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Voltas Ltd Vs. Ncc Ltd & Anr

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Court : Delhi

Decided On : Dec-10-2014

Judge : Deepa Sharma

Appellant : Voltas Ltd

Respondent : Ncc Ltd & Anr

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + O.M.P. 1117/2014 % Judgment Reserved on:

02. 12.2014 Judgement pronounced on:

10. 12.2014 ..... Petitioner VOLTAS LTD Through: Mr.P.K.Sharma and Mr.Sanjay Grover, Advocates versus NCC LTD & ANR ..... Respondents Through: Ms.Priya Kumar, Advocate CORAM: HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1 The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for the relief that respondent No.1 be restrained from invoking three bank guarantees bearing Nos.999513BG0002397, 0999513BG0002398 and 0999513BG0002399 all dated 24.09.2013 of the following nature:S.No.Date i) 24.09.2013 ii) 24.09.2013 iii) 24.09.2013 OMP11172014 Description Mobilization Bank Guarantee Performance Bank Guarantee Retention Bank Guarantee Total Rs. Amount 1,30,56,750.00

1,09,50,000.00 99,50,000.00 2. The admitted facts of the case are that respondent No.1 was formerly known as Nagarjuna Construction Company Ltd. and was a part of an unincorporated joint-venture (JV), namely M/s CRSSG-NCC(JV). The JV was awarded the work under a tender floated by National Building Construction Company Ltd. (NBCC Ltd.) on behalf of Employee State Insurance Corporation (ESIC) for the construction of ESIC Medical College-cumHospital at Mandi Himachal Pradesh. The Joint Venture ceased to exist and its rights and liabilities have been taken over by respondent No.1. Work for supply, erection and commissioning of air-conditioning equipment in the five buildings of ESIC was awarded to the petitioner for a fixed contract having value of Rs.2,19,00,000/-. The completion period of the work was 14 months. At that time, the petitioner had furnished three bank guarantees of a sum of Rs. 4,28,00,000/-. During the course of execution of the work, some dispute arose between the petitioner and respondent No.1 and respondent No.1 encashed the bank guarantees of total sum of Rs.4,28,00,000/- on 07.06.2013. The petitioner filed OMP No.672 of 2013 under Section 9 of the Act seeking stay of the operation of termination letter dated 01.07.2013 by which the contract was terminated by respondent No.1. The petitioner also moved a petition under Section 11 of the Act being Arbitration Petition No.284/2013, whereby a sole Arbitrator was appointed to resolve that dispute vide order dated 30.08.2013. Subsequent thereon, the parties entered into a negotiation. The petitioner sought an adjournment on 11.09.2013 from Arbitrator and subsequently, the petitioner and respondent No.1 entered into a settlement and pursuant to that settlement, a Memorandum of Understanding (MoU) dated 18.09.2013 was drawn. Pursuant to the terms of this MoU, respondent No.1 refunded the sum of Rs.4,28,00,000/-, which the respondent was having pursuant to the encashment of three bank guarantees of the petitioner and in turn the petitioner furnished fresh bank guarantees for Rs.3,39,56,750/-. Respondent No.1 also agreed to compensate the petitioner by way of escalation charges which was quantified at Rs.1,25,00,000/- and agreed to pay in four equal instalments in the following manner:S. No.1.

2. 3.

