IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
COMMERCIAL NOTICE OF MOTION (L) NO. 946 OF 2019
IN
COMMERCIAL SUIT (L) NO.427 OF 2019

Emerson Precess Management (India) Pvt Ltd. ..Plaintiff
Vs.
Citibank N. A. & Anr ..Defendants

Mr. Amir Arsiwala a/w Mr. Archit Virmani for Plaintiff/Applicant
Mr. Rohaan Cama a/w Ms Kalyani Wagle I/b Ms Sapana Rachure for Defendant No.2
None for Defendant No.1

CORAM : K.R.SHRIRAM, J.
DATE : 26th APRIL 2019

P.C.:

1 By this notice of motion plaintiff is seeking a direction to restrain defendant no.1 from encashing the three bank guarantees which are subject matter of the suit.

2 Pursuant to an offer made by plaintiff and subsequent discussions, defendant no.2 placed purchase orders upon plaintiff for supply of ROSOV valves for a total consideration of Rs.7,54,00,000/-. Plaintiff issued three purchase orders, copy of one such purchase order is annexed at Exhibit C to the plaint. That purchase order was for supply of 67 Nos.ROSOV valves including design, testing and commissioning for the project related to upgradation of fire fighting system. Clause 7 and 11 of the purchaser order read as under:

"7. Payment terms:-

a. 5% advance against ABG and on Approval of Purchase Specification by ONGC.

b. 95% payment against Performa Invoice before dispatch and against Inspection Clearance or we may keep option to open letter of credit valid for 90 days against dispatch. Bank interest shall be borne by Indus. The LC will be opened 4 weeks prior to dispatch of the material.

11. Performance Guarantee clause

Performance Bank Guarantee for 10% of order vlaue valid for 15 months from completion / commissioning and acceptance by ONGC for each site/system or 18 months from the date of last supply of whichever is earlier +3 months claim period shall be provided before despatch."

3 In accordance with the purchase order, plaintiff issued three performance bank guarantees which are identical in wordings except that the amounts differ. Recitals ii, iii, iv, vi, vii, xi and xii of the bank guarantee read as under :-

"(ii) Under the terms of the order, the Supplier is required to furnish the Company at his own cost a Performance Bank Guarantee for an amount of Rs.14,82,889/- (Rupees Fourteen Lakh Eighty Two Thousand Eight Hundred Eighty Nine only) being the amount equivalent to 10 percent of the total value of the order for fulfilling the contract.

(iii) The Surety at the request of the Supplier, agreed to issue a Performance Bank Guarantee in terms of the said order on behalf of Supplier and the Company has agreed to accept the same. It is hereby stipulated and agreed that the Supplier shall repair or replace free of cost equipment, machineries, its parts and components, I.T. Software, Technology Products etc. found defective on account of workmanship or defective material and/or inferior manufacturing as mentioned in warranty and guarantee clause of the order for a period upto 31.12.2018 and also agreed to compensate for any loss incurred by the company or claim made by the company consequent to delay in executing the supply order by the Supplier as stipulated in the Purchase Order.

(iv) The Surety binds himself to pay to the extent of

Rs.14,82,889/- (Rupees Fourteen Lakh Eighty Two Thousand Eight Hundred Eighty Nine only) in cases of failure on the part of the Supplier to perform this guarantee provided the company confirms the Surety in writing to this effect.

(vi) The Surety shall not be discharged or released from this Guarantee by any arrangement between the Company and the Supplier with or without the consent of the Surety or by any alteration in the obligation of the parties or by any indulgence or forbearance whether as to payment, time of performance or otherwise.

(vii) This Guarantee shall be a continuing guarantee during its tenure and shall remain valid and irrevocable for all claims of the Company and liabilities of the supplier arising upto and until banking business hours of 31.03.2019.

