



2024:DHC:7365-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Reserved on: September 09, 2024***
Judgment Pronounced on: September 24, 2024

+ **RFA(OS)(COMM) 5/2024**

GAIL INDIA LTD.

..... Appellant

Through: Mr N. L. Ganapathi, Ms Rini V.
Tigga and Mr Amogh S. Rao,
Advocates

versus

UCO BANK & ANR.

..... Respondents

Through: Mr D.S. Chauhan, Ms Ruchi Singh,
Mr Shikher Badial and Mr Santosh
Kr. Baitha, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

AMIT BANSAL, J.

1. The present appeal has been filed by the appellant/plaintiff impugning the judgment dated 8th November, 2023, passed by the learned Single Judge in CS(Comm)276/2016. *Via* the impugned judgment, the plaint filed by the appellant/plaintiff (hereinafter 'appellant'), seeking recovery of the amount of the Performance Bank Guarantee, along with interest from the defendant no.1/respondent no.1, was rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 ['CPC'].

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RFA(OS)(COMM) 5/2024

Page 1 of 15



2024:DHC:7365-DB



BRIEF FACTS AND LITIGATION HISTORY

2. Brief facts relevant for the adjudication of the present appeal are set out below:

2.1. The appellant and the respondent no.2/defendant no.2 entered into a contract for construction of pipelines, terminals and associated facilities *via* Letter of Acceptance dated 29th April, 2011 (hereinafter the “Contract”).

2.2. In terms of the said Contract, the respondent no.2 had furnished a Performance Bank Guarantee [hereinafter the ‘Bank Guarantee’] dated 11th April, 2011, amounting to Rs.2,09,53,500/- (Rupees Two Crores Nine Lakhs Fifty-Three Thousand Five Hundred) to the appellant. The said Bank Guarantee was issued by UCO Bank/respondent no.1 and was set to expire on 26th October, 2012.

2.3. The appellant received a communication dated 16th October, 2012, issued by the respondent no.1 that at the request of the respondent no.2, the Bank Guarantee was extended till 25th April, 2013.

2.4. *Via* letter dated 12th April, 2013, the respondent no.1 informed the appellant that the Bank Guarantee was set to expire on 25th April, 2013 and requested the appellant whether the said guarantee was to be kept effective or discharged. It was also mentioned that in case the respondent no.1 did not receive any instruction from the appellant before the expiry date, the Bank Guarantee would lapse.

2.5. The appellant *via* letter dated 15th April, 2013 informed the respondent no.1 that the appellant had requested the respondent no.2 to extend the Bank Guarantee till 25th October, 2013. It was also stated in the said letter that should the Bank Guarantee not be extended by the respondent

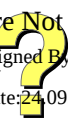
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RFA(OS)(COMM) 5/2024



2024:DHC:7365-DB



no.2, the same letter may be treated as a demand for payment of the guaranteed amount.

2.6. *Via* letter dated 29th June, 2013, the respondent no.1 communicated to the appellant that since the respondent no.1 had not received any communication from the appellant, the Bank Guarantee was cancelled. Further, the appellant was requested to return the Original Bank Guarantee.

2.7. On 18th November, 2013, the appellant wrote another letter to the respondent no.1, wherein the respondent no.1 was requested to extend the Bank Guarantee in terms of letter dated 15th April, 2013. It was reiterated that in case the said guarantee is not extended, the same may be encashed in favour of the appellant.

2.8. Replying to the aforesaid letter, the respondent no.1 *via* letter dated 2nd December, 2013, informed the appellant that it had not received the letter dated 15th April, 2013, issued by the appellant and neither did it receive any communication from the respondent no.2 to extend the Bank Guarantee. In view of the above, it was stated that the Bank Guarantee was closed.

2.9. The appellant *via* letter dated 16th December, 2013 communicated to the respondent no.1 that the letter dated 15th April, 2013 was sent at the official Email-ID of the respondent no.1 as well as through speed-post on 20th April, 2013. The appellant reiterated the request that the Bank Guarantee should be extended.

