

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present:-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

I.A No. G.A No. 1 of 2021

in

A.P. 229 OF 2021

M/S. KSE ELECTRICALS PVT. LTD.

vs

**THE PROJECT DIRECTOR, BANGLADESH RURAL ELECTRIFICATION
BOARD AND ANR.**

For the Petitioner : Mr. Sabyasachi Chowdhury, Sr. Adv.
Mr. Rajarshi Dutta, Adv.
Mr. V. V. V. Sastry, Adv.
Mr. Tridib Bose, Adv.
Mr. Debjyoti Saha, Adv.

For the Respondent no. 2 : Ms. Suchismita Chatterjee, Adv.
Mr. Malay Kumar Seal, Adv.

Reserved for Judgment on : 08.10.2021.

Delivered on : 23.11.2021

Moushumi Bhattacharya, J.

1. The applicant, Yes Bank, seeks vacating of an order of injunction restraining Yes Bank from honouring a counter-guarantee to a performance guarantee issued in favour of the petitioner/ supplier KSE Electricals. The injunction was passed in the present Arbitration Petition filed under Section 9 of The Arbitration and Conciliation Act, 1996, by KSE Electricals, for a restraint on the respondent no.1 purchaser, the Project Director, Bangladesh Rural Electrification Board, from realising a sum of USD 331,500 under the Counter Guarantee issued by Yes Bank through its correspondent bank being Eastern Bank, Dhaka. Yes Bank is the second respondent in the Arbitration Petition.

2. The order of injunction dated 7th May, 2021, was passed ex parte on KSE's application, restraining the respondent no.1 from invoking the bank guarantee dated 1st April 2019 in terms of a letter of invocation received by KSE on 6th May 2021. The order was communicated to Yes Bank and to Eastern Bank. The order of 7th May, 2021 was modified by an order of 15th June, 2021 at the instance of Yes Bank recording the fact of the counter guarantee.

3. The present application of Yes Bank is pursuant to a communication of Eastern Bank, Dhaka to the effect that payment of USD 331,500 was made by Eastern Bank to the Bangladesh Rural Electrification Board (respondent no.1) on 29th June, 2021 in response to the said respondent invoking the bank

guarantee. Yes Bank feels that it is therefore obligated to honour its counter guarantee and replenish Eastern Bank to the extent of the said amount. The present application has been filed for clearing the impediment of the orders of injunction and enabling Yes Bank to pay USD 331,500 to Eastern Bank.

A brief outline of the facts :

4. KSE (petitioner in the section 9 application) entered into a contract with Bangladesh Rural Electrification Board (respondent no1) for supply of line hardware for a project undertaken by the respondent no1. KSE submitted a performance guarantee in terms of the contract issued by Eastern Bank covering 10% of the contract value. Yes Bank gave a counter guarantee to Eastern Bank for and on behalf of KSE to secure Eastern Bank, Dhaka. KSE filed the application under section 9 of the 1996 Act upon receipt of a letter dated 7th April, 2021 from the respondent no.1 calling upon the petitioner KSE to deposit USD 10,385 and BDT 20,06,754 with a threat of invocation of the performance guarantee. The petitioner paid the aforesaid amount to the respondent no.1. The case of KSE was that the respondent no.1 wrongfully withheld 10% of the contract value as retention amount and refused to release the performance guarantee. The urgency shown is also on account of a notice from Eastern Bank informing KSE of a request made by the respondent no.1 to Eastern Bank to encash the bank guarantee.

Contentions of the applicant - Yes Bank – who seeks vacating of the order of injunction :

5. According to Ms. Suchishmita Ghosh, learned counsel appearing for Yes Bank, the counter guarantee issued by the applicant is irrevocable in nature and is a separate contract and that the injunction should be vacated since Eastern Bank has already made payment to the respondent no.1 upon invocation of the bank guarantee. It is further submitted that the bank guarantee is governed by the ICC Uniform Rules for Demand Guarantees (URDG-758), 2010 which provides that the governing law shall be the law of the location of the guarantor's branch or office that issued the guarantee, which is Bangladesh in the present case. Moreover, the contract between KSE and the respondent no.1 shows that the parties had chosen the substantive, arbitration and procedural laws to be that of Bangladesh.

