

LARSEN AND TOUBRO LTD.

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v.

MAHARASHTRA STATE ELECTRICITY BOARD AND ORS.

SEPTEMBER 13,1995

[J.S. VERMA AND K.S. PARIPOORNAN, JJ.]

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Civil Procedure Code, 1908, Order-39, Rules 1 and 2—Bank Guarantees—Furnished under the contract Injunction against invocation of—A confirmed bank guarantee can not be interfered with, unless there is an established fraud and irretrievable injustice involved in the case.

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A contract was executed between the parties upon furnishing Bank Guarantees by appellants viz. security against advance, performance, two guarantees for partial release of retention money and security against liquidated damages.

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As per contract clauses, after taking trial and performance test, the Plant was taken over by the respondent Electricity Board and a taken over certificate was issued in favour of appellant. For the settlement of its claim, appellant invoked the arbitration clause as per contract. Meeting of arbitrators took place and certain directions were passed by them for filing the respective claims of the parties to contract. prior to filing its claim, respondent no.1 invoked all the Bank Guarantees except performance guarantee. Appellant filed arbitration petition contending that Bank Guarantees have been fraudulently and dishonestly invoked and that also after the date of expiry of said guarantees. Petition was dismissed by the High Court holding only in the event of fraud or irretrievable injustice, the court would be entitled to interfere in a transaction involving a Bank Guarantee and under no other circumstances; No fraud or irretrievable injustice have been made out; Relief regarding the amount wrongly recovered from the appellant can be claimed before arbitrator by way of damages; and that Communication by the respondent to the appellant and Bank concerned requesting for extension of expiry date serves the purpose of notices for invocation of Bank Guarantee, so it can not be said that invocation was after the date of expiry of the said guarantees.

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Against the Order of High Court Appellant preferred an appeal by way of special leave, contending that Bank Guarantees have been

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A fraudulently and dishonestly invoked, and that as far as Bank Guarantee towards advance was concerned, no amount remained balance towards advance, rather they have to recover some amount from respondent no. 1. Contention with regard to two bank guarantees towards retention money was that respondent no. 1 was bound to return the retention money as per clause of contract when plan was taken over by them after taking trial and performance test. Regarding Guarantee towards liquidated damages it was contended that damages should be proved and be quantified before invocation of Bank Guarantees.

Allowing the appeal in part, this Court

C HELD : 1. Invocation of advance Bank Guarantee was in proper time. [624-B]

D 2. No fraud of irretrievable injustice have been made out by invocation of Bank Guarantees regarding partial retention money and security against liquidated damages. [624-H]

E 3. Guarantee dealing with partial release of retention money furnished by Citi Bank, N.A. was a conditional guarantee, and will ensure only till successful completion of the trial operation and plant is taken over by first respondent. Since stipulation as per clauses of agreement have been successfully, fulfilled and plant was admittedly taken over by the first respondent that event having ensured, the invocation of Bank Guarantee is not encashable on its terms. [624-E]

F 4. The appellant is entitled to an order of injunction, to a limited extent, against respondent nos. 1 and 4 (Citi Bank, N.A.), restraining them from invoking the Bank Guarantee given by the 4th respondent-citi Bank, N.A. dated 10.5.1989. [626-B]

G *Savenska Handelsbaken v. Indian Charge Chrome and Others*, [1994] 1 SCC 502; *United Commercial Bank v. Bank of India and Others*, [1981] 2 SCC 766; *U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.*, [1988] 1 SCC 174; *General Electric Technical Services Company Inco. v. Punj Sons (P) Ltd. and Anr.*, [1991] 4 SCC 230 and *Elian and Rabbath v. Matsas and Matsas*, [1966] 2 Lloyd's Report 495, referred to.

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8254 of 1995.

From the Judgment and Order dated 20.10.94 of the Bombay High Court in Arbitration Petition Lodg. No. 240 of 1994. A

B.M. Naik, V. B. Trivedi and Bharat Sangal, for the Appellant.

Harish N. Salve, and A.S. Bhasme, for the Respondents. B

The Judgment of the Court was delivered by

PARIPOORNAN, J. Leave granted.

