

(1989) 08 CAL CK 0046
In the Calcutta High Court
Case No : Special Suit No. 62 of 1986

Hindusthan Paper Corporation Limited APPELLANT
Vs
Keneilhouse Angami RESPONDENT

Date of Decision : 14-08-1989

Acts Referred:

Arbitration Act, 1940 — Section 20
Constitution of India, 1950 — Article 133, 134A

Citation : (1990) 1 CALLT 200 : (1990) 68 CompCas 361

Hon'ble Judges : Bimal Chandra Basak, J;Amarabha Sengupta, J

Bench : Division Bench

Advocate : B.K. Chatterjee and K. Roy, for the Appellant; A.C. Bhadra and Dipak Basu, for the Respondent

Final Decision : Allowed

Judgement

Bimal Chandra Basak, J.—This appeal is directed against an order dated March 23, 1989, whereby the teamed trial judge allowed the applications made u/s 20 of the Arbitration Act, 1940 (hereinafter referred to as "the said Act"), and gave necessary directions in connection with the arbitration proceedings. The facts of this case as alleged in the petition are as follows :

2. There was an agreement in writing between the plaintiffs, who are the respondents herein, and the defendants, who are the appellants herein regarding construction of-some plants. Clause 23.1 of this agreement contained an arbitration clause which provides as follows ;

"In the event of any question or disputes arising under or out of these conditions or in connection with this or relating to this contract except as to any matters the decision of which is specifically provided for in these conditions the matter in dispute shall be referred to two arbitrators, one to be nominated by the company and one to be nominated by the contractor, or in case of the said arbitrators not agreeing, then to an umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators or, in the event of

their not agreeing, of the said umpire shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940, and the rules hereunder and any statutory modification thereof shall be deemed to apply and to be incorporated in this contract."

3. Clauses 7.01, 24.02.1, 24.02.2 (a) and (c) of the contract provided for furnishing bank guarantee. It is stated that the plaintiff furnished the bank guarantee as mentioned in the said clauses of the contract --from Vijaya Bank, G. S. Road, Shillong, in favour, of the defendant. The bank guarantee provided as follows :

"Non-judicial paper Rs. 22.50 p.

Bank guarantee against refund of security deposit

Name of the bank

Vijaya Bank

Address

G. S. Road, Shillong 793 001

Guarantee No.

13/85

Date of expiry

30-4-1986

Limit of liability

Rs. 5,67,000 (rupees five lakhs sixty-seven thousand only).

Ref. Purchase order No.

PUR/CH/PO/245

Date

31-5-1982.

For (name of work)

Construction of effluent treatment plant for Cachar Paper Project.

Sub: Refund of security deposit hold back amount against completion

To

M/s. Hindustan Paper Corporation Ltd. Cachar Paper Project, Panchgram 788 202

Dear Sirs,

In consideration of Hindustan Paper Corporation Ltd. having its registered office at Vishal Bhavan, 85, Nehru Place, New Delhi 110024 (hereinafter called "the corporation") having agreed to refund the security deposit to the United Assam Construction Company, Kher Mortal, Dinapur (hereinafter referred to as "the contractor"), from the demand under the terms and conditions of the agreement No. PUR/CH/PO/245, dated May 31, 1982, made between the corporation and said contractor, inter alia, for construction of effluent treatment plant for Cachar Paper Project (hereinafter called "the agreement") of the security deposit for the due fulfilment by the said contractor of the terms and conditions contained in the said agreement, on production of bank guarantee for Rs. 5,67,000 (rupees five lakhs sixty-seven thousand only), We, Vijaya Bank, G. S. Road, Shillong (hereinafter referred to as "the bank"), do hereby undertake to pay to the corporation an amount not exceeding Rs. 5,67,000 (rupees five lakhs sixty-seven thousand only) against any loss or damage caused to or suffered by or would be caused to or suffered by the corporation by reason of any breach by the said contractor of any of the terms and conditions contained in the said agreement arising out of the security deposit.

