

(2012) 03 CAL CK 0005

Calcutta High Court

Case No: G.A. No. 2267 of 2009 and C.S. No. 237 of 2009

Unit Construction Company Pvt.
Ltd.

APPELLANT

Vs

Steel Authority of India and
Another

RESPONDENT

Date of Decision: March 30, 2012

Hon'ble Judges: Nadira Patherya, J

Bench: Single Bench

Advocate: Anindya Mitra, Mr. Abhrajit Mitra and Ms. Rajashree Kajaria, for the Appellant;
Pradip Kumar Ghosh Mr. Abhijit Ganguly and Mr. Emon Bhattacharya, for the Respondent

Judgement

Patherya, J.

In a suit filed for a money decree return of the original Bank Guarantees dated 6th March, 2009 and 25th March, 2009 after cancellation thereof is also sought. This application has been filed for an order of injunction restraining the respondent No. 1 from claiming or receiving any sums under the Bank Guarantees dated 6th March, 2009 and 25th March, 2009.

2. The case of the petitioner is that two Bank Guarantees were furnished by its bankers in favour of the respondent No. 1 on 6th March, 2009 and 25th March, 2009 for the sums mentioned therein. The said Bank Guarantee dated 25th March, 2009 was invoked by letter dated 30th July, 2009 for non - payment of Rs. 1.68 crores as the petitioner had failed to perform its obligations. Upon such invocation and after holding discussion a sum of Rs. 60 lacs was paid on account of the goods supplied by the petitioner to the respondent No. 1 and on receipt of such payment, the letter dated 30th July, 2009 was withdrawn by letter dated 31st July, 2009.

3. Subsequent thereto on 21st August, 2009 once again the respondent No. 1 sought to invoke the Bank Guarantee dated 25th March, 2009 for failure on the part of the petitioner to perform its obligations for the sum of Rs. 1.80 crores. On getting intimation of such invocation the petitioner informed that the Bank Guarantee being

conditional and as no notice of breach caused had been given the question of any payment did not arise. On the same date the instant suit was filed and order passed staying the letter dated 21st August, 2009 and such order is continuing.

4. A third invocation was made in respect of which the bank refused to make payment to the respondent No. 1. The respondent No. 1 also invoked the Bank Guarantee dated 6th March, 2009 out of which a sum of Rs. 12 lacs has been paid to the respondent No. 1. The invocation is not in terms of the Bank Guarantee. Out of an initial claim of Rs. 1.68 crores on negotiation a sum of Rs. 60 lacs was accepted by the respondent No. 1 in full and final settlement which will be reflected from the letter dated 31st July, 2009 wherein it has been stated that all outstanding dues has been cleared and therefore, the first letter of invocation was withdrawn by the said letter. The second invocation was made on 21st August, 2009 which has been stayed by order dated 24th August, 2009. In fact on 19th September, 2009 i.e., during the pendency of the suit the Bank Guarantee dated 6th March, 2009 was sought to be invoked for the sum of Rs. 12,04,127/-. The said sum has been encashed by the respondent No. 1. In respect of the Bank Guarantee dated 25th March, 2009 once again the respondent No. 1 sought to invoke the same for the sum of Rs. 83,43,060/- on 19th September, 2009 which the respondent No. 2 has refused to honour. Therefore, no sum is due and payable to the respondent No. 1 on date as the underlying contract has been fully performed in satisfaction of its dues.

5. In view of the aforesaid the Bank Guarantee comes to an end and a certificate of accord and satisfaction ought to be issued by the respondent No. 1 in favour of the petitioner.

6. The invocation of the Bank Guarantee dated 25th March, 2009 is contrary to the terms and conditions of the Bank Guarantee. In the affidavit filed by the respondent No. 1 it has been categorically stated that a sum of Rs. 83,43,060/- as on 19th September, 2009 was due and payable. The Bank Guarantee dated 6th March, 2009 for Rs. 20 lacs was invoked for a lesser amount and in paragraph No. 36 of the petition it has been categorically pleaded that no subsequent event had arisen after the letter dated 31st July, 2009 as thereafter no supply was made and the said has been accepted by the respondent No. 1 in its affidavit but the amount which it was entitled to receive has not been specified. As the invocation is not in terms of the Bank Guarantee, the orders dated 24th August, 2009 and 9th September, 2009 be confirmed.

