

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT
BHUBANESWAR.**

Present :

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 30th Aug. '14.

Arb. (P) No. 253 of 2011.

(U/s. 9 of the Arbitration and Conciliation Act, 1996.)

M/s. Gammon - BBJ - Joint Venture, Represented through its authorised signatory, Shri Jaysingh L. Ashar, Sr. G.M. (Head-Work Survey), Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai - 400 025.

... **Petitioner.**

-V e r s u s-

1. State of Odisha, represented through EIC-cum-Secretary, Secretariat Building, Bhubaneswar - 751 001, Odisha.
2. Chief Engineer (DPI & Roads), Orissa, Nirman Saudha, Unit - V, Bhubaneswar - 751 001.
3. Executive Engineer, Malkanagiri (R&B) Division, Malkanagiri - 764 045.
4. Assistant General Manager, Punjab National Bank, At - Worli Naka, Shiv E Numh, 205, Dr. Annie Besant Road, Worli, Mumbai - 400 025.

... **Opposite Parties.**

Counsel :

For Petitioner

-- Shri S.P. Misra,

Shri A.R. Mohanty &
Associates.
For O.P. Nos.1 & 3 -- Shri R.P. Nanda (G.P.).
For O.P. No.4 -- Shri P.C. Rath.

Date of conclusion of argument : 07.08.2014.

Date of judgment : 30.08.2014.

J U D G M E N T

This is an application under sections 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called “the Act”) filed by the petitioner praying to restrain the opposite parties from invoking or encashing the Bank Guarantee.

FACTS :

2. The backdrop of the case of the petitioner is that the petitioner is the largest Civil Engineering Construction Company in India for the construction of largest number of bridges. It has got reputation for designing and constructing bridges. It is averred, inter alia, that the petitioner executed contract dated 18.10.2006 with opposite party No.3 on behalf of opposite party No.2 for “design, execution and assistance in construction supervision on turnkey basis for a high level bridge over river Gurupriya near Janbai on Chitrakonda–Papermelta road in the district of Malakangiri in Orissa including construction of 30 metre short approach and 220 metre long approach on either side” for a price of

Rs.47,41,95,000/-. The contract contains arbitration clause for settlement of disputes between the parties. It was agreed that opposite party Nos.1 to 3 had to provide contractors with land, finance and adequate security mostly in insurgent infected areas. The period of completion of the contract was thirty months, including rainy seasons, from the commencement date i.e. 18.10.2006. The petitioner submitted Bank Guarantee towards the performance security and also the Bank Guarantee against mobilization advance. It is further averred that opposite party Nos.1 to 3 did not provide security even if the construction area is Maoist prone and every moment there has been danger to the lives of the petitioner's employees working there. Moreover, the said opposite parties have not provided correct data in the tender documents, since water level in the river was higher by about 8.75 metre in the lean season for which the petitioner could not proceed with the work. Thus, there has been suppression of material facts by the opposite parties in the tender documents, which amounts to fraud, as claimed by the petitioner. Since the work could not be completed, the petitioner submitted a revised proposal; but, on 09.05.2008, the opposite parties declined to revise the proposal. Opposite party No.2 called several meetings with the petitioner, but the

situation for execution of the work created by the activities of Naxalite groups could not be improved. In the meantime, the petitioner employed men and machinery at the spot and approached the opposite parties for the actual cost of Rs.7,79,84,104/-, but that was not paid. The petitioner time and again intimated the opposite parties about the threats of Maoist in carrying out the work, but no positive response was received. The successful completion of the work could only be possible if the opposite parties make necessary arrangement for protection of the lives of supervisory staff, labour, materials, plants and equipments. On the other hand, opposite party No.3 demanded liquidated damage and further interest on mobilization advance without paying any heed to the law and order problem. In spite of the request of the petitioner, the matter was not considered by the opposite parties. On the other hand, the petitioner submitted consequential cost of Rs.9,36,07,912/- due to deemed suspension of work. But, on 13.04.2009, opposite party No.3 informed the petitioner that the claim of the petitioner was baseless and not tenable. The petitioner requested the opposite parties for appointment of Arbitrator to initiate arbitral proceeding. On the other hand, opposite party No.2 asked to pay an amount of Rs.2,51,96,356/- in shape of Bank Draft against the Bank