We, Vijaya Bank, G. S. Road, Shillong, do hereby undertake to pay the amount due and payable under this guarantee without any demur, merely on a demand from the said corporation stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the said corporation by reason of any breach by the contractor of the terms and conditions in the said agreement or by reason of the contractor's failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 5,67,000 (rupees five lakhs sixty-seven thousand only).

We, Vijaya Bank, G. S. Road, Shillong, further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for performance of the said agreement and such extension as may be agreed to and inform us from time to time either for full or also of reduced value and that it shall continue to be enforceable till all the dues of the Hindustan Paper Corporation under, or by virtue of, the said agreement have been fully paid and its claims satisfied or discharged or till the corporation certified that the terms and conditions of the said agreement have been fully and properly carried out by the said contractor and, accordingly, discharges the guarantee. Unless a demand or claim under this guarantee is made on us in writing on or before April 30, 1986, we shall be discharged from all liabilities under this guarantee thereafter.

We, Vijaya Bank, G. S. Road, Shillong, further agree with the corporation that the corporation shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said agreement or to extend the time of performance of the

said contract from time to time or to postpone for any time or from time to time any of the powers exercisable by the corporation against the said contractor or to forbear from enforcing any of the terms and conditions relating to the said agreement, and we shall not be relieved from our liability by reason of any such variation or extension being granted to the said contractor or for any forbearance, act or omission on the part of the corporation or any indulgence by the corporation whatsoever which under the law relating to sureties would, but for this provision, have the effect of so relieving us.

Notwithstanding anything contained herein, our liability under this guarantee is restricted to Rs. 5,67,000 (rupees five lakhs sixty-seven thousand only) and that this guarantee shall remain in force till its expiry on April 30, 1986. Unless a suit or an action to enforce a claim under this guarantee is made against us on or before April 30, 1986, all your rights under the said guarantee shall be forfeited and we shall be released and discharged from all liabilities thereunder.

We, Vijaya Bank, G. S. Road, Shillong, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the corporation in writing

This guarantee shall not in any way be affected by your taking or varying or giving up any securities from the contractor or any other person, firm or company on its behalf or by the winding up, dissolution, insolvency or death, as the case may be, of the contractor.

This guarantee shall come into force simultaneously with your making the said payment to the vendor/contractor and shall not be revoked by us whether before its coming into force or at any time during its currency without your previous consent in writing.

In order to give full effect to this guarantee herein contained, you shall be entitled to act as if we were your principal debtors in respect of all your claims against the vendor/contractor hereby guaranteed by us aforesaid and we hereby expressly waive all our suretyship and other rights, if any, which are in any way inconsistent with the above or any provision of this guarantee.

We have power to issue this guarantee and the undersigned has full power to sign this guarantee on our behalf under power of attorney dated May 10, 1972, granted to him by our board of directors in accordance with our constitution.

Yours faithfully, for Vijaya Bank

(Sd.) Illegible Branch Manager, G. S. Road, Shillong."

Dated at Shillong.

15th July, 1985.

4. Disputes and differences arose between the parties to the main contract as stated in the petition. It is stated that the plaintiff submitted its claim and there

was some appointment of arbitrators. Thereafter, this application was made.

5. In paragraph 27 of the said petition, it has been stated as follows :

"27. The plaintiff states that the following disputes have arisen between the parties and the same have to be adjudicated in terms of the arbitration clause contained in the contract which are as follows :

(a) Whether the plaintiff is entitled to claim the sum of Rs. 73,47,000 from the defendant as mentioned in annexure to the said letter dated 15th July, 1986, being annexure "G" herein.

(b) Whether the defendant is entitled to invoke and/or enforce the said bank guarantee of Rs. 2,00,000 and Rs. 5,67,000 furnished by the plaintiff in terms of the Clause 7.01 and 24.02-2(C) of the contract ?