The appellant, petitioner in arbitration petition Lodg. No. 240/94 in the High Court of Judicature at Bombay, initiated under Section 41 of the Arbitration Act, has filed this appeal by special leave against the order passed by N.D. Vyas, J. dated 20.10.1994. The appellant's prayer for injunction against the first respondent (Maharashtra State Electricity Board) from invoking or claiming or demanding or releasing any amount whatsoever, under certain bank guarantees given by respondent Nos. 2 to 5 was dismissed by the aforesaid order by the learned Judge. Respondent Nos. 1 to 5 in the arbitration petition Lodg. No 240/94 as also in this appeal are- (1) Maharashtra State Electricity Board, Bombay, (2) Standard Chartered Bank, Branch Bombay, (3) Grindlays Bank P.I.C., Branch Bombay, (4) Citi Bank, N.A., branch Bombay and (5) Bank of Baroda, branch Bombay. C
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The first respondent invited tenders for supply and commission of Coal Handling Plant. The appellant's tender, which was accepted, culminated in a contract, executed between the parties, dated 9.3.1989. The value of the contract was Rs. 61,11,07,200. The appellant furnished the following five Bank Guarantees : F

Sl. No.	Name of the Bank	No. of the Bank Guarantee	Nature of the Bank Guarantee	Amount of the Bank Guarantee in Rs.	Last extended date.
1.	Standard Chartered Bank/Respondent No.2	529/88/153	Security against advance payment	5,50,30,000	31.5.94

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A	2.	ANZ Grindlays Bank, PLC Respondent No. 3	1101/88/384/G	Performance	6,17,28,000	31.3.95
B	3.	Citi Bank, N. A. Respondent No. 4	26247	Partial release of retention money	2,72,39,850	19.11.94
C	4.	Bank of Baroda, Respondent No. 5	73/309	Security against liquidated damage	6.,13,40,978	26.9.94
D	5.	Standard Chartered Bank, Respondent No. 2	529/92/380	Partial release of retention money	1,12,00,000	31.12.94

(Vol. II page 4 of Paper Book)

- E** The completion of the Plant seems to have been delayed. The parties are blaming each other for the delay. After taking the trial and performance test, the Plant was taken over by the first respondent on 10.6.1994. On the same day a take-over certificate was also issued. It is seen that earlier on 29.3.1994, the appellant lodged its claim. The first respondent denied the claims so made. they did not make any counter-claim then. On 4.6.1994, the appellant invoked the arbitration clause as per the contract. A meeting of the Arbitrators took place on 14.9.1994. The Arbitrators gave certain directions. In pursuance thereto the appellant filed its claim on 30.9.1994. The Arbitrators gave time to the first respondent to file their counter claim on or before 30.11.1994. In the mean-while on 1.10.1994 the first respondent invoked all the Bank Guarantees except Guarantee No. 2 mentioned herein-above (Performance Guarantee). The Court passed an order directing the status quo to be mentioned on 17.10.1994. Appellant filed arbitration petition Lodg. No. 240/94 and contended that the Bank Guarantees have been fraudulently and dishonestly invoked. Regarding Guarantees in respect of advance and liquidated damages, it was further alleged that they

were invoked after the date of expiry of the said guarantees. Vyas, J. rejected the above pleas and declined to grant the interim relief as prayed for the appellant. As agreed to by counsel on both sides, the interim order was made the order in the main petition itself. Arbitration petition Lodg. No. 240/94 was dismissed. Hence this appeal by special leave.

We heard appellant's counsel Mr. B.M. Naik, senior Advocate, and Mr. Harish N. Salve, senior Advocate, who appeared for the respondents. At the outset we should make it clear that the Bank guarantee relating to performance, item No. 2 mentioned in the preceding paragraph, was not invoked and is not covered by the subject matter of this proceeding.

Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the Court in the matter of grant of injunction against the enforcement of a Bank Guarantee/irrevocable Letter of Credit. After survey of the earlier decisions of this Court in *United Commercial Bank v. Bank of India and Ors.*, [1981] 2 SCC 766, *U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.*, [1988] 1 SCC 174, *General Electric Technical Service Company Inc. v. Punj Sons (P) Ltd. and Anr.*, [1991] 4 SCC 230 and the decisions of the Court of appeal in England in *Elian and Rabbath v. Matsas and Matsas*, [1966] 2 Lloyd's Report 495 and a few American decisions, this Court in *Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others*, [1994] 1 SCC 502, laid down the law thus :

"..... in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud" (p.523)

"..... irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms....." (p.524)

"..... there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee." (pp. 526-527)

A In the order appealed against the learned Judge has referred to the decisions aforesaid and has held thus :

"..... Only in the event of fraud or irretrievable injustice, the Court would be entitled to interfere in a transaction involving a bank guarantee and under no other circumstances. The petitioners have failed on both these counts."

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(Paper Book - Vol.-I p. 7)

C Appellant's Counsel contended that the Bank Guarantees have been fraudulently and dishonestly invoked by the first respondent. It was submitted that so far as the Bank Guarantee towards advance was concerned, no amount remains as balance towards advance and in fact a sum of Rs. 27,000 is recoverable from the first respondent. With regard to the two Bank Guarantees, dealing with retention money (Item Nos. 3 and 5) it was contended that the trial was taken by the first respondent after which
D performance test was also done and thereafter the take-over was completed and so, on the basis of the contract, the first respondent was bound to return the Retention Guarantees. Regarding liquidated damages (Item No. 4) it was contended that the first respondent should prove that they suffered damages and quantify the same before invoking the Guarantee. It
E was also contended that the invocation of the Guarantee relating to advance and liquidated damages was after the expiry of the period. The learned Judge found that no fraud or irretrievable injustice has been made out. The Court also held that the appellant will be able to claim relief before the Arbitrators by way of damages, for amounts wrongly recovered, and so no irretrievable injustice can be said to exist. The learned Judge
F also held that the first respondent by separate letters dated 14.9.1994 and 10.5.1994 addressed to the Bank of Baroda and Standard Chartered Bank respectively, while requesting to extend the Bank Guarantee, specifically stated that, if it was not so done, the communication should be treated as notice for encashment of the Bank Guarantee and these communications
G addressed to the respective banks prior to the Guarantees would serve the purpose of notice to the banks and so it cannot be held that the invocation was after the date of expiry of the said Guarantees.

H Having heard Counsel and on perusing the relevant records, we are of the view that the order of the Court below regarding Item No. 3 - Partial release of retention money in the sum of Rs. 2,72,39,850, Guarantee given

by the Citi Bank alone requires modification. We will deal with the various items in seriatim : A

ITEM NO. 1 : *Security against advance payment (Advance Bank Guarantee).*

The Guarantee given on this count by the Standard Chartered Bank for a sum of Rs. 5,50,30,000 is contained in paper book Volume II at pages 109 to 113. It was agreed at the bar that the Bank Guarantee has not been invoked for the entire sum of Rs. 5.50 crores but is limited to a sum of Rs. 8 lakhs only. We find that dispute exists with regard to the said subject matters, as is evident from the relevant papers - (Volume II Pages 312 and 316). It is seen from the communication dated 10.5.1994 addressed by the first respondent to the appellant, with an endorsement to the Standard Chartered Bank, that a request was made to extend the validity of the Bank Guarantee for a further period of 6 months, i.e., 30.11.1994 and in case the extension is not received before that date, the communication be treated as notice for encashment (Vol. II pages 33 to 34 of the Paper book). We are of the view that the invocation of the Guarantee is in time. We hold that in the light of the dispute pending before the Arbitrator, the Court below was justified in declining to grant an injunction against the invocation of the Bank Guarantee on this count. B
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Item Nos. 3, & 5 : Partial release of retention money : E

Items 3 and 5, though come under the same category, are not similar in content and scope. Item 3, relates to Bank Guarantee furnished by the Citi Bank, N.A. in the sum of Rs. 2.72 cores. It is a conditional Guarantee. Copy of the document is available in paper book Volume II at pages 122 to 126. The relevant portions in the Guarantee in volume II at pages 124 and 125 of the paperbook, are as follows : F