4. 3. Date 18.12.2013 18.03.2014 18.06.2014 18.09.2014 Amount (Rs.) 31,25,000/31,25,000/31,25,000/31,25,000/_____ Total Rs. 1,25,00,000/_____ The petitioner resumed the work in view of this MoU. Under the terms of the MoU, bills for future work were to be paid within 45 days. The petitioner raised the following bills, details of which are shown as under:- 4. RA Bill No.Bill Date Due Amount (Rs.) 11th RA Bill 28.11.2013 3,480,389.00 12th RA Bill 26.12.2013 5,087,207.00 13th RA Bill 25.01.2014 2,072,761.00 14th RA Bill 24.02.2014 854,463.00 15th RA Bill 25.03.2014 2,781,502.92 16th RA Bill 14.04.2014 3,110,789.00 17th RA Bill 28.05.2014 1,041,173.00 18th RA Bill 26.06.2014 1,249,202.00 Total Rs. 1,96,77,486.92 The respondent No.1 against those bills paid a sum of Rs.1,24,84,211/-. The petitioner has submitted that respondent No.1 is in financial difficulties and has been unable to pay its debts and has also not made the payment of RA bills to the petitioner and in terms of the MoU has not paid single instalment of escalation amount of Rs. 1.25 crores and is presently in default to the extent of Rs.1,96,93,275/-. It is submitted that in its correspondence dated 06.02.2014, 11.02.2014 and 08.03.2014, the respondent No.1 had admitted his liability. OMP11172014 CRISIL has also downgraded the debt of respondent No.1 to category D from the earlier category BB+. It is further contended that respondent No.1 had in its meeting dated 02.08.2014 had decided to release the balance payment, including two escalation. It is further submitted that the work of ESIC Hospital has been stopped because the respondent No.1 has not made any payment to its contractors and this fact was also reported on 23.08.2014 in the newspaper Amar Ujala. It is further submitted that on account of inability of respondent No.1 to pay debts, the petitioner has issued a winding up notice dated 13.09.2014 to respondent No.1 at its registered office at Hyderabad. The petitioner had received a letter dated 13.09.2014 from respondent No.1, wherein various false allegations have been made by respondent No.1 and they had also threatened the petitioner that they were going to encash the bank guarantees and would get the balance work executed at petitioners risk and cost. This letter was received by the petitioner on 13.09.2014 by e-mail at 3.00 PM. It is submitted that this threat to encash the bank guarantees amounts to a clear and egregious fraud by respondent No.1. It is further pleaded that in terms of MoU, it was agreed between the parties that

respondent No.1 shall pay escalation charges amounting to Rs. 1.25 crores to petitioner upon the submission of bank guarantee. Thus, for the release of the escalation charges amounting to Rs. 1.25 crores, the petitioner had submitted bank guarantees to the extent of Rs.3.39 crores. The respondent is in the breach of MoU has failed to release the escalation amount and has caused losses to the petitioner who has kept the bank guarantee alive till date. It is submitted that bank guarantees were provided as part of consideration for the release of the escalation charges. Since the respondent No.1 had failed to release the escalation amount, they are playing fraud upon the petitioner. On these facts, it is prayed that respondent No.1 be restrained from invoking the bank guarantee.

5. The petition is contested by the respondent. It is pleaded by respondent No.1 that the petitioner has not pleaded any facts in respect of fraud. It is submitted that the fraud is required to be pleaded and established, especially when it is the ground of seeking restraint order for encashing the bank guarantee. It is submitted that on the other hand, the petitioner has played a fraud on this Court. It is submitted that contention of the petitioner that bank guarantees were given for the release of escalation amount and that the bank guarantee was three times to the escalation amount is contrary to the fact since the bank guarantees were given for performance, towards mobilization advance and towards retention money as per agreed terms and this fact the petitioner has himself stated in his petition as well. It is submitted that bank guarantee is an independent contract and the Court can only restrain its encashment either on the ground of egregious fraud or irretrievable injustice. It is submitted that irretrievable injustice means a situation where the financial condition of the beneficiary under the bank guarantee or for any other circumstance, it would be impossible for the petitioner to recover this amount if it found entitled for that amount at a later stage. It is submitted that there is nothing on record to show that the petitioner would not be able to recover the bank guarantee amount from respondent. It is submitted that this Court has also no jurisdiction to entertain the dispute between the parties arising out of the contract. It is submitted that admittedly a work order of Rs. 21,80,00,000/- was awarded to the petitioner, but the petitioner was only able to complete the work of Rs. 8.84 crores when the contract was terminated by the respondent No.1 and vide this MoU a total value of the work of Rs.21,90,00,000/- was awarded to the

