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

NOTICE OF MOTION LODGING NO. 596 OF 2018
(FOR LEAVE TO FILE APPEAL & CONDONATION OF DELAY)
IN
COMMERCIAL APPEAL LODGING NO. 279 OF 2018

Ahluwalia Contracts (India) ltd. .. Applicant/Appellant

In the matter between :

Ahluwalia Contracts (India) ltd. .. Appellant

Vs.

1. Bellamy Constructions & Infrastructure
Pvt. Ltd. and anr.

.. Respondents
(No.1 – Org. Plaintiff &
No.1 – Org. Deft.)

ALONG WITH
COMMERCIAL APPEAL LODGING NO. 279 OF 2018
IN
COMMERCIAL SUIT NO. 65 OF 2013
WITH
NOTICE OF MOTION LODGING NO. 597 OF 2018
(FOR STAY)

Ahluwalia Contracts (India) ltd. .. Appellant

Vs.

1. Bellamy Constructions & Infrastructure
Pvt. Ltd. and anr.

.. Respondents
(No.1 – Org. Plaintiff &
No.1 – Org. Deft.)

Mr. Rajiv Kumar, Senior Advocate a/w Mr. Mayur Khandeparkar, Mr. Satyasrikant Vutha, Ms. Smiti Tewari, Mr. Dhiraj Mhetre, Ms. Nupur Jalan i/by Khaitan Legal Associates for applicant / appellant.

Ms. Rajani Iyer, Senior Advocate a/w Mr. Vaibhav P. Bajpai I/by Pramod Bajpai for respondent no.1 – Org. Plaintiff.

Ms. Sandhya Nambidi I/by Law Focus for respondent no. 2 – Org. Defendant.

CORAM: NARESH H. PATIL, ACTING CJ &
G. S. KULKARNI, JJ.

RESERVED ON : JULY 24, 2018

PRONOUNCED ON : SEPTEMBER 06, 2018

JUDGMENT [Per Naresh H. Patil, ACJ.] :

1. The Notice of Motion (L) No. 596 of 2018 is filed seeking leave to appeal for challenging the Judgment and Order dated 14th & 15th February, 2018 delivered by the learned Single Judge in Commercial Suit No. 65 of 2013 and for condoning the delay in filing the appeal.

2. The respondent No.1 - Bellamy Constructions & Infrastructure Pvt. Ltd., Original Plaintiff, filed Commercial Suit No. 65 of 2013 against the respondent no. 2 – Bank of India, Original sole Defendant seeking a decree for a sum of Rs.4.80 crores. The plaintiff contends in the said Suit that it is a company registered under the Companies Act, 1956 and engaged in the business of real estate development and construction activities. The plaintiff stated that plaintiff is the owner of land bearing CTS No.25A of Chakala and CTS No.215/B of Mulgaon Mahakali Caves Road, Andheri-Kurla Road, Andheri (East), Mumbai – 400 093. Under the Letter of Intent dated 8th July, 2011 addressed by the plaintiff to Ahluwalia Contracts (India) Ltd., applicant/appellant herein, (hereinafter referred to as “ACIL”) and confirmed by ACIL, the plaintiff confirmed their intention to enter into a contract with ACIL for supply, erection, protection and commissioning of the Shell and Core Works at the Litolier Hotel project of the plaintiff at Andheri (East), Mumbai for total contract value of Rs.42,00,00,000/-. Under the Letter of Intent dated 8th July, 2011 it was prescribed that 13% of the contract value would be paid by the plaintiff to ACIL as a mobilization advance against on-demand bank guarantees for an equivalent amount. The ACIL was to commence the work at site on 22nd July 2011 and complete it by 22nd May, 2012.

3. Consequent to the contract and Letter of Intent, ACIL submitted 9 (nine) bank guarantees all dated 18th July, 2011 issued by the Defendant – Bank of Inida in favour of the plaintiff for amounts aggregating to Rs.4,46,00,000/-. The details of the bank guarantees i.e. numbers, dates and amounts are mentioned in para 5 of the plaint. Copies of the bank guarantees are also annexed to the plaint.

4. It is the plaintiff's contention that relying on the said nine bank guarantees, all dated 18th July, 2011, the plaintiff paid to ACIL mobilization advances of Rs.4,46,00,000/-. Under four letters all dated 17th January, 2012, addressed by the defendant to the plaintiff, the period of validity of the first four bank guarantees was extended upto 17th April, 2012 from 17th January, 2012. The period of validity of nine bank guarantees was extended upto 17th July, 2012. The communications issued in this behalf indicated that the defendant was liable to pay the guaranteed amount to the plaintiff on the plaintiff serving upon the defendant a written claim or demand on or before 17th July, 2012 and all other terms and conditions of the original bank guarantees remain unchanged.

5. The plaintiff contends that ACIL failed to observe, perform and fulfill the terms of the contract between the plaintiff and ACIL. The subject work was not completed in time and, therefore, by letter dated 17th July, 2012 addressed to defendant, the plaintiff claimed and demanded encashment of the said nine bank guarantees dated 18th July, 2011 for a total sum Rs.4,46,00,000/-. The plaintiff called upon the defendant to remit the full payment of the said amount.