2.10. Since the aforementioned requests of the appellant were not acceded to by the respondent no.1, the appellant issued a legal notice dated 20th May, 2014, calling upon the respondent no.1 to either renew the Bank Guarantee or to release the amount thereof. Another legal notice dated 19th July, 2014

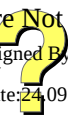
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RFA(OS)(COMM) 5/2024



2024:DHC:7365-DB



was issued reiterating the contents and request made in the legal notice dated 20th May, 2014.

2.11. The respondent no.1 replied to the legal notice dated 19th July, 2014 *via* reply dated 2nd August, 2014 and stated that since they did not receive any communication from the appellant or the respondent no.2, with respect to extension of the Bank Guarantee till 25th April, 2013, the said guarantee was closed.

3. Consequently, a suit for recovery [CS(COMM) 276/2016] was instituted by the appellant seeking recovery of Rs.3,16,14,813/-. The respondent no.1 Bank was arrayed as defendant no.1 while the respondent no.2 herein was impleaded as defendant no.2 in the said suit. The respondents filed their respective written statements in the suit.

4. *Via* order dated 21st November, 2019, the learned Single Judge had expressed a *prima facie* opinion that the suit of the appellant could not be sustained without the appellant providing a justification that the amount due under the Bank Guarantee was payable to the appellant. Further, upon a query raised by the Court, it was informed that no proceedings had been initiated by the appellant against the respondent no.2. Accordingly, the matter was adjourned for the appellant to obtain instructions from the Managing Director of the appellant as to whether the appellant wished to pursue the suit.

5. In the subsequent order passed on 31st January, 2020, the Court was informed that the Chairman and Managing Director of the appellant had considered the matter and the appellant wished to continue with the suit.

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DHAWAN

Signing Date:24.09.2024

14:48:02

RFA(OS)(COMM) 5/2024

Page 4 of 15



2024:DHC:7365-DB



6. Subsequently, an application under Order VII Rule 11(a) of the CPC was moved by the respondent no.1. The appellant contested the said application by filing a reply thereto.

7. By the impugned judgment dated 8th November, 2023, the aforesaid application was allowed and the plaint was rejected. The Court observed that the invocation letter dated 15th April, 2013 issued by the appellant was not in terms of the Bank Guarantee. Therefore, it was held that the invocation in itself was invalid and no useful purpose would be served by continuing with the suit.

8. Aggrieved by the aforesaid, the present appeal has been filed by the appellant.

9. Notice in the present appeal was issued on 14th February, 2024.

SUBMISSIONS ADVANCED ON BEHALF OF THE PARTIES

10. Assailing the impugned judgment, Mr. N.L. Ganapathi, Advocate appearing on behalf of the appellant has made the following submissions:

I. The ground taken in the impugned judgment to reject the suit, i.e., defective invocation of the Bank Guarantee was beyond the scope of the pleadings. It was not the case of the respondent no.1 in its application under Order VII Rule 11 of the CPC or in its pleadings that the appellant's invocation letter was not in terms of the Bank Guarantee.

II. The validity of the invocation letter of the appellant could not have been adjudicated at the stage of deciding an application under Order VII Rule 11 of the CPC.

III. There is no finding in the impugned judgment that the plaint failed to disclose any cause of action. It is a settled position of law that scope of

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Signing Date:24.09.2024

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RFA(OS)(COMM) 5/2024

Page 5 of 15



2024:DHC:7365-DB



inquiry under Order VII Rule 11 of the CPC is to be solely decided by reading the averments in the plaint.

