

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) 382 OF 2023

M/s Hindustan Steel Works Construction

Through its General Manager (Engineer), having its registered office at P-34A, Gariahat Road, Dhakuria, Kolkata-700031 and Corporate Office at 3rd Floor, NBCC Square, Plot No.111F/2, Action Area-III, New Town, Rajarhat, Kolkata-700135 and also having its Zonal Head Office at NBCC (I) Limited, 3rd Floor, Jackson Gate Building, Lenin Sarani, Agartala, Tripura (W)-799001.

.... **Petitioner.**

Versus

1. The Banking Ombudsman,

Being represented by the Reserve Bank of India,
2nd Floor, Jackson Gate Building, Lenin Sarani, Agartala,799001.

2. The Branch Manager,

Punjab National Bank (Formerly known as United Bank of India),
Amarpur Branch, P.O. Amarpur, Gomati District, Tripura-799101.

3. Kajal Chakraborty,

Amarpur, P.O. Amarpur, Gomati District, Tripura-799101.

....**Respondents.**

Present:

For the petitioner : Mr. Uday Gupta, Sr. Advocate.
Ms. Riya Chakraborty, Advocate.

For the respondents : Mr. B. N. Majumder, Sr. Advocate.
Mr. A. Roy Barman, Advocate.
Mr. B. Paul, Advocate.

Date of hearing : **20.09.2024**

Date of delivery of judgment and order. : **25.09.2024**

Whether fit for reporting : Yes

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR.JUSTICE ARINDAM LODH**

JUDGMENT & ORDER

[Arindam Lodh,J.]

By means of filing the instant writ petition, the petitioner has prayed for following reliefs:

i) For issuance of a writ of certiorari and a writ of mandamus and/or any other appropriate writ, order or direction of the like nature to call for the records of the case from the Respondent No.1-Banking Ombudsman being represented by the Reserve Bank of India pertaining to Complaint No.RBI/CMS/N202223005010648 filed by the Petitioner-Hindustan Steelworks Construction Limited (HSCL) and after perusing the said records along with the facts and submissions being urged via the present Writ Petition, be pleased to quash/set aside the Order dated 27.12.2022 passed by the Respondent No.1-Banking Ombudsman being represented by the Reserve Bank of India in Complaint No.RBI/CMS/N202223005010648 having been passed by the Respondent No.1-Banking Ombudsman being represented by the Reserve Bank of India in gross violation of the principles of natural justice and hence illegal, arbitrary and a nullity in the eyes of law.

ii) For the enforcement of the legal rights available to the Petitioner-HSCL and as enumerated under the Reserve Bank-Integrated Ombudsman Scheme,2021.

iii) For issuance of a writ of mandamus thereby directing the Respondent No.2-Punjab National Bank (Formerly known as United Bank of India) for releasing the Bank Guarantee (BG) amount of Rs.66,18,543/- (Rupees Sixty Six lakhs Eighteen Thousand Five Hundred and Forty Three only) along with accrued interest till the date of payment in terms of the Bank Guarantee No.0260141LPER0003 dated 30.07.2018 issued by Respondent No.2- Punjab National Bank (Formerly known as United Bank of India) on behalf of Respondent No.3-Kajal Chakraborty in favour of the Petitioner-HSCL in compliance of Clause 3 of the aforesaid Bank Guarantee.

AND/OR

For issuance of any other appropriate writ(s) or direction(s) or order(s) as Your Lordships may deem fit and proper in view of the facts and circumstances of the case for doing conscionable justice in favour of the Petitioner-HSCL.”

