

THE HON'BLE Dr. JUSTICE G. RADHA RANI**WRIT PETITION No. 18108 OF 2021****ORDER:**

This Writ Petition is filed by the petitioner to issue a Writ of Mandamus directing the respondent No.1 to frame a proper policy for the issue, maintenance and proper cancellation or withdrawal of unconditional bank guarantees by the banking sector in India and to issue appropriate directions in that regard.

2. Heard Sri V. Harish Kumar, the learned counsel for the petitioner, the learned Standing Counsel for respondent No.1 and Sri S. Ravi, the learned Senior Counsel for the respondent Nos.2 and 3.

3. The learned counsel for the petitioner submitted that the petitioner was engaged in the business of supplying raw material for manufacturing and was providing manufacturing services and other services in the infrastructure sector to its customers, the respondent No.4 namely M/s. Kompass Infrastructures Pvt. Ltd., was involved in the business of construction, civil engineering and related works, the respondent No.4 approached the petitioner for supply of raw materials and allied services. Due to the business relationship between the respondent No.4 and the petitioner, multiple purchase orders were issued for supply of Cement OPC 53 bulkers; 8mm, 10mm, 12mm, 16mm, 32mm bars and

chequered plates to the respondent No.4. In furtherance of the business relationship between the parties and to ensure supply of material, the respondent No.2 had issued the following bank guarantees in favour of the petitioner:

1. Bank Guarantee bearing No. 12821IGL0000621 dated 16.02.2021 for an amount of Rs.1,00,00,000/- (Rupees One Crore Only).
2. Bank Guarantee bearing No. 12821IGL0001521 dated 26.02.2021 for an amount of Rs.1,00,00,000/- (Rupees One Crore Only).
3. Bank Guarantee bearing No. 12821IGL0002121 dated 08.04.2021 for an amount of Rs.30,00,000/- (Rupees Thirty Lakhs Only).

4. The petitioner was the sole beneficiary for the above three (03) bank guarantees. The above three (03) bank guarantees had been issued by way of SFMS transactions. The petitioner in good faith and in furtherance of its obligations under the afore-mentioned purchase orders supplied the raw material and provided allied services to the respondent No.4. The petitioner company raised several invoices on respondent No.4 against the raw materials and services provided. The respondent No.4 failed to fulfill its obligations under the purchase orders and failed to make payments to the petitioner company in terms of invoices raised. The petitioner company had sent multiple reminders to respondent No.4 but the same was of no avail. Aggrieved by the failure of the respondent No.4 to make the payments, the petitioner company approached the

respondent No.3 bank vide e-mail dated 05.07.2021 seeking invocation of all the three bank guarantees.

5. To the surprise of the management of the petitioner company, the respondent No.2 vide its reply letter dated 09.07.2021 informed the petitioner company that the bank guarantee bearing Nos.12821IGL0000621 and 12821IGL0001521 had been returned at the behest of the petitioner company on 17.04.2021. Further, the respondent No.2 in its reply conveniently left out any reference to the third bank guarantee No.12821IGL0002121 for the reasons best known to them. The petitioner company issued a letter dated 13.07.2021 to the respondent No.2 bank expressing its shock and surprise and requested the respondent No.2 to share the communication supposedly received by the respondent No.2 from the petitioner company on 17.04.2021 relating to the two bank guarantees claimed to have been returned by respondent No.2. The petitioner company in the said letter once again requested the respondent No.2, to honour the third bank guarantee and to release the amount of Rs.30,00,000/- to the petitioner company at the earliest. The respondent No.2 failed to do so till date. The petitioner company had sent reminders dated 05.07.2021 and 14.07.2021 to respondent No.2 to share the information requested vide its letter dated 13.07.2021, to enable it to verify the veracity and authenticity of the communication claimed to have been received by respondent No.2 on

17.04.2021, but the respondent No.2 failed to respond to the petitioner company's request.