(xi) The Bank hereby waives all his rights of surety and other rights, available to the Guarantor under the Indian Contract Act, 1872 or any other law till such time as this guarantee is in full force and effect and the obligations of the Bank in terms hereof shall not be otherwise affected or suspended by reason of any dispute having been raised by the Supplier (whether or not pending before any arbitrator, officer, tribunal or court) or any denial of liability by the Supplier or any other order of communication whatsoevr by the Contractor/Supplier stopping or preventing or purporting to stop or prevent any payment by the Bank to the Company in terms hereof.

(xii) The amount stated in any notice of demand under this guarantee addressed by the Company to the Bank as liable to be paid to the Company by the Supplier of as suffered or incurred by the Company on account of any losses or damages or costs, charge and/or expenses shall as between the Bank and the Company or suffered or incurred by the Company, as the case may be, and payable by the Bank to the Company, in terms hereof."

4 The operating part of the bank guarantee reads as under:

"Our liability pursuant to this guarantee is conditional upon the receipt of a valid and duly executed written claim, in original, by Citibank N.A. Fort House, 4th floor, Unit1/224, D. N. Road, Fort, Mumbai 400 001, delivered by hand, courier or registered post, prior to close of banking business hours on 31.03.2019 failing which all rights under this guarantee shall be forfeited and Citibank, N.A. shall stand absolutely and unequivocally discharged of all of its obligations hereunder. This guarantee shall be governed by an construed in accordance with the laws of India and competent courts in the city of Mumbai shall have exclusive jurisdiction."

5 It seems defendant issued certain communications to plaintiff informing plaintiff about certain difficulties/problems/shortfalls in the valves supplied by plaintiff. Mr. Arsiwala states that some parts of the valves have not been supplied. I need not go into that for the purpose of this application.

6 On 2nd April 2019, defendant no.2 addressed a communication to defendant no.1 with copy to plaintiffs invoking the three bank guarantees and calling upon defendant no.1 to remit a sum of Rs.7,54,00,000/- being proceeds of the three bank guarantees. The said letter reads as under:-

> *"INDUS:ACCTS:FLOWMORE:BG 133:2019*
> *April 2, 2019*
>
> *The Branch Manager,*
> *Citi Bank N.A.*
> *Nirmal Building, Ground Floor,*
> *Barrister Rajni Patel Marg,*
> *Nariman Point*
> *Mumbai 40021*
>
> *Dear Sirs,*
>
> *Invocation of Performance Bank Guarantee issued by you on a/c of M/s Emerson Process Management (I) Pvt Ltd., fg. Ourselves*
>
> *Our:BG 5524609846 (75969) dated 12.06.2017 for Rs.52,94,729.00 Expiry 30.06.2019*
> *BG 5524609846 (75970) dated 09.06.2017 for Rs.7,62,383.00 Expiry 30.06.2019*
> *BG 5524609846 (75968) dated 09.06.2017 for Rs.14,82,889.00 Expiry 30.06.2019*
>
> *With reference to the above mentioned Bank Guarantee issued by you in our favour on behalf of your client M/s Emerson Process*

Management (I) Pvt Ltd., we prefer to invoke and encash the Bgs forthwith.
Please remit the proceeds of the captioned BGs, totaling to Rs.75,40,001/- through RTGS in favour of M/s Indus Projects Ltd., The Bank details of RTGS payment are as follows :

Beneficiary	*Indus Projects Limited*
Name and address of the Bank	*State Bank of India, SME-MIDC Branch, Andheri (E) Mumbai-93*
Account No.	*30084709107*
IFS Code	*SBIN0017879*

Kindly acknowledge the receipt of our encashment claim and confirm.

Thanking you
Yours faithfully
For INDUS PROJECTS LTD.
Sd/-
Authorised Signatory

CC To: (1) M/s Emerson Process Management (India) Pvt Ltd., "DELPHI", B wing, 6th floor, Central Avenue, Hiranandani Business Park, Powai, Mumbai – 400 076."