6. The defendant by its communication dated 18th July, 2012 informed the plaintiff that the invocation of the nine bank guarantees, issued by the defendant in favour of the plaintiff, was not in conformity with the terms of the bank guarantees and it would not be possible for the defendant to accede to the request of the plaintiff.

7. On 19th July, 2012, the ACIL filed Arbitration Petition (L) No. 964 of 2012 in this Court against the plaintiff and the defendant. According to the plaintiff, a statement was made before the court that since ACIL has objected to the contents of the letter invoking the bank guarantees, the plaintiff shall issue a fresh letter of invocation to the defendant Bank and in view thereof, Arbitration Petition (L) No. 964 of 2012 was disposed of.

8. The plaintiff, thereafter, issued nine letters, all dated 20th July, 2012, addressed to the defendant-bank calling upon it to pay the plaintiff the said amount. By communication dated 25th July, 2012 addressed to the plaintiff, the defendant informed the plaintiff that the invocation of the bank guarantees had been received by the defendant after expiry of the bank guarantees' period and, therefore, the defendant was unable to consider the request for payment of the same. Further communications were made by the plaintiff through its Advocate on 24th July, 2012 and 26th July, 2012 to the defendant-bank stating therein that the invocation was within stipulated time in terms of the bank guarantees and referred to clause 12 of the said nine bank guarantees which expressly grants a period of nine months from the date of expiry of the said bank guarantees for making a demand or claim.

9. The plaintiff thereafter took out Notice of Motion No. 1835 of 2012 in Arbitration Petition (L) No. 964 of 2012 (which was numbered as Arbitration Petition No. 830 of 2012) before this court praying for orders directing the defendant, being respondent no.2 in Arbitration Petition, to make payment to the plaintiff of amounts aggregating to Rs.4,46,00,000/-

guaranteed under the said nine bank guarantees. The said Notice of Motion was disposed of as withdrawn with liberty to the plaintiff to take out appropriate proceedings. The plaintiff thereafter filed a Summary Suit under the provisions of Order XXXVII of the Code of Civil Procedure on the basis of the contract of guarantees dated 18th July, 2011. The plaintiff prayed for following relief in the said Suit:

(a) this Hon'ble Court be pleased to order and decree the Defendant to pay to the Plaintiff a sum of Rs.4,80,09,150/- as per Particulars of Claim (Exhibit "L" hereto) with further interest on Rs.4,46,00,000/- at the rate of 18% per annum or at such rate as may be decided by this Hon'ble Court from the date of filing of this Suit till payment or realization and costs of the Suit."

10. By a Judgment and Order dated 14th and 15th February, 2018 the learned Single Judge of this Court passed a decree against the defendant-bank in the following terms:-

"17. There will, accordingly, be a decree against the Defendant in the sum of principal amount of Rs.4.46 crores. Pedente lite and further interest for a period of four months thereafter at the rate of 12 per cent per annum. After four months, the principal

amount shall carry interest at the rate of 18 per cent per annum till payment or realization. The Defendant to also pay the costs of the Suit to the Plaintiff.”

11. The learned Senior Counsel Mr. Rajiv Kumar appearing for the applicant/appellant prayed for leave to appeal under Order I Rule 10 of CPC as the present appellant was not made party-defendant to the Suit. It was submitted that if the appellant was made party, then they could have brought before the court the relevant record and would contest the claim of the plaintiff. The appellant is prejudiced as they were not made party-defendant to the suit. They were, in fact, necessary party to the suit, even in case where the plaintiff claims invocation of bank guarantees.

12. Considering the nature of the grievance of the applicant/appellant, and that, we would be required to visit the merits of the rival claims in the context of the impugned judgment passed by the learned Single Judge, we feel it appropriate that the Notice of Motion (L) No. 596 of 2018 seeking leave to appeal as also praying for condonation of delay in filing appeal should be allowed. It is accordingly allowed in terms of prayer clauses (a) and (b). We have accordingly taken up the appeal for hearing at the admission stage.

13. On merits of the plaintiff's claim, it was submitted by the learned Senior Counsel appearing for the appellant that it is a settled law that invocation prior to the expiry of the bank guarantee is a condition precedent. A bank guarantee is always structured to suit the principal contract between a contractor and employer. In the instant case, the contract of construction of a hotel was awarded to the appellant and the document executed, though called a bank guarantee, contained indemnity clauses with specific reference to the contractual obligations, including schedule of delivery and completion certificate. It was contractor's obligation to examine the correct nature of the document. The so called bank guarantees are contracts of indemnity, according to the learned counsel. It was submitted by the learned counsel that the learned Single Judge has ignored / overlooked the clause of indemnity and the requirement of compliance of the contractor's obligations. The learned single Judge failed to appreciate that the subject bank guarantees on its true and correct interpretation were, in fact, indemnities and not unconditional bank guarantees. The reference to the doctrine of "*contra proferentum*" by the learned Single Judge is erroneous one. There was no ambiguity in the interpretation of the bank guarantee, particularly, clause 12. It was