2. Brief facts of the case are that the petitioner-Hindustan Steel Works Constructions (HSCL) is a Public Sector Enterprise, (a subsidiary of NBCC(India) Limited) under the administrative control of Government of India which is involved in the business of turnkey execution of large infrastructure projects in India and abroad. It is contended in this petition that the construction and maintenance of the road i.e. Gandacherra to Kalajhari No. TR-04-121, Link No.L038, Length-6.85 Km. Phase-VIII, District-Dhalai, Block-Dumburnagar was sanctioned under the “Pradhan Mantri Gram Sadak Yojana” (PMGY) under scope of NIT No.65 dated 16.04.2012. Accordingly, the said work order was awarded to the respondent no.3 by the petitioner-

HSCL followed by a Letter of acceptance dated 23.07.2012 for agreement value of Rs.26,47,41,720.00 for the said construction and maintenance for 5 years. Thereafter, the respondent no.3, the Contractor had submitted Bank Guarantee No. 026012ILPER0001 dated 31.07.2012 for Rs.66,18,543/- (Rs. Sixty Six Lakhs Eighteen Thousand Five Hundred and Forty Three only) issued by the Punjab National Bank (Formerly known as United Bank of India) in favour of the petitioner-HSCL for the aforesaid project as Performance Security. But, the respondent no.3 failed to complete the work awarded to him and thus, the disputes arose between the petitioner-HSCL and respondent no.3. It is averred in the petition that the said Bank Guarantee was extended from time to time on the undertaking of the respondent no.3, the Contractor upto 31.07.2014 and further extended upto 30.07.2015, 29.07.2016, 29.07.2017, 29.07.2018 and as per the respondent no.2, it was extended lastly upto 29.07.2019 in favour of the petitioner-HSCL.

3. On failure to execute the works, Show Cause Notice dated 03.07.2019 was issued by the petitioner-HSCL followed by further Notices dated 28.09.2019 and 18.10.2019 upon the respondent no.3, but, having found no response to the said Show Cause Notices, Petitioner-HSCL placed demands to the respondent no.2 for invocation of the Bank Guarantee in question vide letters dated 21.09.2019 and 18.11.2019. There was no response of email communication dated 21.09.2019 from the respondent no.2 but subsequently, the respondent no.2 sent reply dated 22.11.2019 to the petitioner making reference to the email dated 21.09.2019 stating that –“ ..*With reference to the above and said letter regarding the invocation of Bank Guarantee No.026012ILPER001 issued in favour of HSCL at the request of*

Mr. Kajal Chakraborty. We would like to inform you that the said Bank Gurantee cannot be invoked as per “point No.8, para iii” of the Bank Gurantee as the invocation claim was made on 21.09.2019 after expiry of the Gurantee.”

4. Having aggrieved by the inaction of the respondent no.2, despite several communications and final communication dated 22.11.2019, as quoted here-in-above, the petitioner-HSCL filed a complaint on 10.11.2022 under the Reserve Bank-Integrated Ombudsman Scheme, 2021 for appropriate relief. But, it is averred that the respondent no.1, being the Ombudsman of the Bank without considering the averments of the complaint dated 10.11.2022 rejected the complaint of the petitioner. Hence, this writ petition.

5. We have heard Mr. Uday Gupta, learned senior counsel assisted by Mrs. R. Chakraborty, learned counsel appearing for the petitioner-HSCL. Also heard Mr. B. Nandi Majumder, learned senior counsel assisted by Mr. B. Paul, learned counsel appearing for the respondent no.3, the Contractor and Mr. A. Roy Barman, learned counsel appearing for the respondent nos. 1 and 2.

6. At the very outset, Mr. Gupta, learned counsel appearing for the petitioner submitted that the initial agreement for construction of road and maintenance has not yet been fulfilled by the respondent no.2 and according to Mr. Gupta, learned Counsel, Clause 3 of the Bank Guarantee also provides that the Bank Guarantee would remain in force till all the dues of the Government have been fully paid, satisfied or discharged. In the present case, respondent no.3 is yet to discharge his liability towards the petitioner-HSCL

even till date. Hence, Mr. Gupta, learned counsel contended that Clause 8(iii) of the Bank Guarantee which rendered Clause 3 otiose to be ignored on the doctrine of '*verba chartarum forties accipiuntur contra proferentem*'. It was further contended by Mr. Gupta, learned counsel that the respondent no.1, Banking Ombudsman being represented by the Reserve Bank of India, without giving any reasonable opportunity of being heard and further without taking into consideration the averments of the complaint filed by the petitioner on 10.11.2022 and law on the subject matter of Bank Guarantee, rejected the complaint in a mechanical manner and thereby the action of the respondent no.1 is violative of the provisions of the Scheme, 2021 and against the principles of natural justice and accordingly, learned counsel for the petitioner prays for setting aside and quashing the impugned order dated 27.12.2022 passed by the respondent no.1 which is illegal, arbitrary and violative of principles of natural justice.

