

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 21965 of 2022

With

CAN 1 of 2022

The Ramco Cements Limited & Anr.

vs.

The Board of Trustees of Syama Prasad Mookerjee Port,
Kolkata & Ors.

For the petitioners	:	Mr. S. N. Mookherjee, Sr. Adv. Mr. Deepan Kr. Sarkar, Adv. Mr. Saptarshi Banerjee, Adv. Mr. Soumitra Datta, Adv. Ms. Ananya Sinha, Adv.
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For the Port/respondents	:	Mr. Kishore Datta, Sr. Adv. Mr. Ashok Kumar Jena, Adv.
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Last Heard on	:	6.02.2023.
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Delivered on	:	22.02.2023.
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Moushumi Bhattacharya, J.

1. An Interim order was passed on 21.9.2022 restraining the Shyama Prasad Mukherjee Port from taking any steps pursuant to the impugned Demand Notice dated 9.9.2022. This order was extended on 30.11.2022 in the presence of learned counsel representing the Port Authorities.
2. The impugned Demand Notice was issued by the respondents for a sum of Rs. 20.28 crores on account of the Minimum Guarantee Tonnage (MGT) short fall in quantity which the petitioners were allegedly due to pay. The Port threatened to encash the bank guarantee furnished by the petitioners in case of failure of the petitioners to make payment within 7 days from receipt of the impugned notice.
3. After hearing the parties on 30.11.2022, the interim order was directed to continue till 13.1.2023. The interim order was further extended thereafter and the parties have filed their respective notes of arguments. The matter was reserved for judgment on 6.2.2023.
4. The petitioner no. 1 claims to be a Company which manufactures cement at a plant in Kolaghat, West Bengal. A Contract of Affreightment was entered into between the petitioner no. 1 and Sea Port Logistics Private Limited whereby cement clinker was to be carried in vessels capable of carrying the cargo to Haldia Dock operated by the respondent authorities for a period of 5 years from 1.7.2017 – 30.6.2022. The petitioner no. 1 was granted priority in berthing of vessels carrying cement clinkers at Haldia Dock by the respondents by a letter dated 4.4.2018. This berthing facility was for a period of 1 year against the commitment of minimum handling of

1 million metric tons (MMT) per annum of coastal cargo backed by a Bank Guarantee equivalent to applicable on-board, wharfage and cleaning charges for 1 MMT of cargo. The port charges against the shortfall was to be recovered from the petitioner in the event the petitioner was unable to fulfil the MGT commitments of 1 MMT. There was a shortfall in the MGT volume after expiry of the period of one year which the petitioners say was beyond the control of the petitioner no. 1. The petitioners requested the respondents to grant priority berthing facilities to the petitioner no. 1 for three years on the condition that the shortfall quantity from the first tenure would be performed by the petitioner no. 1 during the three year period and a total quantity of 34,13,792 MT of cement clinker would be handled by the petitioners at the Haldia Dock for the said period.

5. The second tenure of priority berthing facilities was granted by the respondents by a letter dated 20.6.2019 for a period of three years. The relevant terms for the grant included the petitioner no. 1 mobilising 34,13,792 MT Cargo over a period of three years and that the performance of the petitioner no. 1 would be assessed at the end of the three year period. The petitioner no. 1 was also required to furnish a bank guarantee equivalent to the wharfage, on-board and cleaning charges which was to be valid till 31.12.2022. The petitioner furnished a bank guarantee dated 2.7.2019 for a sum of Rs. 27,79,00,000/- which was issued by the respondent no. 7, ICICI Bank on behalf of the petitioner no. 1. The said bank guarantee contained terms and conditions which included that the bank guarantee would remain in force till 31.12.2022 and could not be invoked simpliciter but only upon satisfaction of certain conditions

precedent. The bank guarantee was amended pursuant to the request of the respondents following which the bank guarantee dated 30.7.2019 containing the additional terms was issued by the respondent no. 7 to the respondent no. 1 Port.

6. The Covid 19 pandemic disrupted all businesses on a global scale from 2020 onwards. The petitioner no. 1 hence requested the respondents by a letter dated 1.9.2020 to extend the performance period up to 30.6.2024 for mobilising the MGT. A Memorandum of Understanding dated 17.2.2021 was executed between the parties followed by a letter dated 24.2.2021 issued by the respondents whereby the 2nd tenure was extended from 19.6.2022 to 30.6.2024 for fulfilling the MGT obligations of the petitioner no. 1.

