

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

Present:-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. 231 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 : Mr. K. Thaker, Adv.
Mr. Varun Kedia, Adv.

Reserved for Judgment on : 08.10.2021.

Delivered on : 23.11.2021.

Moushumi Bhattacharya, J.

1. The issue which falls for consideration in the present case is the ground on which invocation of a bank guarantee can be restrained.

2. By an order dated 10th May, 2021 a learned Single Judge restrained the respondent No. 2 from making any payment under a bank guarantee invoked by the respondent No. 1. The said order was modified on 21st May, 2021 by another Learned Judge confirming the interim order of injunction and further restraining the respondent No. 1 from encashing the bank guarantee. The letter of invocation was stayed and the petitioner was given the liberty of producing a copy of the order before the respondent No. 2 in their seats at Kolkata and Dhaka. The petitioner and the respondent No. 2 have filed their respective affidavits thereafter. The respondent No. 1 has however not contested in the proceedings and has not challenged or responded to the orders of injunction by way of affidavit or otherwise. These orders were passed in the present application filed by the petitioner under Section 9 of The Arbitration and Conciliation Act, 1996.

3. A brief background of the facts is necessary for a better understanding of what brought the petitioner to this court by way of the present Arbitration Petition.

4. The factual matrix in the present matter is almost identical to A.P No. 230 of 2021. The parties are the same and so is the underlying contract as well as the terms of the bank guarantee. The small factual differences relate to the transaction. Counsel appearing for the petitioner and the respondent No. 2 have also proceeded on the substantial similarities of the issues involved in A.P. 230 of 2021, A.P. 231 of 2021 and A.P. 232 of 2021.

5. This judgment and those delivered in A.P. 230 of 2021 and A.P. 232 of 2021 should be read in the aforestated context.

A brief factual background:

6. The petitioner was awarded a contract for supply of conductor and related accessories to the respondent No. 1 pursuant to a global tender floated by the latter. The contract dated 25th October, 2016 was a Carriage and Insurance Paid (CIP) contract for a price of USD 3,030,218.40. The petitioner was required to furnish a performance security for an amount of USD 303,022 for a period of 24 months under the relevant clause of the General Conditions of Contract (GCC). The contract was governed by the GCC and the Special Conditions of Contract (SCC) which also provided for the mode of payment to be made by the respondent No. 1 to the petitioner. The petitioner submitted the performance security in the form of a bank guarantee dated 20th October, 2016. The petitioner, being a constituent of Citibank NA, Kolkata applied for the bank guarantee to be issued in favour of the respondent No. 1 whereupon Citibank NA, Kolkata issued a stand-by letter of credit in favour of the Citibank NA, Bangladesh at Dhaka. Citibank, NA Dhaka issued a performance security in the form of a bank guarantee based on the stand-by letter of credit.

7. The petitioner supplied the entire material under the contract by 30th November, 2018 and the respondent No. 1 prepared Receiving Reports containing the details of the goods dispatched upon receipt of the goods. The

warranty in respect of the goods shipped and supplied by the petitioner to the respondent No. 1 was to remain valid for 12 months after delivery of the goods and acceptance of the same at the final destination under Clause 28.3 of the GCC. The warranty expired on 30 November 2019.

8. On 1st September, 2020, the respondent No. 1 alleged short-supply of goods and demanded a sum of USD 82,180.16 and BDT 23,81,804.48 from the petitioner. This was followed by a letter dated 4th February 2021 where the respondent No. 1 deviated from its earlier stand by alleging that a miniscule portion of the materials supplied by the petitioner were found to be faulty. The petitioner deputed its men for the repair of such materials and also issued a letter on 16th March, 2021 recording the same. The respondent no. 1 did not make any further demands or allegations as regards the material after that. The respondent No. 1 issued a letter of invocation dated 5th May, 2021 and requested the Citibank NA, Dhaka to encash the bank guarantee. The petitioner had renewed the bank guarantee and kept it alive on account of 10% of the contract price having been retained by the respondent No. 1 under the relevant clause of the GCC.

