Serial Nos. 7-9
Regular List

HIGH COURT OF MEGHALAYA AT SHILLONG

Arb.A.No1/2019 with
Arb.A.No.2/2019
Arb.A.No.3/2019

Date of order: 22.03.2022

North Eastern Electric Power Corporation Ltd. (NEEPCO)	Vs.	Patel-Unity Joint Venture
North Eastern Electric Power Corporation Ltd. (NEEPCO)	Vs.	Patel Engineering Limited
North Eastern Electric Power Corporation Ltd. (NEEPCO)	Vs.	Patel Engineering Limited

Coram:
Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. R Shankar, Adv with
Mr. S Jindal, Adv

For the Respondent : Mr. A Dholakya, Sr.Adv with
Mr. R Dangwal, Adv
Mr. K. Gaur, Adv.

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

These three appeals arise out of identical orders passed on three independent petitions under Section 9 of the Arbitration and Conciliation Act, 1996 pertaining to the three packages forming parts of the same work for the construction of a hydro-electric power project in the State.

2. The primary prayer in the three petitions was as follows:

> "Restrain the Respondent, its assign(s), its officers, employees or representatives from fraudulently invoking the Bank Guarantees as

listed in para 26 of the present application and issued by the Applicant in favour of the Respondent."

3. To begin on a lighter note, the prayer made may just as well have been allowed for the mere asking. By the use of the word "fraudulently" therein, the respondent herein only prayed that the invocation should not be fraudulent but did not seek any injunction on the invocation otherwise. So much for careless drafting and the daily rubbish that the Indian Judge is subjected to.

4. There is no dispute that the relevant bank guarantees were unconditional in nature, in the sense that the bank unequivocally agreed to pay the amounts covered by the relevant bank guarantees on the first demand made by the beneficiary without reference to the respondent herein and merely on the basis of the claim of the beneficiary without going into the veracity thereof. It may do well to notice the identical key clause from one of the bank guarantees:

> "We, the said Bank, also do hereby agree to pay unequivocally and unconditionally within Two working days on demand in writing from the said Corporation *(appellant herein)* of any amount upto … to the said Corporation for any purpose or cause or on any account whatsoever under the provisions of the said contract *(matrix contract)* in which respect the decision of the said Corporation shall be final and binding on us."

5. As is elementary, bank guarantees stand on a different footing from the matrix contract and the very purpose of furnishing of a bank guarantee

is to insulate the subject-matter thereof from the disputes or differences that may arise between the parties to the principal or matrix contract. Indeed, a bank guarantee is a contract between a bank and the beneficiary and the other party to the matrix contract is not a party to the bank guarantee despite the bank guarantee being furnished at the instance of such other party to the matrix contract. Generally, as here, a bank guarantee is quite independent of the matrix contract and is a stand-alone document under which a bank is obliged to make payment to the beneficiary strictly in accordance therewith.

6. In the present case, the bank agreed to pay "unequivocally and unconditionally" upon the appellant herein making a demand "for any purpose or cause or on any account whatsoever" under the provisions of the matrix contract. The last limb of the clause even provides for the decision or opinion of the beneficiary to be binding as to whether the demand is in accordance with the provisions of the matrix contract. The terms of the guarantee do not allow any discretion or latitude to the bank and do not envisage any notice being issued to the respondent herein before the payment in terms thereof is released.

7. Bank guarantees, like letters of credit, form the life-blood of commercial activities and have to be strictly construed on the basis of the letter of the document. Whatever may be the prejudice that is suffered by

the person at whose behest the bank guarantee is issued, unless the terms of the bank guarantee permit its interdiction, Courts are not permitted to interfere in the invocation of a bank guarantee or the payment thereunder. High authorities instruct accordingly that unless a case of egregious fraud in the making of the bank guarantee or at the inception of the contract is made out or there is some special equity or irretrievable damage, the Court will be slow in interfering with a bank guarantee or any payment thereunder.

8. The appellant herein first refers to the ad-interim order that was passed on the petitions under Section 9 of the Act. It is evident that two considerations weighed with the Commercial Court in passing the ad-interim orders of status quo with respect to the bank guarantees: that a case of fraud had been pleaded in the petition; and, that clause 29 of the matrix contract was under consideration of this High Court in some ancillary matter. The relevant ad-interim order of February 22, 2019 did not meet the rudimentary tests for the grant of any injunction and it did not even pay lip service to comply with the preconditions for the grant of an interlocutory injunction. No prima facie case appears to have been made out and there is no reflection in the order of any consideration as to the balance of convenience.

