

M/S Constructora Sanjose s.a vs.delhi Development Authority & Ors

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Court : Delhi

Decided On : Nov-03-2016

Appellant : M/S Constructora Sanjose s.a

Respondent : Delhi Development Authority & Ors

Judgement :

\$~7 & 8. * IN THE HIGH COURT OF DELHI AT NEW DELHI + % + CS(OS) 703/2013 Judgment dated 03.11.2016 M/S CONSTRUCTORA SANJOSE S.A Plaintiff Through : Mr.J.P. Sengh, Sr. Adv. with Mr.Subhash Mishra, Ms.Manisha Mehta, Mr.Pulkit Jindal and Ms.Syed Maria Aijaz, Advs. versus DELHI DEVELOPMENT AUTHORITY & ORS Defendants Through : Mr.Arun Birbal and Mr.Sanjay Singh, Advs. for the DDA. CS(OS) 704/2013 M/S CONSTRUCTORA SANJOSE S.A Plaintiff Through : Mr.J.P. Sengh, Sr. Adv. with Mr.Subhash Mishra, Ms.Manisha Mehta, Mr.Pulkit Jindal and Ms.Syed Maria Aijaz, Advs. versus DELHI DEVELOPMENT AUTHORITY & ANR Defendants Through : Mr.Arun Birbal and Mr.Sanjay Singh, Advs. for the DDA. CORAM: HON'BLE MR. JUSTICE G.S.SISTANI G.S.SISTANI, J (ORAL) I.A. 6154/2013 (O XXXIX R1& 2 CPC) IN CS(OS) 703/2013 I.A. 6160/2013 (O XXXIX R1& 2 CPC) IN CS(OS) 704/2013 1. Registry is directed to register both these suits as commercial suits.

2. Since a common question arises for consideration in both the CS(OS) NOS. 703 & 704/2013 Page 1 of 19 applications, arguments in both the applications have been heard together and the applications are being decided by a common

judgment.

3. Plaintiff has filed the present suits for declaration, permanent injunction and recovery. For the sake of convenience, the facts of CS(OS) 703/2013 are being noticed.

4. The facts of CS(OS) 703/2013 are that a tender was floated by defendant no.1 on 28.12.2011 inviting applications from interested parties for bidding for construction of 24,660 LIG and 4,855 EWS houses by using Prefab Technology in Narela and Rohini, Delhi (hereinafter the project). The estimated cost of the project was Rs. 959.23 crores. In order to bid for the tender, the plaintiff formed a joint venture with the defendant No.3/ M/s IVRCL Limited (hereinafter the Joint Venture). Accordingly, the tender document was purchased by defendant No.3. Subsequent to the floating of the tender, various amendments were made by the defendant No.1. The tender document, inter alia, provided for the deposit of earnest money which was to be deposited in the following form: a) Rupees Twenty Lac Only in the shape of demand draft/deposit receipt/treasury challan/fixed deposit/ Receipt of a Scheduled Bank guaranteed by Reserved Bank of India; and b) The balance earnest money (Rupees Nine Crore Fifty Lakhs) in the shape of a bank guarantee.

5. The tender document further stipulated that in case of a joint venture, the bank guarantee was to be furnished out of their accounts in proportion to their financial participation. The validity of bank guarantee was to be 180 days from the last date of submission of the tender, which was initially expiring on 25.06.2012. Thus, in accordance with the tender documents the bank guarantee required to CS(OS) NOS. 703 & 704/2013 Page 2 of 19 be submitted by the plaintiff must be initially valid till 24.12.2012.

6. As per the plaint, an amount of Rs.21,30,900/- was paid by the plaintiff as part earnest money to defendant No.1 being the lead member of the Joint Venture. Thereafter the plaintiff approached defendant No.2/ ING Vysya Bank for issuance of a bank guarantee to the plaintiffs portion. Accordingly, defendant No.2 issued a bank guarantee No.402LG03 dated 30.07.2012 for Rs.4,84,50,000/- in CS(OS) 703/2013 and a bank guarantee

No.402LG03

dated 30.07.2012 for Rs.5,52,33000/- in CS(OS) 704/2013. In addition to the said bank guarantees, the defendant No.3 (other member of the Joint Venture) also deposited the requisite bank guarantees with the defendant No.1 for its participation in the Joint Venture.