7. Reliance has been placed on [Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others](#), and [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), for the proposition that in case the invocation is not in terms of the Bank Guarantee the invocation is bad. [Union of India \(UOI\) Vs. Kishorilal Gupta and Bros.](#), was relied on for recording of accord and satisfaction as no sums were due and payable. In view of [R.M. Investment and trading Co. Pvt. Ltd. Vs. Boeing Co. and another](#), no further invocation was possible. Therefore, an order be passed in terms

of prayer (d) of the Notice of Motion.

8. On a reading of letter dated 19th September, 2009 it will appear that the respondent No. 1 seeks to correct the letter dated 21st August, 2009 which cannot be corrected in view of the order of stay. Therefore, the orders passed be confirmed.

9. Opposing the said application, it has been submitted by counsel for the respondent No. 1 that a Memorandum of Understanding was entered between the parties on 2nd February, 2009 to enable supply of steel materials by the respondent No. 1 to the petitioner. Such Memorandum of Understanding was to be valid from 1st February, 2009 to 31st July, 2009. It was on the basis of the said Memorandum of Understanding that the Bank Guarantees dated 6th March, 2009 and 25th March, 2009 were furnished in favour of the respondent No. 1. A 60 days" credit period to make payment was given to the petitioner and on the basis of orders placed, goods were delivered. For non - payment of dues the first invocation was made on 30th July, 2009 and the same was withdrawn upon part payment being made. Although the case made out by the petitioner is that all outstandings were paid, the said is belied by the letters dated 30th July, 2009 and 31st July, 2009. In none of the correspondence exchanged between the parties full and final satisfaction is reflected. The respondent No. 1 was entitled to invoke the Bank Guarantee in part as the same was permitted by the terms of the Bank Guarantee and the said was done by letter dated 21st August, 2009. There has been no accord or satisfaction nor has a certificate in respect thereof been sought by the petitioner nor issued. That payment was sought will be culled out from the intent of the Bank Guarantee and therefore, the invocation is in terms of the Bank Guarantee.

10. [Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others](#), Calcutta postulates that where there is no documentary evidence no accord or satisfaction can be presumed therefore is distinguishable. It is breach of obligation on the part of the petitioner which gives rise to demand for payment and therefore, on 19th September, 2009, the Bank Guarantees have been invoked, for a sum of Rs. 83,43,060/- but no payment has been made thereunder by the bankers of the petitioner.

11. Reliance has been placed on [Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another](#), and [Jai Prakash Gupta \(D\) thr. LRs. Vs. Riyaz Ahamad and Another](#), for the proposition that subsequent events will warrant invocation. Reliance is also placed on [BSES Ltd. \(Now Reliance Energy Ltd.\) Vs. Fenner India Ltd. and Another](#), and [Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company](#), Substantial compliance is, therefore, sufficient and an unconditional Bank Guarantee warrants payment. In the instant case, the Bank Guarantee has been invoked in terms as will be evident from the letters of invocation and assuming that the letter dated 21st August, 2009 is not an invocation in terms of the Bank Guarantee, the subsequent invocation is in terms and cannot be set aside [Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and](#)

[others](#), is distinguishable on facts so also AIR 1953 Calcutta 642.

12. Counsel for the petitioner in reply submits that the terms of the Bank Guarantee in [Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another](#), differs from the terms of the Bank Guarantee, in the instant case. In 2006 (8) SCC 728 the Bank Guarantee was unconditional and the terms were not set out as in the instant case. In [Jai Prakash Gupta \(D\) thr. LRs. Vs. Riyaz Ahamad and Another](#), the two invocations were not independent, therefore, each of the decisions mentioned above is distinguishable on facts. By letter dated 19th September, 2009 the respondent No. 1 sought modification of the earlier invocation. As no demand was being made, therefore, there was no failure. No counter - claim has been made by the respondent No. 1 against the plaintiff or the bank in the Written Statement filed and till 24th September, 2009 the Bank Guarantees were valid. Applications have been filed for extension of the Bank Guarantee and nowhere has it been stated that the extension was for invocation purposes. It is under Court's order that the Bank Guarantees have been extended. The order of stay makes the letter dated 19th September, 2009 inoperative. Therefore, the orders passed be confirmed.