6. The learned counsel for the petitioner submitted that two bank guarantees had been fraudulently returned by respondent No.4 to respondent No.2 by taking support of a forged letter alleged to have been issued by the petitioner company. In fact, no such letter had been issued. The bank guarantees had been issued by way of SFMS transactions and thus they could only be revoked or returned through SFMS transaction only and not by way of letters or any other written communication. Even assuming, without admitting, that the aforementioned two bank guarantees were indeed returned, the petitioner company requested respondent No.2 to honor the third bank guarantee issued by it and to release the amount of Rs.30,00,000/- to the petitioner company, but the respondent No.2 was refusing to do so. The petitioner company was the sole beneficiary of the third bank guarantee and despite the fact that the said bank guarantee was still live and active and not disputed from any quarter, the respondent No.2 was not honouring the bank guarantee and was putting the petitioner to great hardship by its inordinate delay and prayed to release the bank guarantee bearing No.12821IGL0002121 dated 08.04.2021 for a value of Rs.30,00,000/- issued by respondent No.2 on behalf of the respondent No.4 in favour of the petitioner company and prayed to allow the writ petition.

7. The learned Senior Counsel for the respondent Nos.2 and 3 submitted that M/s. Kompas Infrastructure Private Limited represented by its directors Sri Kattamidi Santosh Reddy, Somavarapu Surender Reddy, Gopal Kondakal and Srinivas Nekkanti (Borrowers) were enjoying the credit facilities from erstwhile Andhra Bank, Madhapur Branch which was amalgamated with Union Bank of India w.e.f. 01.04.2020. At the request of the said borrower, the respondent bank sanctioned credit facilities vide sanction letter dated 05.09.2020 subject to the terms and conditions mentioned in the said letter. In the said sanction letter the credit facilities, the bank guarantee limit of Rs.15,00,00,000/- and secured overdraft limit of Rs.3,26,00,000/- in total Rs. 18,26,00,000/- was extended. At the request of the borrower, the respondent bank issued a Bank Guarantee bearing No.12821IGL0000621 dated 16.02.2021 for an amount of Rs.1,00,00,000/-, Bank Guarantee No. 12821IGL0001521 dated 26.02.2021 for an amount of Rs.1,00,00,000/- for a period of one year and Bank Guarantee No. 12821IGL0002121 for Rs.30,00,000/- dated 08.04.2021 for a period of one year in favour of the petitioner. The petitioner vide letter dated 17.04.2021 released / returned the first two bank guarantees to the respondent bank and on the basis of the said letter and receipt of the original bank guarantees, the respondent bank reversed/closed the first two bank guarantees on 17.04.2021. To the shock and surprise of the respondent bank, it had received an e-mail dated 05.07.2021

from the petitioner invoking the bank guarantees and demanded for payment of the entire bank guarantee amount.

8. The learned Senior Counsel further submitted that respondent bank also issued some other bank guarantees on behalf of the borrower and while the matter stood thus, one M/s. OFB Tech. Pvt. Ltd., vide e-mail dated 25.06.2021 requested the respondent to confirm the issuance of bank guarantee No. 12821IGL0003821 dated 24.08.2021 for Rs. 2,00,00,000/- with expiry date 23.06.2022. The respondent bank sent reply stating that the said bank guarantee number did not exist and it was not issued by their branch. On 01.07.2021, the branch had again received e-mail from M/s. OFB Tech. Pvt. Ltd., to confirm the bank guarantee referred above and the respondent reiterated that the said bank guarantee was not issued by their branch. The said M/s. OFB Tech. Pvt. Ltd. filed a writ petition before the High Court at New Delhi.