Contentions of the petitioner – KSE – in whose favour the order of injunction was passed :

6. Mr Sabyasachi Chowdhury, learned Senior Counsel and Mr. Rajarshi Dutta, learned counsel for KSE submit that the proceeding is an international commercial arbitration under the 1996 Act and that this Court has the jurisdiction to entertain the Section 9 application of KSE since no forum selection clause has been provided in the contract. According to counsel, the governing law of the bank guarantee or the counter guarantee would have no manner of application as the present dispute arises out of the main contract.

7. The arguments advanced on behalf of the parties are on the two-fold premise of whether this Court has jurisdiction to entertain the matter and if yes, whether the petitioner has established a case for sustaining the order of injunction on Yes Bank from making payment to its correspondent bank in Dhaka, Bangladesh. The issues are being dealt with in the sequence as stated above.

Jurisdiction of this Court to entertain the petition filed by KSE under section 9 of the 1996 Act :

8. The objection to this court entertaining the present application on the lack of territorial jurisdiction may be answered on the basis of the clauses contained in the General Conditions of Contract (GCC) which governs the contract entered into between the petitioner and the respondent No. 1 on 13th April, 2015. Under Clause 9.1 of the GCC- “Governing Law” –contract shall be governed by and interpreted in accordance with the laws of the Purchaser’s Country, unless otherwise specified in the Special Conditions of Contract (SCC). Clause 10.2- “Settlement of Disputes” -provides for arbitration where the parties have failed to resolve their disputes by mutual consultation and provides that the arbitration proceedings shall be conducted in accordance with the rules and procedure specified in the SCC. The SCC provides that the rules of procedure for arbitration proceedings pursuant to Clause 10.2 of the GCC shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules, 2010. Clause 9.1 of the GCC which provides that the

contract shall be governed by the laws of the Purchaser's Country, which is Bangladesh in this case, would not stand in the way of this court assuming jurisdiction of the matter since the governing law of the contract only decides the substantive provisions of law which would govern the arbitration between the parties. This would be evident from the decision in *Bharat Aluminium Co. vs Kaiser Aluminium Technical Services Inc.*: (2012) 9 SCC 552 where the Supreme Court made a distinction between the place/seat of the arbitration and the location of the subject matter of the suit.

9. The question with regard to territorial jurisdiction may also be answered with reference to Section 2(1) (e)(ii) of The Arbitration and Conciliation Act, 1996, which defines "Court" to mean in the case of International Commercial Arbitration, the High Court in exercise of its Ordinary Original Civil Jurisdiction, having jurisdiction to decide the questions affirming the subject-matter of the arbitration if the same had been the subject-matter of a suit. Second, it is also undisputed that the transaction is an International Commercial Arbitration as defined under Section 2(f) of the Act since the dispute arises out of a commercial contractual relationship involving a corporation incorporated in Bangladesh. Third, the fact that this court would have jurisdiction to receive, try and entertain the dispute had it been filed by way of a suit would be evident from the averments in the petition. The pleadings in the petition indicate that sufficient cause of action has arisen within the jurisdiction of this court including the commencement of the transaction entered into between the parties, the working out of the

commercial relations between the parties, the dispute and differences between them as evident from the correspondence exchanged and the culmination thereof in the form of the letters of demand issued by the respondent no.1 to the petitioner and the letter of invocation dated 5th May, 2021 to the respondent no.2 and to the petitioner. Although speculative, had the petitioner instituted a suit for the same relief against the respondents, there would have been sufficient ground to grant leave to the petitioner under Clause 12 of the Letters Patent, 1865 to proceed with the same.

