

(2018) 05 DEL CK 0141

DELHI HIGH COURT

Case No: O.M.P.(I) (COMM.) 337 of 2016 & IA Nos. 10273 of 2016 & 11067 of 2017

JKM-NKC (JV)

APPELLANT

Vs

NATIONAL HIGHWAYS
AUTHORITY

RESPONDENT

Date of Decision: May 14, 2018

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9, 17
- Indian Contract Act, 1872 - Section 2(g)

Hon'ble Judges: VIBHU BAKHRU

Bench: Single Bench

Advocate: Tanmaya Mehta, Nitesh Jain, Abhinav Mukhi, Sandeep Sethi, S. K. Maniktala, Nikhil Ramdev

Final Decision: Dismissed

Judgement

S.

No.",Particulars,Purpose,Value (Rs.)

1.,"Bank Guarantee No. SBH â€

2034711BG000013

dated 02.09.2011. Issued by

State Bank of

Hyderabad", "Performance

Security", "20,02,99,377/-

2.,"Bank Guarantee No. SBI

0960111BG0000685

P960111BG0000685

dated 03.09.2011.

Issued by State Bank of

India","Performance

Security","13,35,32,918/-

3.,"Bank Guarantee No. SBH â€

2034711BG0000115

dated 02.09.2011. Issued by

State Bank of

Hyderabad","Additional

Performance

Security","3,00,44,906/-

4.,"Bank Guarantee No. SBH â€

2034711BG0000114

dated 03.09.2011. Issued by

State Bank of

Hyderabad","Additional

Performance

Security","2,00,29,938/-

5.,"Bank Guarantee

No.",Mobilization,"09,18,03,881/-

,"140GPGE140390001 dated

08.02.2014. Issued by Canara

Bank",Advance,

6.,"Bank Guarantee

No.

140GPGE140390003 dated

08.02.2014. Issued by Canara

Bank","Mobilization

Advance","09,18,03,881/-

7.,"Bank Guarantee

No.

140GPGE140390004 dated

08.02.2014. Issued by Canara

Bank","Mobilization

Advance","09,18,03,881/-

8.,"Bank Guarantee

No.

140GPGE140390005 dated

08.02.2014. Issued by Canara

Bank","Mobilization

Advance","09,18,03,881/-

,TOTAL,,,"75,11,22,663/-

12.Mr Tanmaya Mehta, learned counsel appearing for the petitioner contended that the Contract had stood frustrated as it was impossible to perform",,,

and, therefore, the parties were released and discharged all their contractual obligations in terms of Clause 66.1 of the Contract. He further argued",,,

that NHAI had played a fraud while awarding the Contract, as NHAI was fully aware that the Contract could not be executed due to the inherent",,,

defects in the conception of the Project and also because NHAI had not acquired adequate land for construction of the road.,,,

13.He submitted that NHAI was required to provide a total length of 25.187 kms within a period of 12 months from the commencement of the work,",,

however, even after five-and-a-half (5-1/2) years, NHAI was only been able to provide 11.667 kms of land and that also in 28 small non-contiguous",,,

stretches and, therefore, NHAI is in breach of the terms of the Contract.",,,

14.Mr Mehta also contended that the performance of the Contract had been frustrated due to several reasons including the topography of the place,,,

that did not permit construction of the road on the stretches as provided to the petitioner. This was due to percolation of the rain water down the hill,,,

slopes. He further submitted that the land was unsuitable and prone to landslides. He stated that the CRR I was appointed to examine the site, and the",,,

recommendations of the CRR I clearly substantiated that there were inherent flaws in the design of the Project.,,,

15.Mr Mehta relied on the decision of the Division Bench of this Court in Jainsons Clothing Corporation v. State Trading Corporation of India Ltd. and,,,

Anr.: 30 (1986) DLT 359 and on the strength of the said decision contended that if non-performance of a contract is the result of frustration, then it is",,,

not a case of nonperformance but a case in which the performance is excused by law. In such circumstances, bank guarantees cannot be invoked.",,,