9. In the light of the above development, suspecting foul play, the respondent bank lodged a complaint dated 08.07.2021 with the Station House Officer, Madhapur, Hyderabad against the said borrower and its directors. The Station House Officer, Madhapur registered FIR No.791 of 2021 under Sections 406, 420, 465, 467, 468 and 471 read with Section 120 of IPC and took up investigation. During the course of investigation, the said case was transferred to CCS, Economic Offences Wing, Cyberabad and the investigation was

pending and the respondent bank also lodged supplementary complaint dated 07.09.2021 and the same was acknowledged by CCS-EOW on 08.09.2021. The respondent bank suspected that there might be a nexus in between the borrower and the beneficiary to de-fraud the bank. The bank requested CCS-EOW to investigate into the matter whether the contracts which were awarded by the said beneficiaries to the borrower were genuine business transactions and whether the said beneficiaries had parted money to the borrower by way of mobilization advance, etc., and whether the borrower had received the material from the beneficiaries, who were supposed to supply the material to the borrowers. The respondent bank was also having an apprehension whether the above said beneficiaries were holding the genuine bank guarantees issued by the bank or the fabricated bank guarantees and therefore requested CCS-EOW to call for the original bank guarantees from the beneficiaries and refer the matter to forensic lab to decide the genuineness of the said bank guarantees. The respondents came to know that CCS-EOW issued notices to the concerned parties under Section 91/160 Cr.P.C. including the beneficiaries referred in the complaint and a notice dated 10.08.2021 was issued to the petitioner also to appear before the investigating officer along with the original bank guarantees which were listed in the said notice, relevant documents and witnesses to examine and finalize the case at the earliest. The learned Senior Counsel further submitted that the respondent bank strongly suspected that the alleged contract

between the petitioner and the borrower was non-existing and no real work had been allotted by the petitioner to the borrower. The respondent bank had been induced by the petitioner and the borrower by fraud and misrepresentation to issue the bank guarantee at the first instance to a non-existing contract and the very bank guarantee issued by the respondent bank was a voidable agreement under Section 17, 18 and 19 of the Indian Contract Act and need not be honoured by the bank.

10. He further contended that the above transaction required deep investigation by the police / investigating agency to find the roots of the fraud including verifying the genuineness of the work/contract, materials allotted / supplied by the petitioner to the borrower and whether the borrower and the beneficiary had obtained the bank guarantees with the sole purpose of defaulting when the bank guarantees were invoked and whether the borrower and beneficiary/petitioner had forged or fabricated and returned the bank guarantees and were trying to obtain unlawful gain by invoking the returned bank guarantees and the genuineness of the bank guarantees with the petitioner. As the matter was under investigation by the competent authorities, any order passed in favour of the petitioner during the investigation would have far reaching consequences and the same would also cause irretrievable injustice to the respondent bank and prayed to dismiss the petition.

11. As per the Master Circular issued by the Reserve Bank of India on 09.11.2021 pertaining to payment of invoked guarantees, it was stated that:

“Where guarantees are invoked, payment should be made to the beneficiaries without delay and demur. An appropriate procedure for ensuring such immediate honoring of guarantees should be laid down so that there is no delay on the pretext that legal advice of approval of higher authorities is being obtained”.

“Delays on the part of banks in honoring the guarantees when invoked tend to erode the value of the bank guarantees, the sanctity of the scheme of guarantees and image of banks. It also provides an opportunity to parties to take recourse to courts and obtain injunction orders. In the case of guarantees in favour of government departments, this not only delays the revenue collection efforts but also gives an erroneous impression that banks are actively in collusion with the parties, which tarnishes the image of the banking system”.

“There should be an effective system to ensure that the persons on whose behalf the guarantees are issued will be in a position to perform their obligations in the case of performance guarantees and honor their commitments out of their own resources, as and when needed, in the case of financial guarantees”.

12. The learned counsel for the petitioner also relied upon several judgments of the Hon’ble Apex Court. In this regard, he relied upon the judgment of the Hon’ble Apex Court in **Standard Chartered Bank v. Heavy Engineering Corporation Limited and another**¹, wherein it was held that:

“As per the precedents laid down by this Court, the question of law is no more res integra and is well settled that the bank guarantee is an independent contract between the bank and beneficiary and bank is always obliged to honor its guarantee as long as it is an unconditional and irrevocable one. At the same time, the dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence and only two exceptions to the rule have been carved out. The first is when there is a fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The second exception to the general rule of non-intervention is such when there is an

¹ 2020 (13) SCC 574

“irretrievable injury” or “irretrievable injustice” that would occur to the bank”.