Contentions of the Respondent No. 2 Citibank NA:

9. The primary contention of Mr. K. Thakker, learned counsel appearing for Citibank NA, is that this court lacks territorial jurisdiction to entertain the present application.

10. According to counsel, the contract was executed at and is governed by the laws of Bangladesh; the contract was to be performed at Bangladesh and the bank guarantee issued by Citibank NA, Dhaka is governed by the laws of Bangladesh. It is also contended that there is an absence of substantive jurisdiction since the Citibank NA, Kolkata and Citibank NA, Dhaka are separate entities governed by different banking regulations. Counsel submit that neither of the two parties are parties to the arbitration agreement between the petitioner and the respondent No. 1 which forms the basis of the application and hence no relief can be sought against them. The other contention is that the bank guarantee is an independent contract between the bank and the beneficiary, invocation whereof is to be tested on the terms of the bank guarantee. It is also submitted that the petitioner has not been able to make out an established case of fraud or irrevocable injury or special equities which would vitiate the entire underlying transaction.

Response of the petitioner to the above contentions:

11. According to Mr. Sabyasachi Chowdhury, and Mr. Rajarshi Dutta, learned Counsel, Citibank NA, Kolkata and Citibank NA Bangladesh are one and the same entity in respect of the bank guarantee and the respondent No. 2 has been impleaded as a bank carrying on business from Kolkata, India with an overseas branch at Bangladesh, Dhaka. Counsel relies on Clause 10.2 of the GCC which contains the arbitration agreement under which the arbitration proceeding is to be conducted in accordance with the UNCITRAL Arbitration

Rules, 2010. Counsel relies on Section 2 and the relevant clauses thereunder of the 1996 Act which would bestow the jurisdiction on this court to entertain the application. On the merits of the dispute, it is contended that the petitioner has already received 90% of the contract price and the respondent No. 1 is withholding 10% as retention money and that the respondent No. 1 has no other claims against the petitioner. Counsel points to the conduct of Citibank NA, Kolkata espousing the cause of respondent no. 1 as well as Citibank NA, Bangladesh.

12. Counsel submits that there are special equities in the present matter to warrant an invocation of the bank guarantee.

13. The arguments advanced by learned counsel appearing for the petitioner and the respondent No. 2 (the respondent No. 1 is not represented in this proceeding) would make it clear that the challenge to the orders of injunction passed by the court is mounted on the premise of the absence of territorial and substantive jurisdiction. The decision accordingly proceeds on the aforesaid basis.

Lack of territorial jurisdiction:

14. 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 25th

October, 2016. Under Clause 9.1 of the GCC- “Governing Law” – the 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; Reference : *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.

15. 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 copied 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.

16. 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.

17. 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. The issue of maintainability of the arbitration petition was also considered by the learned Single Judge on 18th May, 2021 and the order of injunction was confirmed and extended to the respondent no.1 despite such objection.

Whether the respondent no.2 Citibank NA should be treated as consisting of two different entities?

18. It would be evident from the transaction that the petitioner, the respondent no.1 and Citibank NA, Kolkata (respondent no.2) treated Citibank NA Bangladesh at Dhaka as an overseas office of Citibank NA, Kolkata. Citibank NA carries on business from different offices in India including the one at Kolkata. Since the petitioner was required to submit a Performance Security in the form of a bank guarantee for a sum of USD 303,022, the petitioner applied before the respondent no.2 at its office at Kolkata for a bank guarantee to comply with the aforesaid stipulation. The application for bank guarantee was made by the petitioner at Citibank NA in Kolkata whereupon Citibank from its office at Kolkata issued a Standby Letter of Credit in favour of Citibank at Dhaka. On the basis of such Standby Letter of Credit, Citibank NA, Dhaka issued a Performance Security in the form of a bank guarantee, as the overseas office of Citibank NA, Kolkata.