Lastly, Mr Mehta submitted that based on the recommendations of the DRB, a sum of ₹33.5 crores was due to the petitioner. He referred to",,,

SubClause 67.1 of the Conditions of Particular Application (CoPA) and submitted that the recommendations of the DRB were binding till the,,,

conclusion of the arbitral proceedings. He submitted that, therefore, the petitioner was not entitled to invoking the BGs.",,,

16.Mr Sethi, learned counsel appearing on behalf of NHAI countered the submissions made on behalf of the petitioner. He submitted that the",,,

petitioner had repeatedly assured that the Contract would be completed but had failed to do so. He further submitted that the petitioner had completed,,,

only a miniscule part of the stretch of the road handed over to it. Mr Sethi also disputed the contention that the Contract was frustrated. He submitted,,,

that merely because the contractor discovers the execution of the Contract had become onerous, did not lead to the conclusion that it is impossible to",,,

perform. He further submitted that the petitioner"s reliance on the CRR I report to state that the Contract was impossible to perform cannot be,,,

accepted; as even after receiving the said report, the petitioner had held out assurances that it would complete the Contract. He referred to the",,,

petitioner"s letter dated 02.05.2016, whereby the petitioner had reiterated that it would complete the Project within two years time from 23.12.2015.",,,

He also referred to the letter dated 12.08.2016, whereby the petitioner had asked for additional costs for performance enhanced costs for",,,

performance of the Contract. Reasons and Conclusions,,,

17. The law relating to the bank guarantees is now well settled. The invocation of the bank guarantee cannot be interdicted except in exception,,,

circumstances such of egregious fraud which would result in irretrievable injustice. In Svenska Handelsbanken v. M/s Indian Charge Chrome and,,,

Others: (1994) 1 SCC 502, the Supreme Court had held that confirmed bank guarantees/irrevocable letters of credit cannot be interfered with unless",,,

there is fraud and irretrievable injustice involved in the case. The Court further observed that fraud has to be an established fraud. In Larsen & Tourbo,,,

Limited v. Maharashtra State Electricity Board and Others: (1995) 6 SCC 68, the Supreme Court referred to its earlier decision in Svenska",,,

Handelsbanken (supra) and held as under:-,,,

“5. 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 enforcement of a bank guarantee / irrevocable letter of credit. After survey of the,,,

earlier decisions of this Court in United Commercial Bank v Bank of India, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd.,",,,

General Electric Technical Services Co. Inc v Punj Sons (P) Ltd. and the decision of the Court of Appeal in Elan and Rabbath v Matsas,,,

and Matsas and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome [AIR 1994 SC 626], laid down the law",,,

thus: “...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.“““,,,

18. In U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.: (1988) 1 SCC 174, Justice Sabyasachi Mukherji referred to an",,,

earlier decision in United Commercial Bank v. Bank of India: AIR 1981 SC 1426 and held as under:- "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." Justice Jagannath Shetty in his concurring opinion further explained that: "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."

19.This Court is not persuaded to accept that in the present case the petitioner has established a case of an egregious fraud. In the present case, the",,,

only averment made by the petitioner in the petition in support of its allegation of fraud is regarding the fraudulent execution of the Contract by NHAI",,,

is set out below: "The Contract was executed concealing the material facts of non acquisition of complete site, land and defective faulty designs. It",,,

is submitted that the Respondent completely ignored and brushed aside all the representations of the Petitioner in this regard. It is further stated that",,,

the action of the Respondent in procuring the bank guarantees is fraudulent. The Respondent induced the petitioner to submit the bank guarantees on",,,

the basis of erroneous information and misrepresentations made under the contract."

