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

% **Date of Decision: 22nd September, 2020**

\+ **FAO (OS) (COMM) 106/2020**

HINDUSTAN CONSTRUCTION CO. LTD. .....Appellant

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Jayant Mehta, Mr. Rishi Agrawala, Ms. Shruti Arora, Mr. Ankit Banati and Mr. Sanjeevi Seshadri, Advocates

versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION LTD. .....Respondent

Through: Ms. Maninder Acharya, Senior Advocate with Mr. Piyush Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE ASHA MENON

FAO (OS) (COMM) 106/2020, C.M. Appln. No.21839/2020 (of the appellant for stay of impugned judgement and order)

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("Act", for short) read with Section 13 of the Commercial Courts Act, 2015 against the judgement of the learned Single Judge dated 27th August, 2020 dismissing the petition filed by the appellant/Hindustan Construction Co. Ltd. ("HCC", for short), under

Section 9 of the Act seeking an injunction restraining the respondent/ National Hydro-Electric Power Corporation Ltd. ("NHPC", for short) from invoking/encashing any or all of its Bank Guarantees (BGs) cumulatively worth ₹214.36 crores.

2. The facts as are relevant for the disposal of the present appeal may be set out in brief. The respondent/NHPC being a Public Sector Undertaking involved in the setting up of and execution of hydro-electric power projects in India, invited bids on 25th October, 2006 from pre-qualified bidders for turnkey execution of the 330 MW hydro-electric power plant on the Kishanganga River in Bandipora, Jammu & Kashmir (the "Kishanganga Project"). The bid of the appellant/HCC was accepted on 22nd January, 2009 and a contract was signed between the parties on 9th March, 2009 for the execution of the Kishanganga Project. The scope of the work was defined including the construction of Units I, II & III with power generation capacities of 110 MW each, along with other civil work. The contract price was ₹19,258,390,000/- and the work was to be completed in 84 months i.e. by 21st January, 2016. As part of its contractual obligations the appellant/HCC was required to furnish Performance Bank Guarantees for ₹101.32 crores, Retention Bank Guarantees for ₹107.80 crores and Advance Bank Guarantees for ₹5.24 crores, which it furnished.

3. The appellant/HCC were informed on 20th June, 2020 through email by the ICICI Bank that the respondent/NHPC had invoked two BGs issued by them for ₹65,00,000.00 and ₹1,50,00,000 vide letter dated 19th June, 2020. On the same day, again through email, the Punjab National Bank also informed the appellant/HCC that the respondent/NHPC had

that day, invoked three BGs issued by them for ₹1,65,00,000/-, ₹2,60,00,000/- and ₹3,36,84,272/-. On 22nd June, 2020, the Jammu and Kashmir Bank also informed them of the request of the respondent/NHPC for the encashment of 11 BGs worth ₹29,48,38,964/- issued towards Retention Money BG. At this juncture, the appellant/HCC approached the Court to prevent encashment of any of the 48 BGs given by it.

4. Initially, on 23rd June, 2020, the Court restrained the respondent/NHPC from encashing 16 of 48 BGs furnished by the appellant/HCC. On 26th June, 2020 however, the Court extended this ad-interim injunction to prevent the encashment of the remaining 32 BGs as well. Ultimately, the learned Single Judge vide the impugned judgement dated 27th August, 2020 concluded, that neither was fraud on the part of the respondent/NHPC established, nor were any special equities existing in favour of the appellant/HCC which could prevail upon the Court to grant an injunction in their favour restraining the respondent/NHPC from encashing the 48 BGs and accordingly dismissed the petition under Section 9 of the Act.

5. However, in view of the fact that the respondent/NHPC had been restrained from encashing the BGs during the pendency of the said petition, the learned Single Judge restrained it from encashing the BGs for a further period of ten days from the date of the judgement i.e. 27th August, 2020. We have extended the interim directions till the disposal of the appeal.

6. The present appeal has been filed against the conclusions of the learned Single Judge submitting that the appellant/HCC had established fraud and there were special equities in its favour which have been

erroneously overlooked by the learned Single Judge. We have heard Mr. Dayan Krishnan Senior Advocate for the appellant/HCC and Ms. Maninder Acharya Senior Advocate for the respondent/NHPC at length and have carefully considered the material on record, particularly in the form of letters exchanged between the parties to which our attention was drawn by both sides.