(c) To what other relief, if any, the plaintiff is entitled ?"

6. The learned judge appointed a sole arbitrator and we may point out that the parties had not raised any dispute regarding the personnel. Being aggrieved by the said order, this appeal has been preferred by the Hindustan Paper Corporation Ltd.

Submissions :

The main grievance on behalf of the appellant is as follows :

The appellants do not dispute that the disputes referred to in sub-paragraphs (a) and (c) may be referred for adjudication. However, their main challenge was regarding the reference of dispute set out in sub-paragraph (b). It is submitted that the dispute set out in sub-paragraph (b) cannot be referred for adjudication under the said arbitration agreement. It is submitted that it is now well settled that the contract of guarantee between the bank and its beneficiaries is a separate contract apart from the main contract between the parties one of whom is the beneficiary under the contract of guarantee. The bank guarantee is a separate contract between the bank and the beneficiary and the party at whose instance the guarantee is furnished is not a party to the same. It is further submitted that the enforceability of the bank guarantee depends not on the terms and conditions of the original contract between the contracting parties but on the terms and conditions of the bank guarantee itself. It is further submitted that the bank is not a party to the original contract and that the arbitration agreement is not binding on them. Accordingly, it is submitted that any claim made by the beneficiary against the bank based on the bank guarantee cannot form the subject-matter of an adjudication under the arbitration clause between the parties to the original contract. In this context, reliance is placed on the following decisions :

(i) Union of India (UOI) Vs. Raman Iron Foundry, ; (ii) United Commercial Bank Vs. Bank of India and Others, ; (iii) National Project Construction Corporation Ltd. Vs. G. Ranjan, ; (iv) Allied Resins and Chemicals Ltd. Vs. Minerals and

Metals Trading Corporation of India Ltd. and Another, ; (v) Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, ; (vi) Centax (India) Ltd. v. Vinmar Impex Inc. AIR 1986 SC 1024 : [1987] 61 Comp Cas 697 and (vii) U. P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P.) Ltd. [1988] 1 SCR 174 : [1989] 65 Comp Cas 283.

On behalf of the respondents, it is submitted that the arbitration clause is wide enough to cover the dispute as referred to in sub-paragraph (b). The claim in respect of the bank guarantee is covered by the arbitration clause having regard to the very general terms and conditions of the arbitration clause, it is further submitted that, in any event, in view of the decision in Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, , the said dispute will be covered by the same.

Decision :

The points raised in this case are now well-settled. Two Division Bench decisions of this court and the decisions of the Supreme Court have set at rest the principles involved therein. We shall shortly refer to the same. Allied Resins and Chemicals Ltd. Vs. Minerals and Metals Trading Corporation of India Ltd. and Another, , is a Division Bench judgment of this court wherein the legal aspect of the matter has been dealt with in detail. The Bench considered various decisions cited before it including the case of United Commercial Bank Vs. Bank of India and Others, . In this connection, the Division Bench observed as follows (at page 355) :

"In our opinion, at this stage, the question before us is whether we shall interfere with the discretion exercised by the learned trial judge. As pointed out in the case of Bird and Co. Vs. Tripura Jute Mills and Another, , we are not concerned in this appeal with what will ultimately happen in the suit. In this appeal, this court is concerned with an order passed by the learned trial judge in an interlocutory application. As no proper prima facie case has been made out for any order of injunction, the learned trial judge exercised his discretion properly in refusing to pass any order of injunction. In our opinion also, no prima facie case has been made out on behalf of the plaintiff appellant. The importance of a bank guarantee has been pointed out in the aforesaid decisions. We may also point out that the latest decisions of both the Division Benches of this court and the Supreme Court of India point out that there is no practical difference between a bank guarantee and a letter of credit. The bank and the beneficiaries are the only parties in a bank guarantee. It may be pointed out that we are merely hearing the appeal from an order passed in an interlocutory application in the suit. We are not hearing the suit. At this stage, we are only concerned with the prima facie case and balance of convenience. In our opinion, it all depends on the facts of each and every case and the language of the particular document, irrespective of the question whether it is a bank guarantee or a letter of credit. The question is whether the terms and conditions for enforcement of the bank guarantee have been complied with or not. We agree with Mr. Sen that the bank guarantee in the