9. It is trite law that when a suitor seeks an order, it is for such suitor to affirmatively establish a right to obtain such order. At the interlocutory stage, a strong prima facie case has to be made out. The mere pleading of an allegation is not a substitute for the prima facie satisfaction of the Court being reached as to the right of the suitor to obtain an ad-interim order. Similarly, merely because an issue is pending consideration before a higher forum, it does not imply that it operates as an injunction, unless there is a specific injunction which is in place requiring the relevant provision that has fallen for consideration to not be implemented. The Commercial Court was clearly wrong in passing the ad-interim order as it took irrelevant considerations into account and failed to apply the high tests required when an injunction against a bank guarantee is sought.

10. The same trend continued in the final order of June 21, 2019 which has given rise to the present appeals. The Commercial Court referred to certain averments in the affidavit filed on behalf of the appellant herein and, though such averments did not amount to any concession or admission nor entitle the Commercial Court to pass any injunction in respect of the bank guarantees, the bank guarantees were interdicted. The primary grounds furnished in the judgments and orders impugned are found at paragraphs 4 and 7 of the impugned judgments that culminated in the three

directions issued at paragraph 10 thereof. Paragraphs 4, 7 and the directions from paragraph 10 are set out:

> "4) The Ld. Counsel for the Respondent does not dispute with regard to the statement made in para 16, 17, 26 and 33 of the show cause, however, the Ld. Counsel for Respondent resists to the prayer for issuance of notice before invocation of the bank guarantee and submits that if notice is issued before the invocation of the bank guarantee it would amount to adding conditions in the bank guarantees which otherwise is unconditional. That it would be necessary for this Court to examine the statement made by the Respondent in para 16, 17, 26 and 33. For easy reference the relevant extract is reproduced;
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> That in para 16 (g) the Respondent has stated
> "*... the Arbitral verdict and order in his case, overlaps the clause 29 of the contract agreement and is under hearing before the High Court of Meghalaya by filing the present application and in the guise of the same seeking judicial review of clause 29, the Applicant is abusing the process of law and is attempting to create situation in which there could be diversion of judicial opinion on the same issue"*.
>
> That in para 16 (h) the Respondent has stated
> "*....the Applicant has also got two more Arbitral awards related to revision of the rates for Package-II and package-III which are the subject matter of challenge under Commercial Arbitration case No. 10, 11, 12, 13 of 2018 where again issue relating to judicial review of clause 29 of the conditions of contract is under consideration*".
>
> That in para 17 the Respondent has stated
> *"....the clause 29 of the contract agreement is sub-judice before the Hon'ble High Court of Meghalaya as well as before this Court therefore it is requested that this Court hold its hands in reaching any judicial conclusion in the said clause 29 further any event it is the stated intention of the application to seek injunction against invocation of the bank guarantee in question the said clause 29 has no nexus to the execution or invocation of the said bank guarantee. The Respondent in para 17 page 23 has stated*

"The extra work and escalation amount are not susceptible to the adjustment on account of quantity variation".

"7) That on examining the response of the Respondent which is stated above in the light of the contention raised by the Applicant in his Application u/s 9 of the Arbitration and Conciliation Act, 1996, this Court finds that in view of the statement made by the Respondent in the show cause discussed above the apprehension and the grievances of the Applicant does not survive for adjudication as the Respondent in very clear terms has held that the bank guarantee and cash security deposit, if at all is invoked the same shall be invoked in terms of clause 4 of the agreement, as such, this application can be disposed off base on the admission made by the Respondent."

"10) ... *a) The Respondent will not invoke the bank guarantee or adjust the cash security deposit provided by the Applicant to the Respondent under clause 29 of the contract in question i.e. package-I, package-II, package-III as the said clause 29 cannot be acted upon, being subjudiced. The invocation of bank guarantee and adjustment shall not be contrary to the clause 4 of the contract in question package-I, package-II, package-III.*
b) There shall be no diversion of funds from package-II, package-III for adjustment of vendor of package-I balance amount shall be adjusted from pending payment and R/A Bills.
c) That in case the Respondent proposed to invoke or encash the bank guarantee and adjust security deposit the Respondent shall give indication the intention to encash bank guarantee and cash security deposit".

