

**Encashment of an unconditional and irrevocable bank guarantee cannot be enjoined except in cases of fraud of egregious nature, irretrievable injury or special equities. Financial distress is not irretrievable injury (Delhi High Court)**

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**Suzlon Energy Limited v. Zemira Renewable Energy Limited**

**Court:** Delhi High Court | **Case Number:** OMP (I) COMM 340 of 2019 and connected matters | **Citation:** MANU/DE/1158/2020 | **Judge:** Jyoti Singh J | **Date:** 04 June 2020

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**A. Invocation of bank guarantee and application to restrain encashment**

Suzlon Energy had several contracts with the ReNew group of companies to supply and erect wind turbine generators. Suzlon had issued performance bank guarantees as security for completing the project. Disputes arose because ReNew invoked the guarantees.

Suzlon applied under Section 9 ACA to the Delhi High Court seeking restraint on the invocation of Bank Guarantees.<sup>1</sup> Since the issues were common with slightly different facts, the various respondents are referred to in the decision are “respondent”.

**B. The court’s decision**

The court initially restrained the encashment, but later after hearing the matter in full, Jyoti Singh J dismissed the petitions.

**B1. The nature of the guarantees: unconditional and irrevocable**

First, Jyoti Singh J reproduced various clauses. Some passages later she turned back to the clause and commented on their nature. She concluded, “the BGs are Unconditional and Irrevocable, and the Banks have undertaken to honor the claim of the beneficiary, without any demur or protest and de hors and irrespective of any disputes between the beneficiary and the Guarantor.”

**B2. The law on bank guarantees**

Second, she considered the law relating to unconditional and irrevocable bank guarantees and noted that “the Supreme Court and this Court in several judgments have from time to time emphasized and re-emphasize the restraints on the power of a Court to interfere in the invocation of these BGs, when invoked by the beneficiaries.” Then, instead of referring to each one of these judgments, she referred to “a recent judgment of a Co-ordinate Bench of this Court in *Classic-KSM Bashir JV v. Rites Limited*,

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<sup>1</sup> The dispute arose because the guarantees had been invoked on 04 October 2019. For all practical purposes the reliefs were presumably against encashment (see order dated 11 October 2019 by JR Midha J).

2018 SCC OnLine Del 8888 (Navin Chawla J), which she said, “would succinctly bring out the law on the subject.”

In the passages that Singh J reproduced from *Classic*, Navin Chawla J had referred to *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*, (1997) 6 SCC 450,<sup>2</sup> *Vintec Electronics Private Ltd. v. HCL Infosystems Ltd.*, (2008) 1 SCC 544,<sup>3</sup> and *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and another.*, (2016) 10 SCC 46.<sup>4</sup>

Singh J then noted the legal principle in the following terms: “when a BG is unconditional and irrevocable, the Rule is that the Courts should refrain from injunction their invocation or encashment by the beneficiary. This Rule is subject to only two exceptions: (a) egregious fraud which vitiates the entire underlying transactions and of which the Bank has notice; or (b) irretrievable injury of an exceptional circumstance, where it is impossible for the Guarantor to reimburse itself if it ultimately succeeds in the final adjudication of the disputes.”

Singh J then also noted a third circumstance: “Courts in exceptional circumstances would invoke the doctrine of Special Equities to restrain the injunction but other than these exceptions there cannot be any interference in the invocation of an Unconditional BG.”

### **B3. Suzlon unable to establish fraud**

Third, she observed that “Suzlon has not been able to set up any case of egregious fraud with respect to the invocation of the BGs in question. There is only a vague pleading to this effect which is not enough for this Court to pass a restraint order.”

### **B4. Bank guarantees are independent contracts and have no relation to the merits of the dispute**

Fourth, she noted that there were “serious disputes on the merits of the respective claims raised by the parties” and concluded that those “cannot be a ground to interfere and restrain the invocation/encashment of the BGs in question.” She cited *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. & another.*, 1996 5 SCC 450 for the “settled law” that a bank guarantee “is an independent contract between the bank and the beneficiary. Once the beneficiary invokes the BG, the Bank is obliged to honour the Guarantee without any demur or protest and irrespective of any dispute between the beneficiary and the Guarantor.”<sup>5</sup>

### **B5. Financial distress, not a ground to injunct encashment**

Fifth, she addressed Suzlon’s argument that it was undergoing the Corporate Debt Restructuring Process and encashment of the BGs worth over Rupees One hundred crores would cause irretrievable injury. She rejected the argument referring to *Zillion Infra Projects (P) Ltd. v. Fab-Tech Works & Constructions Pvt. Ltd.*, (2015) 224 DLT 371<sup>6</sup> and *UP State Sugar Corporation v. Sumac International*

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<sup>2</sup> Supreme Court, K.S. Paripoornan, K Venkataswami & BN Kirpal JJ.

<sup>3</sup> Supreme Court, Altamas Kabir & B Sudershan Reddy JJ.

<sup>4</sup> Supreme Court, Kurian Joseph & Rohinton Fali Nariman JJ.

<sup>5</sup> Supreme Court, K Ramaswamy, S Saghir Ahmad, & GB Pattanaik JJ.

<sup>6</sup> A 2-judge bench of the Delhi High Court, Badar Durrez Ahmad & Sanjeev Sachdeva JJ (“the party seeking an injunction would have to show that exceptional circumstances exist which make it impossible for the guarantor to reimburse himself if he ultimately succeeds and this will have to be decisively established”).

*Ltd.*, AIR 1997 SC 1644.<sup>7</sup> She also referred to a single judge’s decision of the Delhi High Court in *Umaxe Projects Private Limited v. Air Force Naval Housing Board and another*, in OMP (I) (COMM.) 206 of 2019, where Sanjeev Narula J concluded that “financial distress” cannot be a ground for an injunction.

#### **B6. Invocation according to the terms**

Sixth, she rejected Suzlon’s arguments that the bank guarantees were not invoked following the terms of the contract. Suzlon had cited Singh J’s decision in *Larsen & Toubro Limited v. Experion Developers Pvt. Ltd.* in OMP (I) (COMM) 200 of 2019.<sup>8</sup> The argument was rejected noting that “this Court in a subsequent judgment between the same parties has distinguished the said judgment based on the law laid down by the Supreme Court and has rejected the prayer for grant of restraint against the invocation of unconditional and irrevocable BGs.” She added that the obligations of the parties under the contract and the interpretation of the contract will be in the domain of the arbitral tribunal.

#### **B7. Ancillary argument**

Seventh, Singh J also rejected an argument based on the identity of the parties in the various contracts. She noted that the guarantees had been rightly invoked and, in any case, a dispute concerning the obligations under the multiple contracts was a matter for the arbitrator.

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<sup>7</sup> A 2-judge bench of the MM Punchhi, Sujata V Manohar JJ (“...since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.”). Singh J noted that in *UP State Sugar*, “a sick industrial company had sought an injunction, but that too was declined relying on an earlier judgment in *UP Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.*, (1988) 1 SCR 1124.

<sup>8</sup> Available at <https://indiankanoon.org/doc/69227054/>.