petitioner to be finished in 14 months, which was extendable to two more months. It was towards the fulfilment of this contract that the fresh bank guarantees were furnished. The petitioner had also submitted a progress schedule dated 17.09.2013 along with the MoU. This schedule had shown the expected completion date as 20.09.2014 and the petitioner has not intentionally placed this document on the Court file along with his petition. It is submitted that it was only on account of the assurance and representation on the part of the petitioner, that he would be able to complete the work by 20.09.2014, that the respondent No.1 had agreed to enter into an MoU and returned the earlier encashed bank guarantees of Rs. 4,28,00,000/- furnished at the time of earlier work order. As a good gesture, the respondent No.1 also agreed to pay the escalation price, but it was for the future work as the petitioner had agreed to finish the work on the same price on which the contract in the year 2010 was entered into between them. This escalation was to be paid in four instalments as per schedule keeping in mind the schedule of the progress submitted by the petitioner. It is submitted that as per industry practice, there could be no payment, including that of escalation, if the contractor fails to execute the work as agreed between the parties or abandons it. The petitioner miserably failed to adhere to the schedule submitted by him and this fact is clear from the various RA bills which show that between 28.11.2013 to 26.06.2014, he had completed the work of Rs.1,96,77,486.92/- while he had to finish within a year a work worth of Rs.21,90,00,000/-, which itself shows the tardy progress of work on the part of the petitioner. It is submitted that petitioner had tried to mislead the Court. It is further submitted that respondent No.1 is a public company having a turnover of about Rs.6270.83 crores as an individual and Rs. 7568.69 crores as a group and is engaged in construction businesses of various types, including housing, hospitals, stadiums, water works, etc. and also in the process of executing several projects running into hundreds of crores. Therefore, the petitioner is not entitled for the relief on account of irretrievable injustice. It is submitted that rating revised by CRISIL is in no way affect the financial status of respondent No.1 and the respondent No.1 is a solvent company. On these facts, it is submitted that the petition is not only liable to be dismissed, but the petitioner is also liable to perjury as he tried to mislead the Court and obtained an order on false facts.

6. Rejoinder has been filed by the petitioner, wherein he has again attributed the fraud on the part of respondent No.1, on account of respondents refusal to pay escalation charges and the balance amount of RA bills, and argued that it was the consideration for providing the bank guarantee. It is further submitted that several cheques of respondent No.1 given to the petitioner were dishonoured, on account of respondent No.1 having no sufficient funds. It is further submitted that the petitioner had made it clear that it was not willing to carry out the work unless it was provided escalation charges because the respondent No.1 had received an escalation of approximately 30 crores from ESIC/NBCC. It is further submitted that after the termination of the work order dated 01.07.2013, the respondent No.1 made several attempts to get the work completed through other agencies like Suvidhar Engineers India Pvt. Ltd., but they refused to take the work knowing that the respondent had defaulted on its obligations with the petitioner. Thereafter, the respondent again approached the petitioner for completion of the work and agreed to the petitioners main demand, i.e, to provide escalation on the work already carried out by the petitioner. It was on these grounds that the MoU was executed. It is further prayed that respondent be restrained from invoking the bank guarantee.

7. The contention of the petitioner on 17.09.2014, before this Court was that in terms of MoU, the respondent had to pay a sum of Rs.1,96,77,486/to petitioner, but instead of paying the said sum, the respondents had proceeded to invoke the bank guarantee and thereby playing fraud upon the petitioner. On that day, the counsel for respondent was also present and while the respondent was given time to file its short-affidavit, an order of status quo in respect of the bank guarantees was passed. That order is still operative till date.

8. Parties have also furnished their written synopsis. In the written synopsis, the submissions made by the petitioner is that the fraud has been played upon the petitioner since the respondents by making misrepresentation and fraudulent representation, induced the petitioner to execute the MoU dated 18.09.2013 and secured three bank guarantees with the sole purpose to encash the same with the sole objective of financial enrichment. It is submitted that from the very beginning, the respondent had no intention of honouring its obligations while the petitioner

had fulfilled his two commitments under the MoU, i.e., providing fresh bank guarantee and resuming the work. It is submitted that respondent was well aware at the time of signing the MoU that its financial condition was precarious and they by inducing the petitioner to enter into an MoU had played fraud upon him. It is further submitted that the reading of the bank guarantees clearly shows that the bank guarantees are interlinked with MoU dated 18.09.2013 and were not executed independently. It is argued that since the fraud has been played which is egregious in nature, the respondent be restrained from invoking the bank guarantee. (Reliance is placed on Meghmala and Others vs. G. Narasimha Reddy and Ors. (2010) 8 SCC383and Hindustan Construction Co.Ltd. vs. State of Bihar and Ors. (1999) 8 SCC436 9. On the other hand, it is argued on behalf of the respondent that the bank guarantees were unconditional and irrevocable. The respondent No.2, i.e., Bank, as per the terms of the bank guarantee, has undertaken to pay the amount on demand of the beneficiary, i.e, respondent No.1, without enquiring into the terms of the agreement or any other circumstance and notwithstanding any dispute raised by M/s Voltas Limited. The liability of the bank is absolute and unequivocal under the guarantees. It is further argued that the law of injunction against the encashment of the bank guarantee empowers the Court to stay the encashment only on the grounds when a fraud of egregious nature has been played upon the petitioner or when the petitioner is going to suffer irretrievable injustice. Reliance is placed on Consortium of Deepak Cable India Limited vs. Teestavalley Power Transmission Limited, FAO (OS) 397 and 398/2014.