19. The above facts would therefore indicate that Citibank NA, from its overseas office at Dhaka issued the Performance Security in the form of a bank guarantee on 20th October, 2016 for USD 303,022. No fact has therefore been pleaded or proved to show that Citibank NA should be seen as two separate and disparate entities namely the Kolkata and the Dhaka branches.

Conduct of respondent no.2 Citibank NA:-

20. By a letter dated 7th June, 2021 the petitioner was informed that Citibank N.A. Bangladesh had enquired from the respondent no. 1 about its stand regarding the orders of injunction. The petitioner was also informed that the respondent no. 1 had reiterated its demand for payment and intends to flout the orders passed by the court. Subsequent correspondence from Citibank NA, Kolkata to the petitioner shows that the petitioner is being pressurized in respect of the invocation of the performance guarantee. The conduct of the respondent no. 2 makes it evident that the respondent no.2 has taken up the cause on behalf of the first respondent although the latter has not contested the present proceeding. It is evident that the respondent no. 2 intends to frustrate the orders of Court with the active collusion of the respondent no. 1. Citibank NA, Kolkata is an independent entity from its Bangladesh-i counterpart and is not connected to the dispute between the petitioner and the respondent no. 1.

21. The cases shown on the subject of bank guarantees should be seen in this context. In *Hindustan Construction Co. Ltd. vs State of Bihar*; (1999) 8 SCC 436, the Supreme Court stressed on the invocation being in terms of the bank guarantee and the requirement of special equities. The Supreme Court was of the opinion that special equities existed in favour of the appellants since the defendants did not have sufficient funds to complete the work. The other set of decisions namely *Girish Mulchand Mehta vs Mahesh S. Mehta*; 2010 (1) Bom CR 31 (Division Bench of the Bombay High Court), *Bluecoast Infrastructure*

Development Pvt.Ltd. vs Blue Coast Hotels Ltd (Single Bench of the Delhi High Court), *Geodesic Techniques vs L&T* (Single Bench of the Madras High Court) and *Valentine Maritime Ltd vs Kreuz Subsea Pte. Limited* (Division Bench of the Bombay High Court) are for the proposition that while the jurisdiction of the Court under section 9 of the Act can only be invoked by a party to the arbitration agreement, Section 9 does not limit such jurisdiction to pass interim measures only against a party to an arbitration agreement. In *Valentine Maritime*, the Bombay High Court specifically pointed out that orders are regularly passed restraining banks from releasing payment under bank guarantees though the bank may not be a party to the arbitration agreement.

22. In *Arch Hi-Rise (P) Ltd. vs. Yatin Bhimani: (2006) 4 CHN 204*, a Division Bench of this court was concerned with the issue of whether an interim order can be passed against a third party who is not a party to the arbitration agreement. The decision can be factually distinguished from the present case since there is no indication from the facts that the appellant third party was inextricably connected to the dispute or was required to be impleaded as a necessary and proper party thereby. The Supreme Court in *U.P. Co-operative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.: (1988) 1 SCC 174*, was of the clear view that there was no fraud or irretrievable injustice involved in the facts of that case. The court reiterated that for restraining the operation of a bank guarantee, there should be good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties. In *Hindustan Paper Corporation Ltd. vs. Keneilhouse Angami: (1990) 1 Cal LT 200*,

a Division Bench of this Court, relying on an earlier decision of this court in *Centax (India) Ltd. Vs Vinmar Impex Inc. Ltd*; AIR 1986 Cal 356 reiterated the importance of the terms and conditions of a bank guarantee or a Letter of Credit for its enforceability. The unreported decision of a Division Bench of this court in *Bridge & Roof Co. (I) Ltd. vs. SKP Buildcon Pvt. Ltd. in APO No. 495 of 2017* was only concerned with the hesitation of a court to stand in the way of an unconditional bank guarantee being invoked and the apparent lack of reasons in the order of the first court. The unreported decision in *Deific Abode LLP vs Union of India in WPA 11123 of 2020* is on the principle of binding precedents and has presumably been cited to lessen the impact of the effect of the decisions of the Bombay and Madras High Courts. *South East Asia Shipping Co. Ltd. vs Nav Bharat Enterprises Pvt. Ltd*; (1996) 3 SCC 443 was concerned with the question whether any part of the cause of action had a reason for the Delhi High Court to entertain the suit and the Supreme Court was of the view that cause of action must include some act done by the defendant. The decision was not concerned with an arbitration agreement or the considerations which would normally arise in respect of an application for interim measures under Section 9 of the Act. Although several decisions have been cited on behalf of the parties, none of the decisions persuade the court to disagree with the contentions made on behalf of the petitioner on the merits of the dispute.