further submitted that clauses 1 and 7 of the bank guarantees make it clear that demand under the bank guarantee ought to have been made on or before 17th January, 2012. This date was extended by two subsequent amendments to the guarantees. The liability of the bank to honour its commitments under the bank guarantees would come to an end on 17th July, 2012 and no demand or claim could have been entertained thereafter. The bank guarantees stood expired on 17th July, 2012. On clause 12 of the bank guarantees, the learned counsel submitted that it did not extend the period of invocation. The genesis of a clause, such as clause 12 of the bank guarantees, can be found in Section 28 of the Contract Act, 1872. Clause 12 of the bank guarantees has to be read pertaining to enforcement of rights under the same before by making a judicial claim in a Court of Law by way of a Suit and not as assertion of right before the bank itself.

14. On non-joinder of the necessary party, the learned counsel submitted that a Section 9 application was made before the court. The court was aware of the suit filed by the present appellant in the City Civil Court at Bombay. In that sense the appellant was a necessary party. The subject bank guarantees could not be understood without reference to the main contract. As a result of non-joinder of the appellant, there was no

pleading before the learned Single Judge of the appellant herein and the respondent no.1 could get an unfair advantage of the same. The learned counsel has further made reference to the on-going arbitration proceedings in which the amount claimed is Rs.4.46 crores. In the facts, no effective decree could have been passed in the absence of the appellant.

15. The learned Senior Counsel appearing for the appellant, in support of his submissions, placed reliance on the following judgments :-

- (a) State Bank of India vs. Mula Sahakari Sakhar Karkhana [(2006) 6 SCC 293].
- (b) Mumbai International Airport vs. Regency Convention Centre [(2010) 7 SCC 417].
- (c) Union of India vs. Indusind Bank Ltd. [(2016) 9 SCC 720].
- (d) Hardevinder Singh vs. Pramjit Singh [(2013) 9 SCC 26].

(a) In the case of State Bank of India and anr. vs. Mula Sahakari Sakhar Karkhana Ltd. (Supra), the Supreme Court in paras 23, 24, 43 and 45 observed as under :-

23. The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself

said that ex facie the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise.

24. The said document, in our opinion, constitutes a document of indemnity and not a document of guarantee, as is clear from the fact that by reason thereof the appellant was to indemnify the Cooperative Society against all losses, claims, damages, actions and costs which may be suffered by it. The document does not contain the usual words found in a bank guarantee furnished by a bank as, for example, “unequivocal condition”, “the Cooperative Society would be entitled to claim the damages without any delay or demur” or the guarantee was “unconditional and absolute” as was held by the High Court.

43. However, in this case, we have no doubt in our mind that the document in question constitutes a contract of indemnity and not an absolute or unconditional bank guarantee. The High Court, therefore, erred in construing the same to be an unconditional and absolute bank guarantee.

45. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The decree of the trial court is restored. The appeal is allowed with costs. Counsel's fee assessed at Rs.5000.”

(b) In the case of Mumbai International Airport Private Ltd. vs. Regency Convention Centre and Hotels Private Ltd. & Ors. (Supra), the

Supreme Court in para 18 observed as under :-

“18. In Kasturi this Court reiterated the position that necessary parties and proper parties can alone seek to be impleaded as parties to a suit for specific performance. This Court held that necessary parties are those persons in whose absence no decree can be passed by the court or those persons against whom there is a right to some relief in respect of the controversy involved in the proceedings; and that proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.”

(c) In the case of Union of India and anr. vs. Indusind Bank Ltd. & anr. (Supra), the Supreme Court in paras 28 and 30 observed as under :-

“28. A reading of the aforesaid clauses makes it clear that neither clause purports to limit the time within which rights are to be enforced. In other words, neither clause purports to curtail the period of limitation within which a suit may be brought to enforce the bank guarantee. This being the case, it is clear that this Court’s judgment in Food Corporation of India v. New India Assurance Co. Ltd., would apply on all fours to the facts of the

present case.

30. In a separate concurring judgment R.M. Sahai, J. after going into the case law in paragraph 3 of his judgment, made an extremely perceptive observation. He stated that where the filing of the suit within limitation is made dependent on any condition precedent, then such condition precedent not curtailing the limitation period within which a suit could be filed, would be valid and not hit by Section 28. In paragraph 8 of the judgment in Food Corporation of India case, the learned Judge put it thus: (SCC p. 335)

“It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply

with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the appellant was within time.”

- (d) In the case of Hardevinder Singh vs. Paramjit Singh and ors. (Supra), the Supreme Court in para 17 observed as under :

“17. Presently, it is apt to note that Sections 96 and 100 of the Code make provisions for preferring an appeal from any original decree or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasis, he can prefer an appeal. In this context, a passage from *Jatan Kumar Golcha vs. Golcha Properties (P) Ltd.* is worth noting: (SCC p. 575, para 3)

“3..... It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment.”