7. Mr. Nandi Majumder, learned senior counsel appearing for the respondent no.3 submitted that after issuance of the 'Letter of Acceptance', dated 23.07.2012, the respondent no.3, i.e. the Contractor had agreed under the terms and conditions of the Agreement dated 31.07.2012 and submitted the Bank Guarantee for Rs.66,18,543/- issued by the respondent no.2/Bank in favour of the petitioner as Performance Security. On the undertaking of respondent no.3, the said Bank Guarantee was time to time extended by the respondent no.2 and finally, it was extended for a further period of one year w.e.f. 30.07.2018 to 29.07.2019. Again, Mr. Nandi Majumder, learned senior counsel agitated that the respondent no.3 was very much interested in executing the work for his professional interest but the petitioner-HSCL

illegally and unauthorisedly rescinded the same and terminated the contract issued vide NIT No.65/2020/45 dated, 05.02.2020. After that, the petitioner-HSCL illegally tried to invoke the Bank Guarantee without examining and appreciating the ground realities. According to Mr. Nandi Majumder, learned senior counsel that the petitioner-HSCL sent a mail to the bank on 21.09.2019 i.e., after the expiry of about 2 months from the date of expiry of the Bank Guarantee i.e. 29.07.2019 and to cover the delay, the petitioner-HSCL put a back date on the mail as 25.07.2019. Therefore, demanding for encashment of the Bank Guarantee on behalf of the Petitioner-HSCL is absolutely illegal, time-barred and unsustainable in the eyes of the law.

8. Mr. Roy Barman, learned counsel appearing for the respondent no.2 submitted that as per the condition of the Bank Guarantee, the petitioner failed to produce certificate of the Government regarding satisfactory completion of the work and as such the respondent no.2 was not in a position to release the Bank Guarantee in favour of the petitioner since the claim was made by the petitioner after expiry of the time stipulated in the said Bank Guarantee.

9. On the above perspective of the submissions advanced by learned counsel appearing for the parties, we have gone through the records and on perusal of the same, it has come to fore that we must confine ourselves to the terms and conditions of the Bank Guarantee whereby the respondent no.2 and respondent no.3 have entered into an agreement. Let us reproduce the Clause 3 of the said Bank Guarantee at first, which reads thus:

“3. We, (Name of the Bank) further Agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said Agreement and that it shall continue to be enforceable till all the dues of the Government under or by virtue of

said Agreement have been fully paid and its claims satisfied or discharged or till Office/Hindustan Steelworks Construction Limited, A Govt. of India Undertaking certifies that the terms and conditions of the said Agreement have been fully and properly carried out by the said contractor(s) and accordingly discharges this guarantee.”

10. In the context, Clause 8(iii) is very relevant, which reads as under:

“(iii) We are liable to pay the Guaranteed amount or any part thereof under this Bank Guarantee only and only if the Government serve upon us a written claim or demand on or before 29th July 2019 (Date of expiry of guarantee)”