IV. The plaint raised triable issues and hence could not have been rejected under Order VII Rule 11 of the CPC.

11. *Per contra*, Mr. D.S. Chauhan, Advocate appearing on behalf of the respondent no.1 has made the following submissions to contend that the impugned judgment does not suffer from any infirmity:

I. As per the terms of the Bank Guarantee, the pre-requisite to invocation of the Bank Guarantee was there being a default in performance of the contractual obligation by the respondent no.2 or there being a default of payment of contractual dues by the respondent no.2. Since the invocation letter dated 15th April, 2013 did not specify any breach of contract or default thereof, the said invocation was defective.

II. The invocation letter dated 15th April, 2013 was not received by the respondent no.1. Since no claim was received by the respondent no.1 till the date of expiry of the Bank Guarantee, the same expired and hence, the respondent no.1 was not liable to pay any amount under the Bank Guarantee.

III. A reading of the plaint demonstrates that there were no averments made with regard to the respondent no.2 violating any terms and conditions of the Contract between the appellant and the respondent no.2.

12. We have heard the counsel for the parties and perused the material on record. Both sides have also placed written submissions in support of their arguments.

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Signing Date:24.09.2024

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RFA(OS)(COMM) 5/2024



ANALYSIS AND FINDINGS

13. Since the entire claim of the appellant is based solely on the invocation of the Bank Guarantee, it may be useful to refer to the relevant terms of the same, which are set out below:

*“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.*

xxx

xxx

xxx

*3. Your right to recover the said sum of 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.*

xxx

xxx

xxx

*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.”

[Emphasis is Ours]

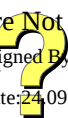
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Signing Date:24.09.2024

14:48:02



RFA(OS)(COMM) 5/2024



2024:DHC:7365-DB



14. A perusal of Clause 1 of the Bank Guarantee makes it abundantly clear that the liability of the respondent no.1 to make payment to the appellant would arise either when the respondent no.2 commits a default in performing the terms and conditions of the Contract or defaults in making payments due to the appellant. This position is reinforced in Clause 3 by use of the words “*in manner aforesaid*”.

15. Clause 5 of the Bank Guarantee specifically states that the Bank Guarantee can be extended only upon receiving instructions from the respondent no.2. Clause 6 states that the amount under the Bank Guarantee would be payable on demand, upon invocation by the appellant.

16. At this juncture, reference may be made to the communication dated 15th April, 2013, sent by the appellant to the respondent no.1 [though the respondent no.1 denies the receipt thereof], seeking encashment of the Bank Guarantee. The relevant extracts from the said communication are set out below:

*“We have requested to M/S HARISONS INDUSTRIES 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.”*

[Emphasis is Ours]

17. Clearly, in the aforesaid communication, there is no mention of the respondent no.2 having committed any breach or default of the contractual obligations or in making the payments due to the appellant. Hence, this communication was not in accordance with what was envisaged in Clause 1 read with Clause 3 of the Bank Guarantee, which specifically provided that

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Signing Date:24.09.2024

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RFA(OS)(COMM) 5/2024

Page 8 of 15



2024:DHC:7365-DB



invocation could only be done if there was default on the part of respondent no.2 in performing the terms and conditions of the Contract or in payment of amounts due to the appellant.

18. The appellant justifies the aforesaid invocation by placing reliance on Clause 6 of the Bank Guarantee, which states that the amount under the Bank Guarantee would be payable on demand, within 48 hours of the presentation of the letter of invocation. The appellant seems to have overlooked the fact that the letter of invocation has to necessarily be in accordance with Clause 1 and Clause 3 of the Bank Guarantee. The terms of the Bank Guarantee have to be read as a whole and Clause 6 of the Bank Guarantee cannot be read in isolation to contend that the Bank Guarantee was unconditional or unequivocal.

19. In *Hindustan Construction Co. Ltd. v. State of Bihar*, (1999) 8 SCC 436, a judgment relied upon by the learned Single Judge, the subject matter of the case was invocation of a mobilization bank guarantee, which provided that the bank “*agrees unconditionally and irrevocably*” to pay the amount under the guarantee, in the event that the obligations in the contract have not been fulfilled by the contractor. Holding that the bank guarantee is an independent contract between the bank and the beneficiary, the Supreme Court observed that the terms of the bank guarantee are extremely material and both the parties would be bound by the said terms. Hence, the invocation has to be strictly in accordance with the terms of the bank guarantee failing which the said invocation would be invalid.

