

SUPREME COURT OF INDIA

Standard Chartered Bank

Vs.

Heavy Engineering Corporation Ltd.

C.A.No.9288 of 2019

(L.Nageswara Rao and Ajay Rastogi,JJ.,)

18.12.2019

JUDGMENT

Ajay Rastogi,J.,

SLP(Civil)No.23430 of 2019

1. Leave granted.
2. The instant appeal is being preferred against the judgment and order dated 8th May, 2019 passed by the Division Bench of the High Court of Calcutta setting aside the judgment dated 16th October, 2015 of the Single Bench and accepting claim of the 1st respondent-plaintiff holding that the bank guarantees were properly invoked in law and accordingly the decree came to be passed for Rs. 1,10,33,207.00/- as claimed in paragraph 18 of the plaint with interest at the rate of 8 per cent per annum from the date of institution of the suit until payment.
3. Although both the Judges of the Division Bench has delivered their separate judgment but have expressed a concurring view on the subject.
4. The dispute primarily arose with regard to two bank guarantees amounting to Rs. 71,35,100/- and Rs. 20,32,500/- in terms of the letters of intent, HEC-CS-1502-81 dated 19th May, 1981 and HEC-CS-1502-81 dated 19th May, 1981 furnished on behalf of the 2nd defendant by the appellant Bank(1st defendant) in favour of the 1st respondent-plaintiff “as advance against supply of plant and equipment” by the 1st respondent-plaintiff to the 2nd respondent (defendant no. 2). The two bank guarantees are on identical terms and the only difference is the date and the amount which are reproduced as under:-

Bank Guarantee No. 1001/03/100G dated 16th February, 1983 “We, GRINDLAYS BANK P.L.C., 19 Netaji Subhas Road, Calcutta 700001 undertake the Indemnity and keep the CORPORATION indemnified to the extent of Rs. 71,35,100/- (Rupees SEVENTY ONE LAKHS THIRTY FIVE THOUSAND AND ONE HUNDRED

ONLY) against any loss or damage caused to or suffered by the CORPORATION by reason or any breach or failure by the said SUPPLIER, in due performance of the aforesaid contract, we shall forthwith on demand pay to the CORPORATION any sum or sums not exceeding Rs. 71,35,100/-(RUPEES SEVENTY ONE LAKHS THIRTY FIVE THOUSAND AND ONE HUNDRED ONLY) without making any prior reference to the said SUPPLIER with and exclusion of any action in Court by SUPPLIER.”

Bank Guarantee No. G/1001/84/608 dated 29th August, 1984 “We, GRINDLAYS BANK P.L.C., 19 Netaji Subhas Road, Calcutta 700001 do hereby undertake the Indemnity and keep the CORPORATION indemnified to the extent of Rs. 20,32,500(Rupees TWENTY LAKHS THIRTY TWO THOUSAND FIVE HUNDRED ONLY) against any loss or damage caused to or suffered by the CORPORATION by reason or any breach or failure by the said SUPPLIER, in due performance of the aforesaid contract, we shall forthwith on demand pay to the CORPORATION any sum or sums not exceeding Rs. 20,32,500/-(RUPEES TWENTY LAKHS THIRTY TWO THOUSAND FIVE HUNDRED ONLY) without making any prior reference to the said SUPPLIER with and exclusion of any action in Court by SUPPLIER.”

(emphasis supplied)

5. The said two bank guarantees were furnished for and on behalf of 2nd respondent towards the sum insured “against any loss or damage caused to or suffered by the Corporation by reason or any breach or failure by the said supplier, in due performance of the aforesaid contract.”