10. The respondent has also placed reliance in the case of NTPC Limited vs. Flowmore Private Limited, 1995(4) SCC515 Hindustan Steel Works Construction Ltd. Vs. Tarapore & Company, 1996(5) SCC34 U.P. State Sugar Corporation vs. Sumac International Ltd. 1997(1) SCC568 Mahatma Gandhi Sahakari Sakhar Karkhana Vs. National Heavy Engineering Coop. Ltd. and Anr. (2007) 6 SCC470and Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works Pvt. Ltd. (1997) 6 SCC450 11. It is argued that the respondent No.1 is a solvent company having huge turnover and so the petitioner is not going to suffer any irretrievable loss. It is further argued that even in the cases of Sick Companies, the Supreme Court has declined to restrain encashment of the bank guarantee.

(Reliance is placed on U.P. State Sugar Corporation (supra)). It is further submitted that the petitioner has not been able to show that a fraud has been played upon him. It is further submitted that whether the escalation price was payable in relation to the previous work or the work done under MoU is a matter which qualifies the contractual dispute and does not constitute fraud which can vitiate the transition of issuance of bank guarantee. Similarly, whether any amount is payable by the respondent No.1 is again the subject matter, to be adjudicated upon in the proceedings and is not the scope of present proceedings. It is submitted that the petition is liable to be dismissed.

12. I have heard the arguments of learned counsel for the parties at length. I have also gone through the synopsis submitted by the parties and the case laws supplied by them.

13. The present dispute relates to the encashment of three bank guarantees of total value of Rs. 3,39,56,750/- which the petitioner had submitted to the respondent No.1 on execution of MoU dated 17.09.2013 between them. The respondents case is that these are unconditional bank guarantees.

14. The petitioner has not pleaded anywhere, either in his petition or in his rejoinder that these bank guarantees were unconditional bank guarantees. However, during the course of arguments and also in his written submissions, it is argued by the petitioner that the bank guarantees were not unconditional, but were related to the MoU, hence these are conditional bank guarantees and cannot be encashed unless the terms and conditions of the MoU are fulfilled. It is argued that one of the terms and conditions of the MoU was that the respondent No.1 was to clear the RA bills and also make the payment of the escalation amount, as per the schedule. It is submitted that part of the money towards RA bills is still due and that no payment has been made towards escalation charges, therefore, the respondent cannot encash the bank guarantee. For this purpose, it is essential to understand the nature of the bank guarantee.

15. The nature and purpose of bank guarantee has been discussed by Supreme Court in the case of Hindustan Construction vs. State of Bihar (1999) 8 SCC436 relied upon by the petitioner. The relevant paragraphs 8 and 9 of the said

judgment are reproduced 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 excusable 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 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. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd.: [1988].1SCR1124, the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank [1984]. 1 All E.R. 351 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 or irretrievable injury. In Svenska Handelsbanken v. Indian Charge Chrome: AIR 1994 SC626; Larsen & Toubro Ltd. v. Maharashtra State Electricity Board: AIR 1996 SC334; Hindustan Steel Works Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.: AIR 1996 SC131; National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd.: AIR 1996 SC445 ; State of Maharashtra v. National Construction Co.: [1996].1SCR293; Hindustan Steel Works Construction Ltd. v.Tarapore & Co :AIR 1996 SC2268 as also in U.P. State Sugar Corporation v. Sumac International Ltd.: AIR 1997 SC1644 , 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.