20. In the facts of *Hindustan Construction* (supra), the Supreme Court held that even though the bank guarantee used the expression “*agree*

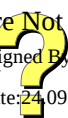
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Signing Date:24.09.2024

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RFA(OS)(COMM) 5/2024

Page 9 of 15



unconditionally and irrevocably” in relation to payments to be made under the said bank guarantee, these words were qualified by conditions relating to fulfilment of obligations under the principal contract. Accordingly, it was held that the subject bank guarantee was not unconditional or unequivocal and did not give an absolute right to the beneficiary to invoke the said bank guarantee and demand payment from the bank. The relevant observations of the Supreme Court from the said judgment are set out below:

*“9. 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 with the terms of the bank guarantee, or else, the invocation itself would be bad.***

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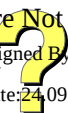
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13. The Bank, in the above guarantee, no doubt, has used the expression “agree unconditionally and irrevocably” to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:

“... in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract.”

*14. This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the “advance mobilisation loan”, then the Bank would pay the amount due under the guarantee to the Executive Engineer. **By referring specifically to clause 9, the Bank***





has qualified its liability to pay the amount covered by the guarantee relating to “advance mobilisation loan” to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the “advance mobilisation loan”. It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the “mobilisation advance” would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee.”

[Emphasis is Ours]

21. The aforesaid observations of the Supreme Court are fully applicable in the present case. The Bank Guarantee in the present case cannot be said to be unconditional or unequivocal, as contended on behalf of the appellant. Pertinently, the words “*unconditional*” or “*unequivocal*” have not even been used in the Bank Guarantee. Further, as observed above, the invocation letter sent by the appellant was not in accordance with the terms of Bank Guarantee. An invocation letter has to assert the foundational events that could show that the defaults specified therein have been committed by the party on whose behalf the guarantee has been issued. It is not to say that the bank would conduct an exercise to determine the veracity of these events, however, if such events have not been mentioned in the invocation letter, the issuing bank would not be in a position to encash the guarantee. In the present case, at the very least, the appellant had to allege that there was a



default in performance of the contractual terms and obligations or a default in payment of monies by the respondent no.2 at the time of the invocation of the Bank Guarantee, which it failed to do. In these circumstances, even if the alleged invocation letter had been received, the respondent no.1 was not obliged to encash the Bank Guarantee on the basis of the said invocation letter.

22. We have also examined the plaint of the appellant threadbare. There is not even a whisper in the plaint with regard to any breach of contractual obligations by the respondent no.2 or a default in payment obligation by the respondent no.2. The entire plaint proceeds on the assumption that the Bank Guarantee was unconditional and could be invoked on demand, without giving any justification for the same. Hence, the plaint failed to disclose a cause of action.

23. The learned Single Judge has correctly placed reliance on the judgment of the Supreme Court in ***Dahiben v. Arvinbhai Kalyanji Bhanusali***, (2020) 7 SCC 366, to reject the plaint under provisions of Order VII Rule 11 of the CPC by holding that the invocation letter dated 15th April, 2013 was defective and the continuation of the suit would be a futile exercise.

24. It is submitted on behalf of the appellant that the whole premise of the defence of the respondent no.1 was that it had not received the invocation letter dated 15th April, 2013 and therefore, the invocation was after the expiry of the Bank Guarantee.

25. Undoubtedly, one of the defences raised by the bank was that it never received the invocation letter dated 15th April, 2013. This would have





become a triable issue only if the invocation letter was in terms of the Bank Guarantee. However, as observed above, the invocation of the Bank Guarantee was in itself not valid. Therefore, whether the invocation letter was received before the expiry of the Bank Guarantee or not, would not, in any manner, affect the outcome of the present suit. In any event, it is an undisputed position of law that while applying the provisions of Order VII Rule 11 of the CPC, reference has to be made only to the averments made in the plaint and not the defence raised by the defendant.

