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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 08.08.2023

Pronounced on : 08.11.2023

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CS(COMM) 276/2016**IN THE MATTER OF:****GAIL INDIA LTD**

..... Plaintiff

Through: Mr.Siddhant Garg and Ms.Samya Chatterjee, Advocates with Mr.Mrinal Singh, Manager (GAIL) & Mr. N.L. Ganapathi, AOR.

versus

UCO BANK & ANR

..... Defendants

Through: Mr.D.S. Chauhan, Ms.Ruchi Singh, Mr.Shikher Badial, Mr.Prashant Kumar and Mr.Santosh Kumar Baitha, Advocates for defendant No.1.

CORAM:**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI****JUDGMENT****IA No.20734/2022**

1. Applicant/Defendant No.1 (hereafter, '*the Bank*') seeks rejection of the plaint under the provisions of Order VII Rule 11(a) CPC.
2. The captioned suit for recovery is instituted in the context of a Letter of Award dated 29.04.2011 awarded by the plaintiff to defendant no.2 for laying and construction works. In terms of its contractual obligations under the contract, defendant no.2 furnished a Contract Performance Bank



Guarantee dated 11.04.2011 for a sum of Rs.2,09,53,500/- (hereafter, '*the PBG*') to the plaintiff. The PBG was issued by the applicant-Bank.

3. In the suit, plaintiff has claimed that in spite of receipt of the invocation letter dated 15.04.2013, the Bank failed to honour its demand for encashment in time and eventually, the term of PBG expired on 25.04.2013. The plaintiff has prayed for recovery of Rs.2,09,53,500/- against the Bank, being the sum guaranteed in the PBG, along with interest. It is claimed that the PBG being unconditional, the Bank was liable to honour plaintiff's request for invocation on mere demand without any demur.

4. The Bank filed its written statement and controverted the averments in the plaint including receipt of letter dated 15.04.2013. It further filed the present application relying on the order dated 21.11.2019 whereby this Court noted that without justifying the entitlement to the damages in the underlying contract between the plaintiff and defendant No.2, the plaintiff could not sustain the claim made in the suit. In the said order, the Court after observing so, granted the parties time to take instructions. The order was not challenged by the plaintiff. On the strength of the above order, wherein doubts were raised by the court on the maintainability of the suit, it is contended by the Bank that the plaint does not disclose a cause of action and hence is liable to be rejected.

5. Before proceeding further, the Court deems it profitable to recapitulate the legal position on the scope of Order VII Rule 11 CPC. Indisputably, the Court can exercise its powers under the said provision at any stage of the suit, provided the conditions enumerated therein are fulfilled. While considering such an application, only the averments in the plaint are to be seen, and the averments in the written statement as well as



the contentions of the defendant are wholly immaterial. If, on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless, in the sense that it does not disclose any right to sue, the Court should exercise its power under the said provision. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 CPC have to be strictly adhered to. The averments of the plaint have to be read on a demurrer. If clever drafting of the plaint has created the illusion of a cause of action, the court must nip it in the bud at the earliest so that bogus litigation will end at the earlier stage. The Supreme Court in D. Ramachandran v. R.V. Janakiraman and Ors.¹ outlined the scope of the test to be applied in the following manner:-

“xxx

8. ...It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.

xxx”

6. On the facts pleaded in the plaint, this Court is of the considered opinion that the maintainability of the suit is not established, for the reasons discussed below.

¹ AIR 1999 SC 1128



7. In the suit the plaintiff has sought decree for recovery of Rs.2,09,53,500/- only against the Bank and no claim is made against the contracting party- defendant No.2, at whose behest the PBG was furnished by the Bank in favour of the plaintiff. Even during the course of submissions, plaintiff's counsel reiterated that neither in the present plaint nor by way of any separate proceedings, any claim is made against defendant No.2.

8. From a bare perusal of the plaint, it is discernible that it is not very explicitly pleaded in the plaint that the claim is on account of damages suffered by the plaintiff due to deliberate omission on part of the Bank to encash the PBG pursuant to invocation letter dated 15.04.2013. However, giving some latitude to the plaintiff, it can be inferred that the suit is in the nature of damages/losses suffered by the plaintiff due to breach of the contract of PBG by the Bank.

9. Although the captioned application is inspired by the order dated 21.11.2019 passed by this court doubting the maintainability of the suit without the plaintiff first establishing its right to claim damages against defendant no.2 under the underlying contract between them, however according to this Court, without going into the aforesaid issue, there is a more glaring impediment in the continuity of the suit which is located in the invocation letter dated 15.04.2013.

Even, learned counsel for the Bank, during the course of submissions contended that the plaintiff's invocation of PBG was not a valid invocation.

