

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) No.1011/1998**

% **17th September, 2012**

M/S. VIDESH SANCHAR NIGAM LIMITED Plaintiff
Through: Mr. Vibhu Bhakru, Sr. Adv. with
Mr. Gopal Jain, Mr. Akshay Ringe and
Ms. Shagun Parashar, Advs.

VERSUS

U.T.I. BANK LIMITED AND ANR. Defendants
Through: Mr. Sanjay Bhatt with
Mr. Abhishek Anand, Advs. for D-1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit has been filed by the plaintiff-M/s Videsh Sanchar Nigam Limited for recovery of Rs.2,57,56,350/- alongwith interest @ 24% per annum from the defendant no.1/UTI Bank Ltd., being the unpaid balance of the bank guarantee dated 20.7.1996 issued by the defendant no.1.

2. The facts of the case are that the defendant no.1-bank at the request of the defendant no.2 issued the subject bank guarantee dated
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20.7.1996 (Ex.PW1/5) for a total amount of Rs.4,20,00,000/-. The bank guarantee was given because of reserving space segment by the plaintiff in an Intelsat Satellite IS-704 at 66 degrees East with a guaranteed 36 Mhz bandwidth transponder for a lease of 10 years with effect from 1.4.1995. The Intelsat Satellite was in the C-band Spot Beam Transponder covering Indian sub-continent and some portions of the Middle East. The plaintiff partially invoked the bank guarantee by its letter dated 7.2.1997 (Ex.PW1/6) for an amount of Rs.1,62,43,650/-, and which was paid by the defendant no.1-bank. Thereafter, the plaintiff issued its letter dated 12.7.1997 (Ex.PW1/12) asked for payment of the balance amount of Rs.2,57,56,350/-, and which amount the defendant no.1 failed to pay, resulting in filing of the subject suit for recovery with interest.

3. The defendant no.1 filed its written statement and the basic facts were not disputed of the issuance of the bank guarantee, of the fact that the bank guarantee was for Rs.4,20,00,000/-, the fact that an amount of Rs.1,62,43,650/- was paid under the invocation letter dated 7.2.1997 and for the balance amount of ₹2,57,56,350/-the bank guarantee was invoked for being paid vide letter dated 12.7.1997 (Ex.PW1/12). The basic defence of the defendant no.1-bank was that there cannot be repeated invocations under the bank guarantee.

4. The following issues were framed in this suit on 26.8.2003:-

“1. Whether the agreement dated 31.7.1996 entered into between the plaintiff and defendant no.2 is valid and binding qua defendant no.1?OPP.

2. Whether the invocation by the plaintiff of the amount of Rs.1,62,43,650/- qua defendant no.1, by its letter dated 7th February 1997 addressed to defendant no.1 extinguishes the full liability of defendant no.1 under the Bank Guarantee No.23/96-97 dated 20th July, 1996? OPD.

3. Whether the plaintiff is entitled to receive from defendant no.1 the remaining sum of Rs.2,57,56,350/- plus interest accruing thereon at the rate of 24% per annum from 12th July, 1997 till the date of decree or payment in full and final, whichever is earlier? OPP.

4. Relief.”

5. Issue no.3 was modified vide order dated 14.2.2006 to read as under:-

“3. Whether the plaintiff is entitled to receive from defendant nos. 1 and 2, jointly and severally, remaining sums of Rs.2,57,56,350/- plus interest accruing thereon @ 24% per annum from 12th July, 1997? OPP.”

6. All the aforesaid issues can be disposed of together inasmuch as the issue in this case is basically a legal issue. I may note that the plaintiff filed its affidavit by way of evidence of its witness Sh.Satish Gopal Ranade and who was not cross-examined by the defendant no.1, and as so recorded in the order dated 25.8.2009. Even the

plaintiff did not cross-examine the DW1, Sh. Lokender Bisht inasmuch as the issue only is with respect to the fact as to whether there can be successive invocations of the bank guarantee.

7. Let us see the language of the bank guarantee in this case.

The relevant portion of the bank guarantee reads as under:-

“RE: Bank Guarantee in respect of Agreement dated 4th April, 1995 between Videsh Sanchar Nigam Limited and M/s. Srishti Video Corp. Limited.

