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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 6th May, 2020
Date of Decision: 13th May, 2020

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O.M.P.(I) (COMM)109/2020, I.A. 3820/2020 & I.A. 3821/2020

LEIGHTON INDIA CONTRACTORS PRIVATE

LTD.

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Krishnendu Datta and Mr.
Manish Srivastava, Advocates.

versus

DLF LTD. & ORS.

..... Respondents

Through: Mr. Rajiv Nayar, Senior Advocate
with Mr. Kartik Nayar, Ms. Meghna
Mishra, Ms. Simran Brar, Mr. Varun
Kumar, Mr. Ankit Rajgarhia, Ms.
Deveshi Mishra, Mr. Apoorva Neral
and Mr. Tarun Sharma, Advocates.
Mr. Nitin Soni, Advocate for R-2.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed by M/s Leighton India Contractors Pvt. Ltd (“*Petitioner*”) against DLF Ltd. (“*DLF*”) and M/s Axis Bank Ltd. (the “*Bank*”) seeking the following reliefs:

(a) Restraining Respondent No.1, its agents, officers, employees etc. from invoking and/or encashing Bank Guarantee(s) as detailed Paragraph No. [73] herein above issued by Respondent No.2 during pendency of the present Petition till conclusion of arbitration proceeding; and/or;



*(b) Restraining Respondent No.2, its agents, officers, employees etc. from making any payment to Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] herein above during pendency of the present Petition till conclusion of arbitration proceeding; and/or;
Or*

In alternative, if amount is already released by the Respondent no.2 in favour of the Respondent no.1 under Bank Guarantee(s) as detailed Paragraph No. [73],

(c) Direct the Respondent No.1, its agents, officers, employees etc. to pay to and deposit the complete amount received under Bank Guarantee(s) as detailed Paragraph No. [73] with the Petitioner during pendency of the present Petition as well as during arbitration proceeding; and/or;

(d) Direct the Respondent No.1, its agents, officers, employees etc. to pay to furnish appropriate security to the Petitioner or to this Hon'ble Court to secure the complete amount received by the Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] during pendency of the present Petition as well as during arbitration proceeding; and/or;

(e) ad-interim reliefs in terms of prayer (a) to (d) above.

(f) for costs:

(g) Pass any such other or further orders as may be deemed fit by this Hon'ble Court in facts and circumstances of the present case;"

2. DLF issued a letter of intent dated 11th July, 2013 for developing a residential project "The Camellias" at DLF City, Phase V, Gurugram. The Petitioner was chosen as the Contractor, and contract dated 19th September, 2013 was executed between the parties. The value of the contract was approximately Rs.1438 crores. The date of completion, as per the contract,



was 3rd September, 2017. After the initial contract, several variation orders were placed on the Petitioner and the date of completion was revised. The last extension was granted till 30th June, 2018.

3. Under the main agreement the Petitioner furnished six bank guarantees. Two bank guarantees were in lieu of the retention money, which was to be retained by DLF and released once the project was completed. The same is however claimed to have been released to the Petitioner by DLF, at the request of the Petitioner against a Bank Guarantee. The remaining four bank guarantees were to secure the proper performance of the contract. The details of the bank guarantees are as under:

Performance Bank Guarantees

<i>Sr. No.</i>	<i>Bank ref.</i>	<i>Amount (In INR)</i>	<i>Expiry Date</i>	<i>Bank</i>
1	00040100007346	23,21,76,895	19.09.2016	AXIS BANK
2	0544BG00107814	48,71,84,459	19.09.2016	ICICI BANK
3	0544BG00116014	23,21,76,895	19.09.2016	ICICI BANK
4	0544BG00107914	48,71,61,354	19.09.2016	ICICI BANK

Retention Bank Guarantees

<i>No.</i>	<i>Bank ref.</i>	<i>Amount (In INR)</i>	<i>Bank</i>
1	07760100000137	36,56,14,608	AXIS BANK
2	0544BG00107714	35,96,80,677	ICICI BANK

All the bank guarantees are admittedly valid till 31st May, 2020.

