

Shapoorji Pallonji And Company Private ... vs Union Of India & Anr on 15 February, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (I) (COMM.) 6/2023

SHAPOORJI PALLONJI AND COMPANY PRIVATE
LIMITED

..... Petitioner

Through: Mr. Saurav Agrawal, Mr. Saad
Sherwani, Mr. Ravi Tyagi, Mr.
Mayank Mishra, Mr. Chirag
Sharma, Mr. Siddharth Dey Ms.
Mayuri Shukla, Ms. Sakshi
Tibrewal, Mr. J. Amal Anand,
Mr. Abhishek Singh, Mr. Insha
Musutaq and Mr. Babit Jamwal,
Advs.

versus

UNION OF INDIA & ANR.

Through:

..... Responde

Mr. Chetan Sharma, ASG, Mr.
Apoorv Kurup, CGSC, Ms.
Swati Bhardwaj, Adv. with M
Dashrath Singh Pan
Executive Engineer & Senior
Manager.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 15.02.2023 I.A. 3108/2023 (for interim relief)

1. The present application was taken up on urgent mentioning and on the assertion of the petitioner that there was an eminent threat of encashment of a Performance Bank Guarantee [PBG] submitted by them favouring the respondent dated 06 February 2019 and valid till 04 October 2023.

2. In order to appreciate the issue which arises, it would firstly be apposite to extract the prayers as made in the original petition under Section 9 of Arbitration and Conciliation Act, 1996 [„Act“]. Those reliefs are extracted hereinbelow:-

"A. Maintain status quo/restrain Respondent no.1, its principal officers, servants, agents, and any others acting for and, on their behalf from taking coercive or

encashment action against the Petitioner in respect of the Performance Bank Guarantee bearing BG No.- SBI-0999519BG0000276 dated 6 February 2019 valid till 4 October 2023.

B. Direct the Respondent no.1, its principal officers, servants, agents, and any others acting for and, on their behalf to undertake joint measurement of the work done along with the Petitioner, alternatively appoint a Court Commissioner for the said purpose.

C. Direct the Respondent no.1 to not create any hindrance for the Petitioner to remove/withdraw goods, materials, machinery, equipment, vehicles, men and manpower, contract workers etc. D. Direct the Respondent no.2 to disclose before this Hon'ble Court the communications exchanged between Respondent no.1 and Respondent no.2 till date.

E. Direct the Respondent No.1 to return to the Petitioner the Performance Bank Guarantee bearing BG No.- SBI- 0999519BG0000276.

F. Pass an order for such other relief in the nature of the foregoing prayers as this Hon'ble Court may consider appropriate to secure the interest of the Petitioner in the present facts and circumstances;

G. Pass an order for ad-interim reliefs in terms of the above; H. Award the cost of this Petition to the Petitioner; I. Pass any such further or other orders in favour of the Petitioner and against the Respondents as this Hon'ble Court may deem fit."

3. When the Section 9 petition was originally called before the Court on 11 January 2023, it had proceeded to pass an order noticing the rival submissions and granting time to the respondents to file a response on the main petition. It had also had an occasion to notice the letter of 26 December 2022 in terms of which the respondents had extended the term of the Contract up to 23 February 2023. The petitioner had taken an objection to the said communication by asserting that it was not legally permissible for the respondents to have unilaterally extended the terms of the Contract. The Court had also taken note of the contention of the learned ASG that the said communication apprehension that the PBG was proposed to be invoked. The petitioner has thereafter also filed a petition referable to Section 11 of the Act and which is now posted for 20 February 2023. The present I.A. has been moved with the petitioner asserting that the respondent has addressed a communication to the concerned bank in terms of which the PBG is proposed to be enforced and encashed. It is the said communication which has led to the petitioner approaching this Court by way of the present application.

4. Insofar as the principal dispute is concerned, it emanates from a Contract dated 08 March 2019 in terms of which the petitioner was awarded a contract for redevelopment of the Srinivaspuri General Pool Residential Colony Project. The petitioner asserts that despite diligent steps having being taken by them, the project has been delayed because of the inaction on the part of the respondent and

various fundamental and repudiatory breaches committed by it. It is also their case that the delay has been caused on account of Environment Clearance, Fire No Objection Certificate having not been obtained and CPWD having failed to hand over the site in full. It also refers to the interim ban on tree cutting imposed by the High Court which too, according to them, had adversely impacted the execution of the contract. According to the petitioner, the contract itself was to come to an end on 26 December 2022. It is alleged that the CPWD by issuing an ante-dated communication unilaterally extended the period of the contract up to 23 February 2023. It is asserted that the petitioners cannot be compelled to execute the contract after it had come to an end by efflux of time.