7 Soon thereafter, plaintiff lodged this suit and moved for urgent ad-interim reliefs. On 4th April 2019, ad-interim relief in terms of prayer clause (a) was granted and it was extended on 8th April 2019, 15th April 2019, 23rd April 2019 and 25th April 2019. Ad-interim restraining order is valid till today.

8 It seems that bank guarantees were extended once in March 2019. It is plaintiff's case that defendant no.2 informed plaintiff that they

will sort out the matter and induced plaintiff to extend the bank guarantees. Therefore, it is plaintiff's case that the invocation of the bank guarantees by defendant no.2 is against settled laws and invocation letter is liable to be quashed and set aside, as bank guarantees have been issued by fraud committed on plaintiff. It is plaintiff's case that plaintiff has been induced in extending the validity of the bank guarantees on defendants with the understanding as per the agreed terms and conditions, will be complied with, but defendant no.2 had no intention to comply with the obligation attached to the bank guarantees. It is also submitted that the bank guarantees were conditional bank guarantees, invocation letter does not have the necessary wordings as required and also special equities required that the bank guarantees invocation should be set aside. Special equities Mr. Arsiwala submitted, were that there are two petitions pending against defendant no.2 in NCLT at Mumbai and if those petitions get allowed and if an order to liquidate defendant no.2 is passed, plaintiff will not be able to recover the money back from defendant no.2, if ultimately court comes to a conclusion that invocation itself was wrongful.

9 Mr. Arsiwala also submitted relying upon three judgments in **Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors.**[1], **Western Coalfields Limited & Anr. Vs. Rajesh s/o Nandlal Biyani,**[2] and **Puri**

1 (1999) 8 Supreme Court Cases 436
2 2012(1) Mh.L.J. 394

International (P) Ltd Vs. National Building construction Co. Ltd.[3] , that a bank guarantee is a separate contract in itself. The invocation has to be strictly in accordance with the requirements of the bank guarantee and in case of conditional or contingent bank guarantees, unless contingencies or conditions are met, a party cannot invoke a bank guarantee. Mr. Arsiwala submitted that in the present case, from the reading of operative portion of the bank guarantees as quoted above, it is clear that these are conditional bank guarantees in as much as defendant no.2 has to first make a claim in which they will have to list out what are the claims they have and the amount of the claims and then send letter of invocation in which also, the claims have to be listed and the amount of claim to be indicated. Mr. Arsiwala submitted that since none of these requirements have been met, the invocation is bad-in-law.

10 In any event, Mr. Arsiwala also submitted that if the bank guarantee is invoked and later the court come to a conclusion that invocation was wrongful, irretrievable injury and prejudice will be caused to plaintiff in as much as, if defendant no.2 is ordered to be liquidated as two petitions are pending in NCLT, Mumbai, plaintiff will not be able to recover those amounts from defendant no.2. Mr. Arsiwala also submitted that bank guarantees have been extended due to fraud committed by defendant no.2 on plaintiff.

3 1997(41) DRJ

11 I do not agree with any of the submissions of Mr. Arsiwala. The law on this is very well settled. The law relating to invocation of such bank guarantees can be found in paragraphs 12, 14 and 16 of the judgment of the Apex Court in **U. P. State Sugar Corporation Vs. Sumac International Ltd.**[4] The said paragraphs read as under:

> *12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the suppler has performed his contractual obligation or not, nor with the question whether the supplier is in*

4 (1997) 1 Supreme Court Cases 568

default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an agregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984 [1] AER 351 at 352): "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged". This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and relisation of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under *the guarantee.*

16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also refereed to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12th of April, 1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees."