4. The case of the Petitioner is that it completed the project by September, 2017, however, in view of the various amendments/variation



orders that were placed, some part of the work continued till date, though a substantial part of the work has already been completed. Further, the Petitioner pleads that since June, 2018, it has written repeated letters to DLF asking for the completion certificate to be issued. Reliance is placed on letters dated 1st June, 2018, 5th July, 2018, 9th July, 2018, 21st July, 2018, 25th August, 2018, 31st August, 2018, 21st September, 2018, as also on replies by DLF dated 16th June, 2018, 16th July, 2018, 4th September, 2018, etc. It is averred that while the Petitioner's letters were very specific that the engineer had inspected the works and had not pointed out any defects and that the work was completed, the letters of DLF do not deny these facts and are vague and ambiguous. It is further stated that DLF had earlier made an attempt in December, 2018 to invoke the bank guarantees, however, the said invocations were withdrawn vide letter dated 20th December, 2018. Mr. Sandeep Sethi, Id. Senior counsel appearing for the Petitioner argues that the alleged defects pointed out by the Engineer in letter dated 7th April, 2020 which have been made the basis for the invocation, are extremely minor in nature and the total cost of rectifying these so called defects would not be more than Rs.50 lakhs. Thus, according to him, the invocation of the bank guarantees of more than Rs. 200 crores on the specious plea that the work is not complete, is totally unjustified.

5. He further relies on Clause 15.2 in the contract, which was amended, to argue that none of the four conditions for invoking the bank guarantees were made out. He relies on the following judgments:

- i. ***Larsen Toubro Limited v Maharashtra State Electricity Board & Ors. (1995) 6 SCC 68***
- ii. ***National Highway Authority of India v Punjab National Bank***



F.A.O. (OS) (Comm) 165/2017 (Decided on 27th October, 2017)

6. Mr. Sethi, Id. Senior counsel thereafter points out that the entire invocation itself is *mala fide* as, letter of the Engineer, dated 7th April, 2020 was replied to on 4th May, 2020 by the Petitioner but the invocation of the bank guarantees were not intimated to the Petitioner either by DLF or by the Bank. It is submitted that the Petitioner came to acquire knowledge of the fact that the bank guarantees were invoked for the first time when the Bank sent an e-mail at 6:44pm on 4th May, 2020 itself, stating that the bank guarantees stood invoked and asking for funds in respect of the invoked liability. He submits that thereafter the present petition has been filed. Mr. Sandeep Sethi, Id. Senior counsel also places heavy reliance on the Petitioner's reply dated 4th May, 2020 to the letter of the Engineer dated 7th April, 2020 to argue that the defects are, at best, minor and in any case they are being pointed out two years after the completion of the contract only with a view to avoid issuing the completion certificate and releasing the bank guarantees to the Petitioner. Reliance is placed on the Occupancy Certificate dated 27th July, 2017 issued by DTCP, Haryana to argue that the governmental authority had itself certified that the project was completed and the properties were fit for occupation. He thus submits that there has been substantial performance of the contract.

7. Advance copies of the petition were served both upon DLF and the Bank. Mr. Nitin Soni, Id. counsel appearing for the Bank has placed on record the two letters of invocation, which according to him, were received on the morning of 4th May, 2020. He submits that as per the language in the bank guarantee, no intimation was to be given to the Petitioner and



accordingly, following the guidelines of the RBI, the Bank credited the amounts of the bank guarantees to DLF's account in the evening of 4th May, 2020 and thereafter intimated the same to the Petitioner.

8. Mr. Rajiv Nayar, Id. Senior counsel appearing for DLF submits that this court ought not to go into the merits of the dispute as to whether there was a breach of contract or not. Bank guarantees are independent contracts as per the settled law and thus this Court only needs to look at whether there has been any fraud in invoking the bank guarantees. He, firstly, points out that the Petitioner has tried to mislead this Court by not informing the Court that by the time the petition was filed, the bank guarantees already stood invoked and the amounts have been credited to DLF's account. Thus the petition itself is infructuous. He, further, urges that the Petitioner clearly admits in the petition itself that minor defects are being rectified. Moreover, DLF is also entitled to levy liquidated damages in terms of the contract. Thus, the invocation is justified.

