

(2014) 06 CAL CK 0051

Calcutta High Court

Case No: TA No. 104 of 2014 and T. No. 209 of 2014

Jai Balaji Industries Ltd.

APPELLANT

Vs

Coal India Ltd.

RESPONDENT

Date of Decision: June 19, 2014**Citation:** (2014) 4 WBLR 887**Hon'ble Judges:** Indra Prasanna Mukerji, J**Bench:** Single Bench**Advocate:** Anindya Kumar Mitra, S. Sarkar and Rajarshree Kajaria, Advocate for the Appellant; P.K. Dutta, Rajarshree Dutta, P.S. Bose and N.K. Roy, Advocate for the Respondent

Judgement

Indra Prasanna Mukerji, J.

The plaint was presented on an urgent basis on 17th June, 2014. This application was moved yesterday, citing grave urgency, in the presence of learned counsel for the first and second defendants. In order to enable this Court to consider or to refuse passing of an interim order properly and upon proper notice to the defendants, I directed the application to appear in the list today, by passing a limited interim order directing status quo to be maintained by the parties with regard to the transfer of funds.

2. This is another suit, claiming, inter alia, an order of injunction restraining the beneficiary of bank guarantees from invoking the same. The beneficiary of the bank guarantee in this case is the second defendant.

3. Six bank guarantees were furnished at the instance of the plaintiff to the second defendant of a total value of Rs. 3,19,18,726/-. These bank guarantees were issued by the third to the sixth defendants.

4. These bank guarantees were required to be furnished by the plaintiff in accordance with the requirements of two agreements both dated 11th March, 2011 between the second defendant and the plaintiff.

5. The complaint of the plaintiff is with regard to the invocation of the bank guarantees by the second defendant. They were made by letters dated 16th June, 2014. Although in the letters of invocation the reason for such invocation was "non payment of coal bills", Mr. Dutta learned Senior Advocate for the second defendant tells me that by a corrigendum sent by e-mail the same day, the second defendant rectified this by stating that the bank guarantees were being invoked for breach of contract committed by the plaintiff.

6. While moving the application, Mr. Anindya Kumar Mitra, learned Senior Advocate, argued that his client was very seriously aggrieved by the action of the second defendant in issuing the two letters both dated 9th May, 2014 at pages 161 and 164 of the petition. The letters alleged that the plaintiffs "level of lifting" of coal was less than 30% when the required rate was supposed to be 25%. He said that this was due to a quality dispute between the parties. This Court should order sampling of the coal being lifted and its examination and evaluation by a committee.

7. At that stage Mr. P.K. Dutta, learned Senior Advocate submitted that the contract between the parties had been terminated on 16th June, 2014.

8. Mr. Mitra responded by saying that the letter of termination had not been served upon his client and could not be said to be binding.

9. Mr. Mitra took several points to challenge the invocation of the bank guarantees. He submitted that they were invoked at or about the time of filing of the suit to make the reliefs claimed in the interim application infructuous. In the interim application, no reliefs have been claimed with regard to them. Secondly, Mr. Mitra pointed out that the bank guarantees were addressed to the Chairman and Managing Director of the first and second defendants and the Chief Sales Manager of the second defendant. It was invoked by the senior Sales Manager of the second defendant who had no authority to invoke the same.

10. He placed the decision of the Hon'ble Supreme Court in Hindustan Construction Co. Ltd. v. State of Bihar and Others with [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), . He read paragraphs 17, 18 and 21 of the report which are inserted below:

17. The "performance guarantee" is in the following terms:

The Chief Engineer,

Subernarekha Multipurpose Project,

Icha Galudih Complex,

Adityapur, Jamshedpur,

Bihar.

WHEREAS M/S. HINDUSTAN CONSTRUCTION COMPANY LIMITED, incorporated in Bombay, under the Companies Act, 1956, and having their registered office at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay-400038 (hereinafter called "the contractor") has undertaken, in pursuance of Contract/Tender Notice No.SMP/ICC/CE-8/87, Adityapur, dated 23-10-1987 to execute the work of construction of Icha Dam, Subernarekha Multipurpose Project (hereinafter called "the contract").