Brief facts of the case

6. By a letter of intent dated 19th May, 1981, 1st respondent placed an order on 2nd respondent(Simon Carves India Ltd. ‘SCIL’) for the complete design, supply of both indigenous and imported equipments, erection and commissioning of requisite civil and construction works of the Dankuni Coal Complex at a total price of Rs. 21.10 crores. The letter of intent dated 19 th May, 1981 after describing 4 sections of the LTC plant at Dankuni stated as under:-

“The above price covers the complete design, supply of both indigenous and imported equipment, erection and commissioning with requisite civil and structural works complete in all respects except land filling upto 4.00 M level, railways siding, roads & outside drawing and perphorial lighting which will only be outside your scope or work. The break up of the total price of Rs. 21.10 crores for purpose of billing is enclosed. We have noted the terms of payment proposed by you in your letter dated 18.05.81. As we have indicated about the terms of payment agreed to by us, it will not be possible to consider your proposal for relaxation of the same. However, attempts will be made to consider some softening of payment terms later depending our own cash flows on this project. Kindly let us have your detailed

technical specifications etc to enable us to draw up a detailed contract for the work. Kindly communicate your acceptance of this letter of intent and furnish us a bank guarantee on approved proforma to release the initial advance of Rs. 15.64 lakhs to you. In pursuance of the letter of intent two bank guarantees have been furnished by the defendant no. 1 on behalf of the defendant no. 2 “as advance against the supply of plant and equipment.”

(emphasis supplied)

7. Pursuant to the letter of intent, a formal Memorandum of Agreement dated 8th August, 1985 was executed by and between SCIL. Thereafter, the 1st respondent (plaintiff) from time to time advanced for the said work against several bank guarantees furnished by SCIL. It may be noticed that the instant dispute pertains to two bank guarantees dated 16th February, 1983 and 29th August, 1984, which were advanced to SCIL, the details of which have been indicated above. The said guarantees furnished by the appellant bank were extended from time to time and revalidated.

8. In due course of time, in breach of contract with the 1st respondent-plaintiff, SCIL failed to duly complete the supply of equipment and the other conditions of the letter of intent and further defective equipments. It is alleged that the work had to be abandoned due to which 1st respondent suffered huge losses and damages. Ultimately, a sum of Rs. 139.90 lakhs, was deducted by the 1st respondent from final bill which pertained to the apportioned work handed over to SCIL.

9. In view of the letter dated 6th November, 1998, 1st respondent- plaintiff demanded encashment of both the said guarantees which were refused by the bank to honour and diverse correspondence was exchanged by and between the 1st respondent -plaintiff and the appellant-defendant bank. 1st respondent in continuation made subsequent demands for encashment of the guarantees by letter dated 19th December, 1998 which is reproduced hereunder:-

“No.HDC/Proj/Fin/98-343

Dated the 19th December, 1998

To

The Chief Manager Corporate Banking ANZ Grindlays Bank 19, Netaji Subhas Road Post Box No.2645 Calcutta - 700001

Dear Sir,

With reference to your St. Relationship Manager’s letter dtd. 7.12.98 regarding encashment of B.Gs issued by you on behalf of M/s. SCIL for a total value of Rs.91.68 lakhs you are very much aware that M/s. SCIL owes to H.E.C. Rs.139.90 lakhs due to defective supply of Plant & Equipment as well as non-supply of Plant & Equipment and also other contractual deficiencies which has caused loss as reflected in the CIL. You are also aware that HEC has gone out of the way in

supporting SCIL and getting the Plant completed with minimum damage. It is within HEC's full rights to invoke the BG as per Clause No.2 of the BG's which is reproduced below; (BG No.G1001/83/1084 dt. 16.8.83 for Rs. 71,35,100.00 and BG No.G1001/84/608 dt. 29.8.84 for Rs. 20,32,500.00).

WE GRINDLAYS BANK PLC 19, Netaji Subhas Road, Calcutta - 700001 do hereby undertake the Indemnity of Rs. (Rupees) against any loss or damage caused to or suffered by the CORPORATION by reason or any breach or failure by the said SUPPLIER, in due performance of the aforesaid contract, we shall forthwith on demand pay to the CORPORATION any sum or sums not exceeding Rs. (RUPEES without making any prior reference to the said SUPPLIER with an exclusion of any action in court by SUPPLIER.