9. Mr. Nayar further submits that the invocation having taken place on 4th May, 2020 and the amounts having been credited in DLF's accounts, the petition itself is not maintainable. Moreover, he places enormous emphasis on the fact that the Petitioner's reply to the letter dated 7th April, 2020 was in fact received on 4th May, 2020 after 11:00 pm, which was much after the bank guarantees were invoked and an intimation had been sent to the Petitioner. This fact has also been concealed from the Court. It is, thereafter, submitted that the retention bank guarantees, in any event, were also to secure the money which DLF was in any case entitled to retain till the successful completion of the contract. In respect of the retention guarantees the Petitioner has no right whatsoever. DLF's case is that the



contract has not been completed and it is thus entitled to invoke arbitration against the Petitioner.

10. It is finally submitted that the Petitioner was under an obligation to renew the bank guarantees 30 days prior to their expiry, which also the Petitioner had failed to do, and in view thereof, DLF was constrained to invoke the bank guarantees. Ld. Senior Counsel relies upon the following judgments:

- (i) ***Himadri Chemicals Industries Ltd. v Coal Tar Refining Co. (2007) 8 SCC 110***
- (ii) ***UP Cooperative Federation Ltd. v Singh Consultants & Engineers (1988) 1 SCC 174***
- (iii) ***Indrajit Power Pvt. Ltd. v Union of India W.P. 2957/2020 (Decided on 28th April, 2020)***
- (iv) ***Hindustan Steelworks Construction Ltd. v Tarapore & Co. (1996) 5 SCC 34***
- (v) ***BSES Ltd. v Fenner India Ltd. & Anr. (2006) 2 SCC 728***
- (vi) ***State of Maharashtra v National Construction Company, Bombay (1996) 1 SCC 735***
- (vii) ***UP State Sugar Corporation v Sumac International Ltd. (1997) 1 SCC 568***
- (viii) ***Umaxe Projects Pvt. Ltd. v Air Force Naval Housing Board OMP (I) (COMM) 206/2019 (Decided on 11th July, 2019)***
- (ix) ***Consortium of Deepak Cable India Ltd. v Teestavalley Power Transmission Ltd. (2014) 215 DLT 246 (DB)***
- (x) ***M/s Classic KSM Bashir JV v Rites Ltd. (2018) 250 DLT 471 (DB)***
- (xi) ***Standard Chartered Bank v Heavy Engineering Corporation Ltd. & Anr Civil Appeal No(s). 9288 of 2019 (Decided on 18th December, 2019)***



(xii) Hindustan Construction Co. Ltd. v State of Bihar (1999) 8 SCC 436

11. This Court is presently considering a petition under Section 9 of the Act. The prayer in the petition, insofar as reliefs (a) and (b) are concerned, are already infructuous. The only reliefs that survive are the alternate reliefs (c) and (d). Admittedly, all the six Bank Guarantee amounts have already been credited by the Bank to DLF's account. The principles laid down in the various judgements cited, in respect of invocation of bank guarantees and the circumstances under which an injunction against invocation can be granted are no longer to be considered in the present case in view of the factual position that the guarantees have already been invoked and DLF has received the amounts.

12. The question that arises is - Whether DLF ought to be directed to refund the amount or to secure the amount in any manner until the petition is heard, or the matter is decided by the arbitral tribunal. Thus, at this stage, the Court needs to see if any 'interim measures of protection' need to be granted in favour of the Petitioner. The scope of Section 9 of the Act is very broad. The Court is empowered to grant various 'interim measures of protection' including orders for securing the amount in dispute, preservation of property, interim injunctions and appointment of receivers. The Section also empowers the Court to grant such other interim measure of protection 'as may appear to the court to be just and convenient'. This is thus an expansive provision and does not curtail the powers of the court. Amendments have been introduced in Section 9(2) and Section 9(3) by the amendments of 2015, as per which a petition under Section 9 can be filed for any interim measure of protection prior to commencement of arbitral proceedings. After



commencement of arbitral proceedings, the application under Section 9 can be entertained only if the Court finds that the remedy under Section 17 is not efficacious. In the present case, the arbitration clause is yet to be invoked. In the `Commentary On The Law of Arbitration'¹ authored by Justice Indu Malhotra, the Ld. Author opines on the powers of the Court under Section 9 as under:

“Section 9(1)(ii)(e) of the Act provides that the court may pass such other interim measures of protection as may appear to be just and convenient.