7. The petitioners faced several difficulties after the onset of the pandemic which included scrapping of the vessel provided by Sea Port Logistics. The petitioner no. 1 was forced to charter another vessel for carrying cement clinker. There was also a decline in cement demand and a rise in freight rates pursuant to lockdowns caused by the Pandemic. The petitioner no. 1 made several representations to the respondents indicating the unforeseen conditions and requested the respondents for time till September, 2022 to resume coastal movements. The petitioner no. 1 availed of the priority berthing for the last time in February, 2021. The respondent no. 4 thereafter issued a letter to the petitioner no. 1 on 8.12.2021 stating that the respondents had extended the period for fulfilment of MGT up to

30.6.2024 and a further request for extending the timeline could not be acceded to.

8. Due to the continuing economic downturn and the unsustainable freight rates, the petitioner no. 1 was constrained to withdraw from the MGT and by a letter dated 31.12.2021 requested the respondents to calculate the amount to be paid to the respondents. The respondent no. 4 being the General Manager (Traffic), Port however did not accept the withdrawal and asked the petitioner no. 1 to resume the cargo movements within September, 2022 on a continuous basis failing which the bank guarantee would be encashed proportionately up to 31.12.2021. The petitioner no. 1 was thereafter constrained to again request the respondents to extend the time frame for cargo movements due to the war in Ukraine. The respondent no. 5 being the Senior Deputy Manager, Port called upon the petitioner to pay an amount of Rs. 20,28,89,796/- by a letter dated 22.7.2022. The petitioner no. 1 made certain representations thereafter.

9. The exchange of letters continued till issue of the impugned Demand Notice dated 9.9.2022 by which the petitioner was requested to pay Rs. 20,28,89,796/- within 7 days from receipt of the letter failing which the respondents would encash the said amount from the bank guarantee dated 2.7.2019.

10. From the submissions made by learned counsel for the parties and the documents shown to the Court, it is evident that the threat of invocation of the bank guarantee is not in accordance with the terms of the bank guarantee. The respondents had not accepted the petitioner's withdrawal

from the priority berthing scheme and had instead issued a letter on 21.1.2022 granting the petitioner no. 1 time till September, 2022 to resume cargo movements on a continuous basis. Hence, the shortfall calculation should have been made only after expiry of 5 years that is till 30.6.2024 as expressed in the letter of 20.6.2019 and the MOU. According to the terms of the bank guarantee, the petitioner no. 1 would be liable for Port charges against the shortfall quantity in the event the petitioner failed to pay the same and the bank guarantee would be encashed on a proportionate basis. The MGT obligation which was initially for a period of 3 years from 20.6.2019 to 30.6.2022 had been extended by the respondents for an additional 2 years from 19.6.2022 to 30.6.2024. Despite granting such extension the respondents however called upon the petitioner to pay an amount of Rs. 20,28,89,796/- which was calculated on a pro rata basis taking a time frame of 3 years instead of 5 years.

11. Therefore, the time to meet the shortfall stood extended by the documents exchanged between the parties including the MOU dated 17.2.2021.

12. The special equities in the case arise out of at least two factors. First, the respondents have not suffered any loss on account of the petitioner no. 1 not availing of berthing services provided by the respondents to the petitioner no. 1. The priority granted to the petitioner no. 1 with regard berthing of vessel carrying cement clinkers at Haldia Dock did not mean that the respondent authorities would be under an obligation to give a dock for the vessels of the petitioner no. 1. It only meant that if there was more

than 1 vessel arriving at the Dock at the same point of time, the petitioner no. 1's vessel would get priority in calling and berthing. In the event more than 1 MGT provider was present at the Dock, the senior most vessel according to the MGT provider would get priority. Hence, by making a demand of Rs. 20,28,89,796/- without suffering any loss would amount to the respondent authorities making a windfall gain and unjust enrichment. The privilege of priority berthing was in any event availed of by the petitioner no. 1 for the last time in February, 2021.