16. In the light of this settled law, we need to examine the bank guarantee furnished by the petitioner. The bank guarantee is an independent contract between the beneficiary and the bank. So, if it is unconditional, then this contract between the beneficiary and the bank has to be honoured. The Court cannot restrain the two contracting parties to honour their agreement, unless except on the two grounds, i.e., an egregious nature of fraud has been played upon the petitioner, which had issued this bank guarantee, or that he shall suffer an irretrievable loss. The bank guarantees in dispute had been issued towards mobilization, advance purpose/execution of the works awarded. The language used in all the three bank guarantees is the same, except that one qualifies as bank guarantee towards mobilization and other towards advance purpose/execution of work. In order to understand the nature of bank guarantee-one of them is reproduced as under:

M/s CRSSG-NCC(JV) 9TH Floor, JMD Regent Square, DLF Qutub Enclave, Phase-II Mehrauli-Gurgaon Road Haryana RE:-Irrevocable and Unconditional Guarantee No.999513BG0002397 Bank At the request of and for the account of M/s. Voltas Limited, A-43, Mohan Coop. Industrial Estate, Mathura Road, New Delhi a company incorporated under the Companies Act, 1956 and having its Registered Office at Voltas House A, Baba Saheb Ambedkar Road, Chinchpokli, Mumbai-400033 (Obligee), we, State Bank of India, CAG Branch, Ballard Estate, Mumbai-400 001 (Bank) having its Registered Office/Head Office at Nariman Point, Mumbai, a Corporation organized and existing under the laws of India,

hereby issue our irrevocable and unconditional Bank Guarantee No.999513BG0002397 (Guarantee) in favour of CRSSG-NCC (JV), having its Registered Office 9th Floor, JMD Regent Square, DLF Qutub Enclave, Phase-II, Mehrauli-Gurgaon Road, Gurgaon-100022, Haryana, together with its successors and assigns (Beneficiary). We understand that M/s Voltas Limited (oblige) was awarded the work of HVAC Works at ESIC Mandi by CRSSG-NCC (JV) (Beneficiary), vide Sub-Contract Agreement No.CRSSGNCC(JV)/NBCC/ESIC/WO/008/10-11 dated 12.05.2010. (such Sub-Contract Agreement, as amended and supplemented from time to time, the sub-Contract Agreement) valued at Rs. 21,90,00,000/(Rupees Twenty one Crore Ninety Lac only). We further understanding that M/s Voltas Limited (Obligee) is providing the Guarantee seeking release of Mobilization Advance in connection with the SubContract Agreement dated 12.05.2010 (the SubContract Agreement) entered into between the Beneficiary and the oblige. We, State Bank of India (Bank) hereby irrevocably and unconditionally undertake on behalf of the Obligee to pay immediately to Beneficiary, on first demand, any sum or sums not exceeding Rs.1,30,56,750/- (Rupees One Crore Thirty Lac Fifty Six Thousand Seven Hundred Fifty only) (The Stated Amount) if Beneficiary notifies us that the Obligee has failed to perform any of its obligations under the Sub-Contract Agreement, referred to above. We, State Bank of India (Bank), agree that we shall have no duty or right to inquire as to the basis upon which Beneficiary has determined to present to us this Guarantee. We shall be entitled to rely and shall rely solely upon this Guarantee and shall be under no duty to, nor shall we under any circumstances whatsoever, inquire into the terms of the Sub- Contract Agreement or any other circumstances, matters or documents. We undertake to pay to the said Beneficiary any money so demanded notwithstanding any dispute or disputes raised by the said Obligee in any suit or proceedings pending before any Court or Tribunal relating thereto. Our liability under this Guarantee is absolute and unequivocal. We, State Bank of India (Bank), hereby waive any right we may have to first require Beneficiary to pursue Beneficiarys legal remedies against the Obligee and waive any presentment, demand, protest or notice of any kind. We hereby agree that the Agreement may be modified, amended and supplemented without our consent in any manner and agree that no such modification,

amendment or supplement shall release, affect or impair our liability under this Guarantee. We, State Bank of India, shall pay any stated amount demanded by the Beneficiary, forthwith on receipt of the Beneficiarys demand. Partial drawings are permitted, and this Guarantee shall, except to the extent reduced thereby, survive any partial drawings. The Stated Amount shall be reduced by the amount of any partial drawing by invocation under this Bank Guarantee at the request of Beneficiary. This Guarantee is valid through and including its expiry date of 30.09.2014 (in words Thirtieth day of September Two Thousand Fourteen). Upon request by the Obligee, on or prior to the current Expiraty Date, the Guarantee shall be extended, in which case we will provide Beneficiary with an amendment hereto. Any notice to Beneficiary in connection with this Guarantee shall be in writing and shall be delivered by hand with receipt acknowledged, or by Registered mail, postage prepaid, to Beneficiary. Any amendment reducing the amount of this Guarantee or otherwise limiting or impairing Beneficiarys rights hereunder shall not be effective, unless consented to in writing by the Beneficiary. This Guarantee will not be discharged due to the change in the constitution of the Bank or the Obligee or the Beneficiary. This Guarantee shall be governed by and construed in accordance with the laws of India. Notwithstanding anything contained hereinabove: a) Our liability under the Bank Guarantee shall not exceed Rs. 1,30,56,750/- (Rupees one Crore Thirty Lac Fifty Six Thousand Seven Hundred Fifty only) b) This Bank Guarantee shall be valid up to 30.09.2014; and c) We are liable to pay the guaranteed 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 31.12.2014. Unless a claim in writing is presented to us or a suit to enforce any claim under this guarantee is filed with us with in a period of three months after the expiry of the bank guarantee i.e. with in 31.2.2014 all your rights under the said guarantee shall be forfeited and we shall be released and discharged from all liabilities thereunder.