This provision confers a residuary power on the court to pass such other interim measures of protection as may appear to be just and convenient. This provision confers a wide discretionary power on the court to pass orders for insuring protection to a party against abuse of process. This power is exercisable prior to commencement of the arbitral proceedings, and continues throughout till the enforcement of the award. It covers various eventualities which may require the court to pass necessary orders. This power has to be exercised in consonance with the discipline of limited judicial intervention. The court must, therefore, assess whether a case for exercise of the jurisdiction under this provision has been made out.

The words ‘such other interim measures of protection as may appear to the court to be just and convenient’ in Section 9(1)(ii)(e) replicates Section 94(e) of the Code of Civil Procedure, 1908 which provides that ‘In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed ... make such other interlocutory orders as may appear to the Court to be just and convenient’. This procedure is known as ‘attachment before judgment’. In Kamala Solvent v Manipal Finance Corporation Ltd AIR 2001 Mad 440 ,the Madras High Court held that the

¹ JUSTICE INDU MALHOTRA, COMMENTARY ON THE LAW OF ARBITRATION, (4th ed., Volume I) pg. 418



jurisdiction of the court under Section 9(1)(ii)(e) is to pass interim orders to safeguard and protect the interests of the parties.

In Ashok Kumar v. SBI Officers Association 2013 (3) Arb LR 246(Del), the Delhi High Court held that the phrase “just and convenient” used in Section 9(1)(ii)(e) of the 1996 Act provides wide discretion to the court to mould the interim relief for safeguarding the rights of the parties. The said discretion has to be exercised judiciously and not in an arbitrary manner. Under Section 9 of the court has the discretion to pass an interim order of protection as may be just and convenient when the court arrives at a finding that the rights of the party are going to be adversely affected pending the arbitration, or prior to enforcement”.

13. It has been informed by Ld. Counsel that a total of 429 flats were to be constructed in the various towers of *The Camellias*. Out of these flats, 203 flats have been sold and handed over to the purchasers, however, none of the purchasers have moved into the said flats. In this backdrop, the admitted facts in this petition are as under:
- i. The Director, Town and Country Planning has issued an Occupation Certificate on 27th July, 2017 i.e., three years ago.
 - ii. In addition to the initial scope of the Contract, several variation orders have been placed by DLF upon the Petitioner.
 - iii. Several extensions have also been granted for completion of the contract. The last such extension was granted till 30th June, 2018.
 - iv. Possession of a large number of flats have been given to DLF which has in turn also sold the same to purchasers. The said purchasers, as per Ld. Sr. Counsels, have not moved in, but are carrying out their own internal designing or fit ins.



A perusal of the petition further shows that some work is still to be carried out by the Petitioner, though *prima facie*, a large portion of the work appears to have been completed. Even going by DLF's notice dated 7th April 2020, the work/defects to be carried out or rectified, when compared with the total expanse and cost of the project do not appear to be of substantial cost when compared with the total value of the Bank Guarantees which stand invoked and credited to DLF. No notice of termination has been issued to the Petitioner. This Court is not going into the merits of the disputes as to whether there has been successful completion, or whether there have been any defects and whether such defects are minor or major and whether or not the Petitioner is in breach but only as to whether any part of the amount received by DLF deserves to be secured at this stage.

14. The records show that the Petitioner has been repeatedly asking for the completion certificate, which has been refused by DLF. The question as to whether the extension was sought by the Petitioner or was given unilaterally by DLF is also not the scope of this petition. Undisputedly, the contract stood extended. The above facts show that though parties may have some grievances against each other, they have almost come to the end of the contract. Only the final culmination is to be arrived at and owing to factors which this Court is not concerned with, disputes appear to have arisen.

15. The facts leading up to the filing of this petition are primarily the letter dated 7th April, 2020 of the Engineer, which seeks to point out defects, the reply thereto by the Petitioner and the invocation of the bank guarantees. The clauses in the bank guarantees are relevant and are set out below.



Illustrative clauses in the Retention Bank Guarantee:

“AND WHEREAS, in terms of Clause No.16.3 of the General Conditions of the Contract, the OWNER has deducted Rs.0.00/- (Rupees Zero Only) @ 0% of the Gross amount from on account bills towards Retention Money for the faithful performance of the contract.