present case, as it clearly shows from Clause (1) itself, is not an absolute and unconditional one from one point of view. The last four sentences as we have set out hereinabove show that it is a conditional one. But having regard to Clause (3) of the said guarantee, i.e., the "finality" clause, the result is the same. By virtue of Clause (3) of the said guarantee, the decision of the beneficiary as to whether the plaintiff-appellant has failed to carry out their obligation shall be final and binding on the bank furnishing the bank guarantee. Even if, according to Clause (1), such payment is not unconditional but whether the condition has been fulfilled or not and whether the obligation has arisen or not will depend on the decision of the beneficiary itself. We are unable to accept the interpretation of Mr. Sen regarding Clause (3) to the effect that the question of "final decision" of the beneficiary has no application when the goods have not been offered. The said question is covered by and comes within the scope of "carrying out the obligation". In their letter demanding the amount from the bank, the beneficiary is saying that the plaintiff-appellant had failed to take delivery of the goods. That contemplates that the goods were offered for delivery. In any view of the matter whether the goods were offered for delivery or not and whether they were taken delivery of or not, it is a dispute relating to "carrying out the obligation" of the purchaser within the meaning of Clause (3) and there is a finality to the decision of the beneficiary in respect of that matter which is binding on the bank and the guarantee becomes enforceable. Therefore, in our view, no prima facie case has been made out for grant of such injunction and no case has been made out for interfering with the decision exercised by the learned trial judge in refusing to pass an interim order of injunction. Further, in view of the decisions referred to above, on the question of balance of convenience also, we are against the plaintiff-appellants. As pointed out by the Supreme Court in the case of United Commercial Bank Vs. Bank of India and Others, and other decisions, in such a case, no temporary injunction should be granted."

7. In the other Division Bench decision in the case of Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others, , a Division Bench of this court held as follows (at page 364) :

"Whether it is a bank guarantee or a letter of credit or contract of indemnity, the enforceability of such an instrument against the bank depends on the terms and conditions of the same. The question before the court in such a case is whether the terms of the same have been fulfilled to enable the beneficiary to enforce the same against the bank executing the same. If it has been so fulfilled, then, the beneficiary is entitled to enforce the same against the bank and, it is not fit and proper on the part of the court as a matter of fact and law, it is not open to the court to pass an interlocutory order, whereby the beneficiary will be deprived of the benefit of the same and he is prevented from enforcing the same against the bank. There should be a sanctity in respect of any such instrument executed by a bank assuring payment to a beneficiary ; otherwise, all commercial transactions will be in jeopardy and foreign trade will be seriously affected. The foreign sellers or buyers will not have any faith in Indian Banks. In respect of such instruments

executed by a bank, the bank is not and should not be concerned with the underlying contract between the buyer and the seller. Duties of a bank under any such instrument are created by the document itself but in any case it has the powers and is subject to the limitations which are given or imposed by it. Whether in respect of the underlying contract between the seller and the purchaser any of the parties have committed default or not, whether the seller is entitled to the prices under the underlying contract or not, is not and cannot be the subject-matter of controversy if otherwise under the instrument the beneficiary is entitled to the amount assured by the bank having fulfilled the terms and conditions of the instrument executed by the bank. The dispute as to the sufficiency of the performance between the buyer and the seller or between the seller and the buyer cannot be the reason for withholding the payment claimed under such instrument. In such a case, the bank has only to see whether the event has happened on which its obligation to pay has arisen. In such a case the courts should not pass any interim injunction ; otherwise the whole banking system would fail and trade will collapse."