5. The Section 9 Petition also rests on the following allegations. It is alleged that as per the schedule placed under the contract, at least 30% of the land had to be handed over at the time of commencement and the balance 70% from the date of start.

the total project area spread over 37 acres and the redevelopment exercise entailed the construction of 19 towers with a common podium parking. It alleges that till 26 November 2022 only 75.78% of the total project land was handed over by CPWD after a lapse of more than 46 months. It also alluded to the Tree Transplantation Policy adopted by the Government of NCT and the various orders passed by the High Court dealing with the preservation of green cover in the NCT. The petitioner asserts that in those proceedings the CPWD had stated on affidavit that the total number of trees likely to be affected at the project site was only 1239 whereas the number of trees liable to be relocated exceeded 1600 in Phase I of the project itself. It is asserted that the petitioner was informed about the aforesaid statements only in December 2020 and directed to reduce the number of affected trees. The project is thereafter stated to have been impacted by the blanket ban on tree cutting as imposed by the order of 19 May 2022 by the High Court in Contempt Case (C) Nos. 851/2021 and 660/2020. It was in the aforesaid backdrop that the Section 9 petition came to be filed originally.

6. In order to examine the prayer which is made in the instant I.A. and which seeks a restraint upon the respondent from encashing the PBG, the Court bears in mind the fundamental grounds which must inform a relief of the nature as is sought. It is by now well settled that a Bank Guarantee constitutes an independent contract between the bank and the named beneficiary. Its enforcement can be enjoined only in case a party is able to establish that the action of the beneficiary is beset by a fraud of egregious nature or where the encashment of the Bank Guarantee would result in irretrievable harm or injustice of an irreversible kind. The encashment of a Bank Guarantee can be restrained only in exceptional circumstances. Contractual disputes which may exist or may arise cannot possibly be recognised as giving rise to special equities. This since special equities would arise only when the party is able to establish the existence of special circumstances which are likely to result in irreparable loss and cause irretrievable injustice.

7. The Court is constrained to note that the applicant petitioner has while asserting fraud failed to allude to any facts on the basis of which the same could be said to have been established even prima facie. Fraud, as is well settled, has a known connotation in law. The mere usage of the word "fraud" would not constitute or evidence fraudulent conduct. Additionally, fraud, insofar as the encashment of Bank Guarantees are concerned must also be proven and established to be of an egregious nature.

The fact that there was an alleged misrepresentation with respect to the number of trees which could be felled cannot possibly be viewed or accepted as constituting an allegation of fraud of an egregious nature. This more so since as per the petitioner itself it has been handed about 78% of the total project area, albeit belatedly. The Court additionally notes that the unilateral extension of the contract also cannot satisfy the test of fraud as recognised in law.

8. The Court further notes that the PBG conferred an unequivocal option to the respondent to lay a claim upon the Bank which had issued the guarantee if there be a demand or the likelihood of a demand relating to the contract being raised. The letter of 14 February 2023 clearly refers to the decision of the respondent to have the suspended and incomplete work executed through a third party. The invocation was thus in terms of the guarantee. In any case, it was not the submission of the petitioner applicant that the invocation was contrary to the terms of the PBG.

9. The Court thus comes to the firm conclusion that the petitioner has woefully failed to satisfy, even prima facie, that the facts of the present case would meet the tests which are liable to be borne in mind while considering prayers seeking an injunction in respect of the encashment of Bank Guarantees.

10. The principles which had been alluded to by the Court in the preceding parts of this decision were lucidly explained by a learned Judge of the Court in Kuber Enterprises v. Doosan Power Systems India Pvt. Ltd. and Another [2021 SCC OnLine Del 5049] in the following terms:-

"13. Mr. Panda pleads the existence of special equities, justifying the stay of invocation of the Bank Guarantee by the respondents, on the premise that the respondents owe, to the petitioner, an undisputed amount of Rs. 4.98 crores, apart from which an amount of Rs. 2.71 crores of the petitioner is presently lying with the respondents. The respondents are, therefore, he submits, sufficiently secured against any claims they may have against the petitioner and, therefore, any invocation of the Bank Guarantee by the respondents against the petitioner would be inequitable at this stage. He also points out that the respondents were seeking to invoke the Bank Guarantees provided by the petitioner in both the contracts executed with the respondents and that it could hardly be believed that the petitioner was remiss in discharging its obligations under both the contracts. This, he submits, is an additional fact, which indicates that the respondents were invoking the bank guarantee not for genuine and bonafide reasons, but merely to pressurize the petitioner into giving up its claims against the respondents.