AND WHEARAS the OWNER has agreed for release of the above amount on request of the CONTRACTORS, in the interest of the work; on submission of an irrevocable and an unconditional Bank Performance Guarantee in favour of the OWNER against the amount of the said Security Deposit without altering any other Condition of the Contract.

AND WHEARAS to secure the successful performance of Contract/ LOI the Bank has at the request of the Contractor agreed to give the Guarantee as hereinafter contained.

NOW THEREFORE THIS DEED WITNESSTH AS FOLLOWS

1. In consideration of award of the aforesaid Contract/ LOI, the Bank hereby undertakes to unconditionally and irrevocably pay to OWNER immediately on demand, without any protest, contest or demur, and without any recourse to the Contractor, a sum not exceeding Rs.41,62,62,975/- (Rupees Forty One Crores Sixty Two Lakhs Sixty Two Thousand Nine Hundred Seventy Five Only) as the OWNER may demand at any time up to 31st July, 2019. Any such demand made by the OWNER on the Bank shall be conclusive and binding.

2. The Owner shall be the sole judge as regards the performance of the Contract and the Bank shall neither question the judgment or declaration of the OWNER nor ask for any evidence on any account whatsoever. The Bank agrees that any demand made in such demand notice by the OWNER shall be final, conclusive and



binding on the Bank as to the amount payable by the Bank under this Guarantee. The demand of the OWNER under this Guarantee shall not be objected, affected or suspended by reasons of any dispute or disputes pending before any forum, Tribunal, Arbitrators, Court or any other statutory authority with regard thereto or in connection therewith.

3. This Guarantee shall be independent, distinct and in addition to and not in substitution or derogation of any Guarantee executed by the Bank in favour of the OWNER or any other security of the Contractor in favour of the OWNER. ”

As per the contract, DLF was entitled to retain a percentage of the gross amount as Retention Money which was to be released to the Contractor in terms of Clause 16.2 and clause 16.3 of the contract only after the Maintenance Period had expired, defects were rectified and the final bill was released. However, at the inception itself, DLF did not retain the said Retention Money and the same was in fact released to the Petitioner. Two Bank Guarantees were issued by the Petitioner to secure the Retention Money which would otherwise have been released only at the end of the contract.

16. Insofar as the performance bank guarantees are concerned the relevant clauses in the performance bank guarantees read as under:

Illustrative clauses in the Performance Bank Guarantee

“...AND WHEREAS in terms of Clause No. 15.1 of the said Contract, the Contractor is required to submit a Guarantee for the faithful performance of the Contract (hereinafter referred to as the “Guarantee) for Rs. 48, 71,84,459/- (Rupees Forty Eight Crores Seventy One Lakhs Eighty Four Thousand Four Hundred Fifty Nine Only)



AND WHEREAS to secure the successful performance of Contract/LOI the Bank has, at the request of the Contractor, agreed to give the Guarantee as hereinafter contained.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

1. In consideration of award of the aforesaid Contract/LOI the Bank hereby undertakes to unconditionally and irrevocably pay to OWNER immediately on demand without any protest, contest or demur, and without any recourse to the Contractor, a sum not exceeding Rs. 48, 71,84,459/- (Rupees Forty Eight Crores Seventy One Lakhs Eighty Four Thousand Four Hundred Fifty Nine Only) as the OWNER may demand at any time up to 31st July 2019. Any such demand made by the owner on the Bank shall be conclusive and binding.

2. The owner shall be the sole judge as regards the performance of the contract and the Bank shall neither question the judgment or declaration of the OWNER nor ask for any evidence on any account whatsoever. The Bank agrees that any demand made in such demand notice by the owner shall be final, conclusive and binding on the Bank as to the amount payable by the Bank under this Guarantee. The demand of the OWNER under this Guarantee shall not be objected, affected or suspended by reasons of any dispute or disputes pending before any Forum, Tribunal or Arbitrators, Court or any other statutory authority with regard thereto or any connection therewith.

3. This Guarantee shall be independent, distinct and in addition to and not in substitution or derogation of any Guarantee executed by the Bank in favour of the OWNER or any other security of the Contractor in favour of the OWNER.