AND WHEREAS it has been stipulated by you in the said contract that the contractor shall furnish you with a bank guarantee by a recognized bank for the sum specified therein as security for compliance with his obligations in accordance with the contract.

AND WHEREAS WE, State Bank of India, incorporated under the State Bank of India Act, 1955, and having our commercial branches at Nyayamurti C.N. Vaidya Marg, Bombay-400023 (hereinafter referred to as "the Bank" have agreed to give the contractor such a bank guarantee.

NOW THEREFORE WE, State Bank of India, hereby affirm that we are the guarantor and responsible to you, on behalf of the contractor up to a total of Rs. 3,97,13,102 (Rupees three crores ninety-seven lakhs thirteen thousand one hundred and two only) such sum being payable in the types and proportions of currencies in which the contract price is payable and we undertake to pay you, upon your first written demand and without civil or argument, and sum or sums within the limits of Rs. 3,97,13,102 (Rupees three crores ninety-seven lakhs thirteen thousand one hundred and two only) as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the contractor before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the contract or the works to be performed thereunder or of any of the contract documents which may be made between you and the contractor shall in any way release us, from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification.

Our liability under this guarantee is restricted to an amount not exceeding Rs. 3,97,13,102 (Rupees three crores ninety-seven lakhs thirteen thousand one hundred and two only) and the guarantee shall remain in force up to 16.10.1992 with a claim period of one year thereafter i.e. up to 16-10-1993 or twelve months after the issuing of maintenance certificate. Unless a demand or claim under the guarantee is made on us in writing on or before 16-10-1993, we shall be relieved and discharged from all our obligations thereafter.

18. This guarantee has been furnished to the Chief Engineer but was invoked by the Executive Engineer by a letter addressed to the Branch Manager of State Bank of India, Commercial Branch, Bombay, reading as under:

"The Branch Manager, State Bank of India, Commercial Branch, Bombay.

Sub: Claim against Bank Guarantee No. A/89/228 dated 17.4.1989 for Rs. 3,97,13,102.00 (Rupees three crores ninety-seven lakhs thirteen thousand one hundred two) only issued in favour of Hindustan Construction Co. Limited, W.H. Marg, Bombay for earnest money of construction of Icha Main Dam.

Dear Sir,

A sum of Rs. 3,97,13,102.00 (Rupees three crores ninety-seven lakhs thirteen thousand 6th hundred two) only was granted to Hindustan Construction Co. Limited, W.H. Marg, Bombay against Bank Guarantee No. A/89/228 dated 17.4.1989 the said bank guarantee is valid up to 16-10-1992 only. Its period of validity has not been extended as yet and no amount against the said earnest money has been paid by me contractor.

You are therefore requested that the bank draft for Rs. 3,97,13,102.00 (Rupees three crores ninety-seven lakhs thirteen thousand one hundred two) drawn in favour of the Executive Engineer, Kharkai Dam Division II Icha, Chaliama, PO Kesatgarhia, District West Singhbhum, Chaibasa payable at State Bank of India, Chaibasa may kindly be sent to the undersigned immediately as a claim against the said bank guarantee.

An early action in this matter is solicited.

Yours faithfully,

Sd/-

Executive Engineer,

Kharkai Dam, Division II,

Icha, Chaliama"

21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer."

11. Mr. Mitra argued that the invocation of the bank guarantees was connected with performance, breach and termination of the contract. According to the Clauses of the contract, its termination could not be sudden but could only be effected after adequate notice. No such notice had been issued. There was no termination according to Mr. Mitra. His client had paid the entire bills of the second defendant in respect of lifting of the coal. Therefore, there was no cause of invocation of the bank guarantees.

12. The last submission of Mr. Mitra, was very substantial.

13. He showed me from the pleadings, mostly at paragraphs 36 and 37 of the petition that the price of coal had been reduced substantially by Rs. 90 lakhs. Furthermore, the bank guarantees were obtained by the second defendant as security for the plaintiffs payment of the price of coal. Since there was reduction in the price to the above extent, the bank guarantees to that extent could not be invoked. A chart to this effect is Annexure "N" at page 200 of the petition. The principles of Special Equity were argued.