(emphasis supplied) 17. The language and the title of these bank guarantees emphatically show that it is an unconditional irrevocable bank guarantee and not the conditional one, as argued by learned counsel for the petitioner. The contention that this bank guarantee is in relation to MoU does not make the bank guarantee as conditional one because all the bank guarantees are given by the

contractors, pursuant to the some agreement and thus all the bank guarantees are pursuant to some agreement. That does not make a bank guarantee a conditional one, unless it is shown in the bank guarantee that the banks are to honour the bank guarantee on fulfilment of some condition on the part of any party. Under this bank guarantee, the bank was under obligation to encash the bank guarantee in favour of the beneficiary on demand. Thus, the bank guarantees are unconditional bank guarantees and the argument of the petitioner to the contrary has no force.

18. The petitioner has relied on the findings in the case of Hindustan Construction Co.Ltd. (supra). However, the facts in that case are entirely different. It is apparent from the judgment that after interpreting the bank guarantees and the terms of the contract, the Court had reached to the conclusion that the bank guarantees were not unconditional bank guarantees. In the present case, however, the bank guarantees are unconditional bank guarantees and not conditional ones. Moreover, the case law discussed by Supreme Court in Hindustan Construction Co.Ltd. (supra) is squarely applicable on the facts of this case, as already discussed.

19. This Court in a recent judgment Consortium of Deepak Cable India Limited (supra), has held as under:

145.....Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or

enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:A. A fraud of egregious nature; B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

Supreme Court has clearly held that the Court cannot issue an injunction against the invocation of the bank guarantees, except in case of fraud or in case of irretrievable injury. The petitioner, therefore, has to establish before this Court in order to succeed that a fraud has been played upon him while obtaining the bank guarantee or that he shall suffer an irretrievable loss.

20. The petitioner has also relied on paras 28, 29 and 33 in the case of Meghmala and Others (supra), wherein the expression fraud has been defined and the Courts are advised to take the element of fraud seriously and the Court has held that any act which is tainted by fraud should not be condoned and sustained. The Court has also relied while defining the fraud on the findings in Lazarus Estate Ltd. Vs. Besalay (1956) 1 QB702 (1956) 2 WLR502 Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills & Anr. AIR 1994 SC2151and State of Maharashtra & Ors. Vs. Prabhu (1994) 2 SCC481 In para 33, the Court has observed as under:

Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla Vs. Delhi Administration AIR 1963 SC1572 Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC550 State of Andhra Pradesh Vs. T. Suryachandra Rao AIR 2005 SC3110 K.D. Sharma Vs. Steel Authority of India Ltd. & Ors. (2008) 12 SCC481 and Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC170.

So, the question which is required to be determined by this Court is whether any fraud has been played upon the petitioner for obtaining the bank guarantees in dispute.

21. Fraud can be ascertained on the basis of facts. The person who comes before the Court with the allegation that a fraud has been played upon him has to establish those facts on record, which constitute the fraud. In its pleading, the petitioner has only pleaded in para 21 that threat to encash the bank guarantee amounts to a clear egregious fraud by respondent No.1. No other fact has been pleaded by the petitioner which constitute fraud.