7. It is the case of the plaintiff that the tender process was getting delayed for the reasons solely attributable to defendant No.1 and the plaintiff was forced to extend the bank guarantees from time to time till the date of the filing of the present suit and even thereafter.

8. As per the plaintiff, technical bid was opened on 14.12.2012 in the presence of the authorized representative of the Joint Venture. The plaintiff was verbally informed that a request had been sent by the Lieutenant Governor of Delhi to the Indian Embassy in Peru to verify and confirm the work experience certificate submitted by the plaintiff; however, the plaintiff claims that neither any notice was issued to the plaintiff nor the plaintiff is aware of the result of the verification. The validity of the bid was again extended upto 30.06.2013. Accordingly, the plaintiff was again asked to extend the bank guarantee upto 30.06.2013. The plaintiff was also informed by defendant No.1 that in case the validity of the bank guarantee is not extended as requested, defendant No.2 should encash the same. In this background, the bank CS(OS) NOS. 703 & 704/2013 Page 3 of 19 guarantee continues to be extended from time to time.

9. Thereafter, the plaintiff was informed that the valuation of the technical bid and verification of documents submitted by the bidders was complete and as a result of complete verification 14.03.2013 was fixed for the opening of the financial bid.

10. In the meeting held on 14.03.2013, the plaintiff and another bidder, namely M/s Larsen & Tubro, were informed that they were technically disqualified; accordingly, the financial bid of the Joint Venture and M/s Larsen & Tubro were not opened. The financial bid of the only remaining bidder, M/s B G Shirke Construction Technology Private Limited, was opened and the said bidder was declared successful. On the very same day, the plaintiff requested the defendant No.1 for release of earnest money and return of original bank guarantee. Thereafter, the

plaintiff was informed by the officials of defendant No.2 that they had received a request for the encashment of the bank guarantees from defendant No.1/ DDA, which has led to the filing of the present suit.

11. Learned senior counsel appearing on behalf of the plaintiff submits that the bank guarantees furnished by the plaintiff were conditional bank guarantees and could be invoked only as per the terms of the tender when the earnest money in both the suits was to be forfeited and the bank guarantees were to be invoked. While relying on the tender document, more particularly Clauses 6 and 18, learned senior counsel submits that since none of these conditions have been violated, neither the bank guarantees could have been invoked nor the earnest money could have been withheld.

12. Learned senior counsel for the plaintiff further submits that the plaintiff has already been put to irreparable loss as not only has the plaintiff CS(OS) NOS. 703 & 704/2013 Page 4 of 19 given two bank guarantees [Rs.9,50,00,000/- in CS(OS) 703/2013 and Rs.11,03,00,000/- in CS(OS) 704/2013]. total amounting to Rs.20,53,00,000/- crores, but has also deposited earnest money in the sum of Rs.20,00,000/-, each, in both the cases (total mounting to Rs.40,00,000/-), besides the plaintiff has almost spent about Rs. 4 crores to meet the bank charges for keeping the bank guarantees alive.

13. Mr. J.P. Sengh, learned senior counsel, also submits that since the plaintiff was not found to be successful and none of the conditions of the bank guarantees have been breached, which is also evident upon reading of the invocation letter, the bank guarantees as also the earnest money are to be returned to the plaintiff, and, thus, prays that the order of injunction be confirmed.

14. Per contra, Mr. Birbal, learned counsel appearing on behalf of the defendant no.1/DDA, submits that the guarantees were unconditional. It is submitted that the plaintiff had made a false declaration in the bid document. The necessary verification was carried out by the officials of the DDA and as it was found that the plaintiff has mislead the DDA and accordingly the bank guarantees were invoked. Mr. Birbal has also relied upon the terms of the bid document to buttress his argument that DDA was well within its right to invoke the bank guarantees as not

only did the plaintiff make a false declaration to the extent that they had experience in precast concrete walls and slabs, but the plaintiff also gave a specific undertaking to the extent that in case the information furnished by the plaintiff would found to be incorrect, the DDA would be well within its right to invalidate the bid and initiate action as per the tender conditions. Accordingly, the DDA initiated action as per the tender conditions. To this end, Mr. Birbal has drawn our attention to conditions of the tender document, more particularly Sections 3 and 4 CS(OS) NOS. 703 & 704/2013 Page 5 of 19 of the Integrity Pact to be furnished by the bidders. Mr. Birbal submits that as per Section 3 of the Integrity Pact if the bidder/contractor, before the award or during the execution has committed a transgression and his reliability and credibility is in question, he would be disqualified from the tender process and the principal i.e. DDA would be authorized to take action as mentioned in the Guidelines on Banning of business dealings. As per Section 4 of the Integrity Pact, if the principal has disqualified the bidder from the tender process prior to the award according to Section 3, the Principal would be entitled to demand and recover the damages equivalent to the earnest money deposited/bid security.