7. On behalf of the appellant/HCC, Mr. Dayan Krishnan keenly urged: (a) the impugned judgement wrongly rejected the principle of proportionality; (b) even if fraud was not disclosed in the making of the BGs, the conduct of the respondent/HCC disclosed fraudulent intent; and, (c) the case of the appellant/HCC was covered under the two exceptions recognized by the courts and that the cumulative impact of all circumstances put together, was to shock the conscience of the court and thus, special equities existed in favour of the appellant/HCC. It was submitted that from March, 2020 to June, 2020 the constant refrain of the respondent/NHPC was that the original documents had not been handed over and therefore, the BGs would be encashed. There was no complaint of the quality of work done. Nor a suggestion that the contract was being terminated. Rather, on 13th February 2020, the Defect Liability Period ("DLP") was extended to 30th June, 2021 for which period the BGs for a proportionate value of the cost of the balance work could have been kept alive. Furthermore, the admitted position was that work remaining in balance to be completed by 30th June, 2021 was of a cost of ₹56 crores for which there was no justification for the respondent/NHPC to encash BGs worth more than ₹214 crores now. Additionally, it was submitted that the respondent/NHPC had not honoured the Arbitral Award dated 14th

October, 2019 whereunder it had to pay to the appellant/HCC ₹163.55 crores, thus putting tremendous financial pressure on the appellant/HCC and it could not be permitted to add to it by encashing the BGs. Therefore, the grant of an injunction against encashment of the BGs was well warranted in the instant case.

8. Ms. Maninder Acharya contended, on the other hand, that the learned Single Judge had rightly concluded that neither was there fraud, which in any case had to be of an egregious kind, nor were there any special equities made out in favour of the appellant/HCC. It was pointed out that the communication between the parties and as reproduced *in extenso* in the impugned judgement, showed that the work had not been completed by the appellant/HCC; that it had not paid its sub-contractors including the BHEL, despite having received the payments from the respondent/NHPC, due to which BHEL had stopped work and heavy losses were being borne by the respondent/NHPC; that it had not paid its workers including statutory payments; it had misused the TIN of the respondent/NHPC saddling it with tax liabilities as reflected in the demand notice; the appellant/HCC was not willing to complete the work as it claimed it had no finances; and, the project arising out of an International Treaty was required to be completed at the earliest and the encashment of the BGs would finance the work now to be got done through some other agency. In short, the respondent/NHPC was entitled to encash the unconditional BGs and other disputes, if any, could not be raised in these proceedings. It was also informed that the respondent/ NHPC were intending to file objections under Section 34 of the Act and had been prevented from doing so only on account of the pandemic

situation and it could not be said that the Award had attained finality.

9. The law relating to grant of injunctions to restrain the invocation/ encashment of unconditional BGs is well settled. BGs are distinct agreements between the banks and its customers and are independent of the main contract between the customer and the beneficiary and therefore, disputes between the latter two will have no bearing on the obligation of the bank giving such a guarantee to honour its invocation by the beneficiary in terms of the bank guarantee, more so when it is unconditional. The courts are slow to restrain the realization of a BG, but have, however, carved out two exceptions to the rule, one being fraud and the other being special equities in the form of irretrievable harm or injustice being caused if encashment is allowed. [**SEE:** UP State Sugar Corporation v Sumac International Ltd (1997) 1 SCC 568; Standard Chartered Bank v Heavy Engineering Corporation Ltd 2019 SCC OnLine SC 1638].

10. Fraud, calling for the intervention of the court, has to be of an egregious nature. There must be fraud established and mere allegations will not suffice. Fraud in connection with a BG should vitiate its very foundation. It is when the beneficiary seeks to benefit thereby, that the courts will restrain encashment. Fraud must be that of the beneficiary and none else. Injunction can be granted also where the bank itself is proved to have knowledge that the demand for payment of the BG is fraudulent. [**SEE:** U.P. Coop. Federation Ltd v Singh Consultants And Engineers(P) Ltd. (1988)1 SCC 174; Svenska Handelsbanken v Indian Charge Chrome 3(1994) 1 SCC 502].