23. With regard to the objection taken on behalf of the respondent no. 2 that a non-party to an arbitration agreement cannot be impleaded in the present

proceeding, this court is of the view that Section 9 read with Section 2(1)(a) of the 1996 Act provides for a right to apply for interim measures only to a “*party*” to an arbitration agreement. There is no embargo however in the provision against implementing a non-party to an arbitration proceeding where the presence of such non-party is necessary to give effect to the order that may be passed in the application against a party to the arbitration agreement. The petition contains an averment that the respondent no. 2 has been impleaded for proper and effective adjudication of the issues involved in the present proceeding. This pleading finds factual support from the petitioner applying for a bank guarantee to be issued in favour of the respondent no. 1 which was impleaded by Citibank NA, Kolkata issuing a stand-by letter of credit in favour of Citibank NA, Bangladesh at Dhaka who in turn issued a performance security in the form of a bank guarantee. Hence in order to seek an order of injunction, and in the event such injunction is granted, to be effective, respondent no. 2 has been made a party to the proceedings and relief sought against it. The issue of maintainability is therefore answered in favor of the petitioner.

Substantive jurisdiction and merits of the dispute:

24. The admitted fact in the present case is that the petitioner completed supply of the goods to the respondent no. 1 by 30th November 2018 and there was no contemporaneous demand or objection from the respondent no. 1 in relation to the supplies made within the period of warranty which was till 30th

November 2019 from the date of delivery to the date of acceptance at the final destination indicated by the respondent no. 1. Under Clause 28.3 of the GCC, the warranty was to remain valid for 12 months after the goods or any portion thereof have been delivered to and accepted at the final destination indicated in the SCC or for 18 months after the date of shipment from the port or place of loading in the country or origin, whichever period concludes earlier. The respondent No. 1 invoked the bank guarantee in terms of the letter dated 5th May, 2021 three years after the completion of the supply of goods and more than two years after the expiry of the warranty. Notably the complaint made by the respondent No. 1 on 1st September 2020 on account of faulty materials was considered by the petitioner who deputed its men for the repair of such materials. The petitioner has already received 90% of the payment for supply of the entire materials under the contract to the respondent no. 1 in accordance with clause 16.1 of the GCC which provides for the terms of payment under the contract. The respondent no. 1 has however retained 10% of the contract price and withheld the same.

25. The letter of invocation dated 5th May, 2021 relates to the 10% retention money under the contract as stated in the said letter. The letter of invocation further makes it clear that the 10% retention money remains unsettled. The demands on account of short supply, and other complaints raised in the letter of invocation dated 5th May, 2021 were already settled by the petitioner without prejudice to the petitioner's rights and contentions. It is therefore clear, that the invocation was not concerned with the performance obligations of the

petitioner and was only confined to the 10% retention money. The performance security issued by the Citibank NA, Dhaka in the form of bank guarantee and the stand-by letter of credit issued by Citibank NA, Kolkata relate to the obligation of the petitioner to supply the materials to the respondent no. 1. This would appear from the application made by the petitioner to Citibank NA, Kolkata with the respondent no. 1 indicated as the beneficiary.