15. Sections 3 and 4 of Integrity Pact read as under: Section 3 - Disqualification from tender process and execution from future contracts. If the Bidder(s)/Contractor (s), before award or during execution has committed a transgression through a violation of Section 2, above or if any Principal is entitled to disqualify the Bidder(s)/Contractor(s) from the tender process or take action as per the procedure mentioned in the Guidelines on Banning of business dealings. Section 4- Compensation for Damage (1) If the Principal has disqualified the Bidder(s) from the tender process prior to the award according to Section 3, the Principal is entitled to demand and recover the damages equivalent to Earnest money Deposit/Bid Security. If the Principal has terminated the contract according to Section 3 or if the Principal is entitled to terminate the contract according to Section 3, the Principal shall be entitled to demand and recover from the Contractor liquidated damages of the Contract value or the amount equivalent to Performance Bank Guarantee. (2) (Emphasis Supplied) 16. It is, thus, the case of defendant No.1/DDA that since the DDA had CS(OS) NOS. 703 & 704/2013 Page 6 of 19 upon verification learnt that the plaintiff had made a false declaration with

regard to his experience which was to be guaranteed under the terms of the bank guarantees the DDA was well within its right to invoke the bank guarantees.

17. Additionally, learned counsel for the DDA submits that while issuing the injunction the plaintiff was directed to keep the bank guarantees alive and in case the Court was inclined to stay the invocation of the bank guarantees the plaintiff should be directed to keep the bank guarantees alive during the pendency of the suit. It is also contended that the balance of convenience is in favour of the DDA for the reason that the plaintiff does not have any roots in the country and in case the DDA succeeds the DDA would have no means to recover the amount; while on the converse since the DDA is a statutory body and a limb of the Government of India, the amount can always be recovered by the plaintiff from the DDA.

18. Mr. Birbal also submits that the plaintiff does not have a prima facie case in its favour as the plaintiff has breached the integrity clause. It is further submitted that having regard to the fact that upon investigation it has been learnt that a false declaration has been made by the plaintiff, the plaintiff should not be given a benefit of discretionary relief.

19. In support of his arguments, Mr. Birbal submits that the law with regard to grant of injunction in the matter of invocation of a bank guarantee or a letter of credit is well settled. The courts should be slow in granting stay of invocation of bank guarantees. In support of this contention, reliance is placed by Mr. Birbal on *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC110 more particularly para 10, which reads as under: CS(OS) NOS. 703 & 704/2013 Page 7 of 19 10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In *U.P. State Sugar Corporation Vs. Sumac International Ltd.* [(1997) 1 SCC568, this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its

customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (Emphasis Supplied) 20. Reliance has also been placed by Mr. Birbal on Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. And Another, (2007) 6 SCC470 (paras 16 to 18 and

20) and Daewoo Motors India Ltd. v. Union of India And Others, (2003) 4 SCC690 (para 7), in order to show as to what amounts to a conditional bank guarantee.

21. Mr. Birbal further submits that ordinarily, the courts should be slow in granting an injunction unless the plaintiff is able to plead fraud of an egregious nature which in the present case has not been pleaded by the plaintiff. Mr. Birbal further submits that in case the invocation of the bank guarantees is bad it was for the plaintiff to file a suit for recovery CS(OS) NOS. 703 & 704/2013 Page 8 of 19 against the DDA and the present suit for injunction would not be maintainable.

22. Rebutting the contention of the respondents, learned senior counsel for the plaintiff has submitted that, as far as the plea of the DDA with regard to disqualification of the plaintiff is concerned; firstly, the plaintiff has not been informed about any disqualification/black listing and; secondly, no verification was carried out by the DDA to which, Mr. Birbal submits that a questionnaire was submitted to the plaintiff and based on the reply of the plaintiff, the DDA reached a conclusion that the plaintiff had given a false statement to the DDA.