11. Clearly, in the facts of the present case, these standards for

pleading fraud are not made out. It is nobody's case that the respondent/NHPC has fraudulently invoked the BGs. What is contended is that the respondent/NHPC had threatened to invoke the BGs through its letters, in case the original documents after extension of the BGs were not delivered to them. In the letter dated 13th February, 2020, there was no whisper of the encashment of the BGs. After granting an extension to the DLP till March 2021, according to learned Senior Counsel, the invocation of the BGs on 19th June, 2020 could only reveal a fraudulent design.

12. We are unable to agree. The learned Single Judge scrutinized the various letters and rejected the contention that the only ground for threatening to encash the BGs was the non-submission of the originals. We do not find it necessary to reproduce the contents of various letters sent by the parties to each other. Suffice it to note certain facts. The Completion Certificate issued by the Chief Engineer on 20th September, 2018 was not the Final Completion Certificate and records:

> *"However, the contractor is required to complete the balance works listed hereto as Annexure-1,2&3 as per the schedule submitted vide no. HCC/SITE/KG/PM/NHPC/6950 dt. 17.09.2018.*
>
> *Further this Certificate does not absolve the contractor from fulfilling its obligations to complete the balance works of the Project in all respects in accordance with the contract nor of its obligations during the defect liability period."*

This Certificate enclosed 18 sheets as Annexures 1, 2 & 3 listing balance E&M works, balance Civil works and balance Hydro-Mech works.

Secondly, the correspondence between the parties, particularly by the respondent/NHPC, thereafter, between 7th September, 2019 and 29th December, 2019 were to request the appellant/HCC to complete these works.

Thirdly, the letter dated 13th February, 2020, which refers to these previous letters, also indicates the three categories of work that remained incomplete and merely because the respondent/NHPC acknowledged that the civil work was somewhat keeping to the schedule, to say that therefore it was satisfied with the work and had no complaints, is fallacious in the context of it then encashing the BGs.

Lastly, since the DLP was extended, in terms of the General Conditions of Contract itself, (Clause 30.2) the BGs were to be kept alive for a period of 15 days after the issuance of the Final Acceptance Certificate in terms of Clause 28 and the respondent/NHPC was well within the terms of the contract to demand renewal of all the BGs, also retaining the right to invoke them, again in terms of the contract and the BGs themselves which were unconditional.

13. The appellant/HCC is also aggrieved that the respondent/NHPC had initially invoked the BGs under Clause 30.1 of the contract, but when the original documents were received, it has sought to encash them under Clause 35.1(b) and (h) on the ground of default of the contractor, without adhering to the procedural requirements of certification by the Engineer in-charge and an eight days' notice and when in fact there were no defaults, as three extensions had been granted by the respondent/NHPC itself for the appellant/HCC to complete the Krishanganga Project and the DLP had been extended by 12 months upto 30th June, 2021. It was

submitted that the Completion Certificate had been issued in June and September 2018 and the appellant/HCC was liable only for work to be carried out during the DLP and with the issuance of the letter dated 13th February, 2020, all issues prior thereto had to be considered as settled, as extension could be granted only on satisfactory work having been done and the respondents/NHPC could not be permitted to rake up old issues only to justify invocation of the BGs.

14. All these submissions have been countered by the learned Senior Counsel for the respondent/NHPC who read us through the letters in question to point out that at no stage did the respondent/NHPC express satisfaction on the work done. Even as per the Completion Certificate dated 20th September, 2018, several works remained as detailed in the three annexures attached thereto. The respondent/NHPC repeatedly asked the appellant/HCC to complete the works since then but as it had failed to complete the project works, the DLP was extended on 13th February, 2020 for another year in the expectation that the balance work would be completed well within that time period. Therefore, the invocation of the BGs whether under Clause 30.1 or under Clause 35.1(b) & (h) or under Clause 17.5 were valid actions covered by the very terms and conditions of the contract.