20.In the additional affidavit filed on behalf of the petitioner, it has been further stated that "In view of the said change in the very nature and object",,,

of the project by the Respondent in the review meeting dated 07.02.2017, it is exceedingly clear that the respondent had played fraud over the",,,

Petitioner & that the present project so awarded to the Petitioner was in executable and impossible to perform in its form due to its inherent defects",,,

and further due to inordinate delays on part of the Respondent". However, the petitioner has also inserted a hand written line after the words",,,

"exceedingly clear" which reads as "the respondent had played fraud over the Petitioner & that the present project" | " | ",,,

21.The petitioner has sought to develop a case that NHAI was fully aware that the Project was not feasible due to geological condition and the,,,
topography of the area and therefore, in its review meeting held on 07.02.2017 (after the Contract with the petitioner had been terminated on",,,,
06.01.2017), the fundamental design of the Project was changed. And, NHAI has now decided to have two separate parts of two lane each instead of",,,,
having a singular stretch of four lanes.,,,,

22.It was also argued on behalf of the petitioner that the topography and the geology of the area in question were known to NHAI and it was not,,,
feasible to construct a four-lane highway to be constructed. Further, at one part, a railway line was existing at the place where the road had to be",,,,
widened. It was contended on behalf of the petitioner that in this view, the petitioner had been induced into entering into the Contract. The aforesaid",,,,
contentions have been seriously disputed.,,,,

23.After considering the averments made and the case set up, this Court is unable to accept that the petitioner has established a case of egregious",,,,
fraud. Mere bald allegations that the petitioner had been induced to enter into the Contract is not sufficient. The petitioner claims to be an experienced,,,
contractor and, thus, it is expected that the petitioner would have satisfied itself as to the topography of the area where the road was to be",,,,
constructed.,,,,

24.It is also relevant to note that there is already an existing road in the area, which was required to be maintained and during the execution of the",,,,
Project. In order to accept the petitioner"s contention that the petitioner has been deliberately defrauded, this Court would have to accept that NHAI",,,,
being fully aware that the road could not be widened, decided to embark on a fraudulent scheme so as to induce a contractor to part with the bank",,,,
guarantees in order that the same could be encashed to unjustly enrich NHAI. In furtherance of this exercise NHAI invited tenders from willing,,,
bidders knowing fully well that the Project as envisaged could never be completed. NHAI then advanced mobilization advance for the petitioner to,,,
mobilize the resources. NHAI also acquired land over substantial stretch of the site to cause an unjust loss to the successful contract as a part of its,,,
devious plan. Plainly, this Court is not persuaded to accept the same.",,,,

25. At the present stage, NHA I disputes that there is any inherent defect in the design of the Project. However, even assuming that the petitioner may",,,
be able to establish, in the course of the arbitral proceedings, that there was some inherent defect in the design of the Project; the same would not",,,
mean that the Contract entered into with the petitioner is vitiated by fraud. At this stage, NHA I disputes that the Contract as awarded was not",,,
feasible. However, this is a dispute that is required to be determined by the arbitral tribunal.",,,

26. Although, it has been averred in the petition that a fraud has been played on the petitioner, it is seen that the averments made in this regard are also",,,
bereft of any particulars.,,,

27. The petitioner has essentially founded its claim on the basis that it would not be possible to perform the Contract and, therefore, the petitioner is",,,
excused from performing the Contract. It was earnestly argued on behalf of the petitioner that since the performance of the Contract is excused on",,,
account of impossibility, the question of invoking performance bank guarantees does not arise and, therefore, the invocation of the same must be",,,
interdicted. Mr Mehta had also earnestly contended that since the performance of the Contract has been rendered impossible due to various reasons",,,
the Contract itself is void by virtue of Section 2(g) of the Indian Contract Act, 1872. He had also relied on the decision of the Jainsons Clothing",,,
Corporation v. The State Trading Corporation of India Ltd. and Anr.: (1986) 30 DLT 359 (DB) in support of his contention that a performance bank",,,
guarantee cannot be invoked if the non-performance of the contract is as a result of frustration because such non-performance is excused in law.,,,

28. The aforesaid contentions are also unpersuasive. NHA I has not accepted that the performance of the contract is impossible. Thus, the question",,,
whether the performance of the Contract has been frustrated on account of impossibility is contentious matter that is required to be adjudicated by the",,,
arbitral tribunal.,,,

29. It is also well settled that the bank guarantees cannot be interdicted on account of pending disputes. Thus, notwithstanding, the disputes between",,,
the parties, an unconditional bank guarantee cannot be interdicted. In U.P. State Sugar Corporation v. Sumac International Ltd.: AIR 1997 SC 1644,",,

the Supreme Court has observed as under:- "12. The law relating to invocation of such bank guarantees is by now well settled. When in 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."