10. Under the terms of PBG, the Bank undertook and agreed to pay the sum under the PBG in the event of default by defendant No.2 in performance of any of the terms and conditions of its contract with the



plaintiff. The PBG is extracted below:-

**“BANK GUARANTEE FOR CONTRACT PERFORMANCE
SECURITY”**

To:
M/s GAIL (India) Limited

Dear Sir,

M/s. HARISONS INDUSTRIES, Hastings Chambers, 7C, Kiron Shankar Roy Road, Kolkata-700001 have been awarded the work of Laying & Construction Works for KCJP-GVK-VEMAGIRI Pipeline Project" against Tender No. KGVPL/GAIL/HRC/2588 [E-tender No. 8000002482] for GAIL (India) Limited, 16, Bhikaiji Cama Place, R.K. Puram, NEW DELHI.

The Contracts conditions provide that the CONTRACTOR shall pay a sum of Rs.2,09,53,500.00 (Rupees Two Crore Nine Lakhs Fifty Three Thousand Five Hundred only) as full Contract Performance Guarantee in the form therein mentioned. The form of payment of Contract Performance Guarantee includes guarantee executed by Nationalized Bank, undertaking full responsibility to indemnify GAIL (India) Limited, in case of default.

The said M/s. HARISONS INDUSTRIES has approached us and at their request and in consideration of the premises we, UCO Bank, Mid Corporate Branch, having our office at #8-2-418, Krishnama House, Road No.4&7, Banjara Hills, Hyderabad - 500034 and having our Head Office at Kolkata have agreed to give such guarantee as hereinafter mentioned.

1. We UCO BANK, Mid Corporate Branch, Banjara Hills, Hyderabad - 500034, hereby undertake and agree with you that if default shall be made by M/s. HARISONS INDUSTRIES in performing any of the terms and conditions of the tender or in



payment of any money payable to GAIL (India) Limited we shall on demand pay without any recourse to the contractor to you in such manner as you may direct the said amount of Rs. 2,09,53,500.00 (Rupees Two Crore Nine Lakhs Fifty Three Thousand Five Hundred only) or such portion thereof not exceeding the said sum as you may from time to time require.

2. You will have the full liberty without reference to us and without affecting this guarantee, postpone for any time or from time to time the exercise of any of the powers and rights conferred on you under the contract with the said M/s. HARISONS INDUSTRIES and to enforce or to forbear from endorsing any powers or rights or by reason of time being given to the said M/s. HARISONS INDUSTRIES which under law relating to the sureties would but for provision have the effect of releasing us.

3. Your right to recover the said sum of Rs. Rs.2,09,53,500.00 (Rupees Two Crore Nine Lakhs Fifty Three Thousand Five Hundred only) from us in manner aforesaid will not be affected or suspended by reason of the fact that any dispute or disputes have been raised by the said M/s. HARISONS INDUSTRIES and/ or that any dispute or disputes are pending before any officer, tribunal or court.

4. The guarantee herein contained shall not be determined or affected by the liquidation or winding up dissolution or changes of constitution or insolvency of the said M/s. HARISONS INDUSTRIES but shall in all respects and for all purposes be binding and operative until payment of all money due to you in respect of such liabilities is paid.

5. This guarantee shall be irrevocable and shall remain valid up to 26.10.2012. If any further extension of this guarantee is required, the same shall be extended to such required period on receiving instruction from M/s. HARISONS INDUSTRIES on whose behalf this guarantee is issued.



6. *The Bank Guarantee's payment of an amount is payable on demand and in any case within 48 hours of the presentation of the letter of invocation of Bank Guarantee. Should the banker fail to release payment on demand, a penal interest of 18% per annum shall become payable immediately and any dispute arising out of or in relation to the said Bank Guarantee shall be subject to the jurisdiction of Delhi Courts.*

7. *We have power to issue this guarantee in your favour under Memorandum and Articles of Association and the undersigned has full power to do under the Power of Attorney dated 23.7.2010 granted to him by the Bank.*

NOTWITHSTANDING anything contained herein:

- 1. Our Liability under the guarantee is restricted to Rs.2,09,53,500.00 (Rupees Two Crore Nine Lakhs Fifty Three Thousand Five Hundred only)*
- 2. This guarantee will remain valid up to 26.10.2012.*
- 3. We shall be released from all liabilities hereunder unless a written claim for payment under this guarantee is lodged on us in writing on or before 26.10.2012."*

11. With the ground for invocation clearly spelt out in the PBG, the invocation letter dated 15.04.2013 is found to be lacking in compliance of the terms of the PBG for enforcing a demand of sum payable under the PBG. The invocation letter is extracted below:-

"Registered Post/Courier

REF.NO.: GAIL/F&A/1050000421/ 15.04.2013

*To,
The Branch Manager,
UCO BANK
BANJARA HILLS DOOR
NOB2-418 KRISHNAMA*



HOUSE ROA NO 4&7
HYDRABAD
INDIA

Subject; Extension of PBG No. 21421GPER002611 dated 11.04.2011 for Amount INR 20953500.00 Against our Purchase / Work Order 5600001207/ laying work dated 10.02.2011.

