*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 29th November, 2019*

\+ O.M.P.(I) (COMM.) 428/2019

MADHUCN PROJECTS LTD.

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Adv. with Mr. Amitabh Chaturvedi, Mr.Suryadeeep Singh, Mr. Sumit Kumar Shukla and Ms. Radha R. Tarkar, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

..... Respondents

Through: Ms. Padma Priya and Mr. Dhruv Nayar, Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the petitioner with the following prayers:

> *"In view of the aforegoing facts and circumstances, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:*
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> *a. restrain the respondent No.1 during the pendency and until conclusion of the Arbitral proceedings, by way of a temporary order and injunction, from encashing / invoking or taking any precipitative steps or receiving any monies under the Performance Bank Guarantee of*

Rs.29,77,12,501/-, numbered as 16340100003675 issued on 16.6.2015 (valid till 30.11.2021) and the Retention Money Bank Guarantee of Rs.4,36,62,265/-numbered as 16340100007637 issued on 03.10.2017 (valid till 30.12.2019) issued by Axis Bank Ltd, 1st Floor No.6-879-B, Green Lands, Begumpet Road, Hyderabad-500016 in favour of the Chairman, National Highways Authority of India for the Project Work as per Letter of Acceptance dated 17.03.2015 along with Contract Agreement dated 08.04.2015;

b. restraining the respondent No.2 Bank from releasing any funds to the respondent No.1 Authority under the Performance Bank Guarantee of Rs.29,77,12,501/-, numbered as 16340100003675 issued on 16.6.2015 (valid till 30.11.2021) and the Retention Money Bank Guarantee of Rs.4,36,62,265/-numbered as 16340100007637 issued on 03.10.2017 (valid till 30.12.2019) issued by Axis Bank Ltd, 1st Floor No.6-879-B, Green Lands, Begumpet Road, Hyderabad-500016 in favour of the Chairman, National Highways Authority of India, Bank Guarantees being numbered as 16340100005308 in favour of the Chairman, National Highways Authority of India till the final disposal of the arbitration proceedings between the petitioner and the respondent No1;

c. direct the respondent Nos.1/2 to release / return the said Bank Guarantee i.e. the Performance Bank Guarantee of Rs.29,77,12,501/-, numbered as 16340100003675 issued on 16.6.2015 (valid till 30.11.2021) and the Retention Money Bank Guarantee of Rs.4,36,62,265/-numbered as 16340100007637 issued on 03.10.2017 (valid till 30.12.2019) issued by Axis Bank Ltd, 1st Floor No.6-879-B, Green Lands, Begumpet Road, Hyderabad-500016 in favour of the Chairman, National Highways Authority of India for the Project Work as per Letter of Acceptance dated 17.03.2015 along with Contract Agreement dated 08.04.2015;

d. grant ad interim ex-parte relief in terms of the above prayer;

e. grant costs of this petition and of the proceedings initiated thereunder; and,

f. grant any other or further relief that this Hon'ble High Court deems fit and proper in the facts and circumstances of the case may also be granted in favour of the petitioner and against the respondents.

Prayed accordingly."

2. Mr. Dayan Krishnan, learned Sr. Counsel appearing for the petitioner submits that under the contract of April 8, 2015, petitioner was required to provide three types of bank guarantees to NHAI as mentioned below:

(a) Performance Bank Guarantee: To secure the performance of the contract as per Clause 7.1.

(b) Advance Bank Guarantee: To secure the advances given by the NHAI to the petitioner to enable it to carry out the project under Clause 19.2.3.

(c) Retention Money Bank Guarantee: To secure the release of monies released, which were otherwise to be held back as retention monies in terms of clause 7.5.1.

