

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

**Civil Writ Petition No.17837 of 2017 (O&M)
Date of Decision: 21.09.2017**

Welspun Enterprises Limited

.....Petitioner

versus

State of Punjab and others

.....Respondents

CORAM: **HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU, JUDGE.**

Present : Mr. Akshay Bhan, Senior Advocate with
Mr. G.S.Bedi, Advocate, for the petitioner.

Mr. Sahil Sharma, Deputy Advocate General, Punjab.

Mr. Rupinder Khosla, Senior Advocate with
Ms. Ishrat Phulka, Advocate, for respondent No.2-GMADA.

S.J.VAZIFDAR, CHIEF JUSTICE

The petitioner seeks a writ of mandamus restraining respondent No.2-Greater Mohali Area Development Authority (GMADA) from encashing two performance guarantees issued in its favour by respondent No.3-Corporation Bank (hereinafter referred to as the Bank) at the petitioner's request and a writ of mandamus restraining respondent No.3 from releasing the amount of the bank guarantees.

2. We proceed on the basis that the writ petition is maintainable. However, having regard to the well established law on the subject of injunctions restraining invocation of and payment under bank guarantees, the nature of the unconditional guarantees and the seriously disputed questions of fact over the past over three years, there is no question of granting the petitioner any relief. In view of the above facts, restraining the

payment under the bank guarantees is virtually impossible. It would be contrary to every known principle of law relating to injunctions in respect of bank guarantees. The petitioner must seek a refund by adopting appropriate proceedings. It has the benefit of an arbitration agreement.

3. It would be convenient to preface the judgment with a reference to the principles that govern the grant of injunctions restraining the invocation of bank guarantees. The law on the subject is far too well established to require elaboration. It is sufficient only to refer to the following observations in the judgment of the Supreme Court in *United Commercial Bank v. Bank of India and others (1981) 2 Supreme Court Cases 766:-*

“43. A letter of credit sometimes resembles and is analogous to a contract of guarantee. In *Elia v. Matsas* [(1966) 2 L1 L Rep 495] Lord Denning, M.R., while refusing to grant an injunction stated:

“... a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in *Malas v. British Imex Industries Ltd.* [(1958) 2 QB 127] . But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction.”

A bank which gives a performance guarantee must honour that guarantee according to its terms. In *R.D. Harbottle (Mercantile) Ltd. v. National Westminster bank Ltd.* [1977] 3 WLR 752 , Kerr, J. considered the position in principle. We would like to adopt a passage from his judgment at p. 761:

“It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the

unconditional wording of the guarantees. *The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.*"
(emphasis supplied)

The observations of Kerr, J. have been cited with approval by Lord Denning, M.R. in *Edward Owen Engineering Ltd. v. Barclays bank International Ltd.* [(1977) 3 WLR 764]

45. The appellant presumably knew little or nothing about mustard oil. Bankers are not dealers in mustard oil in such a case as this, but dealers in documents only. The appellant as the issuing bank was presented with documents and asked to pay a very large sum of money in exchange for them. Its duty was not to go out and determine by physical examination of the consignments, or employment of experts, whether the goods actually conformed to the contract between the buyer and the seller, nor even determine either from its own or expert advice whether the documents called for the goods which the buyer would be bound to accept. The banker knows only the letter of credit which is the only authority to act, and the documents which are presented under it. If these documents conform to the letter of credit, he is bound to pay. If not, he is equally not bound to pay. The letter of credit called for "Sizola Brand Pure Mustard Oil" while the railway receipts carried the description "Sizola Brand Pure Mustard Oil 'Unrefined'" and it was not within the province of the appellant to say that the latter description meant identically the same thing as the former."