11. From the records it has come to light that the Bank Guarantee No.026012ILPER0001 for Rs.66,18,543/- at the outset, was issued on 31st July,2012 by the respondent no.2 having validity period of 1(one) year and it was subsequently renewed on expiry of every after one year. Lastly, the said Bank Guarantee No.026014ILPER0003 was extended upto 29th July, 2019. But the Bank/respondent no.2 had received an email dated 21.09.2019 from the petitioner-HSCL requesting renewal of the Bank Guarantee, which appears to us that the said request was made after expiry of two months of the Bank Guarantee as stipulated therein as observed by the Ombudsman/respondent no.1 . Thereafter, the Petitioner-HSCL made request to the respondent no.2 on 18.11.2019 [Annexure-7 to the writ petition] for invocation of the Bank Guarantee to which the respondent no.2 vide its communication dated 22.09.2019 [Annexure-8 to the writ petition] rejected the said request stating that – *we would like to inform you that the said Bank Guarantee cannot be invoked as per “point no.8, para iii)” of the Bank Guarantee as the invocation claim was made on 21.09.2019, after expiry of the Guarantee.* Therefore, it is very much clear to us that the petitioner could not approach the respondent no.2 for invocation of the said Bank Guarantee within time i.e. before its

expiry on 29th July, 2019. Therefore, in our considered opinion, we find that there was no laches or deficiency in service on behalf of the respondents.

12. Learned counsel for the petitioner-HSCL had given much stress upon Clause 3 to justify his prayer that the Bank Guarantee would remain in full force and effect during the period of performance of contract till all the dues are fully paid and all claims are satisfied or discharged or till it certifies that the terms and conditions mentioned in the Bank Guarantee are fully and properly carried out by the respondent no.3. To say it otherwise, the main crux of the submission of learned counsel for the petitioner is that the Bank Guarantee would remain in force and effective till completion of execution works to the satisfaction of the petitioner-HSCL and if the work is not completed properly and to their satisfaction, then, Clause 8(iii) would have no manner of obligation.

13. At this juncture, we may gainfully make reference of some of the judgments rendered by the Supreme Court of India and other High Courts on the issues in dispute here-under:

In ***State of Maharashtra & Anr. Vs. National Construction Company, Bombay & Anr.*** reported in (1996) 1 SCC 735, the Supreme Court held that *the obligation of the bank to pay under the guarantee is independent of the underlying contract. The court held that the beneficiary must adhere to the terms of the guarantee, including any deadlines for invocation.*

In ***Makharia Brothers Vs. State of Nagaland & Ors.*** reported in (2000) 10 SCC 503, the Supreme court held that Bank Guarantee would continue to subsists for a certain period when the “*terms of the bank guarantee*

are explicit". The present case is similar to that of ***Makharia Brothers*** (Supra) as would be apparent from a reading of para 3 of the report where the terms of the bank guarantee have been extracted. It is as under:

"..... We, the Vysya Bank Ltd. ... further agree that the guarantee herein contained shall remain in full force and effect up to and inclusive of 5-1-1979 or the expiry of the extended period if any and that it shall be continued to be enforceable till all the dues of the Government under or by virtue of the same agreement have been fully paid and its claim satisfied or discharged or till the government certifies that the terms and conditions of the said agreement have been fully and properly discharged out by the said contractor and accordingly discharges the guarantee subject however that the government shall have no right under the bonds after the expiry of six months stated above or extended if any. ... Our liability under the bond is restricted to Rs 2,87,800 (Rupees two lakhs eighty-seven thousand eight hundred only). Our guarantee will remain in force till 5-1-1979 and unless the suit or action to enforce the claims under this guarantee is filed against us within six months from its expiry all your rights under the guarantee shall be forfeited and we shall be released and discharged from all liabilities thereunder."

It is in this context of the terms of the bank guarantee, the Apex Court at para 6 held as under:

"6. There was, therefore, in our view, no way in law in which it could be declared that the bank guarantee would remain effective and enforceable for so long as the work under the contract was successfully commissioned or the amounts due under the bank guarantee were paid or an injunction could issue to the Bank to so renew the period of the bank guarantee. It needs to be remembered that a bank guarantee issued by a bank after the party at whose instance it is issued has put the bank in funds. No bank can be compelled to furnish a bank guarantee without adequate funds to fall back upon should the bank guarantee have to be honoured."