16. Per contra, the learned Senior Counsel Ms. Rajani Iyer appearing for the respondent no.1 objected to the grant of application for leave to appeal to the appellant. In the submissions of the learned counsel as bank guarantee itself is an independent contract between the plaintiff and the defendant-bank, the present appellant is not a necessary or proper party to the Suit. The appeal has been filed to stall the realization of the amount under the decree. The appellant has failed to make a case of irretrievable injury or fraud or special equities. The bank guarantees provided with different time-lines to raise the claim, according to the learned counsel, which are as follows :-

- (a) Clause 1 – 17th July, 2012 (tenure of contract including extension period, if any or the complete recovery of mobilization advance, whichever is later.)
- (b) Clause 2 – till the contractor has maintained the schedule of delivery. Also, under the said clause, respondent no.1 had an irrevocable and unconditional right to claim under the Guarantee and to extend the same as per its opinion. Hence, a remedy has been provided.
- (c) Clause 7- on or before 17th July, 2012.
- (d) Clause 11 – until the issuance of Virtual Completion Certificate.

(e) Clause 12 – within a period of 9 months from the date of expiry of the Guarantee.

Even though a format has been referred to in the bank guarantees, but no format was provided. Time was extended without there being any objection by the appellant. On the issue of non-joinder of appellant as party, reliance was placed on the case of *Mula Sahakari Sakhar Karkhana Ltd. vs. State Bank of India* [2005 (4) Mh.L.J. 629]. According to the learned counsel the ratio of the said judgment applies to the facts of the present case.

17. A Suit was filed by the appellant in the City Civil Court at Bombay against the defendant – Bank, wherein an injunction was sought against the invocation of bank guarantees, wherein a stand was taken by the appellant that the present respondent no.1 – plaintiff is not a necessary party to the Suit. None of the issues framed in the present Suit suggest that the appellant was a necessary party. The learned Single Judge has properly interpreted the clauses of the bank guarantees and considered the relevant documents placed on record. The interpretation made is a possible one. It was submitted that suit filed by the appellant i.e. Suit No. 2165 of 2012

has been impending for framing of issues since the year 2012. The conduct of the bank and the appellant reflects that that they have knowledge of the proceedings. It is submitted that reliance placed on the judgment in the case of Hindustan Construction Co. Ltd. vs. State of Bihar [(1999) 8 SCC 436] is misplaced one since the said case is based on conditional bank guarantee whereas the present bank guarantees are unconditional one.

18. In respect of invocation of bank guarantees, it was submitted that possible time-lines are more specifically dealt with in paras 7 to 13 of the judgment of the learned Single Judge. The bank guarantees were rightly invoked before the stipulated time frame. The appellant in the arbitration proceedings filed against the respondent no.1 has wrongly claimed an amount of Rs.42,00,00,000/- out of which Rs.33,00,00,000/- is for an amount for the pending works to be done under the contract. Out of remaining amount of Rs.9,00,00,000/- of the disputed work done, Rs.4,50,00,000/- are with relation to bank guarantee which is now being used by the appellant to initiate litigation against the present respondent no.1.

19. The learned Senior Counsel appearing for the respondent no.1

vehemently contended that the subject bank guarantees are not a deed of indemnity. The said issue was raised for the first time before this court in the midst of the argument only after the judgment in the case of Mula Sahakari Sakhar Karkhana Ltd. vs. State Bank of India (Supra) was cited. The bank guarantees were prepared under the instructions of all the three parties. Clause 6 of the bank guarantee clearly reads that under the bank guarantee, the client will be entitled to act as if the bank were the principal debtor and the bank hereby waives all and any of its rights of surety-ship. Reading of clause 12 of the bank guarantees shows that a period of 9 months from the date of expiry of the bank guarantees was provided to assert / invoke a claim under the bank guarantees. An unconditional bank guarantee cannot be interfered with. No injunction could be granted if there is no irreparable injury or irretrievable injustice caused to the appellant. The appellant has to make out a case of fraud or special equities which the appellant has failed to establish. It was submitted that no injunction could be granted if there is another efficacious remedy available. Commitments of the bank should be honoured free from interference from courts. The bank guarantee is ordinarily a contract. The learned counsel therefore prayed for dismissal of the Notice of Motion for leave to appeal and the main appeal too.

20. The learned Senior Counsel appearing for the respondent no.1, in support of her submissions, placed reliance on the following judgments:-

(a) Vintec Electronics Pvt. Ltd. vs. HCL Inforystem Ltd. **[(2008) 1 SCC 544]**.

(b) Mula Sahakari Sakhar Karkhana Ltd. Vs. State Bank of India [**2005 (4) Mh. L.J. 629**].

(c) U. P. Co-op. Federation Ltd. Vs. Singh Consultants and Engineers **[(1998) SCC 174]**.

(d) State of Maharashtra Vs. National Construction Co. **[(1996) 1 SCC 735]**.

