.,,,,

3. He contended that the bank guarantees had been encashed by the respondent vide invocation letter dated 09th September, 2020 without adhering to",,,,

the terms of the Bank Guarantees. Consequently, according to him, the bank guarantees had been illegally encashed. In support of his contention, he",,,,

relied upon the judgment of the Supreme Court in Hindustan Construction Company Ltd. Vs. State of Bihar & Ors., (1999) 8 SCC 436 and the",,,,

judgment of the Division Bench of this Court in Indu Projects Ltd. Vs. Union of India, (2013) 204 DLT 600 (DB). The relevant portion of the Division",,,,

Bench's judgment in Indu Projects Ltd. (supra) relied upon by learned counsel for the appellant is reproduced hereinbelow:-",,,,

6. On going through the clauses of the bank guarantee, it is evident that the bank guarantee was in terms unconditional. The",,,,

requirement under the bank guarantee was that on a demand made from the Government stating that the amount claimed was due by way of",,,,

loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the contractor (the appellant",,,,

herein) of any of the terms or conditions contained in the agreement (underlying agreement) or by reason of the contractor's failure to",,,,

perform the said agreement, the bank would pay the amount due and payable under the guarantee without demur. While Mr Dave",,,,

has pointed out that no amount of loss or damage has been quantified, it is evident that the said clause is divided into two parts. One is",,,,

where the Government has incurred loss or damage and the other being where it is likely to incur loss or damage by reason of breach of the",,,,

contract by the contractor. In the present case, the invocation as it was initially set up on 07.08.2013 was, to our minds, deficient inasmuch",,,,

as it had not been stated that there was a likelihood of loss or damage. That deficiency was corrected by the subsequent invocation dated",,,,

23.10.2013 which was an invocation in supersession of the earlier invocation letter dated 07.08.2013. In the letter dated 23.10.2013, it has",,,,

been categorically stated that there has been a breach by the contractor of the terms and conditions of the agreement and by virtue of such,,,,

breach there would be loss/damage caused to the Government, which in the estimate of HQ DG MAP, would exceed the value of the bank",,,,,

guarantee. As such, in our view, the invocation of the bank guarantee is in terms of the second limb of the bank guarantee where it was not",,,,,

at all necessary to quantify the amount of the loss and damage and only upon the respondent indicating that there would be loss or damage,,,,

to be suffered by the Government on account of the breach of contract by the appellant, the bank was liable to pay under the bank",,,,,

guarantee without any demur merely on demand. We may also point out that clause (2) of the bank guarantee also contains the condition,,,,

that "any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this",,,,,

guarantee". Therefore, it is evident that the bank guarantee was clearly unconditional and the bank had to pay without demur on",,,,,

invocation being made in terms of the bank guarantee. We have already taken the view that the invocation was in terms of the bank,,,,

guarantee and, therefore, no injunction against the encashment of the bank guarantee could be granted."",,,,,

4. He also contended that the invocation of the Bank Guarantees in the present case had resulted in grave and irreparable injury to the appellant",,,,,

particularly since 99.25% (ninety nine point twenty five per cent) of the Project Work had been completed, despite the appellant being prevented /",,,,,

obstructed by respondent no.1 on account of a variety of acts and omissions including, inter alia delayed decisions, delayed interim payments, wrong",,,,,

selection or product (internal and external PE-AL-PE plumbing pipe), delayed handing over of work etc. Further, according to him, the appellant had",,,,,

completed the blocks and offered to the respondent for possession, however, the respondent delayed in taking possession of the same on some pretext",,,,,

or the other. In support of his contention, learned counsel for the appellant relied upon appellant's letter dated 4th August, 2016, which reads as",,,,,