4. The petitioner and GMADA entered into an agreement dated 05.03.2012 for the work of augmentation of a water supply scheme in Mohali, Punjab at a contract price of about ₹ 156 crores. The work commenced on 01.03.2012 and was to be completed within 30 months thereof i.e. by 31.08.2014. The contract required the petitioner to furnish Performance Security as follows:-

"PERFORMANCE SECURITY

31.1 Within 21 days of receipt of the Letter of Acceptance, the successful Bidder shall deliver to the Engineer a Performance Security [to cover the amount of liquidated damages and/or the compensation of the breach of contract] in any of the forms given below for an amount equivalent to 5% of the Contract Price plus additional security for unbalanced Bids in accordance with clause 27.4 & 27.5 of ITB and as stipulated in the conditions of contract;

- a bank guarantee in the form given in Section 10; or
- Certified cheque/Bank Draft as indicated in Appendix."

5. Pursuant thereto at the request of the petitioner, the bank i.e. respondent No.3 furnished two performance guarantees in GMADA's favour in the sum of ₹ 2,29,15,000/- and ₹ 7,79,39,230/-. The guarantees are similarly worded and in so far as they are relevant read as under:-

“NOW THEREFORE we hereby affirm that we are the Guarantor and responsible to you on behalf of the Contractor, upto a total of Rs. 7,79,39,230/- (Rupees Seven crores Seventy Nine lacs Thirty Nine Thousand Two Hundred Thirty only) such sum being payable in the types and proportions of currencies in which the Contract Price is payable and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of Rs.7,79,39,230/- as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the contractor before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the Contract or of the works to be performed there under or of any of the contract documents which may be made between you and the Contractor shall in any way release us from any liability under this guarantee and we hereby waive notice of any such change, addition of modification.

Notwithstanding anything contained herein above our liability this guarantee/undertaking shall not exceed Rs.7,79,39,230/- (Rupees Seven crores Seventy Nine lacs Thirty nine Thousand Two Hundred Thirty only), it shall remain in force upto 14.10.2017 and any extension(s) thereof, and we shall be released and discharged from all liability us on or before 14.10.2017 or the date of expiry of any extension(s) thereof if this guarantee/undertaking has been extended.” (emphasis supplied).

6. The guarantees were valid upto 06.04.2017 and 04.04.2017.

GMADA by its letter dated 17.04.2017 addressed to the petitioner stated that

the work was likely to be extended beyond the completion date even as extended and therefore requested the petitioner to extend the guarantees for a year and 28 days beyond the expected date of completion. The letter further stated that if the extension was not granted no payment would be released.

The performance guarantees were extended/renewed upto 14.10.2017. It is important to note however that the guarantees were renewed on 15.04.2017 i.e. prior to the letter dated 17.04.2017. The renewed guarantees were forwarded by the petitioner to GMADA under cover of the petitioner's letters both dated 19.04.2017.

The petitioner's grievance is that despite the above facts, GMADA by an e-mail dated 23.07.2017 invoked the guarantees.

7. The guarantees were invoked in terms of and in accordance with the provisions thereof and it was rightly not even contended to the contrary.

8. Mr. Bhan's contention that there are no disputes between the parties and that all that remains to be done is for GMADA to pay the petitioner the balance amount due under the contract and to release the guarantees is entirely incorrect. For over three years there have been serious disputes between the parties as to which of them had committed breaches of the contract and which of them is responsible for the delay in the execution of the contract. We will refer to only some of these disputes with which the Bank, as we have seen are not concerned and cannot go into.

9. As we mentioned earlier, the commencement date of the work under the contract was 01.03.2012 and the completion date was 31.08.2014. The petitioner alleges that GMADA had been extremely slow in complying with its obligations and that the delay in completing the work was solely

attributable to it. The breaches alleged are inter-alia on account of the delay in approval of designs and items/products, not providing a right of way to the petitioner and withholding the petitioner's dues. There is considerable correspondence in this regard. The petitioner has relied upon various letters addressed by it in this regard commencing from 10.04.2012. For instance, at Annexure P-8 of the petition is a letter dated 21.09.2016 addressed to GMADA in which the petitioner set out various grievances against GMADA which according to the petitioner were the cause for delay. The petitioner sought an extension of time for completing the work without prejudice to its rights and contentions.

10. For the purpose of an application for injunction restraining payment under the guarantees it is important to note that GMADA contends that there are various breaches on the part of the petitioner. It is sufficient to note only some of the disputes.

