

M/S A.K. Mehta And Co vs Delhi Development Authority on 5 July, 2022

\$~21

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P.(I) (COMM) 211/2022
I.A. 10172/2022

M/S A.K. MEHTA AND CO. Petitioner
Through: Mr.Ravi Gupta, Sr. Advocate with
Mr. Vikas Sharma, Mr.Vatsal Kumar,
Mr.Amandeep Singh and Ms.Mugdha
Pandey, Advocates.

versus

DELHI DEVELOPMENT AUTHORITY Respo
Through: None.

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA
ORDER

% 05.07.2022 IA 10172/2022 (exemption from filing of typed copies, with proper margin and prescribed font size as well as originals/certified copies of the various documents)

1. Exemption allowed, subject to just exceptions.

2. Application stands disposed of.

O.M.P.(I) (COMM) 211/2022

3. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996.

4. The petitioner has preferred the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (as amended up to date) seeking an injunction against the respondent thereby restraining them from encashing 4 Bank guarantees of Rs.25,00,000/- each towards the 1st instalment of Mobilization advance amounting to Rs. 1 Crore and two bank guarantees of Rs. 50 Lakh each towards the second instalment of mobilization advance amounting to Rs. 1 Crore, all issued by Union Bank of India, Karol Bagh Branch.

5. The present dispute pertains to e-tender notice floated by the respondent DDA for "C/O Delhi Cycle Walkway Phase-I" and "C/O On Grade Cycle Walk of Neelgai Line". The petitioner was awarded with the said work vide Letter of Acceptance dated 07.08.2020. As per the Letter of Acceptance, the work in question was to be completed within a period of 365 days, the stipulated date of commencement of work being 9th September, 2020 and stipulated date of completion of

work being 8th September, 2021. The total contract value for the entire scope of work under the contract was Rs.36,41,57,591/- (Rupees Thirty Six Crores Forty One Lakh Fifty Seven Thousand Five Hundred Ninety One Only).

6. In accordance with Clause-1 of the contract, the petitioner had furnished the Performance Bank Guarantee dated 18.08.2020 issued by Union Bank of India, Karol Bagh Branch for Rs.1,82,07,880/- (One Crore Eighty Two Lakh Seven Thousand Eight Hundred Eighty Only). The said bank guarantee was extended from time to time.

7. It is submitted that pursuant to the abovementioned work, the petitioner immediately commenced the work with due diligence and deployed all the resources and manpower for execution of the work at the site.

8. That in view of Clause - 10B(ii) of the Agreement between the parties, the petitioner requested for the first instalment of mobilization advance, wherein the petitioner submitted four bank guarantees towards mobilization advance of Rs.25 Lakh each issued by Union Bank of India, Karol Bagh Branch in favour of the DDA, which were extended from time to time. The details of the said bank guarantees are as follows:

BG No .	Date	Amount (In INR)
30790IGL0004720	11.09.2020	25,00,000
30790IGL0004820	11.09.2020	25,00,000
30790IGL0004920	11.09.2020	25,00,000
30790IGL0005020	11.09.2020	25,00,000
Total		1,00,00,000

9. The petitioner vide letter dated 07.12.2020 informed the respondent that the first instalment of the mobilization advance has been exhausted and requested for sanction of second instalment of mobilization advance for which petitioner submitted two bank guarantees of Rs.50 lakh each issued by Union Bank of India, Karol Bagh Branch in favour of the DDA, which were extended from time to time. The details of the bank guarantees are as follows:

BG No .	Date	Amount (In INR)
30790IGL0006520	07.12.2020	50,00,000
30790IGL0006420	07.12.2020	50,00,000
Total		1,00,00,000

10. It has been contended by Mr. Ravi Gupta, Senior Advocate appearing on behalf of the petitioner that despite all sincere efforts, the petitioner faced numerous unseen hindrances as site, while executing the work like delay in approval of pipes and other materials; non- issuance of structural and architectural drawings and other hindrances caused by staff of the DDA. Further, during the execution of the work, the local SDM and officers of NGT and Forest Department directed to stop the work. Subsequently, the petitioner was informed by the respondent/ DDA by letter dated 04.09.2021 to temporarily stop the work on the ground that some clearance from Forest Department and National Monument Authority are to be taken.

11. Thus, the petitioner by letter dated 07.10.2021 requested for pre-closure of agreement after compensation of liquidity and damages. The petitioner wrote another letter dated 20.10.2021 wherein it again requested the respondent to compensate the amount of huge debt incurred by the petitioner for arranging manpower, machinery and material.

