IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO (CARB) No. 3 of 2017 (O&M)
Date of Decision: 28.09.2017

M/s International Transmission Ltd. through its authorized representative Raghunath Madhukar Gawli.

…..Petitioner

versus

ISOLUX Corsan India Engineering and Construction Pvt. Ltd. and anr.

…..Respondents

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

Present : Mr. Alok Mittal, Advocate, for the appellant.
Mr. Abhishek Bansal, Advocate for respondent No.1.
Mr. Rakesh Gupta, Advocate, for respondent No.2.

****

S.J.VAZIFDAR, CHIEF JUSTICE (oral)

This is an appeal against the order of the learned Additional District Judge-cum-Commercial Court, Gurugram rejecting the appellant's petition under section 9 of the Arbitration and Conciliation Act, 1996 for an injunction restraining payment under the guarantee issued by respondent No.2-Canara Bank at the request of the appellant in favour of respondent No.1.

2. An agreement was entered into between the appellant on the one hand and a joint venture of C&C Construction Ltd. and the first respondent on the other under which the joint venture was to purchase equipment such as hardware fittings and conductor and earth wire accessories from the appellant. Subsequently the agreement was amended under which respondent No.1 took over the responsibilities and liabilities

of the joint venture. The agreement, therefore, ultimately subsisted only between the appellant and respondent No.1.

3. Pursuant to the terms of the agreement, the Canara Bank at the request of the petitioner issued the said guarantee in favour of the first respondent. The bank irrevocably and unconditionally agreed to make payment to the first respondent of an amount up to or equal to the advance payment at first demand forthwith upon the first respondent giving written notice to the bank that in its sole and absolute judgment, the appellant had failed to observe or perform any of the terms, conditions or provisions of the contract on its part to be observed or performed. Clause-1 of the guarantee reads as under:-

> "**1.** Upon receipt of a written demand by you on us ("Demand") from time to time or at any time during the Claim Period of this Guarantee and without being entitled or obliged to make any enquiry of you, or the Supplier, and without the need for you to take legal action against or to obtain the consent of the Supplier and notwithstanding any objection by the Supplier or any other third party and without any proof or conditions and without any demur, reservation, contest, recourse or protest and without any right of set-off, deduction or counterclaim, we shall, forthwith, pay to you the amount specified in such Demand. You shall not be obliged to exercise any other right or remedy that you may have under the Agreement before making a Demand on us under this Guarantee."

4. The guarantee which was initially in the sum of about ₹ 1.97 crores stood reduced to ₹ 1.02 crores. Disputes and differences arose between the parties. The first respondent by a letter dated 09.08.2017 invoked the bank guarantee. It is this invocation that was challenged in a petition under section 9 of the Arbitration and Conciliation Act, 1996 before the learned Additional District Judge. This appeal is against the order of the learned Judge dismissing the application. An injunction restraining payment under the guarantee could never have been granted

on the merits of the disputes. The bank was not entitled to adjudicate upon them. Mr. Mittal, the learned counsel appearing on behalf of the appellant, however, contended that the first respondent had not invoked the guarantee in accordance with the terms thereof.

5. It is not necessary to consider whether the first respondent had rightly invoked the guarantee by the said letter dated 09.08.2017 or not. We proceed on the basis that the bank guarantee ought to be invoked strictly on its terms and that the letter dated 09.08.2017 was not strictly as per the terms of the guarantee. We had infact by an ad-interim order dated 12.09.2017 issued notice to the respondents and restrained the bank from making payment to respondent No.1 pursuant to the said letter of invocation dated 09.08.2017. In paragraph-6 we expressly stated that our order would not prevent respondent No.1 from invoking the bank guarantee afresh. Respondent No.1 has infact invoked the guarantee afresh by its letter dated 13.09.2017. A copy of this letter was tendered across the bar. The same is taken on record and marked 'X'. It is not necessary for us to consider whether the invocation of the guarantee by the letter dated 13.09.2017 is in terms of the guarantee or not. It would be for the bank to consider the same.