Guarantee mobilization advance. The petitioner extended the period of Bank Guarantee till finalization of disputes by requesting Punjab National Bank. It is also averred that the petitioner has filed a petition before Hon'ble the Chief Justice of Orissa High Court for appointment of Arbitrator to resolve the disputes vide Annexure-19. In the meantime, the opposite parties are pressing hard to the Banker to release the Bank Guarantee, the period of validity of which is 17.01.2013. It is submitted by the petitioner that since fraud in the underlying transaction is egregious in nature, there is irretrievable injury to the petitioner in the event of encashment of Bank Guarantee and specific equity is in its favour, the petitioner has prayed under section 9 of the Act to restrain the opposite parties from invoking or encashing the Bank Guarantee vide Annexure-23.

3. Opposite party Nos.1 to 3 have filed objection, stating that the petition is not maintainable and there is no cause of action to file the petition. It is further averred that the petitioner is not entitled to any equitable relief or injunction against the State of Odisha in view of bar under section 41 of the Specific Relief Act, 1963 read with section 14 of the said Act. Since the written contract is determinable in nature, the same is not enforceable in law. It is admitted by the

opposite parties that there is contract between the petitioner and opposite party Nos.1 to 3 for completion of the work within thirty months. It is also stated that the petitioner has taken mobilization advance of Rs.2,84,51,700/- from opposite party Nos.1 to 3 and as security has furnished Bank Guarantee dated 31.01.2007 towards the said mobilization advance. The petitioner failed to execute the project work and thereby committed breach of trust for which opposite party Nos.1 to 3 are entitled to encash the Bank Guarantee, which is unconditional. According to these opposite parties, the petitioner was aware of all the conditions of the site, but did not execute the work. He has also not lodged FIR or any report to claim that their work has been affected by the Maoist activities. In spite of repeated meetings to complete the work, the petitioner has failed to follow the conditions of the contract. Since the work was not completed as per the provisions of the written contract, opposite party Nos.1 to 3 determined the contract. All the allegations made in the petition have been refuted by these opposite parties. In spite of request by opposite party No.3 to the petitioner to refund the mobilization amount, the petitioner did not refund the Bank Guarantee amount and as the period of Bank Guarantee is going to expire, opposite party Nos.1 to 3 requested opposite

party No.4, who is the Banker, to pay the Bank Guarantee amount. It is further averred that as there is no refund of the mobilization advance amount, the Bank Guarantee against the mobilization advance should be invoked. Hence, it is submitted by opposite party Nos.1 to 3 to dismiss the petition.

4. Opposite party No.4 has filed show-cause admitting all the facts of furnishing Bank Guarantee. Since the original Bank Guarantee has not been produced, there cannot be invocation and payment of Bank Guarantee amount to the beneficiary. According to this opposite party, the period of Bank Guarantee has been extended till 17.01.2013 and due to status quo order, this matter is pending as such. It is also stated by this opposite party that the petitioner has no claim against this opposite party and the same may be dismissed.

CONTENTIONS :

5. Learned Sr. Advocate appearing for the petitioner submitted that the present petition has been filed to avail the benefit of injunction against the encashment of Bank Guarantee and for that three basic things are required to be established, such as, (i) fraud in the underlying transaction is egregious in nature; (ii) there is irretrievable injustice or injury; & (iii) special equity lies in favour of the petitioner. According to him, opposite party Nos.1 to 3 having made the contract did not