10. Section 2(4) of the Act is an interesting follow-up to Section 2(1)(e)(ii) in the matter of a court assuming jurisdiction in entertaining matters under Part-I of the Act. Under Section 2(4), Part-I of the 1996 Act shall apply to every arbitration under any other enactment for the time being in force unless the provisions of Part-I are inconsistent with the other enactment or the rules framed thereunder. This provision therefore lends weight to the submissions made on behalf of the petitioner with regard to eclipsing the Arbitration Rules mentioned in the SCC and also in the matter of territorial jurisdiction.

11. Section 2(2) of the Act provides that subject to an agreement to the contrary, the provisions of Sections 9, 27, 37(3)(1)(b) shall also apply to International Commercial Arbitrations despite the place of arbitration being outside India and an arbitral award made or to be made in such place is enforceable and recognised under Part-II of the Act. In the present case, the Contract between the parties does not provide for a seat or a place outside

India. Hence Part-I of the Act would be applicable in the given facts. Since the Contract or the GCC does not exclude the applicability of Part-I or Section 9 of the Act, this court would have jurisdiction to try and decide the present application filed under Section 9 of the Act. The wide and unfettered powers of a court under Section 9 has been reiterated in countless decisions of the Supreme Court and the High Courts. Section 2(2) as amended by the amendment of 2016, closes the loops for a party to object to interim measures under Section 9 unless the parties have specifically and unequivocally agreed to exclude the operation of Part-I of the Act.

12. The order dated 7th May 2021 passed by a learned Single Judge of this Court on the petition filed by KSE took into consideration all the material facts including the jurisdictional issue which is now urged on behalf of Yes Bank.

Whether the petitioner has established a case for sustaining the order of injunction on Yes Bank from making payment to the correspondent Bank in Dhaka, Bangladesh? :

13. The ground pleaded in the application of Yes Bank for vacating the injunction is that the bank guarantee issued by Eastern Bank, Dhaka, has been invoked by respondent no.1 and honoured by Eastern Bank. The other case run by Yes Bank is that the counter guarantee is binding in view of the undertaking given by Yes Bank and irrevocable in nature and that the bank guarantee is a separate contract governed by the ICC URDG-758.

14. The order reflects the admitted factual position, namely, that the petitioner KSE had supplied the entire material under the contract on 24th October 2017 and had even received 90% of the payment in terms of the General Conditions of Contract (GCC) and that 10% of the contract value has been retained by the respondent no.1. KSE had also subsequently made payment of USD 38,785 for alleged short supply and packing deviation. There is no further sum which the respondent no.1 is entitled to realise from KSE. On the basis of the aforesaid, the learned Judge was of the view that the respondent no.1 had not made any claim for damages in the intervening 3 years and is also fully secured having retained 10% of the contract value and should therefore be restrained from invoking the bank guarantee.

15. The applicant Yes Bank has not brought any new or subsequent facts to the dispute which would persuade this Court to vacate the order of injunction. Even on 15th June 2021, when the order was modified at the instance of Yes Bank, the only change was the recording of the counter-guarantee with the relevant number. No prejudice was shown or pleaded before the Court by the applicant on that date. Yes Bank also did not file any affidavit in opposition to the Arbitration Petition of KSE to oppose the case on merits. The only ground urged now is the lack of jurisdiction of the Court which has been dealt with in the preceding paragraphs.

16. The fact that the counter guarantee is in the nature of a binding commitment which calls for replenishing the correspondent bank i.e, Eastern

Bank of the sum paid by the said Bank to the respondent no.1 must first turn on whether the invocation was rightly done and was in terms of the bank guarantee. The order of injunction dated 7th May 2021 on the respondent no.1 and Yes Bank from invoking the bank guarantee and from disbursing any amount under the bank guarantee, respectively, was communicated to the relevant parties including the Eastern Bank, Dhaka on 10th May 2021. The injunction, as modified by the order of 15th June 2021, was also communicated to Eastern Bank on 24th June 2021. Despite being made aware of the orders, Eastern Bank made payment of USD 331,500 to the respondent no.1 on 29th June 2021. Having subverted the orders passed by the Court, Eastern Bank must bear the fallout of its action and cannot now use the same as a pretext for fighting a proxy war across the border through Yes Bank. The repeated disregard of the orders passed by the Court assumes significance in light of the respondent no.1 failing to make an appearance in the ongoing proceedings. The respondent no.1 has remained unrepresented in the Section 9 application in spite of having suffered the order of injunction and has also deliberately flouted the said order by proceeding to invoke the bank guarantee. The combination of facts raises a reasonable and legitimate presumption of the respondent no.1 and the correspondent Bank, both located in Bangladesh, acting with a deliberate intent to frustrate the orders passed by the Court.