M/s. Srishti Videocorp Limited a public company incorporated under the Companies Act, 1956 and having its registered office at 24/56, Birhama Road, Kanpur-208 001 (hereinafter called “the company”) has entered into an agreement dated 4th April, 1995 (hereinafter referred to as “the said agreement”) with Messers Videsh Sanchar Nigam Limited (hereinafter referred to as “VSNL”) whereby VSNL has agreed to manage a 36MHz Transponder lease from Intelsat on the terms and conditions mentioned therein.

It has been agreed that a bank guarantee for Rs.4.20 crores (Rupees Four crores and Twenty Lakhs only) shall be given by the company in favour of VSNL for due and faithful performance of the terms and conditions of the said agreement.

UTI Bank Ltd., (Name of the Bank) having its office at Kanchanjunga Building, 18, Barakhamba Road, New Delhi – 110 001 has at the request of the company agreed to give the guarantee as hereinafter contained:

1. We, UTI Bank Ltd. hereby undertake and assure VSNL that if the Company shall in any way fail to observe or perform the terms and conditions of the said agreement or shall commit any breach of its obligations thereunder, the bank shall on demand and without any

objection or demur shall undertake and agree to pay to VSNL the said sum of Rs.4.20 crores (Rupees Four crores and Twenty lakhs only) or such lesser amount as the VSNL may demand without requiring the VSNL to have recourse to any legal remedy that may be available to it to compel the bank to pay the same.

2. Any such demand shall be conclusive as regards the liability of the company to VSNL to pay or as regards the amount payable by the bank under this guarantee. The bank shall not be entitled to withhold payment on the ground that the company had disputed liability to pay or has disputed the question of the amount or that any arbitration proceeding or legal proceeding is pending between the company and VSNL regarding the claim.

3. We the bank further agree that this bank guarantee shall remain in full force until 19th July, 1997; for amount equivalent to the manual intelsat lease charges. The company shall be obliged to furnish to VSNL before 19th April, 1997, the renewed Bank Guarantee. Failure to furnish such renewed Bank Guarantee by the company to VSNL. VSNL shall have the right to invoke the existing Bank Guarantee of Rs.4.20 crores (Rupees Four crores and Twenty lakhs only) within 3 (Three) months, from 19th April, 1997, and the bank shall make the payment of the abovesaid amount to VSNL without any recourse or protest or objection on any ground.

4. The bank further agrees with the VSNL that VSNL shall have the fullest liberty without the consent of the bank and without affecting in any way the obligations hereunder to vary any of the terms and conditions of the said agreement or to extend the time for performance of the said agreement from any of the powers exercisable by the VSNL against the company and to forbear to enforce any of the terms and conditions relating to the said agreement and the bank shall not be relieved from its liability by reason of such failure or extension being granted to the company or through any forbearance, act or omission on the part of the VSNL or any indulgence by

VSNL to the company or nay other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of relieving or discharging the guarantor.

5. Notwithstanding anything to the contrary contained in the text above, our Bank's liability under this guarantee is restricted to Rs.4.20 crores (Rupees Four crores and Twenty Lakhs only) and our guarantee shall remain in force until 19th July, 1997. Unless a demand or a claim under the guarantee is made on us in writing on or before 19th July, 1997 all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities hereunder:

6. This guarantee is given under Bank's power to give t his guarantee and Smt. IL Bhat and Shri R.K.Bniwal who have signed it on behalf of the bank have authority to do so.

For UTI BANK LTD.
LTD.

For UTI BANK

Authorised Signatory
Signatory

Authorised

Power of Attorney No.”

8. Bank guarantee is a contract between the bank which issues the bank guarantee and the beneficiary of the bank guarantee. The bank in this case is defendant no.1 and the plaintiff is the beneficiary. The contract has to be performed as per its terms. The bank guarantee contract in the present case only specifies the upper limit of the bank guarantee for being invoked i.e. for Rs.4,20,00,000/-, and there is no

clause in the bank guarantee reproduced above that it cannot be invoked more than once. Therefore there can be various invocations under the bank guarantee, provided the invocations are within the periods specified in the bank guarantee, and upto the limit of the bank guarantee. The disputed invocation in the present case is dated 12.7.1997, Ex.PW1/12, and the last date for invoking the bank guarantee was 19.7.1997. Therefore, invocation is admittedly for the balance amount of the bank guarantee and before the last date for invocation i.e. 19.7.1997. I therefore hold that the defendant no.1-bank was liable to pay under the bank guarantee.