divulge about law and order problem at the site. He drew attention of the Court to paragraphs 8, 9, 10 & 11 of the petition as to how fraud has been exercised by the opposite parties. He also drew attention of the Court to Annexure-2 where the petitioner has alleged that instances of threat are received by the employees of the petitioner, which adversely affected the work. Further, it was submitted by learned counsel that opposite party Nos.1 to 3 have suppressed the material facts by not disclosing the height of water level while floating tender. When there was water level of 8.75 metre more, it was difficult on the part of the petitioner to undertake the work. In spite of objection raised by the petitioner, they did not listen to him. On the other hand, suppression of facts, which amounts to fraud, and other law and order problem are the matters of fraud being exercised by opposite party Nos.1 to 3. That apart, learned counsel submitted that after mobilization of necessary machinery and other equipments by the petitioner, opposite party Nos.1 to 3 did not give any protection for which the petitioner has go spend a lot and demanded the amount utilised by him. But, opposite party Nos.1 to 3 did not consider the claim. On the other hand, opposite party Nos.1 to 3 went ahead for invoking the Bank Guarantee against mobilization advance. If the Bank Guarantee is encashed, then

the petitioner would sustain irreparable injury. That apart, the petitioner has claimed special equity because of the fact that he is willing to complete the work; but due to non-cooperation by opposite party Nos.1 to 3, he could not complete the work. On the other hand, opposite party Nos.1 to 3 have unilaterally determined the contract and, as such, special equity is in favour of the petitioner. According to learned counsel, determination of the contract cannot be made by the Executive Engineer when the Chief Engineer has executed the contract. He drew attention of the Court to the decisions reported in **(1999) 8 Supreme Court Cases 436 (*Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*; AIR 1981 SC 1426 (*United Commercial Bank Vs. Bank of India and Ors.*); & AIR 2006 SC 1148 [*BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Anr.*]**. He endorsed the views taken in the above decisions and submitted to allow the petition.

6. Learned Government Pleader appearing for opposite party Nos.1 to 3 submitted that mobilization advance has been received by the petitioner, but no work has been performed. He submitted that in the present case, when advance mobilization loan is unconditional, the Bank Guarantee can be invoked. He further submitted that there is no fraud from the side of opposite party Nos.1 to 3. According

to the provisions of the contract, the matter has been proceeded. Had there been any threat from the side of Maoist or there was any internal problem, the petitioner would have approached the local Police Station. The petition is not maintainable, as the contract has already been closed and there is no suppression of facts. He prayed to dismiss the petition.

7. Learned counsel appearing for opposite party No.4 submitted that the Banker has nothing to submit, but the interest of the Bank is required to be guarded. Since the period of Bank Guarantee has been extended till 2015, it was submitted that order may be passed, as deemed fit and proper.

DISCUSSIONS :

8. After going through the contentions of both parties, the following points emerge for determination :

- (i) Whether there is fraud committed by opposite party Nos.1 to 3;
- (ii) Whether there is irretrievable injustice or injury;
- (iii) Whether special equity lies in favour of the petitioner; &
- (iv) Whether injunction can be granted from invoking or encashing the Bank Guarantee ?

Point No.(i) :

9. It is admitted fact that for construction of high level bridge over river Gurupriya near Janbai on Chittrakonda-

Papermelta road in the district of Malakangiri, the petitioner was engaged as contractor by opposite party Nos.1 to 3. It is also admitted that Gammon India and BBJ in joint venture have undertaken the contract. The conditions of contract, as available from Cl.11.1 of the General Conditions of Contract ("GCC", for short), the employer is responsible for expected risk i.e. risk of war, hostilities, invasion, act of foreign enemies, rebellion, revolution, etc. and cause due solely to the design of the Works, other than the Contractor's design. Here the employer's risk does not contain about any law and order problem arising out of internal security. Learned counsel for the petitioner drew my attention to the photograph at page-104 where water level has been shown for piling and putting pile caps. It is revealed from Annexure-8 of the petition that in the original tender, it has been indicated to execute the work at R.L. Of 443.0 M, but water level is about 15 metre higher than L.W.L., as mentioned in drawing No.5846. It is also stated in that Annexure that it needs emphasizing that there is a large difference in execution of work on the ground and in water and for that duration would be increased consequent upon which cost of the project would escalate. The third contract meeting dated 05.03.2008, as revealed from Annexure-3, that the matter has been discussed and the

petitioner was asked to submit the revised estimate. Under these circumstances, there is nothing to show that there is suppression of any material facts. So, the petitioner has not been able to establish that fraud has been exercised by opposite party Nos.1 to 3 on him. Point No.(i) is answered accordingly.