In the short affidavit in reply it is alleged as follows: The petitioner could not complete the work within the stipulated period and accordingly liquidated damages of 1% were imposed upon it as per clause 46 of the agreement. Even thereafter the petitioner did not expedite the work and has not completed the same to date i.e. more than three years after the stipulated date of completion, namely, 31.08.2014. The consequence of the petitioner's breaches is that the general public in the tricity continues to suffer shortage of the water on a daily basis. The work has been at a complete standstill for more than four months despite the petitioner having been requested time and again to complete the work.

About 90% of the work is complete in respect whereof 80% of the payment has already been made. ₹ 170 crores has been released as

against the total claim of ₹ 201 crores. It is important to note that GMADA's case is that it has made excess payment of ₹ 18.95 crores on account of connivance between the petitioner and the officials of GMADA. The rates of non-schedule/extra items were got erroneously approved by the petitioner on the higher side. An enquiry has been ordered to be initiated against the erring officials of GMADA and its competent authority has also decided to withhold the amount of excess payment from the outstanding payments for the time being. An order to that effect was sent on 29.08.2017.

11. Mr. Bhan's contention that the allegations regarding breaches are after thought and to oppose this petition is incorrect. GMADA raised grievances about the petitioner having committed breaches much before the petition was filed and even before the guarantees expired. This is demonstrated as follows:

(A) Mr. Khosla, the learned senior counsel appearing on behalf of GMADA relied upon a letter dated 05.02.2014 i.e. more than three years prior to this petition addressed by GMADA to the petitioner. GMADA expressly alleged that the progress of the work was very slow; that numerous letters and notices were issued to the petitioner to expedite the work; that during the review of the progress of the work it had been observed that there had been no improvement and that the petitioner had compelled GMADA to take action under the agreement. It was further stated that accordingly GMADA imposed liquidated damages at 1% of the amount of the contract value i.e. about ₹ 1.56 crores and stated that the amount would increase if the petitioner failed to expedite the work. The petitioner was again requested to expedite the work and to complete the project in time. As mentioned

earlier, the petitioner has for the past about four months stopped work at the site.

(B) The petition itself refers to Civil Writ Petition No. 8055 of 2017 filed by the petitioner. Some of the annexures in that writ petition itself indicate that there were several disputes between the parties for more than three years. A reference to a few of the documents in that petition would establish this.

(i) By a letter dated 28.07.2014 addressed to the petitioner, GMADA stated as follows: During a review of the progress of the work it had been observed that it was very slow and not in consonance even with the revised bar chart. The petitioner had failed to take GMADA's approval in respect of some of the material which it had ordered from the suppliers. The petitioner obtained the material from vendors other than those approved by GMADA. The Chief Administrator, GMADA, had taken a serious view about the petitioner having placed orders with unqualified firms and the same had clearly delayed the project for which the petitioner was totally responsible. The letter indicates that GMADA had already written several letters regarding the slow progress and had directed the petitioner to depute technically qualified engineers at the project site so that the work would proceed smoothly. The petitioner, however, had failed to do so.

(ii) The records of the proceedings at a hearing in respect of the action taken by GMADA under clause-46 imposing liquidated damages are annexed to the petition. Clause 46 and 56.1 read as under:-

“46. LIQUIDATED DAMAGES

46.1. xx xx xx xx xx

46.2 In case of continued default or shortfall in progress, the Engineer may go on enhancing the levy of liquidated damages, each time limited to 1% of the amount of contract per week of further default subject to maximum limit of five percent of the Contract value.”

The petitioner alleged that GMADA had failed to take certain decisions. On the other hand, GMADA's officers contended that the petitioner was responsible for the delay inter-alia on account of the work of laying the pipelines proceeding very slowly although it ought to have been completed at the time of the hearing i.e. on 28.07.2014. GMADA alleged that the petitioner had deployed inadequate labour. The hearing continued on 06.10.2016 whereat GMADA's officers again raised various grievances against the petitioner.