17. The payment made by Eastern Bank to the respondent no.1 is therefore to be seen against the conduct of the respondents, jointly and severally; as acts in tandem to circumvent the orders of Court and reduce them to naught.

Case Law :

18. The decisions cited on behalf of the respondent no. 2, Yes Bank proceed on the basis that an unconditional bank guarantee results in an absolute obligation on the part of a bank to pay and is not dependent upon any dispute between the parties at whose instance the bank guarantee is given and the beneficiary to whom the payment is to be made. This is the uniform view taken by all courts subject to the exceptions which would call for interference by a court. *Hindustan Steelworks Construction Ltd. vs Tarapore & Co.:* (1996) 5 SCC 34; *U.P. State Sugar Corporation vs. Sumac International Ltd.:* (1997) 1 SCC 568; *Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd.:* (1997) 6 SCC 450; *Rahee GPT (JV) vs The Union of India* (2017) SCC Online CAL 17244; all these decisions mention that there are exceptions to this rule namely, fraud which would vitiate the very foundation of a bank guarantee; irretrievable injustice and special equities. Since it has already been found that the petitioner in this case has satisfied at least two of the conditions for which the invocation should be restrained, none of the cases help the second respondent in respect of the particular facts of the present case.

19. The second group of decisions relate to the jurisdiction aspect. *Hardy Oil & Gas Ltd. vs Hindustan Oil Exploration Company Ltd.:* 2005 SCC Online Guj 250; *Reliance Industries Ltd. vs Union of India:* (2014) 7 SCC 603; *Enercon (India) Limited vs Enercon GMBH:* (2014) 5 SCC 1; *Mankastu Impex Private Ltd. vs Airvisual Limited:* (2020) 5 SCC 399; *Commercial Division Bowlopedia*

Restaurants India Ltd. vs Devyani International Ltd.: 2021 SCC Online Cal 103, each of the decisions relied on provide for a seat, place or venue where the arbitration shall be conducted which form the substantive basis of the decision. *Hardy Oil* designated London as the place of Arbitration, in *Reliance Industries* and *Enercon* the venue was London, the place of arbitration in *Mankastu Impex* was Hong Kong and in *Bowlopedia Restaurants* the seat of arbitration was New Delhi. In *Bowlopedia Restaurants*, the court recognized the importance of the parties choosing the seat of arbitration particularly in an International Commercial Arbitration which would have a bearing on the law applicable to the arbitration proceedings. Since the Arbitration Agreement in the present case does not indicate a place or a seat, the decisions cited cannot be of any assistance to the respondent No. 2.

20. Since reliance has been placed on the *ICC Uniform Rules for Demand Guarantees (URDG-758)*, it would be worthwhile to mention the second part of Article 35 which provides for jurisdiction in relation to the disputes between the counter-guarantor and the guarantor relating to the counter-guarantee to be settled exclusively by the competent court of the country of the location of the counter-guarantors' branch or office that issued the counter-guarantee. In the present case, since the counter-guarantee was issued by the applicant Yes Bank from its office within the jurisdiction of this court, the issue of territorial jurisdiction is answered in favour of the petitioner KSE.

21. In view of the reasons as stated above, G.A. 1 of 2021 being the application of Yes Bank, is dismissed. The orders dated 7th May 2021 and 15th June 2021 are accordingly confirmed and A.P. 229 of 2021 is allowed and disposed of on that basis

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)