11. At the outset, a preliminary objection is taken on behalf of the respondent to the effect that the appeal is not maintainable. A facetious submission is made by referring to Section 37(1)(b) of the Act that it is only the grant or the refusal to grant any measure under Section 9 of the Act which is appellable under Section 37 thereof. According to the respondent, no measure has been granted under Section 9 of the Act by the

order impugned. Such submission has to be rejected out of hand. There is a right and proper injunction in place and by no stretch of imagination can it be said that the order impugned or the directions quoted above do not amount to an injunction. Even when the exercise of a right is hedged with a condition introduced by an order, such order amounts to an injunction or an interim measure under Section 9 of the Act.

12. It is further submitted on behalf of the respondent, again as a preliminary objection, that the appeals are of no further relevance because the work under the several packages have been completed and, except in the odd case, the defect period is over and certificates in such regard have also been furnished. This aspect is as relevant in the present context as may be the weather outside at the moment.

13. On merits, it is submitted on behalf of the respondent that the Commercial Court did not go into the issues raised in the petitions and the Commercial Court merely issued the impugned directions upon its interpretation of the contents of the affidavits filed by the appellant herein. It is the respondent's further contention that since no claim has been made by the appellant till date nor any attempt made to invoke the bank guarantees since the passing of the impugned orders, now that the work is over, the appellate court should not get into the appeals on merits or pave

the way for the invocation of the bank guarantees which would be fraudulent.

14. The respondent has referred to a judgment reported at (2016) 11 SCC 720 *(Gangotri Enterprises Limited v. Union of India)* for the law declared therein at paragraphs 38 to 41 of the report. In that case, two independent contracts were issued by Northern Railway to the appellant before the Supreme Court. In respect of the first contract that pertained to a segment near Agra, the Supreme Court recorded that due to the delay in handing over the site on account of a farmers' agitation and the like, the contract stood terminated and a fresh contract was subsequently awarded by Northern Railway. The second contract was described in the report as Anand Vihar works and, upon such second contract being successfully completed, the performance bank guarantee furnished in connection with the second contract was sought to be invoked and the running account bills pertaining to the work performed under the second contract were sought to be withheld by Northern Railway upon Northern Railway perceiving that it had suffered a substantial loss in the contractor failing to execute the Agra contract.

15. It was in such context that the Supreme Court noticed clause 62 of the general conditions then governing railway contracts that provided as follows:-

> "The amounts thus to be forfeited or recovered may be deducted from any monies then due or which at any time thereafter may become due to the contractor by the Railways under this or any other contract or otherwise."

16. While dealing with such clause and the right of Northern Railway to invoke the bank guarantee pertaining to an altogether different contract, the Supreme Court referred to the principle enunciated in the judgment reported at (1974) 2 SCC 231 (*Union of India v. Raman Iron Foundry)*, not for the purpose of assessing the right of Northern Railway to pursue a claim pertaining to a different contract, but only on the ground that an unliquidated claim in damages is not enforceable till it is adjudicated upon. In *Gangotri Enterprises Ltd*, it was held that a mere claim of unliquidated damages, which had not been ascertained, adjudicated or quantified, would not justify withholding an admitted debt due in terms of clause 62 of the general terms then governing railway contracts. Such principle has no manner of application in the present case where there is no claim on account of unliquidated damages and, indeed, the petitions under Section 9 of the Act were in the nature of *quia timet* actions and before any invocation of any bank guarantee had been made.

17. In any event, it is submitted on behalf of the appellant that the judgment reported at (2020) 2 SCC 540 *(State of Gujrat v. Amber Builders)* has held *Gangotri Enterprises Ltd* to be *per incuriam*. Even the dictum in

Raman Iron Foundry, which was relied upon in *Gangotri Enterprises Ltd*, had long been overruled, but such aspect was not noticed in *Gangotri Enterprises Ltd*. Paragraph 21 of the report in *Amber Builders* is apposite in the context:

> "21. In our opinion, the judgment rendered in *Gangotri Enterprises Ltd.* is per incuriam because it relies upon *Raman Iron Foundry* which has been specifically overruled by the three-Judge Bench in *H.M. Kamaluddin Ansari* (1983) 4 SCC 417)."

18. The respondent asserts that there was egregious fraud in this case since the ultimate value of the work turned out to be more than 400 per cent of the value indicated in the bid documents by the employer. The respondent says that clause 29 of the matrix contract between the parties, in essence, provides that upon the value of the work exceeding the value or the price of the contract, by every 25 per cent, the rates payable to the contractor would be discounted progressively. According to the respondent, a huge amount of security that was furnished by the respondent to the appellant is being withheld in addition to the bills against the completed work not being released despite the employer having no claim against the contractor, whether on account of the quality of the work, or any defect pertaining thereto or any delay in the performance thereof.