23. I have heard learned counsel for the parties and considered their rival submissions. I have also examined the documents placed on record by the counsel for the parties. Since, the issue in question is the bank guarantees, which

were furnished by defendant no.2 Bank in favour of DDA, it would be useful to reproduce the relevant portion of the bank guarantee in CS(OS) 703/2013, which read as under: THE CONDITIONS OF THESE OBLIGATIONS ARE: (1) IF THE BIDDER WITHDRAWS HIS BID DURING THE PERIOD OF BID VALIDITY SPECIFIED IN THE TENDER, OR (2) (3) IF THE BIDDER DOES NOT ACCEPT THE CORRECTION OF ARITHMETICAL ERRORS OF THE BID PRICES. OR IF THE BIDDER HAVING BEEN NOTIFIED OF THE ACCEPTANCE OF HIS BID BY THE EMPLOYER DURING THE PERIOD OF BID VALIDITY (A) FAILS OR REFUSES TO EXECUTE THE FORM OF AGREEMENT IN ACCORDANCE WITH THE TENDER CONDITIONS, IF REQUIRED, OR CS(OS) NOS. 703 & 704/2013 Page 9 of 19 (B) FAILS OR REFUSES TO FURNISH THE SECURITY DEPOSIT, IN ACCORDANCE WITH THE TENDER CONDITIONS. WE UNDERTAKE TO PAY THE EMPLOYER UP TO THE ABOVE AMOUNT UP ON RECEIPT OF HIS, FIRST WRITTEN DEMAND, WITHOUT THE EMPLOYER HAVING TO SUBSTANTIATE HIS DEMAND, PROVIDED THAT IN HIS DEMAND THE EMPLOYER WILL NOTE THAT THE AMOUNT CLAIMED BY HIM IS DUE TO HIM OWING TO THE OCCURENCE OF ONE OR ANY OF THE CONDITIONS, SPECIFYING CONDITION OR CONDITIONS. THE OCCURRED (Emphasis Supplied) 24. The first question, which arises for consideration before this Court, is as to whether the plaintiff had issued an unconditional bank guarantees or was the bank guarantees conditional in nature.

25. The law, in my view, is well settled. There is very little discretion in the hands of the Court for staying a bank guarantee for the reason that it has been repeatedly held by the Apex Court that a bank guarantee is an independent contract between the bank and the beneficiary and the bank has no concern with the dispute between the parties. Accordingly, in cases of an unconditional bank guarantee the bank must honour the bank guarantee without any protest or demur without the employer having to show the nature of dispute and without the dispute having first to be adjudicated upon.

26. For the same reasons, the Courts have repeatedly held that in cases of conditional bank guarantee, the terms of the bank guarantee must be strictly followed and the invocation must be strictly in accordance with the terms of the

bank guarantee. Hence, in case the invocation is bad in law, the invocation is liable to be stayed.

27. To this end, I have already reproduced the observations of the Supreme CS(OS) NOS. 703 & 704/2013 Page 10 of 19 Court in Himadri Chemicals Industries Ltd. (Supra) in paragraph 19 foregoing. Further, this was also accepted in Mahatma Gandhi Sahakra Sakkare Karkhane (Supra) and Daewoo Motors India Ltd. (Supra) sought to be relied upon by the counsel for the defendant; the court had come to the conclusion that the bank guarantees therein were infact unconditional which is evident from paragraph 22 of Mahatma Gandhi Sahakra Sakkare Karkhane (Supra) and paragraph 13 of Daewoo Motors India Ltd. (Supra).

28. Granting of an injunction owing to invocation being contrary to the terms of the bank guarantee was added by the Supreme Court in Hindustan Construction Co. Ltd. v. State of Bihar and Ors., (1999) 8 SCC436 In the said case, the Supreme Court has even gone to the extent that merely mentioning the terms agree unconditionally and irrevocably did not make the guarantee into an unconditional one as the bank had infact qualified its liability. The relevant paragraphs read 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. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as advance from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government advance, the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of CS(OS) NOS. 703 & 704/2013 Page 11 of 19 or injury. irretrievable

fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In U.P. Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. [(1988) 1 SCC174 the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER351(CA)]. was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud In Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC502 , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC68 , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC76 , National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd. [(1995) 4 SCC515 , State of Maharashtra v. National Construction Co. [(1996) 1 SCC735 , Hindustan Steelworks Construction Ltd. v. Tarapore & Co. [(1996) 5 SCC34 as also in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC568 the same principle has been laid down and reiterated.