Dear sir,

*We have requested to M/S HARISONS INDUTRIES to extend the BG no. 21421GPER002611 against purchase order no. 5600001207 dated 11.04.2011 issued by you which is expiring on 25.04.2013. In case the party does not extend the same upto 25.10.2013, this may be treated as our demand on you to pay us the amount in the following currency (in term of bank guarantee)
INR 20953500.00.*

kindly acknowledge the receipt of the letter.

*Thanking You,
For, GAIL (India) Limited*

*Sd/-
Authorized Signatory
NIRMAL KUMAR GUPTA*

*C.C. to
HARISONS INDUSTRIES
HASTINGS CHAMBERS , BH 7C
KIRON SHANKAR ROY ROAD
KOLKATA
700001
C.C. to KANWAL NAIN SINGH
C.C.to HIRA SINGH BIST”*

12. The invocation letter does not say that the same is being issued upon



default committed by defendant no.2 in performance of the terms and conditions of the contract between them. The invocation, rather, is a request to renew the PBG till 25.10.2013, failing which, it is mentioned that the letter/email be treated as a demand for payment of the PBG amount.

13. In the opinion of this Court, the Bank would not have been obliged to honour the demand since the invocation was not made in terms of the PBG.

14. As per the case law evolved over time regarding the stay against invocation of bank guarantee, there are only three exceptions recognised under law i.e., egregious fraud either in the making of the contract or in the invocation of the bank guarantee, irretrievable injury due to invocation of bank guarantee and special equities prevalent in favour of the party seeking stay against invocation.

15. Courts have also held that even after falling under the aforesaid three exceptions, the party seeking injunction must also satisfy that the invocation has been made in terms of the bank guarantee, failing which the invocation would be treated as defective. In this regard, reference may profitably be made to the decision of the Supreme Court in U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd.², where while approving the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank³, it was held that unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given. The Court carved out two exceptions for grant of injunction restraining invocation i.e., wherein fraud or irretrievable injury was established. While reiterating the aforesaid view, Supreme Court in Hindustan Construction Co. Ltd. v. State of Bihar

² (1988) 1 SCC 174

³ (1984) 1 All E.R. 351



and Ors.⁴, observed 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 in whose behalf the bank guarantee was furnished. It was further observed that the terms of the guarantee are extremely material as it represents an independent contract between the bank and the beneficiary and both the parties would be bound by the terms thereof. The invocation therefore will have to be in accordance with terms of the bank guarantee or else the invocation itself would be bad.

16. Recently in Union of India & Anr. v. Millenium Delhi Broadcast LLP & Ors.⁵, the Supreme Court was hearing a challenge against an order passed by Telecom Disputes Settlement & Appellate Tribunal, whereby the Tribunal had declared the invocation of the performance bank guarantee as illegal on the ground that the terms and conditions for encashment of the performance bank guarantee were not satisfied and as such the invocation was unjustified. A performance bank guarantee was furnished to ensure the due performance of the licence agreement. The licence was granted for 10 years which was to be reckoned from the date of issuance of 'wireless operational licence', which was never issued. The Supreme Court upheld the Tribunal's order by observing that the conditions provided in the performance bank guarantee were not satisfied for the invocation.

A Coordinate Bench of this Court in Puri International (P) Ltd. v.

⁴ (1999) 8 SCC 436

⁵ (2022) 7 SCC 67



National Building Construction Co. Ltd.⁶, while considering a prayer for restraint upon invocation of bank guarantee, considered the bank guarantee in question before it. The bank guarantee stipulated that the bank had undertaken to pay the amount due and payable under the guarantee without any demur merely on demand from defendant No.1 stating that the amount is due by way of loss or damage caused to or would be caused to or suffered by NBCC by reason of any breach by the said Contractor or by reason of contractor's failure to perform such contract. The Court examined the letter of invocation in light of the stipulation in the bank guarantee. The Court observed that the invocation was not in terms of the bank guarantee. The relevant extract reads as under:-

“xxx

8. A reference to the contents of the said letter would indicate that the defendant No. 1 did not indicate in the said letter of demand of defendant No. 1 that the amount claimed therein is due by way of loss or damages caused to or to be caused to or suffered by defendant No. 1 by reason of any breach by the contractor by reason of the contractor's failure to perform the said contract. None of the aforesaid conditions has been mentioned in the said demand letter issued by the defendant No. 1 to the defendant No. 2 seeking to invoke the bank guarantee. Now the question that arises for my consideration is as to whether under those circumstances it could be said that the defendant No. 1 invoked the bank guarantee as per its terms and if not, what would be its effect.