30. A similar view was also expressed by the Supreme Court in *Hindustan Construction Company Ltd. v. State of Bihar and Others*;

1999 8 SCC 436, wherein the Court had observed 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."

31. It is also relevant to note that the decision of the Division Bench of this Court in *Jainsons Clothing Corporation (supra)*, which was relied upon by

the petitioner, was set aside by the Supreme Court in the *State Trading Corpn. of India Ltd vs Jainsons Clothing Corpn.* : (1994) 6 SCC 597 and the

Supreme Court had reiterated the principles as enunciated in its earlier decision in *U.P. State Sugar Corporation (supra)*.

32. The petitioner had relied upon the report of the Central Road Research Institute (CRRI) submitted under the cover of a letter dated 31.03.2015 in

support of its contention that the CRRI had, on investigation, found that the Project was not feasible and required remedial measures. However, it is

noticed that even after receipt of the said report, the petitioner had not taken a stand that it was impossible for the petitioner to perform the Contract.

On the contrary, the petitioner had reiterated its commitment that it would fulfill the Contract. In a meeting held on 23.12.2015, the petitioner had

assured that the work would be completed within a period of two years. This was also reiterated by the petitioner by its letter dated 02.05.2016,

wherein it stated as under:- "We committed to Hon'ble minister of Road Transport and Highway in the meeting on dated 23.12.2015 to complete

the project within two years of time and we assure you that we will not We committed to Hon"ble minister of Road Transport and Highway in the,,, meeting on dated 23.12.2015 to complete the project within two years of time and we assure you that we will not leave any stone unturned in,,, competing the project within above committed period.â€œ,,,

33.This Court is refraining from expressing any opinion as to the said issue as, clearly, the same is a contentious one and any expression by this Court",,,,

is likely to prejudice either party in the arbitration proceedings. However, suffice it to say since the issue whether the performance of the Contract is",,,,

frustrated is itself a disputed question and the PBGs furnished by the petitioner cannot be interdicted pending resolution of such disputes.,,,,

34.It is also relevant to note that ABGs were issued to secure the mobilization advances provided to the petitioner and, therefore, the said ABGs can",,,,

only be invoked to the extent of the unrecovered advances. Mr Sethi had also submitted that the said ABGs would not be invoked only to the extent of,,,

the advances have not been recovered from the interim bills submitted by the petitioner. NHAI is bound down to the same.,,,,

35.It was contended on behalf of the petitioner that the DRB had recommended payment of a sum of approximately ₹33.5 crores to the petitioner and,",,,

therefore, the PBGs cannot be invoked. It was also contended that the recommendations of the DRB would be binding till the conclusion of the",,,,

arbitral proceedings. There is some controversy with regard to the aforesaid assertion inasmuch as it is contended on behalf of NHAI that the DRB"s,,,

report indicates that even after the credit is given for the sums recommended in favour of the petitioner, a large amount of ₹108 crores would still be",,,,

payable by the petitioner. The calculation sheets annexed to the recommendations of the DRB dated 06.02.2018, which has been handed across by",,,,

the learned counsel for NHAI, does support the contentions advanced on behalf of the respondent. However, since the parties have already referred",,,,

the disputes to arbitration and the recommendations of the DRB have not been accepted, there is no conclusive decision as to whether any sum is",,,,

payable. The recommendations of the DRB have not attained finality.,,,,

36.The petition is, accordingly, dismissed. All pending applications are also disposed of. The parties are left to bear their own costs.",,,,