9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad. (Emphasis Supplied) 29. Relying upon the judgment in Hindustan Construction Co. Ltd. v. Satluj Jal Vidyut Nigam Ltd., 2005 SCC OnLine Del 1249:(2006) 1 Arb LR16(Del), a coordinate bench had summarized the law as CS(OS) NOS. 703 & 704/2013 Page 12 of 19 under: 19. On the analysis of the above law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited

categories: (i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud. (ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage. (iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court. (iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee. (Emphasis Supplied) 30. The foregoing position of law has been further reiterated in *Continental Construction Ltd. v. Satluj Jal Vidyut Nigam Ltd.*, (2006) 1 Arb LR321(Del) and *Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium*, ILR (2006) 1 Del 415. Accordingly, the present applications are required to be disposed of on the touch stone of well- settled principles of law.

31. Accordingly, the primary question remains in respect of the nature of the bank guarantee. A bare reading of the bank guarantees would show CS(OS) NOS. 703 & 704/2013 Page 13 of 19 that they were conditional bank guarantees, which is evident from paragraphs 1 to 3 of the bank guarantee reproduced in paragraph 23 foregoing.

32. A careful reading of the bank guarantees would also show that the bank had undertaken to pay the employer which in this case is a DDA upto the amount of the bank guarantee on receipt of a written demand without the employer having substantiated its demand. It further goes on to say that provided, in the demand, the employer will note that the amount claimed by it is due to it owing to the occurrence of one or any of the conditions specified, the occurred condition or conditions. Closely connected with this argument is the invocation of the bank guarantees which would obviously shed light as to which condition of the bank guarantee was breached by the plaintiff, which led to the invocation of the bank guarantees.

33. The letter of invocation dated 19.03.2013 reads as under: Sub:-

"1.

2. Encashment of B.G. No.402LG03

Dt:-30.07.2012 for Rs.4,84,50,0000/- Valid Up to 20.03.2013 No.402LG03

Dt:-30.07.2012 for Rs.5,52,33,0000/- Valid Up to 20.03.2013 C/o 24660 LIG & 4855 EWS houses by using prefab technology (having Structural RCC members i.e. columns, beams and slabs all precast) at Narela & Rohini, Delhi (A TURNKEY PROJECT). SH:-

"C/O11566LIG & 2276 EWS Houses i/c internal development & electrification at Sec. G-7 & G-8 Narela & Sec.-34 & 35 Rohini (Group-I). SH:-

"C/O13094LIG & 2579 EWS houses i/c internal development & electrification at Sec. G-2 & G-6, G-3 & G-4 at Narela (Group-II). CS(OS) NOS. 703 & 704/2013 Page 14 of 19 D/Sir, M/S SANJOSE - IVRCL (JV) have transgressed the terms & conditions of the NIT/Tender documents for which they have submitted their Bid with the above subject Bank Guarantees on A/C of EMD. You are requested to En-cash the above subject Bank Guarantees for Rs.4,84,50,000/- & Rs.5,52,33,000/- by way of pay order/demand draft in favour of Sr.AO(CAU)/NZ/DDA. handed over to the bearer of this letter by 20.03.2013 itself. The DD/PO to the tune of Rs.103683000/- may please be (Emphasis Supplied) 34. A reading of this letter of invocation would show that the said letter is general in nature. It merely stated that the Joint Venture has transgressed the terms and conditions of the NIT/tender document for which the plaintiff had submitted its bid and, thus, encashment of the bank guarantee was sought. Admittedly, this invocation letter does not give any of the reasons as to which condition had been breached by the plaintiff and for what amount the bank guarantee was being invoked for as mandated by the bank guarantee itself.

35. During the course of hearing as well, this Court had asked the counsel for the DDA the reasons for the invocation of the bank guarantees, to which the counsel has submitted that same was invoked owing to condition No.1, as a fraud has been committed by the plaintiff in submitting false information. In my view, this submission of the counsel for the DDA cannot be accepted in view of condition no.1 of the bank guarantee.