(e) Himadri Chemicals Industries Ltd. Vs. Coal Tax Refining Co. **[(2007) 8 SCC 110]**.

(f) Mahatma Gandhi Sahakari Karkhana vs. National Heavy Engg. Co.-op. Ltd. **[(2007) 6 SCC 470]**.

(a) In the case of Vintec Electronics Private Ltd. vs. HCL Infosystems Ltd. (Supra), Supreme Court in para 27 observed as under:

“27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable injustice”. There is no plea of any “special equities” by the appellant in its favour. So far as the plea of “irretrievable injustice” is concerned the

appellant in its petition merely stated:

“ That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant.”

(b) In the case of Mula Sahakari Sakhar Karkhana Ltd. vs. State Bank of India and anr. (Supra), the Division Bench of this court, in paras 34 and 35 observed as under :-

“34. We are not convinced with the submission raised by the respondent-Bank and as held by the trial Court that the document in question was in the nature of a contract of indemnity and not a contract of guarantee. In view of the unequivocal condition of the contract in question and as the amount is already ascertained and fixed by the parties so far as the liability claim is concerned, to the extent of Rs. 34,00,000/-, we are of the view that there is no question of settlement of any dispute or conflict insofar as any claim between the appellant and M/s Pentagon. Respondents had no concern with the said dispute, if any, at this stage once the Bank Guarantee in question

was invoked within the prescribed time as per the terms and conditions. The respondents had no option, but to honour the same. The document in question is not a contract of indemnity and in view of the above reasoning, it is a Bank Guarantee and, therefore, there is no question that the appellants should prove the actual loss before filing any claim. The present Suit, therefore, cannot be treated as a Suit based on the contract of indemnity. It is a Suit for the enforcement of the Bank Guarantee. It is also clear from the provisions of section 126 of the Contract Act read with the other provisions that the term “liability” and “deed” as referred under the section means and includes present deed or liability or future deed or liability. In the present case, there is an existence of an element of promise and obligation. As the principal debtor failed to fulfill its liability, the surety-respondent Bank are under an obligation to honour the Bank Guarantee. The very object of the Bank Guarantee would be frustrated if the appellants-creditor are required to wait for the settlement of the future amount or damages against the principal debtor M/s Pentagon. The appellants are entitled to their claimed money without any delay or demur. The nature and need of such commercial contracts and documents need to be respected by the parties concerned. There is no case of any fraud or irretrievable injustice or harm. The respondents' liability is not discharged by any means. The Bank Guarantee in question, at the most, can be said to be performance guarantee, but it cannot be, in any sense, treated as

a contract of indemnity.

35. ISSUE NOS. 3 AND 4 : In view of the above, we are of the view that the learned Judge is wrong in holding that M/s Pentagon was a necessary party. As observed above, if the document in question is a Bank Guarantee, then the principal debtor is not a necessary party in such Suit. The respondent-Bank is bound by the terms and conditions of the Bank Guarantee to honour the said document and make the payment to the appellants, as claimed. In view of the above reasoning, we are of the view that the principal debtor M/s Pentagon was not a necessary party. The document Exhibit-46, is not an independent contract like a contract of indemnity. It is a tripartite agreement. As the appellant need not prove losses caused by the beneficiary, M/s Pentagon therefore, is not a necessary party even though the main agreement dated 25th September, 1983, was between M/s Pentagon and the appellant. In view of the clear terms of the document, the liability of the supplier M/s Pentagon, in view of the default and invocation of the Bank Guarantee, need no further evidence to prove any loss. The comprehensive amount of Rs. 34,00,000/- as claimed had been crystallized by the parties. Therefore, the learned Judge was wrong in dismissing the Suit for non-joinder of party.”

(c) In the case of U. P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (Supra), Supreme Court in paras 43 and

51 observed as under :

“43. The argument for the respondent is attractive but it seems to overlook the basic nature of the case. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to UPCOF Ltd. If under law, the bank cannot be prevented by SCE(P) Ltd from honouring the credit guarantees, the UPCOF Ltd. also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to UPCOF Ltd. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the SCE(P) Ltd. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

51. It is true that both the decisions of this Court dealt with a contract to sell specific commodities or a transaction of sale of goods with an irrevocable letter of credit. But in modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. In business circles, standby letters of credit are also used. Performance bond and guarantee bond are also the devices increasingly adopted in transactions.

The Courts have treated such documents as analogous to letter of credit.”

(d) In the case of State of Maharashtra and anr. vs. National Construction Company, Bombay and anr. (Supra), Supreme Court in paras 13 and 14 observed as under :-

“13. At this juncture it seems necessary to analyze the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee. See United Commercial Bank vs. Bank of India, (SCC at 784 : SCR at p. 325); Centax (India) Ltd. v. Vinmar Impex Inc. and U. P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.