In ***Makharia Brothers(supra)***, the Apex Court held that "*It needs to be remembered that a bank guarantee issued by a bank after the party at whose instance it is issued has put the bank in funds. No bank can be compelled to furnish a bank guarantee without adequate funds to fall back upon should the bank guarantee have to be honoured.*" [SCC pp.506 & 507, para 6]

In the case of ***Hindustan Construction Co. Ltd. Vs. State of Bihar***, reported in (1999) 8 SCC 436, the Supreme Court ruled that *bank guarantee is an independent contract.*

14. Furthermore, on conjoint reading of Clause 3 and Clause 8(iii), according to us, the terms of the Bank Guarantee seem to be very clear and explicit without any ambiguity. By way of incorporating Clause 8(iii) in the agreement of Bank Guarantee, the Bank has clearly and specifically stated that *they are liable to pay the guaranteed amount or any part thereof under the Bank Guarantee only and only if the Government serve upon us a written claim or demand on or before 29th July, 2019 (Date of expiry of guarantee)*. We have noticed in the Bank Guarantee dated 30th July, 2018, that Clause 8(iii) of the Bank Guarantee gives effect and voices all clauses mentioned in the Bank Guarantee. Particularly to say it more explicitly Clause 8(iii) being later clause only qualifies the earlier clause 3. Therefore, following the ratio laid down in ***Makharia Brothers*** (supra) the bank guarantee could not be invoked after expiry of the bank guarantee on 29th July, 2019.

15. Way back in 1921, the Privy Council in ***Forbes vs. Git, AIR 1921 PRIVY COUNCIL 209*** held that if in a deed, an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause and two clauses cannot be reconciled, then, the later clause is to be rejected as repugnant and the earlier clause would prevail. Clarifying the above proposition of law, the Privy Council in ***Forbes(supra)*** categorically held that if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole (para 211). In the case in hand, according to us, on conscious reading of the two clauses [Clause 3 and Clause 8(iii)], the later clause i.e. 8(iii) only qualifies clause 3 and can easily be reconciled as the intention of the parties, i.e. the writ petitioner and the Bank-

respondent, has been clearly disclosed in the deed of Bank Guarantee. Moreover, in similar facts and terms of a bank guarantee the Apex Court has in ***Makharia Brothers*** (supra) clearly held that “*The terms of the bank guarantee are explicit. The bank guarantee was to remain in force and effect only up to the date stated therein or any extended date and it was to be enforceable for a period of 6 months thereafter....*”

16. Thus, Clause 8(iii) renders Clause 3 otiose since Clause 8(iii) specifies that claim or demand for invocation of the Bank Guarantee must be made within 29th July, 2019. It is further noticed that the writ petitioner was well aware of the period of validity and having full knowledge about the date of expiry as on 29th July, 2019 of the Bank Guarantee, they did not raise any claim or demand to the respondent no.2 on or before 29th July, 2019. Apart from that what have been stated here-in-above, the Hon’ble Supreme Court in catena of decisions as referred to above held that any claim made after the expiration of the Bank Guarantee would be deemed to be invalid.

17. Ultimately, it has emerged that the Bank Guarantee provided by the Bank-respondent at the instance of the contractor was renewed time to time after expiry of each and every year and thus continued upto 29th July, 2019. Thereafter, it was not renewed since the contractor-respondent no.3 did not deposit requisite fund to extend the period of Bank Guarantee and in that eventuality, Bank-respondent has no obligation to renew the Bank Guarantee which was expired on 29th July, 2019. The petitioner had placed demand for invocation of Bank Guarantee releasing the amount mentioned in the said Bank Guarantee after expiry of the stipulated period i.e. 29th July, 2019 when the Bank Guarantee dated 30th July, 2018 has lost its force. It is now well

settled that the Bank has no manner of obligation to accept the claim raised by the petitioner-HSCL for invocation of Bank Guarantee after expiry of the period of its validity and further, Clause 8(iii) of the Bank Guarantee must override Clause 3 of the agreement mentioned in the Bank Guarantee.

18. For the aforesaid narration of facts, law and the reasons recorded thereof, we do not find any merit in the instant writ petition. Accordingly, it stands dismissed.

(ARINDAM LODH),J

(APARESH KUMAR SINGH),CJ



SANJAY GHOSH

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