IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO.681 OF 2017
IN
COMMERCIAL SUIT (L) NO.606 OF 2017

Man Industries (India) Ltd. .. Applicant/Plaintiff
Vs.
ICICI Bank Ltd. & Anr. .. Defendants

Mr.Simil Purohit a/w Mr.Rishabh Jaisani a/w Ms.Pooja Vasandani i/by M/s.Rajani Associates for the applicant/plaintiff.
Mr.Sanjay Jain a/w Ms.Shyamali Hajela a/w Ms.Ketaki Minhas i/by M/s.H & M Legal Associates for the defendant no.1-ICICI Bank Ltd.

CORAM : R.D. DHANUKA, J.
DATE : 15th November 2017

P.C.:

. By consent of the parties, notice of motion is heard finally at the admission stage. The plaintiff has proceeded on the basis of denial in respect of the allegations made by the defendant no.1 in the affidavit-in-reply dated 13th November 2017 tendered before this Court today.

2. By this notice of motion, the applicant (original plaintiff) seeks an injunction against the defendant no.1 from making any payment to the defendants or acting in respect of the counter bank guarantee No.0544BG00002318 issued by the defendant no.1 in favour of the defendant no.3 for a sum of 1.5 million USD or any part thereof.

3. The plaintiff had submitted its bid in response to the invitation of bid issued by the defendant no.2. The defendant no.3 gave

a Bank Guarantee being the bid security in favour of the defendant no.2 on behalf of the plaintiff on 20th April 2017. The plaintiff submitted two bids i.e. technical bid and price bid to the defendant no.2 along with bid security. The defendant no.1 gave a counter bank guarantee for USD 1,500,000 in favour of the defendant no.3 on 19th April 2017. The contract was awarded by the defendant no.2 to M/s.Jindal Saw Limited (for short "Jindal"). Jindal however committed default in submitting performance of bank guarantee in favour of the defendant no.2. The defendant no.2 accordingly terminated the contract awarded to Jindal.

4. By letter dated 12th September 2017, the defendant no.2 informed the plaintiff that the said Jindal was a successful tenderer and was awarded such contract for the project. In view of the said letter received from the defendant no.2, the plaintiff applied for cancellation of the counter bank guarantee to the defendant no.1. The defendant no.1 thereafter addressed a letter to the defendant no.3 for cancellation of the bank guarantee. The defendant no.2 therefore addressed a letter to the plaintiff awarding the said contract to the plaintiff and called upon the plaintiff to issue a performance bank guarantee.

5. The plaintiff therefore addressed a letter to the ICICI Bank Limited not to make any payment to the defendant no.3-Dhaka Bank Limited on 13th October 2017. The plaintiff requested the ICICI Bank Limited to hold payment till 13th October 2017 informing that the plaintiff was pursuing with Gas Transmission Company Ltd., Bangladesh to withdraw the letter of invocation received by the ICICI Bank Limited through Dhaka Bank, Bangladesh. The plaintiff undertook not to approach a Court of law/tribunal in the interim to arrange for an order

restraining payment under bank guarantee. The plaintiff also informed that in the event of there any claim, loss or damage suffered by the ICICI Bank by virtue of holding the payment under the bank guarantee, the plaintiff agree and undertake to make good such claims, loss and damage. On 15th October 2017, the plaintiff affirmed this plaint and applied for ad-interim relief on 16th October 2017 before the learned Vacation Judge without issuing notice to any of the defendants.

6. It is not in dispute that the defendant no.3-Dhaka Bank which has given bank guarantee on behalf of the plaintiff in favour of the defendant no.2 has invoked the counter bank guarantee issued by the defendant no.1 on behalf of the plaintiff in favour of the defendant no.3.

7. Mr.Purohit, learned counsel appearing for the plaintiff and Mr.Jain, learned counsel appearing for the defendant no.1 invited my attention to various provisions, bid documents and also the terms and conditions of the bank guarantee issued by the defendant no.3 at the first instance in favour of the defendant no.2 on behalf of the plaintiff and also the counter bank guarantee issued by the defendant no.1 in favour of the defendant no.3 on behalf of the plaintiff.

8. It is submitted by Mr.Purohit, learned counsel for the plaintiff that the bank guarantee issued by the defendant no.3 in favour of the defendant no.2 was a conditional bank guarantee. The said bank guarantee would have been expired upon issuance of the award of contract by the defendant no.2 in favour of Jindal and informing the other unsuccessful bidders. He submits that the ICICI Bank Limited

had addressed a letter accepting this contention of the plaintiff to the defendant no.2 for withdrawing the letter of invocation of the bank guarantee. He submits that though the plaintiff had addressed a letter dated 13th October 2017 to the ICICI Bank Limited thereby rendering an undertaking not to file any proceeding against the defendant no.1 if payment was not released by the defendant no.2 in favour of the defendant no.3-Dhaka Bank Limited invoking counter bank guarantee issued by the plaintiff in law, the plaintiff is entitled to adopt the remedy available to the plaintiff.

9. In so far as the counter bank guarantee issued by the defendant no.1 in favour of the defendant no.3 is concerned, it is submitted by the learned counsel that the said counter bank guarantee issued by the defendant no.1 incorporates all the terms and conditions of the bank guarantee submitted by the defendant no.3 in favour of the defendant no.2. He submits that the other terms and conditions mentioned in the said counter bank guarantee issued by the defendant no.1 could not be in variance with the terms and conditions of the bank guarantee furnished by the defendant no.3 in favour of the defendant no.2.