14. The legal position, therefore, is that a bank guarantee is ordinarily a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure. To that extent it can be said to give rise to a cause of action separate from that of the underlying contract. However, in the present case we are handicapped because the High Court (both the learned Single Judge and Division Bench) had no occasion to analyze the nature of the bank guarantee. We, therefore, refrain from making any observation regarding the true nature of the bank guarantee except pointing out that the two causes of action may not be identical. That would be a matter for the Trial Court to consider on a true analysis of the bank guarantee at the appropriate stage.”

21. We have also heard Ms. Sandhya Nambidi, the learned counsel appearing for respondent no.2.

22. We have perused the record, judgments cited (Supra) and considered the submissions advanced before us. It is necessary to refer to the relevant clauses of the bank guarantees i.e. Clauses 1, 7 and 12 read as under :-

“01. In consideration of Client, at the request of the Contractor,

advancing a sum of Rs.50,00,000 (Rupees Fifty Lacs Only), to the Contractor as and by way of Mobilization advance, the Bank hereby unconditionally and irrevocably guarantees to the Client for due performance of the Contractor's obligations under the contract and indemnifies the client the client in respect of the amount of the mobilization advance. BANK hereby undertakes without recourse to Contractor, to pay the Client, on mere demand in the enclosed format up to and not exceeding altogether a sum of Rs.50,00,000/- (Rupees Fifty Lacs Only) being the part amount of the 100% (One hundred percent) of the mobilization advance payment i.e. thirteen percent (13%) of Contract value or such other unadjusted amount of the said mobilization advance. If the Client notifies to the Bank that the Contractor has failed to observe, perform and fulfill the terms of the said Contract then the Bank shall immediately pay to the CLIENT, on CLIENT's mere demand in the enclosed format, such sum or sums of money to the extent of Rs.50,00,000/- (Rs. Fifty Lacs Only) being part of 13% of the value of the Contract value as may be claimed by the CLIENT by reason of non-fulfillment by the Contractor of his obligations under the Contract as aforesaid / and shall also indemnify the CLIENT against all losses and damages which may be suffered by the CLIENT as aforesaid and against all costs, charges, expenses which may be incurred by the CLIENT in connection herewith. The Bank shall pay the said amount without demur or protest or without recourse to the Contractor. Any such demand placed in

the enclosed format on the Bank shall be conclusive with respect to the amount due and payable by the Bank under this Guarantee. The decision of Client as to whether the terms and conditions of this Guarantee or Contract have been observed or not shall be final and binding on BANK and the BANK will not have the discretion to withhold payment to the CLIENT if letter in enclosed format is delivered by the CLIENT to the BANK on or before 17th January, 2012 (Tenure of Contract including extension period, if any or the complete recovery of mobilization advance whichever is later).

07. THE GUARANTEE HEREIN CONTAINED is unconditional and not revocable by notice during its currency and will remain in full force until full payment has been made to the Client by BANK on the Client having lodged a claim under the Bank Guarantee within its validity i.e. 17th January, 2012 (Due Date) and if no claim is lodged by the Client then the Guarantee would expire within the period specified in this Guarantee. The BANK's liability under this Guarantee is restricted to Rs.50,00,000/- (Rupees Fifty Lacs Only). The CLIENT may claim the full or part of the amount under the Guarantee entirely at its sole discretion and make this claim at one or more times before the expiry (including the claim period) of this guarantee. The total amount of claims is restricted to the BANK's liability under the Guarantee. The Bank is required to make a payment immediately on receipt of the claim in this

enclosed format.

12. Unless demand or claim under this Guarantee is made within Nine (9) months from the date of expiry of this Guarantee, all the rights of the CLIENT hereunder shall be forfeited and the Bank shall be relieved and discharge of all liabilities.

23. By a communication dated 17/01/2012, the Bank of India informed the plaintiff that on the request of the appellant – ACIL, the bank guarantees are amended and they are extended upto 17/4/2012. The bank guarantees shall be valid upto 17/4/2012. The said communication dated 17/01/2012 reads as under :-

“Amendment of Guarantee No.0119IPEBG110102 dated 18th July 2011 valid upto 17th January 2012 Extended from 17/01/2012 to 17/04/2012.

To
Beliamy Construction & Infrastructure Pvt. Ltd.
106, Free Press House,
10th Floor, Nariman Point,
Mumbai – 400 021.

At the request of Ahluwalia Contracts (India) Limited, on whose behalf this guarantee has been issued, we hereby amend the guarantee as follows :

The period of subject Guarantee, issued in your favour on behalf of Ahluwalia Contracts India Ltd. is hereby extended upto April

17, 2012.

Notwithstanding anything contained herein:

- a) Our liability under this bank guarantee shall not exceed Rs.50,00,000/- (Rupees Fifty Lakhs only).
- b) This bank guarantee shall be valid upto 17.04.2012.
- c) We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only and only if you serve upon us a written claim or demand on or before 17.04.2012.

All other terms and conditions of the original Bank Guarantee shall remain unchanged.

This letter forms as integral part of the original Bank Guarantee referred to above and may be kept attached thereto.