4. The OWNER will be at liberty to vary and modify any of the term(s) and condition (s) of the said Contract



without affecting this Guarantee, notice of such variations or modifications to the Bank is hereby waived.

5. This Guarantee shall not be affected by any change in the constitution of the Bank or of the Contractor nor shall the benefit of this Guarantee be affected by any change in the constitution of the OWNER or by any amalgamation or merger of the OWNER with any other body corporate and this Guarantee shall be fully enforceable during its currency.

6. The Bank shall not be relieved of its obligations under these presents by any exercise by the OWNERS of its powers with reference to the performance of the any other acts of omission or commission on the part of the OWNER or any other indulgence shown or vary any terms of the warranty or any other matters or thing whatsoever, which under law would but for this provision have the effect of relieving the Bank.

7. The Bank also agrees that the OWNER at its option shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, without proceeding against the Contractor and notwithstanding any security or other guarantees that the OWNER may have in relation to the Contractor's liabilities.

8. This Guarantee is a continuing guarantee during its currency and the Bank undertakes not to revoke this Guarantee during its currency without previous written consent of the OWNER and the Bank agrees that the Guarantee contained herein shall continue to be enforceable till the OWNER discharges the same or till 31st July, 2019 (Expiry date) whichever is earlier."

17. A perusal of both sets of bank guarantees shows that the same are unconditional and irrevocable. However, they are both meant for different purposes. First, the retention bank guarantees were meant to secure the amounts which DLF could have retained but were released to the Petitioner at its request. Considering that DLF's case is that there are defects which



are yet to be rectified and that DLF was entitled to retain amounts to secure the rectification of defects in terms of Clause 16 of the Contract, the invocation of the Bank Guarantees qua retention money, which were furnished “*in favour of the OWNER against the amount of the said Security Deposit,*” as per the recital in the Bank Guarantee, cannot be faulted with.

18. Insofar as the performance bank guarantees are concerned, the said guarantees were issued to secure the faithful performance of the contract in terms of Clause 15.1 of the Contract. The said clause makes it clear that the Bank Guarantees are ‘*for the due execution and proper performance of the Contract.*’ The correspondence between the Petitioner and DLF, shows that since 2018, the Petitioner has sought issuance of the completion certificates repeatedly, which has been withheld on one ground or the other. The inspections by the Engineer etc., are all on record. The responses of DLF, however, do not deal with the issues raised by the Petitioner in its letters seeking the completion certificate. Insofar as the recent letter dated 7th April, 2020 is concerned, even if that letter is taken at its highest, the same shows that, in a project of approximately Rs.1400 crores, the so-called defects that were pointed out would not disclose unfaithful performance by the Petitioner or non-performance of the contract. At best, these could be arbitrable disputes, and could not have led to invocation of bank guarantees of such huge amounts, especially during the COVID-19 lockdown.

19. In addition, this Court is also persuaded by the fact that due to the national lockdown which has been declared in view of the COVID-19 outbreak the letter dated 7th April, 2020 may not have been replied to with alacrity, and it is only when encashment of the bank guarantees was suspected that the same was replied to. The question is whether the letter



dated 7th April, 2020 could have led to encashment of all the performance guarantees, which were submitted by the Petitioner, which were still valid until 31st May, 2020.

20. The invocation took place in the morning on 4th May, 2020 and a copy of the invocation letter was not sent to the Petitioner by DLF. The Bank chose not to intimate the Petitioner. The amount was released to DLF on the same day evening, without intimation to the Petitioner. It is only after the amounts were credited to DLF, that the e-mail was written at 6:44 P.M. in the evening, much after banking hours. This chronology of events did not even permit the Petitioner to avail of its legal remedies against the invocation. This Court is thus of the opinion that the manner in which the bank guarantees, especially the performance bank guarantees, have been invoked, that too during the lockdown period is not completely *bona fide*.

21. Unlike in a case which involves only an injunction to restrain invocation of bank guarantees, the reliefs sought in this petition are also for grant of interim measures of protection. To consider whether any interim measures of protection need to be granted, to secure the interest of the Petitioner, this Court has perused the correspondence and the clauses in the contract etc.