The failure of M/s. SCIL in fulfilling the contractual obligation which includes performance Guarantees of Plant & Equipment are very well documented by HEC & CIL. In fact, the unadjusted advance of SCIL on account of Plant & Equipment is far in excess of the loss suffered by HEC. The same has been brought down to Rs.139.90 lakhs after allowing credit for contractual settlement.

Although as per terms of BG we are not bound to explain you all these things but the above details are furnished so that good sense will prevail and we expect you to live up to your reputation and honour the beneficiaries claim for encashment.

Thanking you,
Yours faithfully, T.L.N. SOURI
GENERAL MANAGER (PROJECTS & MNTG)
(emphasis supplied)"

which is also reproduced hereunder:- "No.GGM(CM)/ /98
28th December,
1998

To
The Chief Manager ANZ Grindlays Bank CALCUTTA.
(Atten: Shri Vasudeo Kundu)
Fax No.033-2211196

Sub: Encashment of two Bank Guarantees Nos.

- 1) G/1001/83/108G for Rs.71,35,100/-
- 2) G/1001/88/608 for Rs.20,32,500/-

Ref: Our letter dated 19.11.1998.

Dear Sir,
We have intimated vide our above letter to encash the above two Bank Guarantees

issued by you on behalf of SCIL India Ltd., to HEC. You are requested to encash the above Bank Guarantees and send the proceeds amounting to Rs.91,67,600/- within 3 days time. Kindly treat this as most urgent and failing on the part of the Bank to honour the beneficiaries demand will be viewed seriously.

Thanking you,
Yours faithfully, (L.M. Prasad)”

11. A further complaint was made by way of a letter dated 22nd February, 1999 to the Banking Ombudsman, Calcutta. Ultimately, 1st respondent-plaintiff was constrained to institute a suit before the High Court of Calcutta for decree of Rs. 1,10,33,207.07/- along with interest being the aggregate sum of both the said guarantees.

12. The appellant Bank filed its written statement and primarily took objection that the invocation of the bank guarantees was not in accordance with either of the said guarantees and contrary to the terms thereof and accordingly the appellant Bank was not liable to make payment to the 1st respondent-plaintiff under either of the said guarantees. In support of its defence, the appellant Bank referred to the diverse correspondence exchanged between the appellant and 1st respondent. In brief, the defence of the appellant Bank was that the invocation of the said bank guarantees was contrary to the terms or not in terms thereof.

13. On the pleadings of the parties, the suit in the first instance came to be dismissed vide judgment & decree dated 16th October, 2015 which came to be challenged by the 1st respondent in appeal before the Division Bench of the High Court of Calcutta. In a concurring judgment while setting aside the judgment of the Single Judge of the High Court, it was finally held that the bank guarantees were properly invoked in law by the 1st respondent- plaintiff and accordingly passed a decree of Rs. 1,10,33,207.00/-together with interest at the rate of 8% per annum on and from the date of institution of the suit until payment.

14. Learned senior counsel for the appellant Bank, Shri Amit Sibal submits that the said bank guarantees only covered losses arising out of supply of plant & equipment and according to the pleadings on record, the plant stood installed in October, 1990 and this is the case where the appellant Bank in its independent capacity, refused the claim for it being clearly false to its knowledge and also not in accordance with the terms of the guarantee, i.e. beyond the purview of the bank guarantees and failing to apportion those losses suffered on account of claims which would be within the terms of the bank guarantees.

15. Learned counsel further submits that the bank guarantees are in reference to two category of losses (i) non-supply/defective supply of plant & equipment (ii) “other contractual deficiencies” and by the invocation vide letter dated 19th December, 1998 claims caused by “non-supply/defective supply of plant & equipment and other contractual deficiencies” is outside the purview of the bank guarantee. Further, assuming the

correctness of the claim, the 1st respondent if suffered loss for both (i) non-supply/defective supply of plant and equipment (ii) “other contractual deficiencies”, it is difficult to determine the apportionment between the two categories, because the invocation does not state how they are apportioned. The invocation is thus inchoate and incomplete and this according to the appellant does not constitute a valid invocation at all and it has not been properly appreciated by the Division Bench of the High Court in the impugned judgment and has to be interfered by this Court.