Mumbai

17/1/2012

For Bank of India

Sd/-

Asst. Gen. Manager

Andheri Large Corporate Branch”

By further communicated dated 16/04/2012, the Bank of India informed the plaintiff that on the request of Ahluwalia Contracts (India) Limited, the bank guarantee period is further extended upto 17/7/2012.

The said communicated dated 16/04/2012 reads as under:

“Amendment of Guarantee No.0119IPEBG110102 dated 18th July, 2011 valid upto 17th April, 2012. EXTENDED FROM 18.04.2012 TO 17.07.2012.

To

Bellamy Construction & Infrastructure Pvt. Ltd.
106, Free Press House,

10th Floor, Nariman Point,
Mumbai – 400 021.

At the request of Ahluwalia Contracts (India) Limited, on whose behalf this guarantee has been issued, we hereby amend the guarantee as follows :

The period of subject Guarantee, issued in your favour on behalf of Ahluwalia Contracts India Ltd. is hereby extended upto July 17, 2012.

Notwithstanding anything contained herein:

- a) Our liability under this bank guarantee shall not exceed Rs.50,00,000/- (Rupees Fifty Lakhs only).
- b) This bank guarantee shall be valid upto 17.07.2012.
- c) We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only and only if you serve upon us a written claim or demand on or before 17.07.2012.

All other terms and conditions of the original Bank Guarantee shall remain unchanged.

This letter forms as integral part of the original Bank Guarantee referred to above and may be kept attached thereto.

For Bank of India
Sd/-
Chief Manager
Andheri Large Corporate Branch.”

By a communication dated 17/07/2012, the Chief Manager of Bank of India informed the present appellant – ACIL that the beneficiary has demanded for immediate payment and as they have received the

invocation notice before expiry of the Bank Guarantees, they are bound to make payment within 48 hours. The appellant – ACIL were called upon to arrange for payment at the earliest. The appellant herein on the same day i.e. on 17/07/2012 informed the Bank that demand for invocation of bank guarantees is ab-initio bad in law. Thereafter on the next day i.e. on 18/07/2012, the Bank informed the plaintiff that their invocation was not in conformity with the terms of Bank Guarantees and it was not possible to accede to the request for payment.

24. We may also reproduce the order dated 20/07/2012 passed by the learned Single Judge in Arbitration Petition (L) No. 964 of 2012 filed by the appellant herein, which reads as under :-

“P.C.

The learned Senior Advocate appearing for Respondent No.1 informs the Court that since the Petitioner has objected to the contents of the letter invoking the Bank Guarantee, the Respondent No.1 shall issue a fresh letter of invocation of the Bank Guarantee to the Bank. In view thereof, the present Petition stands disposed of.”

25. The learned Single Judge framed issues and has referred to the

relevant clauses of the bank guarantee and the record. In para 8 of the judgment, while referring to the relevant clauses of the bank guarantee, the learned Single Judge observed that the guarantee is a continuing guarantee mandated to continue by its own force until the events noted occur. Clause 11 suggests the guarantee to be in force until the date of Virtual Completion Certificate under the Contract. It was further observed that there was a specific stipulation in Clause 12 which countenances demand or claim under the guarantee within nine months from the expiry of the guarantee. In para 9, the learned Single Judge observed that one has to construe the guarantee and make a sense out of it.

26. While construing the time limit for the invocation of the bank guarantees, the learned Single Judge observed in paras 13 and 14 as under:-

“13. The Plaintiff has preferred, and presumably acted on, the interpretation that it was permissible for it to lodge its claim or demand, pure and simple, with the bank under the bank guarantee on or before the stipulated date, i.e. 17 July 2012 and then follow it up by notifying the bank within nine months of the stipulated date about the contractor's failure to perform the contract. Since this is clearly a possible interpretation, it ought to be preferred in the facts of the case and allowed to hold the field

on the principle of *contra proferentem*.

14. Learned Counsel for the Defendant submits that there is no ambiguity or doubt in the present case. In plain terms, that appears to be an extremely ambitious argument. Ambiguities and doubts are galore in this document of guarantee, as shown above. Learned Counsel alternatively submits that in any event, there being a non-obstante clause in the bank guarantee, the conflict, if any, between different provisions of it must be resolved in favour of the stipulation that the date of 17 July 2012 is the last date of invocation. In the first place, it is by no means clear that the non-obstante character of the clause referred to by learned Counsel extends to all stipulations within that clause. The non-obstante clause begins with the words “NOTWITHSTANDING anything contained” and ends with the words “Rs.50,00,000/- (Rupees Fifty Lacs Only):. It surely applies to the ceiling limit of the amount for which the guarantee is given, but does it apply to the period of its invocation, that is to say, the period of validity of the guarantee and lodgment of a claim thereunder on or before the specified date? That is by no means clear. Be that as it may, even if the non-obstante clause were to extend to all stipulations which follow it, it can only be applied on one and the only basis and that is that Clauses 11 and 12 of the bank guarantee are completely nugatory and have no existence in the contract. No contract can be construed in a manner so as to make the whole of its clauses rendered completely nugatory. It is pertinent to note that there two

specific stipulations, namely, Clauses 11 and 12, are self contained clauses and would make no sense at all if the non-obstante clause were to be read as suggested by the Defendant. In the facts of the case and on the interpretation discussed by the Court above, the non-obstante clause must be held to be restricted to the stipulation of the upper ceiling of the amount to be claimed, i.e. Rs.50 lacs in eight bank guarantees and Rs.46 lacs in the ninth bank guarantee.”