22. As per the contract, DLF could invoke the performance bank guarantees in terms of clause 15.2. The said clause reads as under:

“15.2 The Owner may at any time redeem the Performance Bond from the guarantor bank without being bound to give any evidence or notice whatsoever and without resorting to the necessity of any legal or other formality or without taking recourse to judicial proceedings. The demand of the Owner under the Performance Bond shall not be



objected, affected or suspended by reason of any dispute (or disputes) pending before any forum, tribunal, arbitrators, courts or any other statutory authority with regard thereto or in connection therewith.

The Owner shall not make a claim under the Performance Bond except for amounts to which the Owner is entitled under the Contract (notwithstanding any other provisions in the Contract) in the event of:

(a) failure by the Contractor to extend the validity of the Performance Bond as described in Sub Clause 15.1, in which event the Owner may claim the full amount of the Performance Bond.

(b) failure by the Contractor to pay the Owner an amount due, as either agreed by the Contractor or determined by the Engineer under the provisions of this Contract, within 42 days after this agreement or determination

(c) failure by the Contractor to remedy a default within 42 days after receiving the Owner's notice requiring the default to be remedied, or

(d) circumstances which entitle the Owner to termination under Clause 81 (Default of Contractor), irrespective of whether notice of termination has been given."

A perusal of the four conditions above, in Clause 15.2 on the basis of which non-performance could have been claimed, shows that in these facts, the only ground that can be urged by DLF is ground (d), which requires that if any ground leading to termination of the contract could have been made out, the bank guarantees could be encashed.

23. The circumstances that could have led to termination are enumerated in Clause 81. The said Clause 81 reads as under:



“81.0 DEFAULT OF CONTRACTOR

81. The Owner may, without prejudice to its other rights and remedies under the Contract or at law, terminate the Contract with fourteen (14) days notice in writing to the Contractor, in case of a default by the Contractor. The events of default of the Contractor shall include:

- (i) if the Contractor becomes bankrupt, or being a corporation goes into liquidation or winding-up or the Contractor itself commences bankruptcy, insolvency, reorganization, stay, moratorium or similar debtor-relief proceedings or insolvency, receivership, reorganization or bankruptcy proceedings are brought against it and the proceedings are not discharged or stayed by the appropriate Court of Law within 90 days of such proceedings being initiated, or the Contractor becomes insolvent or unable to pay its debts as they become due, or admits in writing its inability to pay its debts or makes an assignment for the benefit of its creditors. However a voluntary liquidation for the purposes of amalgamation or reconstruction or reorganisation may not constitute a default of the Contractor provided that:
 - (a) as part of such amalgamation or reconstruction or reorganisation, the entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed or reorganised entity and the amalgamated or reconstructed or reorganized entity has unconditionally assumed the obligations of the Contractor under the Contract; and*
 - (b) the amalgamated or reconstructed or reorganized entity has the capability and experience required for the performance of its obligations under the Contract; and*
 - (c) the amalgamated or reconstructed or reorganized entity has the financial standing to perform its obligations under the Contract;**



- (ii) *if the Contractor assigns the Contract or any right, interest or benefit thereof without the prior consent in writing of the Owner;*
- (iii) *if the Contractor has an execution levied on his goods or other assets;*
- (iv) *if there is any misrepresentation by the Contractor in any representation or warranty of the Contractor set forth in the Contract, or the omission by the Contractor of any fact which renders any such representation or warranty materially misleading, untrue or incorrect;*
- (v) *if the Contractor fails to pay the Owner any amount under the Contract (including but not limited to liquidated damages) within [fourteen (14) days] of the due date;*
- (vi) *if the Engineer certifies in writing to the Owner that in his opinion the Contractor:*
 - a) *has, repudiated or abandoned or manifested an intention to repudiate or abandon the Contract, or*
 - b) *has, failed to commence the Works or has suspended the progress of the Works for twenty eight days after receiving from the Engineer written notice to proceed, or*
 - c) *has, failed to remove materials from the Site or to pull down and replace any work for twenty eight days after receiving from the Engineer, a written notice that the said materials or work has been rejected under these conditions, or*
 - d) *has, despite previous warnings by the Engineer, in writing, is not executing the Works in accordance with the Contract, or is persistently or flagrantly neglecting to carry out his obligations under the Contract, or*
 - e) *has, to the detriment of good workmanship, or in defiance of the Owner's instructions to the contrary, sublet any part of the Contract or*