6. Mr. Mittal, however, made an oral application to restrain payment even pursuant to this fresh letter of invocation dated 13.09.2017. He submitted that second invocation of a guarantee is not permissible. According to him the guarantee having been invoked once, the first respondent's right to invoke the guarantee stood exhausted. Though this application was without amending the pleadings we entertained it.

7. There is nothing in principle or in law that prevents a creditor from invoking a guarantee more than once. It often happens that

by an error the language of the letter invoking the guarantee is not strictly in terms of the guarantee itself. The creditor is thereby not prevented from rectifying that error. To restrain a subsequent invocation of a guarantee, it would be necessary to establish that the second or subsequent invocation had itself prejudiced the principal debtor i.e. the appellant. In the present case nothing to this effect has been indicated. If the invocation is fraudulent or if special equities arise in favour of the principal debtor, he would be entitled to an injunction restraining the invocation of the guarantee. The mere fact that the guarantee had been invoked earlier does not render the subsequent invocation void. The cause of action to invoke a guarantee is not extinguished once it is invoked.

8. The Canara Bank as the surety is, therefore, bound and liable to consider the subsequent invocation. It is, however, for the Canara Bank to consider whether the second invocation is in accordance with the terms of the guarantee or not.

9. Mr. Mittal, then, contended that special equities arise in favour of the appellant in the present case on account of certain facts. He submitted that winding up petitions have been filed against the first respondent.

10. A creditor's right to invoke a guarantee is not affected merely because winding up petitions have been filed against it. The first respondent has not been ordered to be wound up. Nor has a provisional liquidator been appointed of respondent No.1. There is no justification then to restrain respondent No.1 from invoking the guarantee or receiving payment thereunder.

11. Mr. Mittal then submitted that the holding company of the first respondent is incorporated under the laws of Spain and that there is a possibility of it siphoning out the funds or assets of its subsidiary namely the first respondent.

12. Firstly, there is no pleading in support of this contention. Further, the appellant can always adopt appropriate proceedings to safeguard its right even in respect of the monies received pursuant to the invocation. To leave no room for grievance, we intend protecting the petitioner only to a limited extent in this regard.

13. Mr. Mittal lastly contended that the first respondent is not entitled to invoke the guarantee as it had already terminated the contract.

14. The submission is not well founded. A guarantee can and indeed often is invoked after the underlying contract is terminated. A creditor is not bound to keep the contract alive only to entitle it to invoke the guarantee. The guarantee in this case is liable to be honoured upon the first respondent invoking it in accordance with the terms and conditions of the contract. We fail to see what difference it makes if the guarantee is invoked before or after the termination of the underlying contract. There is none.

15. In the circumstances, the appeal is disposed of by the following order:-

i) The Canara Bank shall consider the fresh invocation of the guarantee by the first respondent's letter dated 13.09.2017 and process the same. In the event of the Canara Bank making payment under the guarantee, the first respondent shall retain the funds with it in its account under intimation to the appellant's Advocate for a period of three weeks after the receipt thereof but subject to the condition that in the event of the appellant not obtaining any interim relief in appropriate proceedings regarding the further utilization of the same by the first respondent, the appellant shall pay the first respondent interest in respect of the said amount at an adhoc rate of 12% per annum from 12.09.2017 till payment which shall be subject to final orders in any proceedings that the appellant may adopt.

ii) The appellant is at liberty to adopt appropriate proceedings for the recovery of its dues as well as for the protection of its rights, if any, including qua the amounts received by the first respondent pursuant to the invocation of the guarantee.

iii) Yesterday Mr. Abhishek Bansal, the learned counsel appearing for respondent No.1 had made a statement that respondent No.1 is willing to have the disputes and differences referred to arbitration in accordance with clause-36 of the contract. However, both Mr. Mittal and Mr. Bansal, stated that they would prefer to have the reference to a sole arbitrator instead of to a tribunal of three arbitrators as provided in clause 36 with a view to saving time and costs. On their application Mr.B.L.Singhal, former District & Sessions Judge, Haryana is appointed as the sole arbitrator to adjudicate upon the disputes and differences between the parties.

(S.J. VAZIFDAR)
CHIEF JUSTICE

28.09.2017
ravinder

(HARINDER SINGH SIDHU)
JUDGE

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