13. Second, the bank guarantee furnished by the petitioner was valid up to 31.12.2022 which meant that the performance of the petitioner no. 1 was to be assessed at the end of the period 30.6.2022 as per the agreement covered by the letter dated 20.6.2019. The terms of the bank guarantee were never amended after the second tenure was extended for 2 years from 19.6.2022 to 30.6.2022.

14. Third, the petitioner no. 1 was also not required to make any payment to the respondent authorities before 30.6.2024 after the MOU of 17.2.2021 and the letter dated 24.2.2021 issued by the respondent authorities by which the second tenure was extended from 19.6.2022 to 30.6.2022 for fulfilment of the MGT obligation. The petitioners however, to show their *bona fides*, voluntarily requested to the respondent to calculate a fair penalty being Rs. 4,25,21,912/- calculated till February, 2021 till which date the petitioner no. 1 had availed of the priority berthing facilities.

15. The respondents seeking to encash the bank guarantee is hence arbitrary as the respondents gave a go-by to the 5-year contract period and

instead calculated penalty on a pro rata basis by relying on the 3-year contract which was superseded on and from 24.2.2021. The respondent authorities also sought to make a windfall gain despite not suffering any loss.

16. This Court hence finds that the petitioners have made out a case against invocation of bank guarantee. It may also be mentioned that the respondents could not give a satisfactory answer as to why the MGT requirement was calculated on 3-year basis when the petitioner no. 1 was given a 5-year extension. There is also no satisfactory answer as to the reason for the respondents invoking the bank guarantee when the petitioners had unequivocally expressed their desire to withdraw from the arrangement on and from 31.12.2021.

17. In *Cargill International SA v. Bangladesh Sugar & Food Industries Corporation*; (1996) 4 WLR 563, the Court of Appeal held that the defendant would make a substantial windfall where it had not suffered any loss which would run counter to the general proposition that compensation for breach of contract depends on proof of loss. The Supreme Court in *Kailash Nath Associates v. Delhi Development Authority*; (2015) 4 SCC 136 stressed on the expression “whether or not actual damage or loss is proved to have been caused thereby” in section 74 of The Indian Contract Act, 1872 and held that the expression meant that where it is possible to prove actual damage or loss such proof is not dispensed with, only where the damage or loss is difficult or impossible to prove that the liquidated amount named in the contract can be awarded if it is a genuine pre-estimate of damage or loss. In

Omega Shelters Pvt. Ltd. v. United Construction Co. Pvt. Ltd.; (2009) 4 CHN 22 a Division Bench of this Court, after considering the relevant facts, held that the invocation was not in terms with the bank guarantee and thus the bank was not obliged to honour the same or make payments on the basis of the demands which were not in conformity with the terms of the invocation. The Division Bench also noted that the appellant had not asserted that the amount claimed is due by way of loss or damage caused to the appellant or that the concerned party would suffer by reason of any breach by the contractor.

18. The conduct of the respondents would also be apparent from the documents in CAN 1 of 2022 which has been filed by the petitioners for setting aside two letters issued by the respondents on 11.11.2022 and 16.11.2022. These letters were issued to the petitioners with the express threat that the respondents would lodge a claim and encash the bank guarantee if the respondents did not receive the extension of the validity of the bank guarantee. Both these letters were issued after the Court passed the interim order on 21.9.2022 which was communicated to the respondents soon thereafter.

19. Submissions made on behalf of the respondent authorities and the notes/documents placed before the Court does not disclose any reason to depart from the view taken on 21.9.2022 and 30.11.2022 when the first interim order was granted and extended respectively.

20. For the above reasons, this Court is inclined to confirm the interim orders and quash the impugned Notice of Demand dated 22.7.2022 and

9.9.2022 together with the subsequent letters issued by the respondents on 11.11.2022 and 16.11.2022. This judgment shall not preclude the respondent authorities from demanding a justifiable amount of penalty from the petitioner no. 1. It is made clear that the petitioner no. 1 shall be liable for penalty on account of the shortfall which is to be calculated from and on the basis of the letters and MOU between the parties including the last understanding arrived at between the parties. The petitioners shall pay the calculated amount to the respondent authorities within the framework of the correspondence or within any agreed timeframes and on such terms thereof.

21 WPA 21965 of 2022 along with CAN 1 of 2022 are disposed of in terms of the above.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)