under:-,,,,

"Ref. No. UC/MAP/Delhi/149/16 Dated 04/08/2016",,,,,

To",,,,,

The Director (Contracts),,,,,

Dte. Gen. Md Accn Project," ,,,,

E-in Câ??s Branch,,,,,

Integrated HQ MoD (Army),,,,,

Kashmir House, Rajaji Marg," ,,,,

New Delhi â?" 110011,,,,,

Ref. â?" CA NO. DG MAP/DELHI/BP/PHASE-1/T-1A-01 OF 2007-2007-2008:
PROVISION OF MARRIED ACCOMMODATION FOR,,,,,

MAJOR 192 DUs (PART-I) INCLUDING ALLIED EXTERNAL SERVICES WITH
SOURCE DEVELOPMENT AT BAIRD PLACE, DELHI" ,,,,

Sub.: - Release of BGB of performance security R/Sir," ,,,,

This is regarding the above subject work. We here to inform to your goodself that
out of six block in Baird place, 4 (four) Blocks are" ,,,,

completed on the following dates. Block No. P-54/P-55 â?" Aug 2010 / Mar 2011
respectively, Block No. P-53 â?" May 2014 & Block No." ,,,,

P-52 â?" Jan 2015 the blocks were occupied on the above dates. The defect
liability period as per contract is two years. According to the ,,,,

above said dates the DLP (Defect Liability Period) period is also lapsed. ,,,,

We have changed the internal PLPEPL pipes to GI pipes in all the six blocks
except servant qtr. We had spendend huge amount to change ,,,,

these pipes i.e. Rs. 1.5 to Rs.1.75 Cr. With ourselves. We are facing financial
hardship as you well know. Every month we are paying ,,,,

approximately Rs. 1.0 Lacs to extend this BG of Rs. 2.24 Cr. ,,,,

We are requesting to your goodself that kindly release our BG of four blocks. We
will submit the fresh BG for 2 Blocks if you allow us. We ,,,,

hereby submitting the partial completion certificate which was issued to us by
the Project Manger (W) in March 2016. ,,,,

We are requesting kindly release the BGB, of four blocks we are facing financial
hardship, due to that the progress of our another project" ,,,,

is also affected. Kindly take up our case on humanitarian grounds. From last
4½ years we have not received any payment from this ,,,,

project. Its great help for us. ,,,,

Thanking you & assuring you our best services at all time. ,,,,

For United Constructions,,,,,

Sd/-,,,,,

Encl: Completion Certificate issued by P.M.,,,,,

Copy to : DDG (Team â??Bâ??)â??,,,,,

5. He submitted that till the claims of the respondent no.1 were crystallised or adjudicated upon, the respondent no.1 could not have encashed the",,,,,

Bank Guarantees. He stated that the learned Single Judge failed to appreciate that the Agreement had been wrongly terminated and the invocation of,,,,,

the Bank Guarantees were illegal, untenable in fact, contract and law as well as violative of the principles of natural justice and promissory estoppel.",,,,,

COURTâ??S REASONING,,,,,

BANK GUARANTEES IN QUESTION ARE UNCONDITIONAL, UNQUALIFIED AND UNEQUIVOCAL AS THEY INCORPORATE A",,,,,

CONCLUSIVE EVIDENCE CLAUSE. THE MANIFEST OBJECT OF CONCLUSIVE EVIDENCE CLAUSES IS TO PROVIDE A READY MEANS,,,,,

OF ESTABLISHING THE EXISTENCE AND AMOUNT OF THE GUARANTEED DEBT AND AVOIDING AN ENQUIRY UPON LEGAL,,,,,

EVIDENCE INTO THE DEBITS GOING TO MAKE UP THE INDEBTEDNESS,,,,,

6. Having heard learned counsel for the appellant, this Court is of the view that it is essential to first determine as to whether the five bank guarantees",,,,,

in question are unconditional or not. The relevant common term in the five bank guarantees is reproduced hereinbelow:-,,,,,

