IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:
The Hon'ble Justice Sugato Majumdar

CS-COM/573/2024
[OLD NO. CS/155/2007]
IA NO: GA/1/2007
(Old No:GA/2227/2007), TA/4/2007(Old No:TA/774/2007)

SKIPPER LIMITED
VS
BHARAT SANCHAR NIGAM LIMITED & ANR.

For the Plaintiff	:	Mr. Satadeep Bhattacharyya, Adv. Mr. Uttam Sharma, Adv. Ms. Vrinda Kedia, Adv
Hearing concluded on	:	24/04/2024
Judgment on	**:**	**25/04/2024**

Sugato Majumdar, J.:

The instant suit is filed by the Plaintiff praying for perpetual and mandatory injunction in respect of bank guarantees.

The original Plaintiff of the suit was M/S Bansal Cylinders & Tubes Ltd., a company registered under the Companies' Act 1956. The original Plaintiff was engaged in the business of manufacture and sale of 40M NB Light Weight Towers, commonly known as telecommunication towers as well as in the business of manufacture and sale of accessories and components of the telecommunication towers. The original Plaintiff was previously known as M/s BMW Industries Limited having registered office at 23A, Netaji Subhas Road, 5th Floor, Kolkata – 700001. M/s BMW Industries Limited became the original Plaintiff which subsequently merged and amalgamated to the present Plaintiff M/S Skipper Ltd.

The Defendant No.1 M/S Bharat Sanchar Nigam Ltd. is a public sector undertaking engaged in the business telecommunication and the Defendant No.2 State Bank of India is banking company and is a nationalized bank.

A tender enquiry for supply of 40M NB Light Weight Towers were issued by the Defendant No. 1. The Plaintiff participated in the tender and the bid of the Plaintiff was accepted at the registered office of the said later at 23A, Netaji Subhas Road, 5th Floor, Kolkata – 700001. On acceptance of the Plaintiff's bid, three different purchase orders were placed by the Defendant No. 1 to the Plaintiff. Detailed terms and conditions were incorporated in the tender documents itself. One of the conditions was to furnish bank guarantees. The Plaintiff furnished bank guarantees representing performance security deposit of 5% of the total value. The Plaintiff was also required to submit additional bank guarantees for further 5% of the total value of goods to be supplied for securing damages and shortages. Six bank guarantees were furnished by the Plaintiff. Thus, the Plaintiff duly caused six bank guarantees to be furnished by the Defendant No. 2 in favour of the Defendant No. 1 which were issued at 24, Park Street, Kolkata – 700016 within jurisdiction of this Court. Details of the bank guarantees are given below:

	Bank Guarantee No.	Date	Amount (Rs.)	Valid till
a.	0750204 BG 000 2105	01.11.2004	8,16,750/-	28.10.2007
b.	0750204 BG 000 2222	18.12.2004	4,20,750/-	16.12.2007
c.	0750205 BG 000 0065	29.01.2005	4,20,750/-	28.01.2007
d.	0750205 BG 000 0207	16.03.2005	8,16,750/-	15.02.2006
e.	0750205 BG 000 0228	29.03.2005	4,20,750/-	28.12.2005
f.	0750205 BG 000 0243	09.04.2005	4,20,750/-	08.01.2006

The Plaintiff duly caused the entire supply to be made in terms of purchase orders which were duly accepted by the Defendant No. 1 without any objection, demur or protest. The bank guarantees, given for securing shortages or damages of goods were permitted to be lapsed by the Defendant No. 1. One of the conditions of the contract was and in particular Clause 11 provided that 95% payment was to be made by the Defendant No. 1 upon proof of the items supplied. The balance 5% of payment was to be released within six months from the date of supply of equipment in absence of any damages or shortages.

Between the month of April and the month of July 2005, the Defendant No. 1 issued various letters dated 29/04/2005, 26/05/2005, 28/05/2005, 15/06/2005, 29/06/2005, 02/07/2005 and 14/07/2005 alleging short supply of goods and requesting for delivery thereof. It is the case of the Plaintiff that in order to buy peace and to maintain good relations, the Plaintiff caused all the goods required by the Defendant No. 1 to be supplied against the alleged short supply and the last of supply made by the Plaintiff on 28/07/2005. Subsequent thereto, the Defendant No. 1 made payment of the balance outstanding amount. In other words, full payment was made by the Defendant No. 1 to the Plaintiff on proof of receipt of goods without any damage or shortage.

All on a sudden, the Plaintiff received a letter dated 17/01/2006 followed by a letter dated 05/09/2006 alleging shortage in tower materials for 40M GBT delivered at Hospet in the State of Karnataka. It was alleged by the Defendant No. 1 that certain items were missing. The Defendant No. 1 thereafter issued a notice dated 30th September, 2006 purporting to invoke the bank guarantees. A case is made out by the Plaintiff that the Defendant No. 1 had threatened the Plaintiff to encash the bank guarantees furnished, for Rs.5,62,330/-. There is a negative covenant contained in bank guarantees which stipulates that unless there is actual loss or damage, caused to or suffered by the Defendant No. 1 by reason of any breach by the Plaintiff, the bank guarantee cannot be invoked. It is contended by the Plaintiff that the Defendant No. 1 acted in contradiction and in infringement of the clause in their attempt to invoke bank guarantees which led to the Plaintiff to institute the instant suit praying for,

a) Perpetual injunction restraining the Defendant No. 1 from invoking or receiving any payment in respect of the bank guarantees being annexure "C" of the plaint;

b) Perpetual injunction restraining the Defendant No. 2 from making any payment to the Defendant No. 1 in respect of the bank guarantees being annexure "C" of the plaint and/or debiting the account of the Plaintiff with any sum of money therefore;

c) Mandatory injunction upon the Defendant No. 2 to forthwith cancel the bank guarantees being annexure "C" hereto;

d) The bank guarantees being annexure "C" of the plaint as well as the invocation notice dated 5th July, 2007 be adjudged, void, delivered up and cancelled;

e) Mandatory injunction directing the Defendant No. 1 to forthwith return the bank guarantees, copies whereof are annexed hereto and collectively marked with the letter "C" annexed to the plaint and consequential reliefs.