22. In rejoinder also, the petitioner has not pleaded any facts which constitute fraud, except that the egregious fraud is made out from documents and pleadings. In written synopsis and during arguments, it has been submitted that the fraud on the part of respondent No.1 is clear from the fact that the respondent did not pay the escalation charges under MoU and also failed to pay the balance amount of RA bills and that the encashment of bank guarantee was a consideration towards such payment. From the bare reading of the MoU, it is apparent that payment of escalation charges was not the condition precedent of submitting the bank guarantee. Encashment of the bank guarantee was also not made conditional to the clearance of RA bills. It is thus clear that the submission of bank guarantee was unconditional. During the course of arguments, however, it is argued by the learned counsel for the petitioner in a desperate attempt to succeed that the petitioner was induced into the MoU by misrepresentation and fraudulent representations by respondent with the sole intention to obtain the three bank guarantees with sole purpose to encash them in order to save themselves from financial crisis and to get enriched. These facts they were cheated into the MoU are not pleaded by the petitioner, rather in the petition, contrary facts have been pleaded.

23. The relevant Para 9 and 10 of petition are reproduced herein:-

9. subsequent to the developments, the parties entered into negotiations in order to settle the differences between them. The petitioner thereupon wrote to the learned Arbitrator on 11.09.2013 requesting him to defer the matter, since the

parties were negotiating settlement. Thereafter the petitioner and respondent No.1 executed a Memorandum of Understanding (MoU) dated 18.09.2013, at New Delhi.

10. Petitioner states that in terms of the aforesaid MoU, the respondent No.1 agreed to refund the sum of Rs. 4.28 crores which had been illegally encashed by the respondent No.1. The petitioner in turn agreed to furnish fresh guarantees for Rs.3,39,56,750/-. The respondent No.1 also accepted the claim of the petitioner that the delay in the execution of the project and the consequential time and cost overruns entitled the petitioner to be compensated by Escalation. The amount of escalation was quantified at Rs.1,25,00,000/-

24. It, therefore, is clear that no contention is there on the part of the petitioner in his petition that he was induced into the MoU by any misrepresentation or fraudulent misrepresentation. The pleadings on the other hand show that the petitioner had voluntarily entered into MoU. Moreover, the very nature of the MoU (terms and conditions enunciated therein) clearly shows that two things were done simultaneously. Execution of three bank guarantees of Rs.1,30,56,750.00, Rs.1,09,50,000.00, and Rs 99,50,000.00 by petitioner and refund of cash of sum of Rs.4.28 crores by respondent No.1. The record of this fact in the MoU clearly shows that respondent No.1 bartered a cash amount of Rs.4.28 crores against threes three bank bank guarantees worth of Rs.3.39 crores executed by petitioner. The Court is unable to make out as to in what manner the respondent No.1 had got enriched by inducing the petitioner into the present MoU. The dispute between the parties to the effect whether the escalation charges were for the work done under this MoU or were for the work already done under the earlier work order, is not a subject matter of the present petition and the parties are free to raise this dispute before appropriate forum. The meaning of the word fraud in Oxford English Dictionary is the use of false representation to gain unjust advantage. In the present case by entering into an MoU, the petitioner has failed to show that respondent No.1 had put himself in a position of undue advantage. As shown earlier, not only they had paid a cash of Rs.4,28,00,000/- to the petitioner, but also agreed to pay a sum of Rs.1,25,00,000/- towards escalation charges to the petitioner. The petitioner, therefore, has failed to satisfy this Court that he has

been induced by respondent No.1 into this MoU and has put him in a position of undue disadvantage, while putting respondent in a position of undue advantage. Both parties have voluntarily as part of a settlement entered into MoU and pursuant to that while the respondent refunded the cash amount of Rs.4,28,00,000/-, the petitioner executed the present unconditional bank guarantee. The petitioner, therefore, has failed miserably to show that any egregious fraud had been played upon him for execution of the present bank guarantees. There is no dispute to the fact that the respondent is a company worth of Rs.6270.83 crores as an individual and worth of Rs.7568.69 crores as a group and is not a sick company, as stated by respondent No.1 on affidavit.

25. In the case U.P. State Sugar Corporation (supra), the Supreme Court has clearly held that pendency of reference of the contractor company before BIFR under Sick Industrial Companies (Special Provisions) Act would not be sufficient to constitute irretrievable injustice.

26. It, therefore, cannot be said that the petitioner shall suffer an irretrievable injury if the stay is not granted to it.

27. For the foregoing reasons, I hold that the petitioner is not entitled to any relief. The stay granted by this Court stand vacated and the petition stands dismissed. DEEPA SHARMA (JUDGE) DECEMBER10 2014 BG

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