â??2. We, Centurion Bank of Punjab Ltd. do hereby undertake to pay the amounts due and payable under this guarantee without any",,,,,

demur, merely on a demand from the government stating that the amount claimed is due by way of loss or damage caused to or would be",,,,,

caused to or suffered by the government by reason of any breach by the said contractor of any of the terms or conditions contained in the,,,,,

said agreement or by reason of the contractor failure to perform the said agreement any such demand made on the bank shall be conclusive,,,,,

as regards the amount due and payable by the bank under this guarantee. However, our liability this guarantee shall be restricted to an",,,,,

amount not exceeding Rs. 2,24,01,450/- (Rs. Two crores Twenty four lakhs one thousand four hundred and fifty only).",,,,,

(emphasis supplied),,,,

7. From the aforesaid, it is apparent that the bank guarantees in question are unconditional, unqualified and unequivocal because they incorporate a",,,,

conclusive evidence clause inasmuch as the bank is liable to pay, without any demur, merely on a demand from the Government stating that the",,,,

amount claimed is due by way of loss or damage caused by the contractor i.e. appellant and such a demand â??shall beâ?? conclusive on the bank.,,,,

8. This Court is of the view that the manifest object of conclusive evidence clauses is to provide a ready means of establishing the existence and,,,

amount of the guaranteed debt and avoiding an enquiry upon legal evidence into the debits going to make up the indebtedness.,,,,

THE ENCASHMENT LETTER IN THE PRESENT CASE IS IN ACCORD WITH THE TERMS OF THE BANK GUARANTEES. LETTER OF,,,

ENCASHMENT OF BANK GAURANTEE IS NOT TO BE READ LIKE A PLAINT OR A STATUTE.,,,,

9. The relevant portion of the letter of encashment dated 9th September, 2020, in the present case, is reproduced hereinbelow:-",,,,

â??B2B/MAP/DELHI/BP/T-A/1670/EB Dated 09.09.2020,,,

HDFC bank Ltd,,,

Plot No. 5, Community Centre",,,,

Garg Plaza, Sector-OB; Rohini",,,,

New Delhi â?" 110085,,,

CA NO, DG MAP/DELHI/BP/PH-1/I-2A/OF 2007-2008 PROVISION OF MARRIED ACCOMMODATION FOR MAJOR 192 DLIS (PART-I)",,,,

INCLUDING ALLIED EXTERNAL SERVICES WITH SOUCE DEVELOPMENT AT BAIRD PALCE, DELHI M/S UNITED CONSTRUCTIONS",,,,

Dear sir(s)",,,,

1. Reference HQ letter No. 81830/MAP/BP/T-1A/1639/ED dated 05.05.2020.,,,,

2. WHEREAS your branch has furnished the following Bank Guarantee Bonds against CA no. DG MAP/DELHI/BP/PH-1/T-IA/DI OF 2007-,,,,

2008 made between the president of India and M/S United Construction H-6/301, 305 Aggarwal Tower, Netaji Subhash Place, Distt. Centre",,,,

Wazirpur Delhi- 110088,,,

Sl No.,Bank Guarantee Bond No. And Date,Amount In Rs.,Valid Up to,Remarks

1.,"003GT0108300060 0 dated 07.03.2008

(old BGB no 1239GT00000408 issued by

centurion Bank Of Punjab Ltd)","2,24,01,450.00",02.02.2021,Performance security

2.,"BGB no. (003GT020B3000760 date

09.7.2008 (old BGD

no.1239GTE000013DB)","d20,00,000.00",31.12.2020,"Recep(cid:50)on money against weak done

3.,"BGB no. (103G102091740001 dated

23.06.2010","75,00,000.00",31.12.2020,"Recep(cid:50)on money against material lying at

site

4.,"BGB no.DO3GT0201008 20026 Date

23.03.2010","d1,00,00,000.00",31.12.2020,"Recep(cid:50)on money against work done &

material lying at site.