10. Mr.Jain, learned counsel for the defendant no.1, on the other hand, invited my attention to the correspondence exchanged between the parties and also the terms and conditions of the counter bank guarantee issued by the defendant no.1 in favour of the defendant no.3 on behalf of the plaintiff. He submits that at the request of the plaintiff, the defendant no.1 had requested the defendant no.3 to issue a bank guarantee on various terms and conditions. The defendant no.3 had issued a bank

guarantee on those terms and conditions which are quoted by the defendant no.1 in the said counter bank guarantee. He submits that the counter bank guarantee furnished by the defendant no.1 in favour of the defendant no.3 is an unconditional and irrevocable bank guarantee under which the defendant no.1 became liable to pay the defendant no.3 without any kind of demur, set off, counter claim, deduction or taxes on the defendant no.3 first written demand without any proof or condition. He submits that it is not in dispute that within the validity of the said counter bank guarantee, the defendant no.3 has already invoked the said counter bank guarantee and thus the defendant no.1 has no alternate than to release the said payment in favour of the defendant no.3.

11. It is submitted that even otherwise the transaction of the bank guarantee between the defendant no.1 and the defendant no.3 being an international transaction, if the defendant no.1 refuses to comply with the said counter bank guarantee, the defendant no.1 will face not only litigation in respect of the claim but also will disrepute the defendant no.3 in the international market.

12. Though both the learned counsel have invited my attention to various provisions of the bid documents, in my view, since the bank guarantees is an independent and separate contract and unless the bank guarantee incorporates the terms and conditions of the main contract, those provisions cannot be read into as the bank guarantee. Thus the provisions of the main contract cannot be invoked for the purpose of seeking an injunction in so far as the bank guarantee is concerned. This Court thus will have to scrutinize whether the counter bank guarantee

of the defendant no.3 is an unconditional bank guarantee or not and if not, whether the terms and conditions mentioned therein are complied with by the beneficiaries of the bank guarantee or not.

13. It is not in dispute that the said counter bank guarantee was issued by the defendant no.1 in favour of the defendant no.3. It is also not in dispute that the defendant no.3 has invoked the counter bank guarantee in writing within the validity of the said counter bank guarantee. The relevant clause of the counter bank guarantee is extracted as under :-

> *"1. In consideration of your issuing the guarantee as above (the 'Guarantee'), we ICICI Bank Ltd. a schedule bank in India incorporated under the provisions of the Companies Act, 1956 and having its registered office at ICICI Bank Limited, near Chakli Circle, Old Padra Road, Vadodara-390 007, India and having a branch office at ICICI Bank Ltd., First Floor, Trans Trade Centre, Near Floral Deck Plaza, Seepz, MIDC Andheir (East), Mumbai – 400 093, India hereby irrevocably issue this irrevocable counter guarantee in your favour and unconditionally agree to hold you indemnified against all liabilities, damages, losses and expenses incurred in connection with your guarantee and any claim or claims made by you under this counter guarantee shall be forthwith paid in USD (currency) without any kind of demur, set-off, counter claim, deduction or taxes on your first written demand by authenticated swift without proof or condition, provided that our liability shall not exceed the aggregate amount of USD 1,500,000.00 (USD One Million Five Hundred Thousand Only) and provided further that your claim shall be submitted to us before or on the expiry date of this counter guarantee. This counter guarantee shall expire on 18.11.2017 (including 30 days mailing period).*

14. A perusal of the terms and conditions of the counter bank guarantee clearly indicates that the said counter bank guarantee is an

unconditional and irrevocable bank guarantee and thus the defendant no.1 is liable to make payment under the said counter bank guarantee upon receipt of the demand from the beneficiaries of the said bank guarantee without raising any objection. In my view, the plaintiff has thus not made out any case for grant of injunction in this notice of motion. It is, however, made clear that the demand raised by the defendant no.2 against the defendant no.3 for invocation of the bank guarantee, if any, is valid or not and the terms and conditions of that bank guarantee are satisfied is not decided by this Court in this order. Balance of convenience is in favour of the defendant no.1 and not in favour of the plaintiff.

16. In so far as the submission of Mr.Purohit that if counter bank guarantee is allowed to be encashed, the plaintiff would suffer irretrievable loss and injury is concerned, it is not disputed by the plaintiff that when the counter bank guarantee was issued by the defendant no.1 on the terms and conditions recorded in the counter bank guarantee, the plaintiff was fully aware of those terms and conditions and did not raise any dispute about the conditions incorporated in the said counter bank guarantee. No case is thus made out by the plaintiff that counter bank guarantee which is in the nature of the unconditional bank guarantee if it is allowed to be encahsed, the plaintiff would suffer irretrievable loss and injury. This argument of the learned counsel is without merit and is accordingly rejected. In my view, there is no substance in the submission of Mr.Purohit that terms and conditions of the bank guarantee given by the defendant no.3 and the defendant no.1 cannot be varied.

16. Notice of motion is accordingly dismissed. There shall be no order as to costs.

17. At this stage, learned counsel for the plaintiff seeks continuation of the ad-interim order dated 16th October 2017 passed by the learned Vacation Judge which is vehemently opposed by the Mr.Jain, learned counsel for the defendant no.1 on the ground that ad-interim order granted on 16th October 2017 has come to an end on 2nd November 2017 and also on the ground that if the said ad-interim order is continued by this Court, irreparable harm, loss and injury would be caused to the defendants.

18. In view of the fact that this Court has taken a view that the counter bank guarantee issued by the defendant no.1 was an unconditional bank guarantee, I am not inclined to continue the ad-interim order dated 16th October 2017 without going into the issue whether the said order has come to an end on 2nd November 2017 or not.

R.D. DHANUKA, J.