15. We find force in the contention of the learned Senior Counsel for the respondent/NHPC. A perusal of all the letters placed on record reveal that the appellant/HCC has never disputed that the work has remained incomplete. It is also clear that the Completion Certificate underscored the obligation of the appellant/HCC to complete these works within the DLP, which was subsequently extended on 13th February, 2020 as the

work still remained incomplete. Mere extension of the completion time can by no stretch be reckoned as satisfaction, to prevent invocation of performance BGs either because the contractor had failed to faithfully perform its obligations (Clause 30.1) or it failed to commence work, or had suspended the work or had failed to take effective steps for making good the defects etc. (Clause 35.1 (b) & (h). In this context and as is also borne out from the correspondence between the parties, it is to be noted that the BGs furnished by the appellant/HCC had been encashed on an earlier occasion too and the money utilized to complete pending works of the Krishanganga Project. Similar letters have been addressed by the respondent/NHPC to the appellant/HCC intimating it of various payments being made on its behalf, as for example on 23rd April 2020, informing the appellant/HCC of directions issued by the Chairperson, DDMA/ Deputy Commissioner under the Disaster Management Act to pay the labour at site their wages, and which could be recovered from receivables of the appellant/HCC.

16. In other words, no fraudulent or deceitful conduct has been made out on the part of the respondent/NHPC in invoking and seeking to encash the BGs. The present invocation appears to be as per the terms of the contract itself, and cannot be described as a fraud, let alone as an egregious fraud. This plea of the appellant/HCC was rightly rejected by the learned Single Judge.

17. The law relating to encashment of BGs under the second exception has attained wider dimensions over a period of time. The courts were initially very circumspect and required existence of fraud before it prevented encashment of unconditional BGs. Then it looked into the

question of who was in breach of the contract to determine the relief to be granted under special equities. Through various judicial pronouncements the scope of what constitutes special equities was expanded to include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself. In the absence of any straight-jacket formula, the courts are required to examine each case to find out whether it falls within these heads.

18. Before proceeding further, it would be very useful to refer to the decisions of the Supreme Court in at least two cases. The Supreme Court in ***U P State Sugar Corporation (supra)*** held as below:

> *"**14.** On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corpn. case [566 Fed Supp 1210] . In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if*

decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case [566 Fed Supp 1210] there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

19. Following its decision in ***U P State Sugar Corporation (supra)*** the Supreme Court crystallized the law relating to the issue, in ***Himadri Chemical Industries Ltd v Coal Tar Refining Co.*** (2007) 8 SCC 110 in these words:

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(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 realise 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 realisation 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."

20. Applying these principles to the facts of that case, the Supreme Court concluded that no injunction could be granted as fraud or the exceptional circumstances which would make it impossible to reimburse the guarantor were not made out as only an apprehension was expressed. We may add that this decision has been followed by the Supreme Court recently in ***Standard Chartered Bank (supra)***.

21. It is thus apparent that one of the most important aspects of irretrievable injury would be that it would be impossible for the guarantor to get back the money if it succeeds in any claim against the beneficiary. Such a situation is not even conceivable in the present case as the respondent/NHPC is a Public Sector Undertaking.

22. It appears, therefore, necessary to examine whether proportionality would constitute yet another kind of special equities, where relatively speaking, the crystallized liability of the guarantor formed only a small portion of the amount assured by way of BGs. The learned Senior Counsel for the appellant/HCC submitted that in the letter of the appellant/HCC dated 25th May, 2020, it had specifically averred that the balance work that was required to be completed during the extended DLP was worth only ₹56 crores and this figure has not been disputed by the respondent/NHPC in any of its subsequent communications including dated 12th June, 2020. Since the total value of the BGs was ₹214.36 crores, it was submitted that only a proportionate amount of BGs may be permitted to be encashed by the respondent/NTPC if at all and the balance BGs be returned by it in terms of the request made by the appellant/HCC vide its letter dated 7th April, 2020. Reliance has been placed by the learned Senior Counsel on two Single Bench orders of this Court in ***Bhushan Power & Steel Ltd. & Anr. V Union of India*** W.P.(C) 7740/2015 and ***M/S D B Power Ltd v Union of India*** W.P.(C) 7583/2012, to support this plea.

23. The learned Senior Counsel also submitted that the respondent/NHPC were required to pay a sum of ₹164 crores under an Award, and had not done so till date. This sum had also to be offset and the respondent/NHPC could not be permitted to encash BGs worth a sum of ₹214.36 crores.

24. Finally, with regard to the tax demand notice, it was contended that since the exact tax liability was yet to be determined pursuant to the notice, encashment of the BGs could not be justified on this ground. At

best, it could be covered by the furnishing of a BG of adequate value but the respondent/NHPC could not be allowed to encash the 48 BGs already furnished without a definite tax demand being even raised.