13. Having considered the submissions of the parties the two Bank Guarantees dated 06.03.2009 and 25.03.2009 were furnished by the petitioner in favour of the respondent No. 1. Bank Guarantee dated 6th March, 2009 was invoked on 19th September, 2009 for Rs. 12,04,127/- and the said sum has been paid by the bankers of the petitioner and no dispute has been raised in respect thereof.

14. It is the Bank Guarantee dated 25.03.2009 and its invocation which is in issue in the said proceedings. Initially the said Bank Guarantee was invoked on 30.07.2009 for the sum of Rs. 1.68 crores. Subsequent thereto discussion took place and the parties came to an agreement. The agreement reached has not been disclosed in these proceedings but a sum of Rs. 60 lacs was paid by the petitioner to the respondent No. 1 by cheque and the same was against its outstanding dues with the respondent No. 1 and therefore, the 1st invocation dated 30.07.2009 was withdrawn.

15. On 21st August, 2009 once again the Bank Guarantee dated 25.03.2009 was invoked this time for Rs. 1.80 crores. Therefore, from the said letter dated 21.08.2009 it was evident that payment of Rs. 60 lacs was not in full and final settlement. Although the petitioner has sought for a mandatory order of injunction for cancellation of the Bank Guarantee dated 6th March, 2009 and 25th March, 2009 the only reason for this prayer is no sum being due and payable. There is no documentary evidence produced to support such claim. Therefore, the issue regarding liability of payment, if any, need not be considered at this stage and the only issue that needs consideration in this application is whether the letter of invocation dated 21.08.2009 is in terms of the Bank Guarantee.

15. From a reading of the Bank Guarantee dated 25.03.2009 it appears that the respondent No. 2 Bank, guaranteed payment in case of any breach by the petitioner of its obligation on receipt of -

a) the respondent No. 1's letter stating that the client has failed to pay the amount of Rs. 1,80,00,000.00 (Rupees One crore eighty lacs only) due from him/them as price and other charges, and

b) pre - receipted claim for the said amount.

16. On a reading of the letter of invocation dated 21.08.2009 nowhere has it been stated that in terms of (a) above, the petitioner had failed to pay nor was the pre - receipted claim as in condition (b) enclosed with the letter of invocation. Therefore, on a careful reading of the letter dated 21.08.2009 the same is not in terms of the Bank Guarantee dated 25.03.2009 and warrants confirmation of the orders dated 24th August, 2009 and 9th September, 2009.

17. While the said orders were subsisting the respondent No. 1 on 19.09.2009 sought to invoke the Bank Guarantee dated 25.03.2009 as per the terms of the Bank Guarantee for a lesser amount and sought to correct the amount mentioned in letter dated 21.08.2009. The said was without prejudice to the respondent No. 1's right and contentions to an appeal filed from order dated 09.09.2009.

18. There is no doubt that the respondent No. 1 was entitled to invoke the Bank Guarantee in part but to do so when the invocation letter for a greater sum and in fact its balance claim, if at all had been stayed, to seek invocation of lesser sum which forms a part of the greater amount would amount to nullifying the orders passed in respect of the earlier letter of invocation. In fact the respondent No. 2 has refused to make payment of the corrected sum therefore, no further order is warranted and the decisions reported in ILR 1973 (2) Cal. 704 and [R.M. Investment and trading Co. Pvt. Ltd. Vs. Boeing Co. and another](#), need not be applied at this stage to the facts of the instant case. The invocation by letter dated 19.09.2009 mentions that the same is without prejudice to the appeal filed from order dated 09.09.2009 and the legal issues raised therein. This would not have been necessary if it was an independent invocation.

19. [Union of India \(UOI\) Vs. Kishorilal Gupta and Bros.](#), will not apply as the question of sums payable will be decided at the final hearing of the suit and need not be decided in this application.

20. As the Bank Guarantee was conditional and the conditions not satisfied [Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others](#), and [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), comes to the aid of the petitioner.

21. The decisions relied on by the respondent No. 1 are distinguishable on facts as they are all cases of unconditional Bank Guarantee which can only be restrained in

case of "fraud" or "irretrievable injustice". This is not so in the instant case which is a conditional Bank Guarantee and will be evident from letter dated 19.09.2009. For all the said reasons the order dated 21.08.2009 continued by subsequent orders is confirmed. The application is accordingly disposed off.

Later:

Prayer for stay made is considered and refused.