Although summons was served, the Defendant No. 1 and 2 did not file any written statement within the statutory period or subsequent thereto. Therefore, the instant suit has been taken up as an undefended suit.

The Plaintiff adduced oral as well as documentary evidences.

Ext. 'C' is the notice inviting tender. Ext. 'A' series contained purchase order dated 06/11/2004, 20/12/2004 and 14/02/2005 which show coming into being of a a concluded contract between the parties. Copies of bank guarantees in question are produced and exhibited. These bank guarantees are Ext. 'B' collectively. Ext. 'D' is delivery-cum-challan. Ext. 'I' and 'J' shows complain made by the Defendant No. 1 to M/s BMW Industries Limited for short supply. Ext. 'K' is also similar document. These Exhibits bear dates 26/05/2005 (Ext.I), 15/06/2005 (Ext.J), 29/06/2005 (Ext.K), 02/07/2005 (Ext.L) and 14/07/2005 (Ext.M) respectively. Copy of a letter dated 09/06/2005 written by the M/s BMW Industries Limited in reply to the letter dated 26/05/2005 written on behalf of the Defendant No. 1 is adduced showing short supply of shortage materials. Similarly, the shortage of tower material complained in terms of letter dated 29/04/2005 was also addressed. Complain of shortage of tower materials made by the Defendant No. 1 in terms of letter dated 15/06/2005 is also addressed to by the Plaintiff in terms of their letter dated 26/06/2005 being part of Ext. 'B'. Another letter of Defendant No. 1 dated 02/07/2005 complaining shortage of supply was also taken care of by the Plaintiff in terms of letter dated 08/07/2005. The Plaintiff produced copy of ledger account between the M/s BMW Industries Limited and the Defendant No. 1 showing payment on various occasions. The tender document contains terms and conditions which has been adduced in evidence and marked as Ext.'C'. Payment terms shows, as contemplated in Clause 11.1 that 95% payment shall be made on proof of receipt and retrofitting of the item by the consignee. Clause 11.2 states that balance 5% shall be released within six months from the date of supply of equipment in case there are no damages or shortages. In those cases where there are shortages or damages are intimated to the supplier in writing. Balance of payment shall be released only after the cases are settled in accordance with the provisions of the purchase order. Statement of accounts shows and also deposed by the Plaintiff's witness in Para.20 of evidence-on- affidavit that all the outstanding payments were made to the Plaintiff; full payment was made by the Defendant No. 1 only upon proof of receipt of goods and upon satisfaction that there have been damages or shortages. It is also in oral evidence that three additional bank guarantees given by the Plaintiff which were permitted to lapse as there was no shortages or damages.

Oral as well as documentary evidences, adduced by the Plaintiff are unopposed and uncontroverted.

On appreciation of oral as well as documentary evidence adduced by the Plaintiff, this Court is of considered opinion that the later is able to establish conclusion of contract, execution of the contract, complain of short supply by the Defendant no. 1, addressing the issue and making short or deficit supply good to the

Defendant No. 1 and payment of full consideration money to the Plaintiff by the Defendant No. 1. Since in terms of Clause 11 of the tender document, full consideration money is to be paid only after delivery of goods and settlement of disputes related to short supply and since no evidence is there to the contrary, a conclusion can be arrived at that the Defendant No. 1 made full payment to the Plaintiff on being satisfied that the contract was executed properly and there was no short supply or deficit of supply. Bank guarantee in respect of short supply also lapsed without requiring the same to be renewed, by the Defendant No. 1.

The documentary and oral evidence well-established that the contract was duly performed, there was no further contractual liability of the Plaintiff and the Defendant No. 1 cannot encash the bank guarantees for their unjust enrichment without having any ground for invocation of bank guarantee. It is settled law that bank guarantee is an obligation of the bank. It represents an independent contract between the bank and the beneficiary and both the parties are bound by the terms. Injunction against invocation of bank guarantee is sparingly allowed by the courts except in case of established fraud or irretrievable injury, as observed by the Supreme Court of India in **Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors. [(1999) 8 SCC 436]**. The case in hand is one where invocation of bank guarantee would be unjustified leading to unjust enrichment.

This Court is of considered opinion that the Plaintiff is able to establish his case and is entitled to relief claimed. Hence, the instant suit is allowed.

It is ordered that there be a decree of perpetual injunction restraining the Defendant No. 1 from invoking or receiving any payment in respect of the bank guarantees being annexure “C” of the plaint. Let there be a decree of mandatory injunction directing the Defendant No. 1 to forthwith return the bank guarantees, copies whereof are annexed hereto and collectively marked with the letter "C" annexed to the plaint within three months from the date of decree.

In the instant suit is disposed of along with pending applications, if any.

Let decree be drawn up.

(Sugato Majumdar, J.)