5.,"BGD no. 003GT02110B00001 Date

21.03.2011","d4,00,00,000.00",31.12.2020,

Total = 4,59,01,450.00",,,,,

Furthermore, from the extract referred to above, the Supreme Court was of the view that the bank guarantee in that case was not",,,,,

unconditional or unequivocal in terms so that the beneficiary could be said to have had an unfettered right to invoke the guarantee and",,,,,

demand payment from the bank. The facts of present case are entirely different as the bank guarantee is unconditional and unequivocal.,,,,,

We also note that in Hindustan Construction Co. Ltd. (supra) in paragraph 10 thereof the Supreme Court has clearly noted that in that case,",,,,

the whole matter could be disposed of purely on the basis of the ""terms of the bank guarantee"". We also note that the invocation itself was",,,,,

also bad because it was invoked by a wrong person as observed by the Supreme Court in paragraph 21 of the said decision which reads as",,,,,

under:-",,,,,

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.",,,,,

In view of the foregoing discussion we do not see any reason to interfere with the impugned orders except to delete the order of costs and,,,,,

observations made with regard to the counsel.â??",,,,,

(emphasis supplied),,,,,

13. Consequently, neither the Supreme Court judgment in Hindustan Construction Company Ltd. Vs. State of Bihar (supra) nor the Division Bench",,,,,

judgment of this Court in M/s. Indu Projects Ltd. vs. Union of India (supra) offer any assistance to the appellant.,,,,,

14. This Court is of the view that one must not forget that one is dealing with a commercial transaction between commercial parties, who may or may",,,,,

not be well versed with intricacies of law. Accordingly, the letter of encashment of bank guarantee is not to be read like a Plaint or a Statute.",,,,,

Moreover, one must not lose sight of the larger objective that commitments of banks must be honoured free from interference by the courts, as",,,,,

otherwise, trust in commerce internal and international would be irreparably damaged.",,,,,

ENCASHMENT OF BANK GUARANTEE CAN BE STAYED ON TWO GROUNDS ONLY NAMELY, FRAUD AND IRRETRIEVABLE",,,,,

INJUSTICE/INJURY. NONE OF THE SAID GROUNDS FOR ENCASHMENT OF BANK GAURANTEE ARE MADE OUT IN THE PRESENT,,,,,

CASE.,,,,,

15. In the opinion of this Court, encashment of bank guarantee can be stayed on two grounds only namely, fraud and irretrievable injustice/injury. In",,,,,

Andhra Pradesh Pollution Control Board vs. CCL Products (India) Limited, 2019 SCC OnLine SC 985, the Supreme Court has held as under:-",,,,,

23. The settled legal position which has emerged from the precedents of this Court is that absent a case of fraud, irretrievable injustice and",,,,

special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in",,,,

terms of the bank guarantee.,,,,

(emphasis supplied),,,,

16. As far as the concept of irretrievable injustice and injury is concerned, the Supreme court in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy",,,,

Engineering Works (P) Ltd. & Anr., (1997) 6 SCC 450 has held as under:-",,,,

â??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.â??"",,,,

(emphasis supplied),,,,

17. The nature of fraud on the basis of which an encashment of bank guarantee can be stayed is fraud of an egregious nature. It should be a fraud",,,,

which the bank can detect with minimal investigation.,,,,

THE UNDERLYING CONTRACT IS INDEPENDENT FROM THE BANK GUARANTEE ISSUED BY THE BANK. CONSEQUENTLY, AT THE",,,,

BEHEST OF A CONTRACTOR I.E. THE APPELLANT, THE COURT CANNOT EXAMINE THE TERMS OF THE UNDERLYING AGREEMENT",,,,

AND DECIDE DISPUTES BETWEEN THE CONTRACTOR AND BENEFICIARY IN A SUIT SEEKING STAY OF ENCASHMENT OF BANK",,,,

GUARANTEES.,,,,

18. It has also been held in a catena of cases that the underlying contract is independent from the bank guarantee issued by the bank. The Supreme",,,,

Court in U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174 has held as under:-",,,,

â??19.Â?The plaintiffs appealed to the Court of Appeal in England. It was held by a Bench consisting of Lord Denning, M.R.",,,,