26. It has also been strenuously argued on behalf of the appellant that it was not the case of the respondent no.1 either in its application under Order VII Rule 11 of the CPC or in its pleadings, that the invocation letter dated 15th April, 2013 was not in terms of the Bank Guarantee.

27. We are afraid that the aforesaid contention is not borne out from the record of the case. A perusal of the application under Order VII Rule 11 of the CPC shows that the same was premised on the order dated 21st November, 2019 passed by the learned Single Judge and paragraph 18 of the said order was also quoted therein. In the said order, the learned Single Judge had raised serious doubts on the viability of the suit in view of the fact that the invocation letter of the appellant did not allege any default on behalf of the respondent no.2. The relevant extracts from the aforesaid order are set out below:

“11. The communication dated 15th April, 2013 claimed to have been sent by the plaintiff to the defendant no.1 Bank, does not state that the defendant no.2 had defaulted in performance of the contract as aforesaid; it is a letter asking for extension of the bank guarantee and only if the bank guarantee is not extended, demanding the amount of the bank guarantee.



12. Question arises, whether the invocation is in accordance with law inasmuch as if it is not so, proof even if any by the plaintiff, of invocation before 25th April, 2013, will not serve any purpose.

13. I have asked the counsel for the plaintiff, whether the plaintiff, in the plaint, has made out a case of the defendant no.2 having not performed its part of the contract, though it is quite evident from the plaintiff not making any claim against the defendant no.2 in alternative.

14. Though the counsel for the plaintiff answered in affirmative, but is unable to show from the plaint.

15. A perusal of the plaint does not show the plaintiff to have even uttered a word about non-performance and the suit has been filed merely on the basis of bank guarantee.

16. I have next enquired from counsel for the plaintiff, whether the plaintiff, in any other proceedings, claimed non-performance by defendant no.2.

17. It is informed that there is no other proceeding between plaintiff and defendant no.2.

18. In view of the law as has evolved with respect to forfeiture, I am prima facie of the opinion that the plaintiff, without justifying the bank guarantee amount to be due to it, cannot sustain this suit. It would have been a different matter, if the plaintiff, on account of the bank guarantee being unequivocal and unconditional, had realized the money. In such a case it would have been for the defendant no.2 to make a claim against the plaintiff on the ground of the plaintiff having realized monies without being due to it. However, now that the plaintiff has had to approach the Court, no purpose will be served in allowing the plaintiff to recover the monies from defendant no.1 Bank, even if the bank guarantee is found to have been validly invoked within time, if the plaintiff were to be not entitled to the monies claimed.

19. *Therefrom also it appears that the plaintiff is not due any monies from the defendant no.2 under the subject contract."*

[Emphasis is Ours]

28. In view of the above, it is wholly misconceived on the part of the appellant to contend that no ground relating to the invalidity of the



2024:DHC:7365-DB



invocation letter was made out in the application under Order VII Rule 11 of the CPC.

29. It has also been contended on behalf of the appellant that the non-extension of the Bank Guarantee by the respondent no.2 beyond 25th April, 2013, by itself constituted a default under the terms of the Bank Guarantee. We are not impressed with this argument as Clause 3 of the Bank Guarantee has clearly enumerated conditions of defaults that would allow for the invocation thereof. Plainly, non-extension of the Bank Guarantee was not one such ground.

30. In view of the discussion above, there is no infirmity in the impugned judgment that requires interference by this Court. There is no merit in the present appeal and the same is dismissed.

31. All pending applications stand disposed of.

AMIT BANSAL
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

SEPTEMBER 24, 2024

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RFA(OS)(COMM) 5/2024

Page 15 of 15