13. He also relied upon the judgment of the Hon’ble Apex Court in **Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Limited**², wherein a three-judge bench of the Hon’ble Apex Court held that:

“It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor”.

14. He also relied upon the judgment of the Hon’ble Apex Court in **Hindustan Corporation Limited v. State of Bihar**³, wherein a two-judge bench of the Hon’ble Apex Court held that:

“What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance

² 1996 5 SCC 450

³ (1999) 8 SCC 436

with the terms of the Bank Guarantee; or else, the invocation itself would be bad.”

15. He also relied upon the judgment of the Hon’ble Apex Court in **SBI v. Mula Sahakari Sakhar Karkhana Limited**⁴, wherein a two-judge bench of the Hon’ble Apex Court held that:

“It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction”.

“If a construction, as was suggested by Mr. Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law.”

16. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honor its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. The exceptions to this rule is when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

⁴ (2006) 6 SCC 293

17. He also relied upon the judgment of the Hon'ble **Apex Court in Bank of India v. Nangia Constructions (I) Pvt. Ltd., and others**⁵ wherein it was held that:

“It is unfortunate that a nationalized bank is finding excuses for refusing to make the payment on totally untenable and frivolous grounds. The Division Bench was fully justified in making observations regarding the conduct of the nationalized bank. The entire trust, faith and confidence of people depend on the conduct and credibility of the nationalized bank. In the present day world, the national and international commercial transactions largely depend on bank guarantees. In case the banks are permitted to dishonour their commitments by adopting such subterfuges, the entire commercial and business transactions will come to a grinding halt. This principle has been reiterated in large number of cases by this court. We do not deem it appropriate to burden this judgment by reiterating all those judgments”.

18. He also relied upon the judgment of the Hon'ble Apex Court in **Uttar Pradesh Federation Ltd., v. Singh Consultants and Engineering (P) Ltd.**⁶, wherein, while explaining the salient features of letter of credit, it was held that:

“The letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. It was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for the seller to rely upon the credit of an unknown customer. It was also found difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came into existence to bridge this gap. In such transactions, the seller (beneficiary) receives payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The Courts, however, carved out an exception to this rule of absolute independence. The

⁵ AIR 2008 SC 2906

⁶ (1998) 1 SCC 174

Courts held that if there has been "fraud in the transaction" the bank could dishonour beneficiary's demand for payment. The Courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else."

19. The learned Senior Counsel for the respondents also relied upon the same judgment on the ground that "fraud unravels all", wherein it was held that:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of the any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment".

"To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases, of which the leading or 'landmark' case is Szejn v. Henry Schroder Banking Corp., [1941] 3 1 NYS 2d 631. This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal in Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All E.R. 979 (1978) QB 159 though this was actually a case about a performance bond under which a bank assumes obligation to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit. The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application to the maxim ex trupi cause non oritur actio or if plain English is to be preferred, 'fraud unravels all', the courts will not allow their process to be used by a dishonest person to carry out a fraud."

20. The learned senior counsel for the respondents also relied upon the judgment of the High Court of Calcutta in **AIMS India Private Ltd., and others v. Indian Bank and others**⁷ on the ground that a writ is not

⁷ 1997 (4) SCC 237

maintainable in the matters of Bank Guarantees as there is no public law element involved in it and it arises out a contract. It was held therein that:

“The claim of the petitioner is essentially a money claim. The bank guarantee is a contract between the bankers and the beneficiary. Although the same had been furnished at the instance of the petitioner, it cannot be said that the agreement was a tripartite one”.

“This bench was also recently in A.C. Roy and Ors. v. Union of India and Ors. reported in MANU/WB/0035/1995: AIR1995Cal246 relying upon a large number of Supreme Court decisions, decisions of this court as also Patna High Court, enter alia, held that a dispute under a bank guarantee is a private dispute and the same does not involve any public element and, thus no writ is maintainable”.

“It was held- “Right to enforce bank guarantee arises out of a contract qua-contract”.

“There is no public law element involved in it”.

“Thus a writ will not issue in the matter of enforcement of bank guarantee unless there exists a public law element.”