19. Finally, the respondent refers to a judgment reported at (2018) 2 SCC 602 *(State of Jharkhand v. Hindustan Construction Co. Ltd.)* to place

paragraphs 63 to 68 thereof. According to the respondent, such judgment instructs that a Court of appeal cannot look into a matter as the Court of first instance in exercise of is appellate authority. But the paragraphs from the report relied upon do not lay down the proposition that the respondent canvasses; as it cannot, in view of the plenary powers of an appellate court as recognised in Order XLI of the Code of Civil Procedure, 1908 when the scope of the appeal is not confined to only questions of law. The appellate authority conferred by Section 9 of the Act does not confine it to only questions of law. However, what appears from the paragraphs cited is that the Supreme Court upheld the principle that was enunciated in the judgment reported at [1905] A.C. 369 *(The Colonial Sugar Refining Company, Limited v. Irving)* and followed in the judgment reported at AIR 1953 SC 221 *(Hoosein Kasam Dada v. State of M.P.)* and, again, in the judgment reported at AIR 1957 SC 540 *(Garikapati Veeraya v. N. Subbiah Choudhry)*. The principle is that since an appeal is a creature of statute, a right of appeal inheres in the litigant if such right is available at the start of the *lis*; and the subsequent abolition of the right of appeal will not affect the right of a litigant who had entered the adjudication process prior to the right of appeal being removed, erased or altered. Such principle, obviously, has no manner of application in the present case.

20. There is no doubt that the case carried by the respondent to the Commercial Court may not have been appropriately assessed. However, the respondent has not proffered any appeal from the impugned orders. Further, the grounds urged by the respondent here and the grounds indicated in the petition under Section 9 of the said Act, even if accepted at face value, would not constitute grounds for interfering with an unconditional bank guarantee. In short, the best arguable case of the respondent does not entitle the respondent to an injunction or any form of interdiction in respect of the subject unconditional bank guarantees.

21. The orders impugned amount to the Commercial Court rewriting the conditions of the bank guarantees or the contract between the parties, which the Court had no jurisdiction to do. If an unconditional bank guarantee permits the beneficiary to receive the payment thereunder on its first demand and without any reference to or concurrence of the person at whose behest the guarantee had been furnished, the Court cannot introduce clauses to make the invocation conditional. Indeed, the directions issued amount to the conversion of an unconditional bank guarantee into a conditional one, which the Court plainly lacks the authority to do.

22. The arguments of *fait accompli* that the appellate court has been presented with by the respondent are of no relevance. Merely because no claim has been made or there is no attempt at invocation of the bank

guarantees since the making of the impugned orders, it does not follow that the orders have to be continued. The contention in such regard is akin to an injunction being issued in respect of a residential property in favour of a stranger merely because the owner of the house does not intend to sell the house. When an injunction is sought against a bank guarantee or a letter of credit or the like, serious considerations should go into the adjudication; and only in the rare case may an injunction issue. There is no doubt that there is an element of prejudice that the respondent has suffered or is likely to suffer; but that is not a ground for an unconditional bank guarantee to be interdicted or interfered with. There is no case of fraud at the inception that has been made out. The only case run by the respondent is that large sums of money due to it from the appellant remain unpaid and, as such, it would be inequitable for the appellant to be left free to invoke the bank guarantees. Even if it is so, it is a completely irrelevant consideration in the matter of assessing whether the nature of order sought in respect of the bank guarantees ought to be passed.

23. For the aforesaid reasons, the judgments and orders dated June 21, 2019 are found to be without basis and completely flawed. No reason is indicated therein to interfere with the invocation or encashment or payment under any of the unconditional bank guarantees. The Commercial Court,

clearly, failed to take relevant considerations into account and apply the law in such regard that it was obliged to.

24. Considering the facts that the respondent came to Court with, it may not have been unfair to expect the respondent not to urge its claim beyond a point at this appellate stage or merely seek some other concession that the appellant may have acceded to. But the vigour and gusto with which the respondent sought to justify the completely baseless orders was an affront to the institution.

25. Accordingly, Arb.A.No.1 of 2019, Arb.A.No.2 of 2019 and Arb.A.No.3 of 2019 are allowed by setting aside the impugned judgments and orders dated June 21, 2019 and dismissing altogether the petitions under Section 9 of the Act. The respondent will pay costs assessed at Rs.3 lakh for the proceedings in the Commercial Court below and in these appeals for the hopelessly unmeritorious cause that it sought to assert and defend.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
22.03.2022
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