16. In support of his submission, learned counsel has placed reliance on the judgment of this Court in *Hindustan Construction Co. Ltd. Vs. State of Bihar & Others*¹ and *Gangotri Enterprises Ltd. Vs. Union of India and Others*².

17. Per contra, Ms. Madhavi Diwan, learned ASG appearing on behalf of the 1st respondent, while supporting the finding recorded by the High Court in the impugned judgment submits that as per 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 the beneficiary and the bank is always obliged to honour 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 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 a ‘irretrievable injury’ or ‘irretrievable injustice’ that would occur to the Bank.

18. We have heard learned counsel for the parties and with their assistance perused the material available on record.

19. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three-Judge Bench of this Court in *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another*³ held thus:-

“4. 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 prima 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.

5 The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties.”

(emphasis supplied)

20. A bank guarantee constitutes an independent contract. In *Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*(supra), a two Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms:-

“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.”

21. The same principle was followed in *State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd*⁴. wherein a two-Judge Bench held thus:-

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

34. 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.”

22. Taking note of the exposition of law on the subject in *Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co*⁵. , a two- Judge Bench of this Court in *Gujarat Maritime Board Vs. Larsen & Toubro Infrastructure Development Projects Limited and Another*⁶ has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under:-

“ From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

23. 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 honour 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. There are, however, exceptions to this Rule 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.

24. The guarantees in the instant case were unconditional, specific in nature and limited in amount. The terms of the guarantee categorically covered money which the 1st respondent had advanced against supply of the plant and equipment by SCIL. The said guarantees covered any loss and damage caused to or suffered by the 1st respondent-plaintiff in due performance of the contract for supply of plant and equipment. The guarantee documents dated 16th February, 1983 and 29th August, 1984, as a whole and clause 2 of the guarantee document in particular cover the advance which had been paid by the 1st respondent-plaintiff by reason of any breach or failure by SCIL in due performance of the aforesaid contracts i.e. against the contract for supply of plant and equipment.

25. From the correspondence that has been exchanged by and between them pertaining to invocation of the said guarantees, it clearly manifests that the initial letter of invocation

written by the 1st respondent-plaintiff dated 6th November, 1998 indeed was per se inadequate and did not enumerate any condition for invocation of said guarantees save and except a reference to “a substantial amount to be recovered from SCIL”. However, in the later correspondence exchanged between the parties dated 19th December, 1998 followed by a letter dated 28th December, 1998, 1st respondent informed the appellant Bank that due to defective supply of plant and equipment as well as non-supply of plant and equipment and also other contractual deficiencies of SCIL, losses had been suffered by the 1st respondent and it was duly informed to the appellant Bank that the losses had been incurred both on account of supply of plant and equipment and on account of performance of the supply of plant and equipment. On reading of letters exchanged by and between 1st respondent and the appellant Bank pertaining to invocation of the guarantees, the condition of the guarantees had been duly complied with.

26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position.

27. It is informed by the learned counsel for the appellant that the Standard Chartered Bank’s predecessor in interest, ANZ Grindlay’s Bank had opened a fixed deposit of Rs. 91,67,600/- on 18th May, 2001, which was lien marked to HEC(Heavy Engineering Corporation Ltd.) and is being held under the control of the Registry of the High Court of Calcutta and the current fixed deposit is valued at Rs. 2,32,69,129.71/- and the total liability under the impugned order as on date will be Rs. 2,78,03,681.64/-. The Registry of the High Court of Calcutta may release the money lying in the account in favour of the 1st respondent and it is for the appellant Bank(judgment debtor) to settle and satisfy the decree which is impugned in the instant proceedings.

28. We do not find any merit in the appeal which is hereby dismissed. No costs.

29. Pending application(s), if any, stands disposed of.

Judgment Referred.

¹(1999) 8 SCC 0436

²(2016) 11) SCC 0720

³(1996) 5 SCC 0450

⁴(2006) 6 SCC 0293

⁵(2007) 8 SCC 0110

⁶(2016) 10 SCC 0046