21. The learned Senior Counsel further submitted that, the Respondent Bank was a Government of India Undertaking and was honouring various bank guarantees issued from time to time, if the said bank guarantees were in order. In the present case, as fraud was suspected and the matter was under investigation by the CCS-EOW, Cyberabad and unless the investigation was completed, the respondent bank would not be in a position to take a decision on the subject matter of the invocation of the bank guarantee, as the same would cause irretrievable injustice to the Respondent Bank and prayed to dismiss the writ petition.

22. As seen from the facts of this case, the Bank issued bank guarantees bearing No.12821IGL0000621 dated 16.02.2021 for a period of one year for an amount of Rs. 1,00,00,000/- and Bank Guarantee No.12821IGL0001521 dated 26.02.2021 for an amount of Rs.1,00,00,000/- for a period of one year and Bank Guarantee No.12821IGL0002121 for an amount of Rs.30,00,000/- dated 08.04.2021 for a period of one year in favour of the petitioner. The petitioner vide letter dated 17.04.2021 released / returned the first two bank guarantees to the respondent bank and on the basis of the said letter and receipt of the two bank guarantees, the respondent bank reversed/ closed the said two bank guarantees on 17.04.2021; to its shock and surprise, the respondent bank received an e-mail dated 05.07.2021 from the petitioner invoking the bank guarantees demanding for payment of the bank guarantees amount. The contention of the respondent bank was that the bank filed a complaint, the original bank guarantees had been returned by the beneficiary and they had already reversed / closed the bank guarantees in their books and there was no existing liability in their books with regard to the said two bank guarantees of Rs.1,00,00,000/- each, there was no proof that the bank guarantees held by the petitioner were original. It was possible that the petitioner could have been defrauded by the borrower who might have handed over the fabricated bank guarantees to the petitioner and returned the original bank guarantees to the bank along with a covering letter of the petitioner. As the original covering

letter (Written Instructions) had been received by the bank from the beneficiary, the bank had closed the bank guarantees. The bank was also suspecting that the alleged contracts between the borrower and the beneficiaries (petitioner) were non-existent and no real work had been allotted by the petitioner to the borrower. The bank had been induced by the petitioner and the borrower by fraud and misrepresentation to issue the bank guarantees at the first instance to a non-existing contract and it could be an alternate financial arrangement. The contention of the bank was that the very bank guarantees issued by the respondent bank were voidable agreements under Section 17, 18 and 19 of the Indian Contract Act and in view of the same, the bank had issued a supplementary complaint dated 07.09.2021 requesting the authorities to investigate into the said matter and to determine who was holding the original bank guarantee and whether or not the contracts entered in between the petitioner and the borrower were genuine or not and had any material been supplied for the alleged advancement / mobilization of bank guarantees executed by the parties.

23. As the matter is under investigation and as it was alleged that the bank received a letter dated 17.04.2021 from the petitioner and on the basis of the said letter and on receipt of the alleged original bank guarantee, the bank released / returned the said bank guarantee on 17.04.2021 and the petitioner

vide e-mail dated 05.07.2021 invoked the bank guarantees for payment of entire bank guarantee amount, it is necessary for the investigating agency to determine as to which was the original bank guarantee. When there were disputed question of facts which shall be investigated and as the respondent was suspecting that the contract between the borrower and the beneficiaries was non-existent and lodged a supplementary complaint dated 07.09.2021 and the petitioner in contra was suspecting that he was cheated by M/s. Kompass Infrastructure Private Ltd., in collusion with the bank officials, no direction can be given to the bank authorities to honour the third guarantee bearing No.12821IGL0002121 and to release the amount of Rs.30,00,000/- in favour of the petitioner.

24. As the circular instructions issued by the Reserve Bank of India are already covering the relevant prayer and fraud is an exception to the general rule, it is considered fit to dismiss the writ petition.

25. In the result, the writ petition is dismissed. No order as to costs. Miscellaneous Petitions pending, if any, shall stand closed.

Dr. G. RADHA RANI, J

Date: 26.10.2022

NSK