Point No.(ii) :

10. In the case of *Hindustan Construction Co. Ltd.* Vs. *State of Bihar and Others* (supra), Their Lordships have been pleased to observe at para-8 that :

“8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as “advance” from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government “advance”, the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be

an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In *U.P. Coop. Federation Ltd. V. Singh Consultants & Engineers (P) Ltd.* [(1988)1 SCC 174], the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351 (CA)] was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts would not grant any irretrievable injury. In *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502], *Larsen & Toubro Ltd. v. Maharashtra SEB* (1995) 6 SCC 68], *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.*[(1995) 6 SCC 76], *National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd.*[(1995) 4 SCC 515], *State of Maharashtra v. National Construction Co.*[(1996) 1 SCC 735], *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.*[(1996) 5 SCC 34], as also in *U.P. State Sugar Corpn. v. Sumac International Ltd.*[(1997) 1 SCC 568], the same principle has been laid down and reiterated.”

With due respect to the above decision, I find that in the instant case, in order to invoke the Bank Guarantee, the petitioner must prove that irretrievable injury would be caused to the guarantor. It was the contention of learned counsel for the petitioner that since the Bank Guarantee is going to be encashed or invoked in spite of the demand of loss caused to the petitioner three times the Bank Guarantee for advance mobilization loan, there would be irretrievable injury to the petitioner. On going through the terms of contract vide Sl.51,

it is found that 10% mobilization advance shall be paid on submission of Bank Guarantee. However, this advance is not interest free. The interest rate shall be average cost of Govt. borrowing + 1%. It is not a performance security, as there is separate clause for this vide Cl.52.1. It is revealed from pleadings of both parties and also it is admitted fact that this advance was made for an amount of Rs.2,84,51,700/- on 31.01.2007. Annexure-23 shows that the Bank Guarantee has been extended from time to time and finally it was extended to 17.01.2012 and then to 17.01.2013. All are unconditional Bank Guarantee. It is revealed from the pleadings of both parties that opposite party Nos.1 to 3 have determined the contract. Of course, the petitioner has challenged the same on the ground that in spite of request, time has not been extended. But, it appears from Annexure-14 that on 25.06.2010, the petitioner has requested the Chief Engineer (opposite party No.2) to foreclose the contract of the above subject work and to arrange for the release of the amount in question. Opposite party Nos.1 to 3 have also stated in their objection that as the work could not be executed by the petitioner, they closed the contract. Also there is a clause i.e. Cl.59.4 to show that notwithstanding the terms of the contract, the Employer may terminate the contract for convenience. Clause 60.2 says

that if the contract is terminated at the Employer's convenience, the Engineer shall issue a certificate for the value of the work done, the reasonable cost of removal of equipment, repatriation of the Contractor's personnel employed solely on the Works, the Contractor's costs of protecting and securing the Works and less advance payments received upto the date of the certificate, less other recoveries due in terms of the contract and less taxes due to be deducted at source as per applicable law. From going through all the clauses, it is clear that the Employer may terminate the contract for convenience. Now, it is alleged by the petitioner that when the contract is terminated, there should be payment for the work done. Here a question arises about encashment of advance mobilization loan, but not the security performance. Since advance mobilization amount is unconditional, the payment of actual cost incurred, etc. can be linked to performance security. Apart from this, there is no other evidence produced by the petitioner to show that in the event of contract being terminated, there would be irretrievable injury or loss in case the Bank Guarantee to this extent is encashed. At any rate, the petitioner has not been able to prove that irretrievable injustice or injury would be caused to the them if the Bank Guarantee is invoked. Point No.(ii) is

answered accordingly.