14. Mr. Dutta learned Senior Advocate for the second defendant submitted at the outset that the letters invoking the bank guarantees had been corrected by corrigendum. Secondly, he submitted that the contract had been terminated for breach on the part of the plaintiff. He said that the plaintiff could not ask for examination of samples under orders of Court, as, under the Coal Control Order 2000, this evaluation of coal had to be done by a specified authority. There was gross suppression of material facts particularly with regard to termination of the contract According to Mr. Dutta, the contract had been duly terminated by the second defendant and the letter of termination duly received by the plaintiff.

15. He submitted that the bank guarantees were unconditional. This Court should not interfere with the same by passing an order restraining their invocation.

16. Mr. Dutta also submitted that the terms of the bank guarantee permitted their invocation by the seller or Eastern Coal Fields Ltd. It was so invoked by an authorised officer of the Company.

17. Now, I come to my prima facie findings.

18. First of all the judgment in Hindustan Construction Co. Ltd. v. State of Bihar and Others with [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), does not apply to the facts of this case, at all. It is true that in the case before the Hon"ble Supreme Court the bank guarantee was addressed to particular officers. There was no stipulation in the said bank guarantee that the bank guarantee could be invoked by a company or by the seller and so on. Hence, the highest Court held that only those officers could invoke the guarantee. In the subject bank guarantees in this case, there is a clear stipulation that the bank guarantees could be invoked by the seller. Seller has been defined to be Eastern Coal Fields Ltd. Therefore, I do not think

that invocation of the bank guarantees by the Senior Manager of Eastern Coal Fields Ltd. could be said to be an unauthorised invocation of the same.

19. Secondly, according to the second defendant the contract was terminated by the letter dated 16th June, 2014. Although it is the bone of contention as to whether the letter of termination was actually received by the plaintiff or not, at this stage we have to take the submission of Mr. Dutta to be correct that the contract was terminated by the second defendant.

20. If a contract has been terminated, there is no future obligation under the contract. If there is no future obligation under the contract it is wholly irrelevant for this Court to order inspection and evaluation of samples to assist in the performance of the contract.

21. Furthermore in my view the bank guarantees were unconditional. The stipulation in the invocation letters that the plaintiff was in breach of contract was enough for their invocation. The Court is not inclined to interfere in its invocation. This is so because the ground made out is a very ordinary ground which is usual in contracts of this nature. It is said on behalf of the plaintiff that because the quality of coal was poor, the plaintiff was unable to fulfill its contractual obligations. If for this reason the bank guarantees were invoked, there is no irregularity. It could not be said that there was fraud or that the principles of special equity can be invoked.

22. But the substantial point raised by Mr. Mitra to my mind is that there has been a fall in the price of coal to the extent of Rs. 90 lakhs. Supporting documents have also been annexed to substantiate this argument. There is no contradiction of this at this stage. It is prima facie proved that the price of coal is reduced by Rs. 90 lakhs. It follows that the plaintiff is entitled to return of the bank guarantee and its discharge to that extent. If the bank guarantee is liable to be returned and discharged there should be no bank guarantee in the eye of law. If that is the position and the Court passes appropriate orders then this Court could not be accused of passing an order restraining invocation of a bank guarantee. The bank guarantee to that extent has become non-est. I repeat that these findings are prima facie.

23. In those circumstances, I would refuse an order of injunction with regard to bank guarantees against serial numbers 1, 2, 3, 4 and 6 described in annexure G at page 146 of the petition. The bank guarantee against serial No. 5 is for Rs. 87,27,100/- which is roughly close to Rs. 90 lakhs. I restrain the second defendant from invoking this bank guarantee only provided the plaintiff keeps the same renewed with notice of such renewal to the second defendant at least seven days before its expiry. Otherwise the second defendant will be at liberty to invoke this bank guarantee also.

24. Let copies of documents relied on by Mr. Dutta be handed over to the Advocate on Record for the plaintiff by 20th June, 2014.

25. Let affidavits be exchanged according to the following directions. Affidavit in Opposition is to be filed by 7th July, 2014. List this application only 16th July, 2014. Affidavit in Reply may be filed in the meantime.