"AND WHEREAS at the request of the contractors, we, CITI BANK N.A. (hereinafter referred to as "The Bank" has agreed to guarantee 2, 72,39,850 (Rupees Two Crores, Seventy Two lakhs, Thirty Nine thousand, Eight hundred fifty only) covering the amount of the said payments *till successful completion of trial operations.*" G

In pursuance of the said agreement and in Consideration of the H

A board making the said payment to the contractors, the Bank hereby agree with the Board as follows :

B 1. The Bank hereby agree unequivocally and uncondition to guarantee the said amount released by the Board till successful completion of trial operations in due performance of the contract and undertakes to at Bombay within 48 hrs. on demand in writing from MSEB, or any officer authorised by it in this behalf of any amount upto and not exceeding Rs. 2,72,39,850/- (Rupees Two crores, Seventy two lakhs, Thirtynine thousand, Eight hundred fifty only) to the Maharashtra State Electricity Board on behalf of the contractors

C 2. That the guarantee hereby given shall be continuing guarantee upto 19 May, 1990. The validity of this Bank guarantee will be extended one month prior to its present validity at the request of the Board for suitable period(s) till successful completion of trial operations."

(emphasis supplied)

E Volume II, pages 46 to 108, contains a copy of the agreement executed between the appellant and the first respondent Board. The following clauses therein at pages paragraphs 70.1, 70.2, 70.3 and 70.4.01, appearing at pages 92 to 95, are relevant in the this connections. They are as follows:

"70.1 (i)

F (ii)

G (iii) After the precommissioning tests are satisfactorily completed equipment shall be considered ready for initial operation. During initial operation, the complete equipment shall be operated integral with sub-system and supporting equipment as a complete plant.

70.2 TRIAL OPERATION :

H (I) After satisfactory initial operation, the Plant shall then be put on trial operation. The period of trial

operation shall be 30 days from the date of completion of initial operation. During the period of trial operation, all the necessary adjustments in the plant/equipments shall be made by the Contractor and make ready the same in all respects for performance and guarantee test. Out of trial operation, the plant shall run for atleast a period of 100 hours at the rated capacity. Out of these 100 hrs. a minimum of 20 hours of operation at the rated load shall be established for the mode of operation from wagon tippler to the bunker.

70.3 PERFORMANCE TESTS AT SITES:

(i) *The performance test shall be conducted at site by the Contractor, after successful completion of trial operation. The duration of the performance test of the plant at the rated capacity shall be of 2 hours. Performance Guarantee test shall in any case be conducted within 45 days of successful completion of trial operation or within the extended period as can be mutually agreed. In case the performance test cannot be conducted within a period of 75 days after successful completion of trial operation due to reasons solely attributable to owner, the time frame and method of conductance of the same shall be discussed mutually and finalised.*

xxx xxx xxx

(v) Any special equipment, tools and tackles required for the successful completion of the performance tests shall be provided by the Contractor free of cost."

"70.4.01 Upon successful completion of all the performance tests at site, the owner shall *issue to the Contractor a "Taking Over Certificate" as a proof of the final acceptance of the equipment....."*

(emphasis supplied)

The first respondent Board intimated the appellant by communication dated 10.6.1994 thus :

A "After reasonable completion of the Coal Handling Plant works as per the contract 2 M part-A, capacity operation of the various equipments of C.H.P. were planned from 15th January, 1994. Rates as well as design capacity trials also tried Certain Points for stabilisation which were pointed to L&T were attended. *Since these trials are generally satisfactory as per Clause no. 70.2 & 70.3, all the*

B *commissioned equipments under the contract of 2M Part-A are taken over by MSEB for regular operation and maintenance from 10th June, 1994 as per Clause No. 70.4 of Contract Agreement Vol. I."*

C (emphasis supplied)

The appellant wrote to the first respondent on 21.2.1994 that the plant was completed and so all Bank Guarantees have served their contractual requirements. On a perusal of the relevant clauses in the contract, executed