Point No.(iii) :

11. So far as special equity is concerned, it was submitted by learned counsel for the petitioner that at no point of time, the petitioner has violated the terms and conditions of the contract and they have not executed the work because of deficiencies, nor they have abandoned the work on their own volition; but the situation was not conducive under law to execute the work. In this regard, the petitioner has filed additional affidavit explaining the activities of Maoists in that area. It is also revealed from the correspondence that the petitioner has intimated from time to time to the Chief Engineer and the Executive Engineer, but no instance has been cited by the petitioner to show that they have been obstructed by the Maoists or Naxalities from continuing the construction work. No FIR has been lodged with Police Station or any complaint has been filed before Court of law by the petitioner. It may so happen that the petitioner being a big organization must have been reluctant to lodge FIR or file complaint. When the matter came to Court of law, the mere allegation of law and order will not suffice to justify that special equity lies in favour of the petitioner. Hence, the principle of special equity has not been proved by the petitioner in this case to pass order of

injunction as a special case. Point No.(iii) is answered accordingly.

Point No.(iv) :

12. Undeniably, this is an application under section 9 of the Act, which speaks that interim measure can be granted by Court before or during arbitral proceedings or at any time after the passing of the arbitral award. In this case, the petitioner has submitted that they have already moved Hon'ble the Chief Justice of Orissa High Court for the appointment of Arbitrator. So, there is no bar to deal with the application under section 9 of the Act. But, it is reported in the case of ***Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*** (supra) that law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351 (CA) was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. The same principle has also been laid down and reiterated in other decisions of the Hon'ble Apex Court, as mentioned hereinbefore in para-10 of this judgment while answering point No.(ii).

With due respect to the said decisions, I find 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. So, the terms and conditions are extremely material. The invocation of Bank Guarantee, therefore, will have to be in accordance with the terms of the of the Bank Guarantee, or else, the invocation itself would be bad. In the instant case, there is no conditions or terms for encashing the Bank Guarantee; but it is simply a mobilization advance paid and, in lieu of that, the petitioner has requested the Banker to issue Bank Guarantee. There is a dispute as to who will invoke the Bank Guarantee. When the Chief Engineer is the Employer, he is only to invoke the Bank Guarantee. This is not the issue when opposite party No.3 is subordinate to opposite party No.2 and opposite party No.3 has been authorised by opposite party No.2 to receive the Bank Draft, as available from the pleadings of the opposite parties and submission advanced by learned Government Pleader. I have already observed in aforesaid paragraph that the petitioner has failed to prove the fraud, irretrievable injury or loss and special equity and the Bank Guarantee is

unconditional. It is, therefore, invocable. In the case at hand, since the contract has been closed, opposite party Nos.1 to 3 are justified to invoke the Bank Guarantee and encash the advance mobilization amount. The amount, which has been kept by opposite party Nos.1 to 3, is nothing but paid from public exchequer. So, the money, which is to be realised, is for the interest of public at large. Hence, I find in the instant case, the petitioner has no ground to insist on issuing injunction as interim measure under section 9 of the Act to stop opposite party Nos.1 to 3 from invoking or encashing the Bank Guarantee furnished towards advance mobilization loan. Hence ordered :

O R D E R

The Arb.(P) under section 9 of the Arbitration and Conciliation Act, 1996 being devoid of merit stands dismissed without cost.

Before parting with this order, it is found that opposite party Nos.1 to 3 have restrained themselves from invoking the Bank Guarantee, except writing letter to release the amount in question. In such circumstances, it is advised to both parties to settle the matter amicably in the best interest of the State and its people.

District Judge, Khurda

at Bhubaneswar.

30.08.2014.

Dictated, corrected by me and pronounced in the open Court
this day the 30th August, 2014.

District Judge, Khurda

at Bhubaneswar.

30.08.2014.

