IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1143 OF 2015
WITH
CIVIL APPLICATION NO.1428 OF 2015

ISC Projects Private Limited ... Appellant
vs.
SKS Power Generation (Chattisgarh) Limited and Others ... Respondents

Mr. A.Y. Anturkar, Senior Advocate i/b. Mr. S.S. Patwardhan and Mr. Sukhmanrati, for the Appellant.
Mr. S.U. Kamdar, Senior Advocate a/w. Mr. Yushesh Kamdar, Mr. Munaf Virjee and Mr. Rishabh Jagani i/b. DSK Legal, for the Respondents.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **16th NOVEMBER, 2015**

P.C.:

. This Appeal from Order is directed against the order dated 29th July, 2015 passed below Exhibit "5" in Special Civil Suit No. 898 of 2015. The Appellant is a Plaintiff who has moved the application under Order 39, Rule 3 of the Code of Civil Procedure for grant of temporary injunction restraining Defendant No. 1 from encashing the seven bank guarantees which were executed by the Plaintiff in favour of the Defendants at the time of executing of a contract in respect of giving services in the work of generation of electricity carried out by the Defendant-Company. The issue involved in this Appeal is whether the bank guarantee which was given by the Plaintiff in favour of Defendant are conditional or not. If it is conditional then injunction can be granted and if not then no relief can be awarded in favour of the Plaintiff.

2. The learned senior counsel for the Appellant has raised three points. i) The Defendants have earlier invoked bank guarantees and therefore the second invocation is against the terms and conditions of the bank guarantees. ii) The bank guarantee are in fact based on the contingent contract, therefore unless the Defendants prove that there is violation of any such condition, the bank guarantee cannot be invoked. iii) The Respondent i.e. the original Defendant is undergoing financial problem and in order to meet its financial crises with a view to generate money, the bank guarantee are invoked by the Defendants.

3. The learned senior counsel elaborated his submissions that though it is mentioned that bank guarantee is unconditional, it is a routine statement made in the formate of all the bank guarantees.

In order to ascertain whether it is unconditional or not, it is necessary to look into the facts and terms and conditions of bank guarantee and so also the mother contract of the bank guarantee. The learned senior counsel relied on the clause Nos. 22.2, 22.3 and 22.5.1 of the contract between the parties. He submitted that these clauses speak about the termination of the contract due to supplier's default. Under clause No. 22.3 of the contract, it is necessary for the Respondents to give 7 days notice for the termination of the contract and such notice is not required if the conditions which are under clause 22.2 (e)(f) are violated. The condition 22.2(e) of the contract pertains to winding up of the supplier and which is not done in the present case. The condition 22.2(f) of the contract speaks that if representation under the contract which is found to be false or misleading, then without notice the contract can be terminated and it is not found on the present case. He submitted that clause 22.5.1 of the contract is important to understand whether the bank guarantee is conditional or not. The clause 22.5.1 of the contract reads as follows :

> Upon termination of the Contract under Clause 22.3 -
> *(a) Employer may allow the Supplier to complete the Supply and/or arrange for other entities to do so at the*

> *risk and cost of the Supplier. Employer and its entities may then use the access roads, the Supplier's Documents and all other facilities made by or on behalf of the Supplier; or*
>
> *(b) Call the whole or such portion of the Performance Security amount as Employer may consider fit.*

The learned counsel placed emphasis on sub clause (b) of clause 22.5.1 of the contract.

4. The learned senior counsel for the Appellant further developed his arguments that bank guarantee can be invoked only upon the termination of the contract as mentioned in the clause 22.5.1 of the contract. In support of his submissions, he relied on the judgment in the case of ***"Western Coalfields Limited and Another vs. Rajesh s/o Nandlal Biyani and Another"***[1]. The learned senior counsel referred Section 126 of Contract Act which defines the contract of bank guarantee and Sections 31 & 32 of Contract Act are about contingent contract and enforcement of such contract. He submitted that this is the only judgment wherein the injunction was granted for the invocation of the bank guarantee which was though mentioned as unconditional but in fact was contingent.

1. 2011 (0) BCI 342.

5. While meeting the submissions of the learned senior counsel for the Appellant, the learned senior counsel for the Respondents has submitted that no injunction can be granted if the bank guarantee is invoked when there is no such clause restraining the invocation of the bank guarantee. He further submitted that the bank guarantee in the present case was not for the performance but it was for the advance payment and retention of the amount. He submitted that the bank guarantee can be enforced in number of times or so long as it remains in force. He further submitted that the judgment of *Western Coalfields Limited* (supra) is distinguishable and the same is dealt with by the Division Bench of this Court in the case of "***S. Satyanarayana & Co. vs. West Quay Multiport (Private Limited) and Ors.***"[2]. He submitted that the learned single judge in the case of *Western Coalfields Limited* (supra) has held in terms of bank guarantee which permitted invocation on failure of negligence of performance of the terms and conditions of the contract. He further submitted that the bank guarantee and a contract are two separate documents and conditions in the contract and terms and conditions in the bank guarantee can not be mixed up. To call the bank guarantee a

2. MANU/MH/0968/2015.

conditional, it is necessary to have a specific terms and conditions mentioned in the bank guarantee itself. The terms of the contract can not be considered as conditions for the bank guarantee. The present bank guarantee is unconditional and therefore it was rightly invoked. He relied on the ratio in the case of ***"Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd."[3].*** He further submitted that the Respondents may have suffered some losses in the business, however it does not mean that it is in liquidation.

6. Heard submissions of the learned counsel of both the parties. The learned senior counsel for the Appellant could not show any condition in the bank guarantee to render this bank guarantee as conditional bank guarantee. Nothing is shown to hold that this bank guarantee was conditional and there is a failure on the part of the Respondents to show that there is breach of any condition mentioned in the bank guarantee. Under such circumstances, the bank guarantee, in the case in hand, is an unconditional bank guarantee. The main contention of the learned senior counsel that the invocation of the bank guarantee depends on the termination of the contract is

3. (2008) 1 Supreme Court Cases 544.

not correct. The terms mentioned in clause 22.5.1(b) of the contract is the effect of the termination of the contract. Upon termination of the contract, the bank guarantee can be invoked. The invocation of guarantee is an effect of termination. However, it cannot be said that the termination is a condition precedent for invoking of bank guarantee. The bank guarantee can be invoked and the contract may continue. These two documents are separate. The bank guarantee is an outcome of the contract however the terms in the contract can not render bank guarantee conditional, therefore the order passed by the learned Judge of the trial Court is correct and no interference in the said order is required.

7. There should be separate conditions mentioned in the bank guarantee to treat it as contingent. So also there is no restriction on invocation of bank guarantee only once as submitted by the learned senior counsel for the Appellant. In the case of *"Western Coalfields Limited"* (supra), it is held that it was necessary for the party at the time of invocation to make the demand in writing and so also to specify the amount. Both these conditions as envisaged in the bank guarantees. The said bank guarantees were not fulfilled at the

time of invocation and therefore the learned single Judge has granted injunction on invocation of bank guarantees. The case in hand is, therefore justifiable on facts as already mentioned in the beginning that no such condition or any default of such condition mentioned in the bank guarantees by the Respondents is pointed out.

8. Hence, the Appeal from Order stands dismissed.

9. In view of the above, Civil Application stands disposed of.

10. The learned counsel for the Appellant submits that the order passed by the Court be stayed for eight weeks or alternatively two days time be given after the order is signed. However, I am not inclined to grant stay to the order considering the legal position in respect of invocation of bank guarantees.

11. The parties to act on the authenticated copy of the order.

(MRS.MRIDULA BHATKAR, J.)