D between the appellant and the first respondent, and the communication of the first respondent dated 10.6.1994, it is fairly clear that the stipulations or conditions mentioned as per clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the Plant was admittedly taken over by the first respondent. The Guarantee given by the Citi Bank, N.a. dated 10th of May, 1989 appearing in Volume II at pages 122 to 126 will ensure only till

E successful completion of the trial operations and the plant is taken over. That event having ensued, the invocation of the Guarantee given by the Citi Bank dated 10.5.1985 in the sum of Rs. 2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to respondents 1 and 4 deserves to be issued on that score. The

F Court below was in error in not doing so. We hereby restrain respondents 1 and 4 from invoking the Bank Guarantee aforesaid.

But item No. 5 partial release of retention money, for which the second respondent, Standard Chartered Bank has given a Bank Guarantee for Rs. 1,12,00,000 (Rs. 1.12 crores) stands on a different footing. The

G relevant Guarantee is contained in paper book Volume II at pages 134 to 138. The first respondent made an ad hoc payment of Rs. 1.11 crores out of the total retention amount for which the Guarantee was furnished by the Standard Chartered Bank. *It is an unequivocal and unconditional Guarantee.* We hold that no fraud or irretrievable injustice has been made

H out by the appellant. The court below was justified in declining to issue an

order of injunction on this count.

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The last item is covered by the Guarantee specified as No. 4 hereinabove. It was furnished by the Bank of Baroda as a security against 'liquidated damages'. The Guarantee is contained in paper book Volume II at pages 129-131.

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The Bank has given Guarantee for Rs. 6.13 crores against the liquidated damages recoverable by the first respondent Board, from the appellant. The relevant clause regarding levy of liquidated damages is contained at pages 99 and 100 of the Paper book, (Clause 75.01), to the following effect :

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"75.01 If the Contractor fails to complete the works as per the clause 72.01 item 1, 2 and 3 within a period of 25 months from the date of letter of intent or within any extension of time granted by the owner then the liquidated damages shall be levied by the Owner on the Contractor at the rate of 1/2% (one half of one per cent) per week of delay of the contract price for the works limited to 10% (ten percent) of the contract price of the works."

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Appellant's Counsel argued that before invoking the Bank Guarantee the first respondent should have levied the liquidated damages and only for the sum so determined, and intimated to the appellant, the Bank Guarantee can be invoked. It was further argued that the Guarantee was due for expiry on 26.9.1994 and it has been invoked after the expiry of the said period. There is no force in the above pleas. It is common ground that the arbitration proceeding for resolving the dispute between the parties (appellant and the respondent) is pending before the arbitrator. The parties are at issue as to whether the Plant was completed in time or was delayed. They are blaming each other for the delay. That is a matter to be adjudicated in the proceedings. It is also brought to our notice that the first respondent has claimed liquidated damages as per clause 75.01 of the contract of more than eight crores - much more than the amount of Rs. 6.13 crores guaranteed. Since the decision in the arbitration proceedings has an impact on this aspect, we are of the view that no prima facie case of fraud or irretrievable injustice is made out to restrain respondents, 1 and 5 from invoking the Bank Guarantee. Perusal of the communication dated 14.9.1994, sent by the first respondent to the appellant and also to the Bank of Baroda appearing in paper book Volume 1 at pages 35 to 36,

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A will show that a request to extend the validity of the Bank Guarantee which was to expire on 26.9.1994, was made and if not so done, the communication was to be treated as notice for encashment of the Bank Guarantee. The plea that the invocation was not in proper time is also without substance.

B In the result, we hold that the appeal succeeds in part. The appellant is entitled to an order of Injunction, to a limited extent, against respondent Nos. 1 and 4 (Citi Bank N.A.), restraining them from invoking the Bank Guarantee given by the 4th respondent - Citi Bank, N.A. dated 10.5.1989 (item No. 3 stated hereinabove) (Volume II at pages 122 to 126 of the Paper book). Subject to the above modification, the order passed by the Court below dated 20.10.1994 is affirmed. In the circumstances, their shall be no order as to costs.

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R.A.

Appeal allowed.