12. The respondent - DDA by its letter dated 13.05.2022 foreclosed the agreement by invoking Clause 13 of the Contract. In the said letter DDA categorically stated that the security deposit as well as the performance guarantee will be refunded as per terms and conditions of agreement. However, the petitioner was requested to deposit mobilization advance along with up to date 10% Simple Interest as per terms and conditions of the agreement.

13. The respondent - DDA on 04.07.2022 submitted letter dated 02.07.2022 with the Union Bank for encashing the aforesaid six bank guarantees amounting to Rs. 2 Crores towards the mobilization advance. It is alleged that the respondent's act of encashing the bank guarantees is unfair, harsh and against the interest of justice.

14. The petitioner has filed the present petition seeking a stay on the invocation and encashment of the bank guarantees.

15. Mr. Ravi Gupta, Senior Advocate appearing on behalf of the petitioner has contended that the contract could not be completed within the stipulated time due to various hindrances and shortcomings on the part of the respondent. The respondent failed to provide the drawings to the petitioner and also failed to procure the clearances from the Forest Department and other Government Departments on time. The petitioner suspended the work as per directions of the respondent - DDA till further orders. Despite this the petitioner was ready to resume the work. However, the respondent without thinking about the efforts being put by the petitioner, arbitrarily foreclosed the agreement on 13.05.2022. It was contended on behalf of the petitioner that respondent cannot recover the advance by invoking the bank guarantee, as the advance can only be recovered from running bills of the contractor. However, no running bills could be raised by the contractor because of suspension of work by the respondent. Since the work has been stopped due to the fault of the respondent - DDA itself, the respondent cannot claim the advance by invocation of bank guarantees. It is further submitted that there is no fault and failure on the part of the petitioner in fulfilling its contractual obligations. Thus, it was contended that the mala fide act of the

respondent amounts to fraud of an egregious nature as contemplated by courts in a catena of judgments where encashment of guarantee has been stopped. The learned Senior Counsel for the petitioner also relied upon the judgment of the Hon'ble Supreme Court in the case of Gangotri Enterprises Ltd. Vs. Union of India & Ors., (2016) 11 SCC 720.

16. The present matter was listed and heard upon urgent mentioning. As per the petitioner, the letter dated 2nd July, 2022 written by the DDA to the Manager, Union Bank of India, Arya Samaj Road, Karol Bagh for encashment of bank guarantees, was already with the bank. Thus, if no interim order is granted in favour of the petitioner, the said bank guarantees will get encashed today itself, i.e., 05.07.2022. Since this Court was not inclined to grant any interim protection, at the request of the petitioner, this matter is taken up for final disposal.

17. At the outset, it would be useful to refer to the law as propounded by the Hon'ble Supreme Court relating to invocation of bank guarantees. The Hon'ble Supreme Court in the case of Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, (2008) 1 SCC 544, has held as under:

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd., this Court observed that: (SCC p.574, para 12)

"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. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. 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 of no consequence. In *BSES Limited v. Fenner India Ltd.*, this Court held: (SCC pp.733-34, para

10) "10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non- intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* (hereinafter „U.P. State Sugar Corpn.) this Court, correctly declare that the law was „settled ."

13. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, this Court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner: (SCC pp. 117-18, para 14) "14... (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

18. Keeping in mind the aforesaid principles enunciated by the Hon'ble Supreme Court with respect to invocation of bank guarantees, it would useful to refer to the bank guarantee for mobilization advance in the present case, which is reproduced as under:

"1. In consideration of the Delhi Development Authority (hereinafter called "The Government") having offered to accept the terms and conditions of the proposed agreement between Executive Engineer, SPD-2/SZ/DDA and M/s AK Mehta & Company (Hereinafter called the said Contractor(s)" for the work of C/o Delhi Cycle Walkway Phase-1, C/o On Grade Cycle walk of Neelgai line having agreed to production of an irrevocable Bank Guarantee for Rs.25,00,000/- (Rupees Twenty Five Lacs only) as a security/guarantee from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the agreement no NIT No-O5/EE/SPD-2/DDA/2019-20 for mobilization advance from Government.

We Union Bank of India, Karol Bagh Branch, 10184, Arya Samaj Road, Delhi-110005 (Herein referred to as "The Bank") hereby undertake to pay to the Government an amount not exceeding Rs.25,00,000/- (Rupees Twenty Five Lacs only) on demand by the Government.