9. Learned senior counsel for the plaintiff has also rightly relied upon *EMAAR MGF Construction Pvt. Ltd. vs. Delhi Development Authority & Ors., 175 (2010) DLT 585*, wherein a learned Single Judge at the stage of disposal of an injunction application has held that there can be more than one invocation under a bank guarantee. Relevant paras of the judgment are paras 61 to 65 and which read as under:-

“61. Having heard learned Counsel for the parties, considered their respective submissions, and in view of the settled position of the law on the subject, I am of the view that the petitioner is not entitled to seek a restraint on the encashment of the bank guarantees in question for the amount of Rs.183 crores, or to any other relief as prayed for.

62. I may first deal with the submission of learned ASG that the bank guarantees in question could not have been invoke partially and repeatedly, and that if a partial invocation had been resorted to by the respondent DDA, the same would have lapsed for the remaining

balance amounts even before the expiry of the period of currency of the said guarantees.

63. On this submission being made, learned counsel for the respondent Bank of India was asked by the court to specifically take instructions as to the normal banking practice in such situations. Learned counsel for the State Bank of India has stated that a bank guarantee, unless there is a limitation contained in its terms that it could be invoked only once, could be invoked repeatedly during its currency, partially, so that the aggregate amount invoked by the beneficiary does not exceed the maximum amount payable under the bank guarantee.

64. A perusal of the bank guarantees in question dated 12.6.2008 (issued by State Bank of Patiala), the validity whereof was extended vide extension dated 27.9.2010; and the bank guarantee dated 11.6.2008 (issued by State Bank of India), the validity whereof was extended vide extension dated 27.9.2010 upto 31.12.2010, does not support the submission made by Ms. Jaisingh. The said bank guarantees, inter alia, state that the said banks “do hereby unconditionally and irrevocably undertake to pay to DDA an amount not exceeding without any demur or merely on a demand in writing from DDA, received by the bank on or before..... stating that the amount claimed is due and payable by project developer. Any such demand received by the bank on or before shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, the bank's liability to this guarantee shall be restricted to an amount not exceeding.....”. The bank guarantees further recite “our liability under this agreement shall not exceed” It further states “we shall be liable to pay guaranteed amount or any part thereof only and only if you serve upon us a written claim or demanded on or before.....”.

65. From the aforesaid language used in the bank guarantees in question, it cannot be inferred that there is any limitation therein that they could be invoked only once. The upper limit of the amounts for which these bank guarantees were furnished, have been indicated in the respective guarantees. Therefore, up to the upper limit/ceiling fixed in the said bank guarantees, the beneficiary could invoke the guarantees repeatedly during their currency, such that the total amount invoked/drawn on the bank guarantees does not exceed the upper limit/ceiling amount for which they are furnished.”

(underlining added)

10. In view of the above, the issues 1, 2, 3 are decided in favour of the plaintiff and against the defendant no.1 and it is held that the

plaintiff is entitled to recovery of the amount of Rs.2,57,56,350/- from the defendant no.1.

11. Since the transaction is a commercial transaction, and the plaintiff had duly served notices to the defendant no.1 through its Advocates, and copies of which notices have been exhibited as Ex.PW1/17, Ex.PW1/19, Ex.PW1/20 and Ex.PW1/22, the plaintiff is entitled to interest at the rate of 12% per annum simple. I may note that actually the plaintiff may be entitled to interest at the rate of 18% per annum in view of Section 80 of the Negotiable Instruments Act, 1881 which provides for grant of interest at 18% per annum simple in case of a dishonoured negotiable instrument, a bank guarantee being a negotiable instrument, however, the Supreme Court in the recent chain of judgments reported as *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7 SCC 700, *Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra*, 2007 (2) SCC 720 & *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140 (SC) has held that once the litigation remains pending for a long period of time, and since the changed economic scenario has resulted in consistent fall in the rates

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of interest, Courts are duty bound to reduce the high rates of interest. Accordingly in the fact of this case, I hold that plaintiff will be entitled to interest at the rate of 12% per annum simple from 12.7.1997 till the date of filing of the suit, and also at this same rate pendente lite and future till payment by the defendant no. 1 to the plaintiff.

Relief

12. The suit of the plaintiff is decreed against the defendant no.1 for a sum of Rs.2,57,56,350/- with interest at 12% per annum simple from 12.7.1997 till the date of filing of the suit, and also pendente lite and future interest at the same rate of 12% per annum simple till payment by the defendant no.1 of the decretal amount to the plaintiff. Plaintiff will also be entitled to costs in terms of the Rules of this Court. Decree sheet be prepared.

VALMIKI J. MEHTA, J

SEPTEMBER 17, 2012
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