- f) *has failed to ensure that the Works are in compliance with all laws and permits to the extent applicable to the Works, or*
- g) *has, breached any of the terms conditions of the Contract.* ”

24. Breach of contract has been alleged by DLF, however, no notice of termination has also been served upon the Petitioner. The contract continues to subsist between the parties. Even in the letter dated 7th April 2020, DLF, after setting out various defects, concludes as under:

“We once again request the Contractor to complete the balance work at the earliest instead of raising such frivolous claims and making allegations against the Owner/Engineer. This is without prejudice to the Owner’s entitlements to recover additional costs and take necessary action, including but not limited to Clause 6, Clause 67.5 of SCC.

This is without prejudice to the Owner’s other rights and entitlements which are hereby expressly reserved”

Thus, DLF called upon the Contractor to complete the balance work at the earliest and states that it may be entitled to recover additional costs. Even in this letter, there is no notice to the Petitioner that the Bank Guarantees would be invoked. Though this letter is ‘without prejudice’ it definitely shows that DLF did not contemplate ending the contract or invoking the Bank Guarantees. In effect, there has been no notice whatsoever to the Petitioner of the invocation of the Bank Guarantees. The Petitioner refuted DLF’s stand vide its reply dated 4th May 2020 and stated that DLF’s intention is only to delay the issuance of completion certificate. The chronology of events also shows that variation orders were placed and



extensions were granted. Thus, the parties were actively working with each other in a collaborative manner, when the invocation took place in a completely distrustful manner. Under these circumstances, special equities exist to protect the interest of the Petitioner and secure the amount of the performance bank guarantees. Such an order is required to be passed in the light of the clauses of the Contract, the clauses in the Bank Guarantees and the correspondence on record as the encashment of all the bank guarantees is clearly not justified.

25. In the totality of circumstances, insofar as the defects pointed out are concerned, DLF has already received the retention money to secure its interest in terms of any additional costs. However, insofar as the amount of the performance bank guarantees are concerned a *prima facie* case has been made out for securing the interest of the Petitioner, as the said amount is substantial and the same has been received by DLF after encashing performance bank guarantees.

26. Accordingly, it is directed that out of the amount credited by the Bank to DLF, DLF shall create a fixed deposit for a sum of Rs.143,87,22,708/- and place the same in an interest bearing fixed deposit on auto renewal mode. The same shall be made out in the name of the Registrar General of this Court. The original fixed deposit receipt shall be filed in this Court along with an undertaking by the bank issuing the fixed deposit that the said deposit shall not be permitted to be encashed until further orders of this Court in the present petition. The interest etc., that accrues on the said Fixed Deposit shall also be retained by the bank issuing the Fixed Deposit which shall be initially for a period of six months. Reply be filed to the petition within four weeks, rejoinder with four weeks thereafter. The FDR be placed



on record on or before 20th May, 2020.

27. List before the Joint Registrar for confirmation of the FDR receipt on 22nd June, 2020. Original FDR be retained in a sealed cover in the safe custody of the Ld. Registrar General. The Joint Registrar may record the statement of the bank official issuing the FDR, if deemed appropriate.

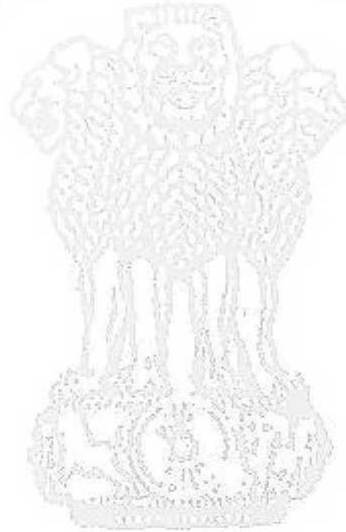
28. List before the Court on 17th August, 2020.

**PRATHIBA M. SINGH
JUDGE**

MAY 13, 2020

dj/rg

HIGH COURT OF DELHI



सत्यमेव जयते