2. We Union Bank of India, Karol Bagh Branch do hereby undertake to pay the amounts due and payable under this Guarantee without any demure, merely on a written demand from the Government stating that the amount claimed is required to meet the recoveries due or likely to be due from the said contractor(s). Any such written demand made on the Bank shall be conclusive as regards 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.25,00,000/-(Rupees Twenty Five Lacs only).

3. We Union Bank of India, Karol Bagh Branch the said bank further undertake to pay to the Government any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or Tribunal relating thereto, our liability under this present being absolute and unequivocal.

The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and the contractor(s) shall have no claim against us for making such payment.

4. We Union Bank of India, Karol Bagh 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 continue to be enforceable till all the dues of the government under or by virtue of the said agreement have been fully paid and its claims satisfied or discharged or till Engineer-in-charge on behalf of the Government certified that the terms and condition of the said agreement have been fully and properly carried out by the said contractor (s) and accordingly discharges this guarantee. Unless a demand or claim under this guarantee is made on us in writing on or before 10.03.2022. We shall be discharged from all liability under this guarantee thereafter.

5. We Union Bank of India, Karol Bagh Branch further agree with the Government that the government shall have the fullest liberty without our consent and without effecting in any manner our obligations hereunder to vary any of the terms and conditions 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 Government against the said contractor(s) and to for bear or enforce any of the terms and conditions relating to the said agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted to the said contractor(s) or for any forbearance, act of omission on the part of the Government or any indulgence by the Government to the said contractor(s) or by any such matter of thing whatsoever which under the law relating to sureties would, but for this provision, have effect of so relieving us.

6. This guarantee with not be discharged due to the change in the constitution of the Bank or the contractor(s).

7. We Union Bank of India, Karol Bagh Branch lastly undertake not to revoke this guarantee during its currency except with the previous consent of the government in writing.

NOWWITHSTANDING
HEREIN:

ANYTHING

CONTAINED

1. Our liability under this Bank Guarantee shall not exceed Rs.25,00,000 (Rupees Twenty-Five Lakh Only)

2. This bank guarantee shall be valid upto 10.03.2021.

3. We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 10.03.2022

4. At the end of claim period that is on or after 10.03.2022 all you rights under this guarantee shall stand extinguished and we shall be discharged from all our liabilities under this guarantee irrespective of receipt of original Bank Guarantee duly discharged by Bank.

5. Expired BGs issued in favor of Government authorities should be reversed in the same manner as above."

19. All the six bank guarantees for mobilization advance are worded similarly. Perusal of the same show that the guarantees in the instant case were unconditional and specific in nature, as well as limited in amount. Once a demand was made by the DDA in due compliance of the bank guarantees, the bank was obliged to pay under the terms of the bank guarantee. The Hon'ble Supreme Court in the case of Standard Chartered Bank Vs. Heavy Engineering Corporation Limited and Anr., (2020)

13 SCC 574, has held as follows:

"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."

20. From the aforesaid it is clear that if a bank guarantee is unconditional and irrevocable, there can be no fetters upon encashment of the same. It is liable to be invoked on demand by the respondent. Existence of any dispute between the parties is not a ground for issuing an injunction to restrain the enforcement of a bank guarantee. As held in a catena of judgments, there must be a fraud in connection with the bank guarantee in order to restrain the enforcement of the bank guarantee. However, in the present case, the petitioner has not been able to point out such fraud. The allegations as raised on behalf of the petitioner do not in any manner satisfy the requirement of law regarding constituting fraud of an egregious nature so as to vitiate the entire transaction. Further, the law is also very clear that merely because invocation will cause financial distress and hardship, is not a ground for stay of invocation of a bank guarantee.

21. As regards the judgment in the case of Gangotri Enterprises Limited (Supra) as referred by the counsel for the petitioner, perusal of the same shows that the said judgment dealt with the issue pertaining to claim for damages for breach of contract, which was held not a claim for a sum presently due and payable. Thus, it was in that context that the Hon'ble Supreme Court held that the appellant therein was entitled to claim injunction in relation to encashment of bank guarantee. The facts of the said case are totally distinct and are not applicable to the present case.

22. In view of the aforesaid discussion as well as settled position of law, this Court finds no merit in the present petition.

23. However, it is made clear that this order shall have no bearing on the merits of the case before the Arbitrator, as and when the Arbitral Tribunal is constituted in terms of the agreement between the parties.

24. The present petition is dismissed accordingly.

MINI PUSHKARNA, J JULY 5, 2022/PB/au