xxx”

This view has been adopted by the courts in the following judgments:-

⁶ (1997) 41 DRJ 592



KKSPUN India Ltd. v. OFB Tech Pvt. Ltd. & Ors.⁷, Naval Science & Technological Laboratory & Anr. v. M/s TSL Defence Technologies Pvt. Ltd. & Anr.⁸, Standard Chartered Bank v. Heavy Engineering Corporation Ltd. & Anr.⁹, Marshal Infradevelopers India Pvt. Ltd. v. Union of India & Anr.¹⁰ among others.

17. This court is in complete concurrence with the view adopted in the aforesaid judgements. The court is of the view that the relief claimed in the suit is based on Bank's failure to act on the invocation letter dated 15.04.2013. The court must necessarily decide the validity of the invocation letter in consideration before casting any liability on the Bank based on its contract of PBG. If at the very threshold the invocation letter is found to be defective, the consequential reliefs claimed in the suit become non grantable.

18. In Rajendra Bajoria & Ors. v. Hemant Kumar Jalan & Ors.¹¹, the Supreme Court observed:-

“xxx

“10. The question arises as to whether in the background of the facts already stated, such reliefs can be granted to the plaintiff. Unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. Further, it is to be considered that if the plaintiff does not comply with the transfer order, it may ultimately lead to termination of service. Therefore, a declaration that the transfer order is illegal and void, in fact amounts to imposing

⁷ 2022 SCC OnLine Del 3176

⁸ 2018 SCC OnLine Del 9349

⁹ (2020) 13 SCC 574

¹⁰ 2022 SCC OnLine Del 936

¹¹ (2022) 12 SCC 641



*the plaintiff on the defendant in spite of the fact that the plaintiff allegedly does not obey order of her superiors in the management of the defendant Company. Such a relief cannot be granted. Next relief sought in the plaint is for a declaration that she continues to be in service of the defendant Company. Such a declaration again amounts to enforcing a contract of personal service which is barred under the law. The third relief sought by the plaintiff is a permanent injunction to restrain the defendant from holding an enquiry against her. If the management feels that the plaintiff is not complying with its directions it has a right to decide to hold an enquiry against her. The management cannot be restrained from exercising its discretion in this behalf. Ultimately, this relief, if granted, would indirectly mean that the court is assisting the plaintiff in continuing with her employment with the defendant Company, which is nothing but enforcing a contract of personal service. **Thus, none of the reliefs sought in the plaint can be granted to the plaintiff under the law. The question then arises as to whether such a suit should be allowed to continue and go for trial. The answer in our view is clear, that is, such a suit should be thrown out at the threshold. Why should a suit which is bound to be dismissed for want of jurisdiction of a court to grant reliefs prayed for, be tried at all?** Accordingly, we hold that the trial court was absolutely right in rejecting the plaint and the lower appellate court rightly affirmed the decision of the trial court in this behalf. The High Court was clearly in error in passing the impugned judgement whereby the suit was restored and remanded to the trial court for being decided on merits. The judgement of the High Court is hereby set aside and the judgements of the courts below, that is, the trial court and the lower appellate court are restored. The plaint in the suit stands rejected.*

(emphasis supplied)



xxx”

19. In Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) dead through LRs & Ors.¹², the Supreme Court has held the following:-

“xxx

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC.

23.14. The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra . The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain case.

xxx”

20. Legal dictum says, nip in the bud the false causes that are not likely to succeed. The present suit is premised on holding the Bank accountable for their contractual failure to honour the PBG. However, if the invocation letter dated 15.04.2013 itself is defective, continuation of the suit will be a futile exercise. The Bank has already objected to the validity of the invocation letter. It is true that Bank’s factual defence is out of scope of the court deciding a challenge to maintainability under Order 7 Rule 11 of CPC, letter can be taken cognisance of by the court. Bank having already conveyed their

¹² (2020) 7 SCC 366



legal stand, coupled with the judicial decisions discussed above where it is laid down that request for invocation of BGs must be in terms of the BG, the reliefs asked for in the suit cannot be granted.

21. Under the circumstances, and for the reasons stated hereinabove, the suit is liable to be rejected since the relief claimed in the suit cannot be granted on the basis of invocation letter dated 15.04.2013, which has not been issued in terms of Clause 6 of the PBG. No useful purpose will be served for the suit to continue that is found to be still born. Accordingly, the application is allowed and the suit is rejected.

MANOJ KUMAR OHRI
(JUDGE)

NOVEMBER 8, 2023
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