3. He fairly stated that the present petition confines only to Performance Bank Guarantee of ₹29,77,12,501 and Retention Money Bank Guarantee of ₹4,36,62,265/- as the third Advanced Bank Guarantee furnished by the petitioner for approximately ₹35 Crores has already been encashed by the NHAI on August 28, 2018. He stated that in relation to Performance Bank Guarantee as given by the petitioner in terms of clause 7.1 of the contract apprehending invocation of the said Performance Bank Guarantee, the petitioner had approached this court in OMP (I) COMM 397/2018. The said petition was disposed of vide order dated October 8, 2018 recording the understanding that NHAI would issue a notice of one week to the petitioner before invoking the Bank Guarantee. He submitted that the said order had also recorded that NHAI would consider the petitioner's representation for the proportionate reduction of performance security from ₹29.77 Crores to ₹21.35 Crores as there has been descoping in the project due to conversion of rigid payment to flexible payment and removal of Thiruvarur Bypass causing a reduction of the contract value from ₹396.95 Crores to ₹280.12 Crores. He stated that the NHAI has not

accepted or rejected the petitioner's representation for proportionate reduction of performance security to ₹21.35 Crores. Be that as it may, he also stated that there are numerous breaches on the part of the NHAI in facilitating the completion of the project and the same was brought to the notice of NHAI by the petitioner vide letter dated September 26, 2018. He stated that in the light of these circumstances, the petitioner was of the opinion that the force majeure circumstances in terms of clause 21 had arisen and accordingly, the petitioner had initiated the process of termination of the contract under clause 21 inasmuch as vide letter dated February 4, 2019, petitioner invoked 15 days' notice period for termination in terms of clause 21.7 giving notice of intention to terminate. Finding no response, finally on February 21, 2019, after the period of 15 days, the petitioner terminated the contract.

4. It was the endeavour of Mr. Krishnan to state that the petitioner having already terminated the contract on account of breaches of NHAI, the correctness and incorrectness of the termination by the petitioner and the payment due to the petitioner has to be adjudicated by the Arbitral Tribunal. He stated that the petitioner immediately after the termination of the contract on February 21, 2019 had asked the respondent NHAI for returning of the Performance Bank Guarantee and Retention Money Guarantee in terms of clause 23.6.2 vide letters dated April 23, 2019; June 13, 2019; July 10, 2019; July 22, 2019 and July 30, 2019. In fact, it has been his endeavour to submit that NHAI has accepted the termination by the petitioner and had also resumed the dispute resolution mechanism and in that regard, NHAI vide its letter dated July 8, 2019 had requested the petitioner to refer the dispute to NHAI Engineer for mediation and to assist the party in arriving at an amicable settlement in

terms of clause 26.2. Since, NHAI failed to respond to requests for mediation despite initial instances on the same by the NHAI on July 8, 2019, petitioner nominated its Arbitrator and had requested the NHAI to appoint its Arbitrator. Surprisingly, despite earlier termination of the contract by the petitioner on February 21, 2019 and pending process of dispute resolution between the parties suddenly on November 19, 2019, NHAI issued a notice for termination to the petitioner merely 9 months after the termination of the contract by the petitioner. He submitted that on coming to know about the inclination of NHAI to invoke the Performance Bank Guarantee from the bank officials on November 20, 2019 without informing the petitioner in terms of order dated October 8, 2018, the petitioner immediately wrote to NHAI on November 20, 2019. Accordingly, the present petition has been filed by the petitioner.

5. The submission of Mr. Krishnan with regard to the invocation of the Performance Bank Guarantee and the Retention Bank Guarantee was that it primarily amounts to fraud. In this regard, he stated that the contract between the parties stood terminated by the petitioner on February 21, 2019 and that as indicated from the correspondence above, NHAI had itself resorted to the dispute resolution mechanism, then NHAI cannot be allowed to re-terminate the contract only to facilitate the invocation of bank guarantees by the NHAI. That apart, he stated that once the contract was terminated by the petitioner on February 21, 2019, NHAI cannot be allowed to re-terminate claiming breach of performance by the petitioner as the disputes and claims from termination of the contract by the petitioner as on February 21, 2019 has to be adjudicated by the Arbitral Tribunal. That apart, it was his submission that the bank guarantees can only be invoked for non-

performance by the petitioner and once the contract is terminated, there is no question of any performance of the contract by the petitioner. That apart, he stated that despite clear obligation in the contract under clause 23.6.2, requiring NHAI to return the bank guarantees and NHAI failing to do so cannot be allowed to use the device of termination to invoke the bank guarantees. In substance, it was his plea that the invocation of the bank guarantees by NHAI is *mala fide* and amounts to fraud. That apart, he also stated that irretrievable harm or injury or injustice of such nature shall be caused to the petitioner that would not leave the petitioner with any legal remedy adequate to compensate its injuries as even the realization or recovery of the amount which is reflected in the said bank guarantees, by the petitioner from the respondent NHAI in the event of the petitioner succeeding in the arbitration, would not be sufficient. Further, existence of special equities in favour of the petitioner and against the respondent are made out in the peculiar facts and circumstances of the case. Mr. Krishnan has relied upon the judgment of the Supreme Court in the case of ***Hindustan Construction Company vs. State of Bihar 1999 (8) SCC 436*** in support of his submission.