12 Indisputably, a document has to be read as a whole and not in bits and pieces. A recital in bank guarantee indicates only the reason why this bank guarantee was required to be given. The reason for which this performance guarantee was given as stated in the recital is because plaintiff had agreed to repair or replace free of cost equipments, machineries, its parts and components IT Software, technology products etc., if they were having difficulties on account of workmanship or defective material and/or inferior manufacturing as mentioned in warranty and guarantee clause of the purchase order for a period upto 31st December 2018 and for a further

period of three months as stated in the purchase order and also for compensation for any loss incurred by defendant no.2 or claim made by defendant no.2 consequent to delay in executing the supply order by plaintiff, as mentioned in the purchase order. The bank guarantee, in my view, is not a conditional bank guarantee because (a) in the recital it states that it shall be a continuing guarantee during its tenure and shall remain valid and irrevocable for all claims of company (defendant no.2) and liabilities of the supplier (plaintiff) arising upto and until 31st March 2019 and (b) the banks obligations under the bank guarantees shall not be otherwise effected or suspended by reason of dispute having been raised by plaintiff whether or not pending before any Arbitrator officer, Tribunal or Court or any denial of liability by plaintiff or any other order of communication whatsoever by plaintiff stopping or preventing or purporting to stop or preventing any payment by the bank to defendant no.2 in terms of the bank guarantees.

13 The operative part of the bank guarantees also states that the bank is liable to pay bank guarantee amount or any part thereof under the bank guarantee only and only if the bank receives a written claim or demand on or before 31st March 2019 (this date has been extended to 30th June 2019) and what kind of claim has to be received, is also mentioned and it only says "……….. our liability pursuant to this guarantee is

conditional upon the receipt of a valid and duly executed written claim, in original, ……………..”. Therefore, what was required to be sent is only a valid, which means within validity of the bank guarantee, duly executed means signed by the authorized signatory, written claim. The claim is received by defendant no.1 from defendant no.2, in writing. As I read the bank guarantees, what was required is a simple letter from defendant no.2 to the bank (defendant no.1) calling upon the bank (defendant no.1) to pay amounts under the bank guarantees duly signed by an authorized signatory before 31st March 2019, calling upon the bank (defendant no.1) to pay the amount mentioned in the said letter. Invocation letter dated 2nd April 2019 is signed by authorized signatory, the amount is specifically mentioned, it is in writing and it is within the validity of the bank guarantees. Therefore, the invocation accordingly is valid.

14 Was there any fraud ? The answer is no. Though there are averments in plaint of fraud, the bank guarantees were not issued because defendant no.2 perpetrated a fraud on plaintiff. The bank guarantees were issued because the contract, viz., purchase order, requires plaintiff to issue such bank guarantees. The fact, even assuming what plaintiff is stated is correct that plaintiff was induced to extend the bank guarantees by giving a hope of settlement, still that cannot be a fraud in the invocation of the bank guarantee. Disputes between the parties relating to claims under the

contract cannot make invocation of bank guarantees fraudulent. In the absence of any fraud, defendant no.2 is entitled to realise the bank guarantees.

15 On irretrievable prejudice or injury, submissions made by Mr. Arsiwala that there are two petitions pending in NCLT Mumbai against defendant no.2 and if, defendant no.2 is ordered to be liquidated, plaintiff will not be able to retrieve the amounts that defendant no.2 received by invoking the bank guarantees, in my view is not correct. Any company may have any number of litigations for various reasons including for winding up or liquidation pending. Mr. Cama states that there is only one petition which is pending, in which, 30% of the claim amount has been paid and defendant no.2 is in the process of filing consent terms before the NCLT Mumbai. An example of irretrievable injury's case can be found in paragraph 14 of *U. P. State Sugar Corporation (supra)* as quoted above. That is not the situation here. The fact that there is a petition pending in NCLT against defendant no.2, cannot be a reason to term that invocation of bank guarantees will amount to irretrievable injury.

16 In the circumstances, ad-interim granted on 4th April 2019 and extended on 8th April 2019, 15th April 2019, 23rd April 2019 and 25th April 2019, stands recalled. Notice of motion accordingly stands disposed.

17 In view of the above order, Mr. Arsiwala states that plaint will have to be amended and states that proper chamber summons for leave to amend will be filed. Plaintiff may take such steps as advised.

(K.R. SHRIRAM, J.)