36. It would also be used to reproduce Clause 18 of the tender document: CS(OS) NOS. 703 & 704/2013 Page 15 of 19 18. The Technical and Financial Bid for the work shall remain open for acceptance for a period of 180 days from the date of opening of the tender. If any tenderer withdraws his tender before the said period or issue of letter of acceptance whichever is earlier, or makes any modifications in the terms and conditions of the tender which are not acceptable to the department, then the Government shall, without prejudice to any other right or remedy, be at the said earnest money/performance guarantee, stage wise as under: liberty forfeit to Case of withdrawal of offer Action to be taken If in (i) the Contractor withdraws his offer within validity period or makes any modification the terms and conditions of the Contract, which are not acceptable the Department. to 50% of the Earnest Money deposited by the Contractor shall be forfeited absolutely. (Emphasis Supplied) 37. A reading of Clause 18, shows that if any tenderer withdraws his tender before the said period or issue of letter of acceptance whichever is earlier, or makes any modifications in the terms and conditions of the tender which are not acceptable to the department, then the Government may forfeit the said earnest money/performance guarantee, stage wise. None of the conditions detailed above would show that furnishing of false information would lead to forfeiture of the earnest money and invocation of the bank guarantees.

38. Learned counsel for the DDA has laboured hard to show that the CS(OS) NOS. 703 & 704/2013 Page 16 of 19 plaintiff had breached the integrity clause and in support of this contentions has placed reliance on Sections 3 and 4 of the bid document.

39. The same contention cannot be accepted as it is settled law that bank guarantee is an independent contract and other ancillary agreements cannot be said to be incorporated in its terms until the same is expressly mentioned in the bank guarantee itself. In Hindustan Construction Co. Ltd. (Supra) (SC), the Supreme Court had refused to refer to the clauses of the main contract in order to support the invocation of the bank guarantee; while rejecting the contention the Apex Court held as under: through 20. Learned counsel appearing on behalf of the defendants has contended that in the general conditions of contract appended to the agreement between HCCL and the State of Bihar, the word employer has

been defined to mean the Governor of Bihar acting the Chief Engineer or his authorised representatives. The word Engineer-in-Charge or Engineer has been defined separately to mean Superintending Engineer or the Engineer appointed from time to time by the employer and notified in writing to the contractor to act as Engineer. It is contended that Executive Engineer who has invoked the guarantee would be covered not only by the definition of employer but also by the definition of Engineer-in-Charge or Engineer as set out in the general conditions of contract. We are not prepared to accept this contention.

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 CS(OS) NOS. 703 & 704/2013 Page 17 of 19 the Bank was under no obligation to pay the amount covered by the performance guarantee to the Executive Engineer. (Emphasis Supplied) 40. The invocation in the present case is completely silent and this silence continues to haunt the defendant No.1/ DDA even as of today for the reason that in case the DDA is of the view that a fraud has been played upon the DDA, there is nothing on record to show that the DDA has contemplated any action against the plaintiff herein. The bank guarantees were furnished by the plaintiff in the year 2012 and admittedly any lapse or fraud having been played by the plaintiff upon the DDA came to the knowledge of the DDA as far back as in March, 2013. Till date DDA has not taken any action against the plaintiff, no legal notice has been issued; infact till date the plaintiff has not even been informed about the fraud or false declaration. Even otherwise, the DDA is unable to show as to how it can illegally enrich itself by invocation of the bank guarantee when it does not cover any of the clauses which form part of the conditions for furnishing of the bank guarantees.

41. Accordingly, interim orders dated 17.04.2013 passed in both the suits stand confirmed. DDA is restrained from invoking the bank guarantees.

42. It is also pointed out that the bank guarantees are alive till 15.12.2016. Mr. Sengh submits that in case the DDA is willing to pay the bank charges towards renewal of the bank guarantees. The plaintiff would have no objection for keeping the bank guarantees alive.

43. Subject to the DDA paying the earlier renewal charges and current charges of the bank guarantees before 15.12.2016, the bank guarantees would be kept alive, failing which the DDA is restrained from invoking CS(OS) NOS. 703 & 704/2013 Page 18 of 19 the Bank Guarantees bearing nos.402LG03 dated 30.07.2012 and 402LG03 dated 30.07.2012.

44. Applications stand disposed of. CS(OS) 703/2013 & CS(OS) 704/2013 45. List on 12.12.2016. G.S.SISTANI, J NOVEMBER03 2016 //msr CS(OS) NOS. 703 & 704/2013 Page 19 of 19

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