14. The last submission of Mr. Panda, to justify the prayer for injunction against invocation of the Bank Guarantee, is that the petitioner is in dire financial straits. He also draws attention to the financial defects being faced by his client and submits that if the Bank Guarantee is permitted to be invoked, his client would be "deoxygenated" and that several of its employees would be laid off. In the submission of Mr. Panda, the parent company of Respondent 1 is presently facing severe financial constraints, and that Respondent 1 is dependent on the parent company. In these circumstances,

he submits, an additional ground for a restraint against the respondents from invoking the Bank Guarantee is that the Bank Guarantee would act as a security, in the event of an award in the arbitral proceedings favourable to the petitioner. Otherwise, he submits, if the respondents are allowed to invoke the Bank Guarantee, there would be no security which would serve to ensure that, were the petitioner to succeed in arbitration, the award could be enforced, given the precarious financial condition of the respondents.

15. For this reason, Mr. Panda presses his second prayer, in these petitions, for directing the respondents to secure the claims of the petitioner by making a deposit in this Court.

16. Having heard Mr. Panda at considerable length, I am of the opinion that these petitions are completely misconceived. They seek to re-agitate issues which, in one judicial decision after another, stand settled, in law, against the petitioner.

17. Re. prayer for stay of invocation of bank guarantee:

18. Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in *SES Energy Services India Ltd. v. Vedanta Limited* has noted these exceptions and observed thus:--

"9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard.

The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in *CRSC Design* to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from *BSES Ltd. v. Fenner India Ltd.*, neatly encapsulates this position:

"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.*, (1997) 1 SCC 568

that this Court, correctly declared that the law was „settled .”

(Italics and underscoring in original)

19. Additionally, in para 72 of the report in Svenska Handlesbaken v. Indian Charge Chrome, a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in Hindustan Steelworks Construction Co. Ltd. v. Tarapore & Co. held, after noticing and interpreting Svenska Handlesbaken, that, in Svenska Handlesbaken, the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it was held, "not much importance" could be attached "to the use of the word „and in the observation that „it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case". Vinitec Electronics Private Limited v. HCL Infosystems Limited and BSES Ltd. hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice.

20. While, therefore, there appears to be some fluidity in judicial thinking on the issue of whether the "fraud" element would permeate the other two considerations of "special equities" and "irretrievable injustice", there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose."

11. It becomes pertinent to note that the learned Judge in Kuber Enterprises was also constrained to enter a critical note in the following terms:-

"Critical note sounded in CRSC Research and Design Institute Group

40. In CRSC Research and Design Institute Group, the Division Bench of this Court has critically commented on parties approaching this Court under Section 9 of the 1996 Act, seeking restraint against invocation of bank guarantees, despite the extremely restricted grounds on which such prayers could be sought. This Court has opined that such attempts have to be quelled with a heavy hand and imposed, in the said case, costs of Rs. 5 lakhs on the appellant in that case. Unjustified attempts at approaching Courts at the pre-arbitral stage under Section 9 of the 1996 Act, such as the present, apart from burdening the docket of the Court, are also against the very ethos of the 1996 Act.

41. I am therefore constrained, albeit reluctantly, to dismiss these petitions with costs, in each case of Rs. 2.5 lakhs."

12. In the facts of the present case, this Court finds that the I.A. as well as the prayer made in the main petition with respect to encashment of the Bank Guarantee were based on a wholly specious

foundation and clearly did not justify a restraint being sought in the absence of fraud of an egregious character even existing. The petitioner also could not establish the spectre of irretrievable injury or special equities. It was essentially based solely on various contractual disputes which appear to exist between the parties. The present foray was thus clearly misconceived. A prayer for an injunction being issued in respect of an apprehended invocation of a Bank Guarantee, it must be reiterated, must be founded on facts which meet the onerous tests that have been enunciated by courts.

13. Consequently, the present I.A. shall stand dismissed with costs quantified at Rs. 1 lakh to be deposited with the Delhi High Court Legal Services Committee.

YASHWANT VARMA, J.

FEBRUARY 15, 2023 SU