6. On the other hand, Ms. Padma Priya, learned counsel for the respondent NHAI would oppose the petition by stating that so-called termination effected by the petitioner is no termination in the eyes of law, inasmuch as the petitioner as per the clause 21.7.1 of the agreement was require to give 15 days' time notice, which was not given. It was her submission that the invocation of clause 21.7.1 of the agreement is for force measure event and not for reasons attributable to the respondents.

7. That apart, she stated that the bank guarantees being separate and independent contract from the main agreement, it is only the terms of the bank guarantees which need to be seen to justify that the invocation has been done by the Competent Authority, whose satisfaction is paramount, properly. It was her submission that invocation being in terms of the conditions of the bank guarantees, the same cannot be interdicted. In this regard, she has relied upon the judgment of the Supreme Court in the case of ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110.***

8. That apart, it was her submission that the bank guarantees having been furnished in relation to infrastructure project, in view of Section 41 (ha) of the Specific Relief Act, this Court would not like to interdict the invocation of the bank guarantees as it is specifically barred under that section.

9. That apart, it was her submission that the three conditions laid down by the Supreme Court for interdicting invocation are that the invocation has not been made, in terms of the bank guarantees; fraud of an egregious nature has been played which would vitiate the very foundation of such a bank guarantee and allowing encashment of an unconditional bank guarantee would result in irretrievable harm, have to co-exists for the petitioner to succeed in this petition. She submits, none of the conditions have been pleaded in this case.

10. She stated that even the case of fraud pleaded by the petitioner is superficial without any substance. It was her submission that the fraud has to be of such nature which would vitiate the very foundation of bank guarantee, which is not the case herein. In fact as per her, submissions made by Mr. Dayan Krishnan, are relatable to the main contract which

this Court shall not consider, when the issue regarding invocation of bank guarantees is being considered. She also submitted, the invocation is pursuant to the termination of the agreement effected by the respondent. In the end, she submits that the invocation being in terms of the bank guarantees, is justified. This Court will not interfere with the impugned action of the respondents.

11. In rejoinder, Mr. Dayan Krishnan has controverted the submissions made by the learned counsel for the respondent NHAI. He has drawn my attention to the reply given by the petitioner to the cure notice issued by the respondent NHAI and more specifically at page 548 of the documents to highlight the stand of the petitioner in that regard.

12. Having heard the learned counsel for the parties, the only issue which arises for consideration in this petition is whether the invocation of advance bank guarantee and retention money bank guarantee by the respondent NHAI is justified. Before I answer the issue, it is necessary to cull out the position of law with regard to invocation of bank guarantees. The Supreme Court in the case of ***Himadri Chemicals Industries Ltd. (supra)***, has held as under:

> *"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 SCC 568], 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.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where

allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174 held as follows:

> *The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.*

While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA V/s. Chase Manhattan Bank (1984) 1 All ER 351 at p. 352 g-h which is as follows:

> *"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's Credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."*
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> *(Emphasis supplied)*

13. Similarly, in ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544***, the Supreme Court has held as under:

> *"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un- conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corporation v. Sumac International Ltd. MANU/SC/0380/1997:AIR1997SC1644 , this Court observed that:*
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> > *The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties*

concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Limited (Now Reliance Energy Ltd.) v. Fenner India Ltd. and Anr. MANU/SC/0741/2006 : AIR2006SC1148 this Court held:

10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non- intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corporation v. Sumac International Ltd. MANU/SC/0380/1997 : AIR1997SC1644 (hereinafter 'U.P. State Sugar Corpn') this Court, correctly declare that the law was 'settled'.

13. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company MANU/SC/3256/2007 : AIR2007SC2798 , this Court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner:

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(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in

irretrievable harm or injustice to one of the parties concerned.

14. In Mahatama Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Anr. MANU/SC/2980/2007 : AIR2007SC2716 , this Court observed:

Para 22. If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

Para 28. What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one."

14. Having noted the law laid down by the Supreme Court, the submissions made by Mr. Dayan Krishnan can be summed up as under:

(i) The petitioner having already terminated the contract on account of breaches of NHAI and the correctness and incorrectness of the termination by the petitioner need to be adjudicated by the Arbitral Tribunal.

(ii) The petitioner immediately after the termination of the contract had asked the NHAI for returning of the performance bank guarantee and retention money guarantee.

(iii) The NHAI has accepted the termination by the petitioner and had also resumed the dispute resolution mechanism.

(iv) Despite earlier termination of the contract by the petitioner and pending dispute resolution process, the NHAI issued notice of termination / re-termination of the contract which is impermissible.

(v) In any case, the invocation of the bank guarantee and retention money bank guarantee in the facts, amounts to fraud. The bank guarantees can only be invoked for non performance by the petitioner and once the contract is terminated; there is no question of performance of the contract by the petitioner.

(vi) There is a clear obligation on the part of the NHAI in terms of clause 23.6.2 of the agreement to return the bank guarantees. The NHAI failing to do so cannot allow the invocation of the bank guarantees which is a motivated exercise and amounts to fraud.

15. From the submissions made by Mr. Dayan Krishnan, it is noted that the same primarily relate to the main contract, which have no bearing on the invocation, as it is settled law, as noted above, the same has to be seen from the perspective of the terms of bank guarantee. The only submission of Mr. Dayan Krishnan which need to be looked into is whether the invocation of the bank guarantees in the facts of this case

amounts to fraud. The answer to this plea has to be in the negative for the simple reason that the fraud should be such, which vitiates the very foundation of such bank guarantees. The bank guarantees are of the year 2015 when the agreement was entered into between the parties. They have been furnished with open eyes, in terms of the obligation under the contract. The bank guarantees remained valid, for almost four years. No attempt was made by the petitioner to get the bank guarantees cancelled. It is not the case of the petitioner that the bank guarantees have been acquired in the year 2015 by playing fraud. So, it cannot be said that the very foundation of the bank guarantees has been vitiated.

16. It was the contention of Mr. Dayan Krishnan that after the termination of the agreement by the petitioner, the respondent was liable to return the bank guarantees to it and not giving the bank guarantees to it shall amount to fraud. I am not in agreement with this contention as the respondent NHAI is relying on its own termination letter and justifying invocation as per the terms of the contract. Surely, whether the invocation by terminating the contract was justified shall be decided by the Arbitral Tribunal.

17. It was the plea of Mr. Dayan Krishnan that in terms of the bank guarantees, the invocation can be during the construction period / defects liability period and maintenance period and the agreement having been terminated, it cannot be invoked, is also without merit. In this regard, I may only state that the bank guarantees being unconditional and irrevocable guarantees were for *due and faithful performance of the contractors obligation during the construction period / defects liability period and maintenance period* and there is an obligation on the bank to pay, to the Authority upon its first written demand, without demur,

reservation, recourse, contest or protest and without any reference to the contractor, the sums payable under the guarantees and, it is the case of the respondent NHAI that the petitioner has defaulted in performance of its obligations during the currency of the contract.

18. Even the plea that irretrievable injury shall be caused to the petitioner, is also without any merit, inasmuch as it is not the case of the petitioner that if in the eventuality the award is given in its favour, it cannot be executed against the NHAI.

19. Insofar as the judgment relied upon by Mr. Dayan Krishnan in the case of ***Hindustan Construction Co. Ltd. v. State of Bihar and Ors., (1999) 8 SCC 436*** is concerned, the same would not be of any help, inasmuch as the plea therein was in fact that the invocation of bank guarantee is not in terms thereof as the same was furnished to the Chief Engineer however invoked by the Executive Engineer, which is not the case herein. In view of my above discussion, I do not find any merit in the petition, the same is dismissed.

20. No costs.

V. KAMESWAR RAO, J

NOVEMBER 29, 2019*/aky*