Browne and Geoffrey Lane, L.J. that a performance guarantee was similar to a

confirmed letter of credit. Where, therefore, a bank had",,,, given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party,,,, to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the,,,, underlying contract had been established and the bank had notice of the fraud. Accordingly, as the defendants' guarantee provided for",,,, payment on demand without proof or conditions, and was in the nature of a promissory note payable on demand, and the plaintiffs had not",,,, established fraud on the part of the buyers, the defendants were required to honour their guarantee on the demand made by the Libyan",,,, bank. It followed that the judge had been right to discharge the injunction and that the appeal would be dismissed.,,,,

xxx xxx xxx,,,

28. I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the",,,, decision that there should be a prima facie case. 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,,,, negatived and the fabric of trading operation will get jeopardised.,,,,

xxx xxx xxx,,,

34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise,",,,, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or,,,, in case of irretrievable injustice be done, the court should interfere.",,,,

xxx xxx xxx,,,

44. The modern documentary credit had its origin from letters of credit. We may, therefore, begin the discussion with the traditional letter of",,,, credit. Paul R. Verkuil in an article explains the salient features of a letter of credit in these terms:,,,,

â??The letter of credit is a contract. The issuing party â?" usually a bank â?" promises to pay the â??beneficiaryâ?? â?" traditionally a,,,

seller of goods â?" on demand if the beneficiary presents whatever documents may be required by the letter. They are normally the only two,,,

parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its",,,

own credit. The letter of credit thus evidences â?" irrevocable obligation to honour the draft presented by the beneficiary upon compliance,,,

with the terms of the credit.â?,,,

45.The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to",,,

determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any,,,

dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of",,,

absolute independence. The courts held that if there has been â??fraud in the transactionâ? the bank could dishonour beneficiary's",,,

demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.",,,

xxx xxx xxx,,,

49. This was also the view taken by this Court in United Commercial Bank case. There A.P. Sen. J. speaking for the Court, said (pages 323",,,

and 324): (SCC pp. 783-84, paras 40-42)",,,

â??. . the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between,,,

the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is",,,

subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.....",,,

xxx xxx xxx,,,

53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of 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 fraud of the beneficiary, not the 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.,,,,
(emphasis supplied),,,,

19. In *Standard Chartered Bank vs. Heavy Engineering Corporation Ltd. & Anr.*, 2019 SCC OnLine SC 1638, the Supreme Court reiterated the",,,,
aforesaid principle as under:-,,,

23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between",,,,
bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The",,,,
dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence.,,,,
There are, however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court",,,,
ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank",,,,
guarantee.,,,,
(emphasis supplied),,,,

20. Consequently, at the behest of a contractor i.e. the appellant, the Court cannot examine the terms of the underlying Agreement entered into",,,,
between the contractor and beneficiary to determine as to whether the respondent had delayed payments or delayed handing over of works or wrong",,,,
selection of product or that the appellant had completed 99.25% (ninety nine point twenty five per cent) of the projects or that the Agreement had",,,,

been wrongly/illegally terminated by respondent no.1.,,,,

21. The appellant's submission that till the claims of the respondent no.1 are crystallised or adjudicated upon, the respondent no.1 could not have",,,,

encashed the Bank Guarantees had found favour with a Division Bench of the Supreme Court in Gangotri Enterprises Limited vs. Union of India &,,,

Ors., (2016) 11 SCC 720. However, the said judgment of the Supreme Court has been declared per incuriam by the Apex Court in a subsequent",,,,

judgment in State of Gujarat Through Chief Secretary & Anr. vs. Amber Builders, (2020) 2 SCC 540.",,,,

22. Accordingly, none of the grounds for encashment of bank guarantees are made out in the present case.",,,,

23. Consequently, the present appeal is dismissed being bereft of merits.",,,,

24. The order be uploaded on the website forthwith.,,,,