(iii) As on date only a short reply was filed in the above Civil Writ Petition No. 8055 of 2017. Even that short reply refers to several defaults and breaches on the petitioner's part. Some of these are as follows: The petitioner's allegation that the respondents had not obtained the requisite permission from the authorities was incorrect for as per clause 31 of the General Instructions of the Contract, the petitioner was required to pursue the obtaining of the requisite permissions. Despite the same, keeping in view the public interest, GMADA obtained the requisite permissions required for completing the project by the year 2016 itself and prior to the filing of that writ petition. The petitioner had not even completed the works in the areas where no permission was required from any authority. For instance, the petitioner had till then not even completed laying of the 200 meters pipeline in respect whereof the permission had been obtained two years earlier. The imposition of liquidation damages was referred to.

12. The petitioner in that petition had sought an order directing GMADA to obtain the requisite permissions from the Railway, Electricity, Irrigation and other authorities for commissioning of the project in the interest of public at large and a writ of mandamus directing GMADA to

consider and resolve its representations to release the amounts wrongly withheld and to release the cost incurred by the petitioner due to the execution of the contract beyond the scheduled intended completion date in the back ground of the seriously disputed questions of fact.

13. As the matter is pending before the learned Single Judge we do not wish to express any opinion about the tenability of such reliefs. It would undoubtedly be for the learned Single Judge to decide whether a writ petition of this nature ought to be entertained or not.

14. There are no special circumstances in this case which would warrant a departure from the normal rule. The petitioner has not established fraud either on the part of GMADA or on the part of the Bank. Nor are there any special equities that would warrant the grant of an injunction restraining the payment under the bank guarantees. The disputes raised by the respondents are clearly not an after thought as was suggested by Mr. Bhan. The disputes were raised at least as far back as in the year 2014. The few documents that we have referred to, in turn refer to various other notices and complaints addressed by GMADA to the petitioner. Bankers are dealers in documents and not in goods. Much less are they engineers, scientists or construction project managers who can themselves adjudicate upon matters such as these which involve expertise in technical and engineering subjects. Indeed on the terms of the guarantees they are neither required nor even entitled to do so.

15. Mr. Bhan, however, submitted that the petitioner has made out a case of fraud and special equities in view of the fact that the petitioner extended the guarantees pursuant to GMADA's letter dated 17.04.2017 in which GMADA stated that if the guarantees were not extended it would not

release any payment. He submitted that the letter constituted an admission that amounts were due and payable to the petitioner and that upon the guarantees being extended the same would be released.

16. The submission is not well founded and must be rejected for more than one reason.

Firstly, as we mentioned earlier, the guarantees had infact already been extended by the petitioner on 15.04.2017 and were only forwarded to GMADA under cover of the petitioner's letter dated 19.04.2017. The submission is thus factually incorrect.

Even otherwise, the submission is not well founded. The letter dated 17.04.2017 does not by any stretch of imagination indicate that upon the extension of guarantees, the amounts would be paid by GMADA to the petitioner. Nor is the letter an admission that amounts are due and payable by GMADA to the petitioner. The letter obviously only states that if any amounts are infact due and payable to the petitioner, the same would not be released if the guarantees were not extended. GMADA also has a claim against the petitioner for breach of contract. Further GMADA infact contends an excess amount of about Rs.19 crores has been paid by it to the petitioner.

It is also important to note that even after the guarantees were extended on 15.04.2017, the breaches or the alleged breaches by the petitioner continued. The guarantees were invoked on 23.07.2017 i.e. more than three months later. As we noted the work had come to a complete standstill during this period. This more than justifies the invocation of the guarantees. This also belies Mr. Bhan's contention that the guarantees were renewed under a misrepresentation.

GMADA was certainly entitled to call upon the petitioner to extend the bank guarantees. Under clause 31.1 the guarantee was to be furnished in the form given in Section 10. The last paragraph of the guarantee itself which kept the same in force up to 14.10.2017 and any extension(s) thereof is not prescribed in Form-10. However, the last paragraph contemplates an extension of the guarantee. The Form itself required the guarantee to be valid until 28 days from the date of the expiry of the Defects Liability Period. The petitioner, therefore, was bound and liable in any event to extend the guarantee up to 28 days from the date of the expiry of the Defects Liability Period.