8. It may be pointed out that the SLP filed against the aforesaid decision of the Division Bench of this court was dismissed by the Supreme Court.

9. In our opinion, the point is now well-settled. A bank guarantee may be furnished in terms of a particular contract between two parties. In terms of the conditions of the contract, a bank guarantee may be provided by a bank in favour of one of the parties to the original contract (hereinafter called "the beneficiary"). As to the question of enforcement of the bank guarantee by the beneficiary against the bank, the rights and liabilities are to be governed by the bank guarantee itself and not by the terms and conditions of the original contract. The bank guarantee itself is a contract separate from the original contract pursuant to which the bank guarantee is furnished. The bank is not a party to the original contract. Similarly, the party at whose instance the bank guarantee is furnished pursuant to the agreement, is not a party to the bank guarantee. The bank guarantee is to be enforced if it complies with the terms and conditions of the bank guarantee itself and not when there is any default or breach of the terms and conditions of the main contract. If the condition for payment under the bank guarantee is fulfilled, then such payment is to be made to the beneficiary though ultimately it may be open to the party at whose instance the bank guarantee was furnished to file a suit for damages against the other parties to the contract. It is open to such parties also to file any suit against the bank for recovery of any amount, if any, if the bank has acted contrary to the transaction between the bank and such other parties. That is no ground for holding that the original contract is to be treated as part of the guarantee or that the arbitration agreement in the original contract can be incorporated in the bank guarantee. If the two contracts are separate, the arbitration clause in the original contract cannot be imported in the contract of bank guarantee. In that event, the arbitration clause in the parent contract cannot include the question as to whether the terms and conditions of the bank

guarantee have been fulfilled. Whether the bank guarantee is enforceable or not does not depend on the terms and conditions of the original contract. In this particular case, Clause (b) as such makes it quite clear that the alleged dispute sought to be raised therein is the dispute regarding the right of the beneficiary under the bank guarantee to enforce the bank guarantee as against the bank. It has nothing to do with any breach of contract by the beneficiary under the parent contract. A claim arising out of a bank guarantee is not a dispute arising out of the original contract. As we have pointed out, Clause (b) as such relates to the right of the beneficiary against the bank on the basis of the said bank guarantee and not the right of the beneficiary as such against the other party to the contract under the said original contract. The original arbitration agreement may be very wide or general in terms, but that certainly does not include a dispute arising under a separate agreement with a separate party, that is, the bank guarantee and the bank.

10. The decision reported in Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, does not help the respondent, i.e., the plaintiff in the petition. The main reason why we are not inclined to follow that judgment of the single judge is that this judgment does not take into consideration the two Division Bench decisions of this court, one of which was affirmed in appeal by the Supreme Court. In our opinion, this single Bench judgment does not set out the correct law.

11. For the aforesaid reason, we allow this appeal. The judgment and order of the learned trial judge is modified to the extent that disputes and differences between the parties referred to arbitration for adjudication shall only be in respect of Clauses (a) and (c) of paragraph 27 and not Clause (b) which relates to the right of the beneficiary against the bank arising out of the bank guarantee. Certain ancillary directions have been given by the trial court which shall remain excepting that the arbitrator is directed to enter into the reference within two weeks from the date of communication of this order and that he will make and publish his award within three months from- the date of entering into the reference. Liberty to apply for costs in the reference.

12. Prayer for certificate under Article 134A read with Article 133 of the Constitution of India is made and is rejected on the ground that we are not of the opinion that this involves any substantial question of law which, in our opinion, need be decided by the Supreme Court as we have made it clear that we are following the decisions of the Division Bench of this court and the Supreme Court. Accordingly, such prayer is rejected.

13. Prayer for stay of operation of the order is also rejected. All interim orders are vacated.

14. All parties concerned including the arbitrator are to act on the operative portion of the signed copy of the order.

Amarabha Sengupta J.

15. I agree.