25. It may be noted at this juncture that neither of the two orders relied upon by the learned Senior Counsel for the appellant/HCC actually lays down any principle of proportionality because in both the cases the Union of India had agreed to the reduced value of the BGs to be furnished by the petitioners in those cases. Secondly, in both the cases the exact liabilities were spelt out. In ***Bhushan Power & Steel Ltd (supra)***, the forfeiture was for a sum of ₹6.4995 crores whereas the value of the BG was ₹34.19 crores. In ***M/s D B Power Ltd. (supra)***, the BG was worth ₹17.60 crores against a liability for damages if at all payable by the petitioner, only to the tune of ₹4.40 crores. Thus, in both these cases the BGs were modified for the lower sum. Such a situation does not prevail here.

26. One of the letters dated 22nd April, 2020 written by the respondent/NHPC to the appellant/HCC explained in detail as to how it had failed to discharge its statutory obligation of paying the labour force directly engaged by it, and how the encashment of the BGs would pay for such obligations. It is also significant to note that in several responses the appellant/HCC acknowledged that the respondent/NHPC had infused finances to make payments on its behalf and made further requests for continued payments by the respondent/NHPC to pay 'third parties' and set it off against the receivables of the appellant/HCC with interest. Such requests made by the appellant/HCC would actually lend justification for the encashment of the BGs.

27. It is in this letter dated 22nd April, 2020 that the respondent/NHPC

reminded the appellant/HCC that work of the costs of ₹100 crores remained to be executed of the Krishanganga Project which included not merely civil work but also work of HM & E&M and had asked the appellant/HCC to submit actionable detailed schedule to take up the balance work. In its reply dated 25th May, 2020, the appellant/HCC had placed a figure of ₹56 crores only for the balance work but had annexed only the list of balance civil work. It also admitted in the said letter that the updated lists for completed and balance HM & E&M works were awaited from the sub-contractor BHEL. In such a factual situation, it is not possible to conclusively peg the costs of the balance work at ₹56 crores. In fact in its letter dated 22nd July, 2020, (at page 2207 of the paper-book) referencing its earlier letter dated 25th May, 2020, the appellant/HCC sent the revised schedule for all three categories of work i.e. Civil, HM and E&M vide three separate annexures. Interestingly, it also sought the release of ₹58 crores to start the work!

28. As regards the Award, the learned Senior Counsel for the respondent/NHPC has informed that objections were to be filed. In any case, in the backdrop of the fact that work remains to be completed and BGs to the tune of 5% of the cost of the Project were contractually required to be furnished by the appellant/HCC the validity of which was to continue for 15 days beyond the date of Final Acceptance, the existence of the Award in favour of the appellant/HCC has no relevance.

29. As regards the argument submitted that even if the tax liability was yet to be determined, the respondent/NHPC was required to make provision for the amount demanded as per the notice of ₹22,30,89,058/- (in notice dated 4th May, 2019) or more, and which was allegedly a direct

result of the misuse of the TIN of the respondent/NHPC by the appellant/HCC and so was already a burden on it and encashment could not be deferred as if it was a future liability which could be covered by furnishing fresh BGs, we do not have anything to say except that it may give rise to a claim against the appellant/HCC.

30. While proportionality could be included in the exception of special equities, in our view, it can be applied only where the crystallized liability is significantly lower than the value of the BG furnished and the contract is a concluded one.

31. In the present case, neither condition prevails. The contract is not a concluded one. Neither has it been terminated. The liabilities are not crystallized. There were also several payments that had been made by the respondent/NHPC on behalf of the appellant/HCC. As pointed out by the learned Senior Counsel for the respondent/NHPC, though it had extended the DLP, the stand of the appellant/HCC in its communications has been that it had no finances to proceed to complete the pending work and the respondent/NHPC should pitch in with the money. It is, thus, clear that the respondent/NHPC may have to get the work completed from some other agency at the risk and cost of the appellant/HCC which justified the respondent/NHPC encashing the existing BGs.

32. Suffice for our purposes that all the facts highlighted by the learned Senior Counsel for the appellant/HCC do not disclose special equities in favour of the appellant/HCC.

33. In other words, encashment of the unconditional BGs will not result in irretrievable injury to the appellant/HCC requiring this Court to take a view different from the very well considered view taken by the

learned Single Judge.

34. The appeal is dismissed as being devoid of merit.

ASHA MENON, J.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 22, 2020
s*