The Defects Liability Period is not yet over. The petitioner was, therefore, bound to have the guarantees renewed. In any event GMADA was at least at this stage within its rights to state that it would not release the amounts, if any, due to the petitioner unless the guarantees were extended. The petitioner could have refused to extend the guarantees and sued for the balance, if any. It, however, chose to extend the guarantees as a part of a commercial decision. In any event the petitioner can hardly be heard to say especially in a petition under Article 226 that GMADA made a blunder by not invoking the guarantees within the original period of validity.

17. Mr. Bhan then relied upon clause 56.1 to contend that the guarantees can be invoked only upon the termination of the contract. Clause 56.1 reads as under:-

“56. PAYMENT UPON TERMINATION

56.1 If the Contract is terminated because of a fundamental breach of contract by the Contractor, the Engineer shall issue a certificate for the value of the work done less advance payments received upto the date of the issue of the certificate, less other recoveries due in terms of the contract, less taxes due to be deducted at source as per applicable law and less 5% of the contract value towards compensation for the breach of contract. The total amount of liquidated damages and compensation for breach of contract shall, however, be limited to 7.5% of the

contract value or the amount available with the Engineer (in the shape of retention money and performance security), whichever is less. The requisite amount for which the Contractor may become liable shall be realized by enhancing the performance security furnished by the Contractor and/or from other amounts due to the Contractor in respect of this work or any other work, undertaken by him for the Government.”

This submission is also not well founded. Clause 56.1 merely stipulates the rights of the parties upon the termination of the contract. It stipulates the payments to be made after the adjustments stated therein, the quantum of liquidated damages and the manner in which GMADA would be entitled to recover its dues. The clause does not by any stretch of imagination restrict GMADA right to invoke the guarantees only upon the termination of the contract.

18. As we mentioned at the outset we proceed on the basis that the writ petition is maintainable. The disputes in the present case, however, are such that they ought not to be entertained in the extra ordinary writ jurisdiction of this Court under Article 226 of the Constitution of India. While even in a petition under Article 226, evidence can be taken, we see no reason to do so in the facts of the present case. Even if we are inclined to entertain this writ petition and receive evidence in it, we would certainly not grant an interim injunction restraining GMADA from receiving money from the bank pursuant to the invocation of the guarantees.

The petitioner has the more appropriate remedy of referring the disputes to arbitration. There is no conceivable reason for the petitioner not doing so. As rightly contended by Mr. Khosla on behalf of GMADA, Clause 25 of the General Conditions of Contract contains a detailed “Disputes Resolution Mechanism” and the petitioner must invoke the same.

19. Mr. Bhan's reliance upon the judgment of the Supreme Court in *Hindustan Construction Co. Ltd. v. State of Bihar and others* 1999(8) SCC 436 is not well founded. The facts in that case were entirely different. It was held that the first guarantee which was invoked by the respondents was not an unconditional guarantee at all. In the case before us the guarantee is unconditional. The second guarantee in that case was invoked by the wrong officer. The Supreme Court held that the guarantee could have been invoked only by the Chief Engineer whereas it had been invoked by the Executive Engineer.

20. It is not necessary to deal with the judgment of the Supreme Court in *ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others* (2004) 3 Supreme Court Cases 553 as we have proceeded on the basis that the writ petition is maintainable. However, in view of the well established law on bank guarantees and in the facts of this case, we dismiss the writ petition on merits.

21. By an ad-interim order dated 10.08.2017 we restrained respondent No.2-GMADA from receiving any amount pursuant to its invocation of the guarantees. However, before this order could be served upon the respondents, the payment was made by the bank to GMADA. Had we upheld the petitioner's contention we would have directed GMADA to return the money to the bank. In view of the dismissal of the petition, the question of the respondents refunding the amount does not arise.

22. In the circumstances, the petition is dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

21.09.2017
ravinder

(HARINDER SINGH SIDHU)
JUDGE

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No