27. We have perused the terms of the bank guarantees and the interpretation of the terms of the bank guarantees and the relevant record. In our view it is an unconditional and irrevocable bank guarantee to the Client for due performance of the contractor's obligations. It indemnifies to the Client in respect of the amount of the mobilization advance. The bank undertook without recourse to Contractor to pay the Client on mere demand in the enclosed format. The guarantee is a continuing one and not revocable except with the previous written consent of the Client. It also states that the Client will be entitled to act as if the bank were the principal debtor and the bank waives all and any of its rights of surety ship. Clause 7 of the guarantee states that it is unconditional and not revocable by notice during its currency and will remain in full force until full payment has been made to the Client by bank on the Client having lodged a claim under

the bank guarantee within its validity i.e. 17/01/2012. This period was extended twice. Once, upto 17/04/2012 and on second occasion upto 17/07/2012. Clause 12 states that unless demand or claim under the guarantee is made within nine months from the date of expiry of the guarantee, all the rights of the Client thereunder shall be forfeited and the Bank shall be relieved and discharged of all liabilities.

28. The learned Senior Counsel appearing for the appellant submits that the respondent no.1 – plaintiff had invoked the bank guarantees after the prescribed time limit. In support of his submission, the learned counsel placed reliance on the order passed by the learned Single Judge in Arbitration Petition (L) No. 964 of 2012 on 20/7/2012. Perusal of the said order shows that the court had recorded a statement made by the respondent no.1 that since the petitioner (appellant) has objected to the contents of the letter invoking the Bank Guarantee, the respondent no.1 shall issue a fresh letter of invocation of the Bank Guarantee to the Bank and in that view of the matter, the petition stood disposed of. We are not inclined to accept the submission made by the learned counsel appearing for the appellant that in view of the order passed by the learned Single Judge, the respondent no.1 could not have invoked the bank guarantees

thereafter. The period of nine months lapsed after the initial time limit prescribed under the bank guarantee. The communications referred above issued by the bank addressed to the plaintiff clearly stipulated that on the request made by the appellant herein (ACIL), the bank guarantees were amended and the period of the subject bank guarantees was extended by communication dated 17/1/2012 and 16/04/2012. In both the communications it is specifically contended by the Bank that only and only if written claim or demand is submitted on or before 17/4/2012 or extended time 17/7/2012, the bank would be liable to pay the guaranteed amount. All other terms and conditions remain unchanged. In fact, the contractual period of invocation of bank guarantees stood extended by consent of the parties and now it would not be permissible and appropriate for the appellant to raise an issue of time limit of invocation of bank guarantees.

29. We find sufficient force in the submissions of the learned Senior Counsel appearing for the respondent no.1 – plaintiff that the bank guarantee itself is an independent contract and respondent no.1 – plaintiff was entitled to invoke the bank guarantees which was unconditional one. The bank guarantees and the relevant documents do not support the

submission advanced on behalf of the appellant herein that it was not a bank guarantee but a document of indemnity. We do not accept the submission that the respondent no.1 invoked the bank guarantees second time. In view of the clear stipulation in the communications made by the bank, the time limit itself was extended and the condition of the initial bank guarantees stood amended by way of extension of time. We find that the invocation of the bank guarantees was done in accordance with the terms of the contract and the bank guarantees. Invocation letter dated 17/7/2012 is part of the compilation, which states that the respondent no.1 – plaintiff would like to encash the nine bank guarantees which are detailed in the communications.

30. The learned Single Judge has properly construed the terms of the bank guarantees, the contractual relationship between the appellant and respondent no.1 and reached conclusions which are reasonable and proper. We do not see any perversity in the view adopted by the learned Single Judge. The view taken by the learned Single Judge is a possible one and does not call for any interference at the appellate stage.

31. Resultantly, the appeal fails and is accordingly dismissed.

32. In view of the dismissal of appeal, Notice of Motion (L) No. 597 of 2018 does not survive and is disposed of.

G. S. KULKARNI,J.

ACTING CHIEF JUSTICE

33. After pronouncement of the judgment, the learned Senior Counsel appearing for the appellant prays for maintaining status quo as on today in respect of encashment of the bank guarantees for a period of ten weeks. None present for the respondents. In the facts, we direct that the status quo as on today in respect of encashment of the bank guarantees be maintained for a period of four weeks from today.

G. S. KULKARNI,J.

ACTING CHIEF JUSTICE

Pravin
Dasharath
Pandit

Digitally
signed by
Pravin
Dasharath
Pandit
Date:
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