26. The performance security also makes it clear that the undertaking on the part of the respondent no. 2 to pay the beneficiary (respondent no. 1) was confined to the beneficiary's demand and statement in relation to breach of the obligations of the petitioner under the contract. Since the petitioner performed its obligations under the contract by executing the entire supplies by November, 2018 and received 90% of the contract price for the same, there can be no further basis for any outstanding claim by the respondent no. 1 against the petitioner under the contract. No claim on account of liquidated damages has been made by the respondent. The facts hence must be construed in favor of the petitioner in confirming the order restraining the invocation of the bank guarantee.

The Law:

27. In contemporary business, trade and commercial transactions, both domestic and international, significant complexities are involved; for instance spatial distance between counterparties who engage in such commercial transactions. As such, it is often very difficult and challenging to approximately assess the creditworthiness of the counterparty or the business partner.

Hence, over a period of time, commercial instruments have emerged for securing contractual payments. A Bank Guarantee is such an instrument that has evolved for securing payments with respect to commercial transactions. Under Section 126 of The Indian Contract Act, 1872, a 'Contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. In the case of a Bank Guarantee, a bank, who is the guarantor, undertakes or guarantees to pay the beneficiary an amount of money as specified in the guarantee if the original contract's debtor fails to adhere to his contractual obligations.

28. Courts are generally slow to interfere with the transaction between a bank and the beneficiary which is seen as being independent of the underlying contract between the lender and the supplier unless conditions call for such interference. The three conditions, as accepted in several decisions, are fraud of an egregious nature; special equities or the invocation not being in terms of the bank guarantee. It is sufficient if a party seeking a restraint on the invocation is able to establish any one of the three requirements. The test of special equity or irrevocable injustice is a matter of an assessment by a court on the particular facts presented to it for stay on a notice of invocation. The injury or injustice must be irrevocable, irremediable and irreversible: Refer: *State Bank of India vs Sun Pharmaceuticals Industries Ltd*: AIR 2019 CAL 385. The party seeking an order for restraint must show that the invocation and consequent payment by the bank to the intended beneficiary would set the party back-

irreversibly- in monetary terms which may not be recovered in the foreseeable future.

29. In the present case, the petitioner has satisfied two of the three ingredients, namely special equity and the invocation not being in terms of the guarantee. The clauses in the contract and more particularly the GCC clearly demonstrate that the bank guarantee was furnished towards performance security. There can be no issue with regard to performance since the petitioner has already received 90% of the contract price as discussed above. The invocation letter also demonstrates that there cannot be any performance issue with regard to the supplies effected by the petitioner. The invocation letter does not contain any allegation of a breach of performance obligations by the petitioner. The special equity also stands satisfied by reason of the petitioner facing an immediate and irreversible financial loss if the payment is made by Citibank NA, Dhaka to the respondent No. 1 in terms of the Letter of Invocation. The submission made on behalf of the respondent no. 2 that Citibank NA, Dhaka may already have made payment to the respondent no. 1 thereby rendering the present application infructuous, is not a factor which would deter this court to permit the order of injunction to be subverted by errant parties. If Citibank NA, Dhaka has the temerity to frustrate the orders of injunction passed against the respondents, it must also bear the risk and consequence of such action.

30. The interim orders passed by learned judges of this court on 10th May, 2021 and modified on 21st May, 2021 were on a particular set of facts before filing of affidavits. This court may have considered altering or further modifying the orders of injunction at the instance of the respondent No. 2 had compelling facts subsequently been disclosed on affidavits. Apart from territorial jurisdiction, no other grounds have been pleaded or shown which would warrant varying the orders when all relevant facts were taken into consideration by the learned Judges. It is also significant that the respondent no. 1 has not appeared or contested these proceedings and respondent no. 2 has taken to “shadow boxing” on behalf of the absentee wrongdoer.

31. In view of the above reasons and finding that the contentions made on behalf of the petitioner are of substance, the order dated 10th May, 2021 as modified by the order dated 21st May, 2021 is confirmed and made absolute. A.P. No. 231 of 2021 is disposed of in accordance with the above.

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

(MOUSHUMI BHATTACHARYA, J.)