

(2007) 03 MP CK 0040
In the Madhya Pradesh High Court

Jagdish Constructions Ltd.

APPELLANT

Vs

M.P. Rural Road Development Authority and Others

RESPONDENT

Date of Decision : 23-03-2007

Acts Referred:

Citation : AIR 2007 MP 266 : (2008) 1 BC 74 : (2007) 2 CTLJ 411

Hon'ble Judges : S.K. Seth, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Seth, J.—Though this petition is directed against the communication dated 1-3-2007 (Annexure P-1) but in fact, it is to seek a restrain order against respondents not to effect recovery from the petitioner till adjudication of dispute by arbitrator.

2. Undisputed facts. Petitioner was awarded contract for "Construction and of Maintenance of Rural Roads" under Pradhan Mantri Gram Sadak Yojna (PMGSY) in respect of package No. MP-3153 A.D.B. to be completed within the stipulated period of twelve months. Pursuant to this, work order was issued. Petitioner also furnished an unconditional performance guarantee in the sum of Rs. 75 lacs payable on demand without demure to the respondent No. 1. The respondent No. 2, the Oriental Bank of Commerce issued said performance guarantee in favour of respondent No. 1. It is also not disputed that respondent No. 1 terminated contract on 1-3-2007 and invoked the performance guarantee, consequently, the respondent No. 2 issued the communication dated 6-3-2007 (Annexure P-4) advising petitioner to deposit amount of the per for mance guarantee. Hence this petition.

3. Shri Bagadia, learned senior counsel for the petitioner made two-fold submissions. One, that no letter or prior notice was given by the respondent No. 1 to show what were the compelling factors for invoking the performance guarantee. Second, without ascertaining or quantifying the amount of loss,

respondent No. 1 was unjustified in invoking the performance guarantee. After having heard learned Counsel for the petitioner on the question of admission, and giving considerable thought, I find myself unable to agree with either of the submissions of learned Counsel for the petitioner for the following reasons.

4. A performance guarantee is akin to letter of credit. In other words, it is a commercial document so it can be invoked in a commercial manner. The invocation would be sufficient and proper, if the bank concerned understands that the guarantee is being invoked by the beneficiary in terms of the guarantee. The position has been summed by Roskill, LJ in *Howe Richardson Scale Co. Ltd. v. Polimex-Cekop and National Westminster Bank Ltd.* (1978) 1 LR 161 in these words:

Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform, that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen.

In *United Commercial Bank Vs. Bank of India and Others*, , Supreme Court in para 41 of the judgment also quoted with approval the following observations of Lord Denning in *Elia v. Matsas* (1966) 2 LILR 495 while refusing to grant an injunction "...a bank guarantee is every much like a letter of credit. The Courts will do their utmost to enforce it according to its terms. They will not in ordinary course of things, interfere by way of injunction to prevent its due implementation.... But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction."

5. An unconditional bank guarantee is encashable on the very demand of the beneficiary and the demand according to the terms of guarantee is conclusive. In such type of guarantee, the beneficiary is the sole Judge as to whether there is any breach of underlying or primary contract and the bank is not concerned with the underlying contract unless otherwise expressly provided for. In present case, performance guarantee furnished in favour of respondent No. 1 beneficiary, is unconditional one without any strings attached to it as is clear from perusal of performance guarantee furnished in favour of respondent No. 1. Neither a prior notice nor determination or quantification of loss would be necessary for invoking the performance guarantee such as the one furnished by the petitioner. No doubt, it is true that in exceptional cases, such as fraud of which the bank has the notice, Court may issue injunction but otherwise it is open for the parties to settle their disputes as per the mode provided under the contract. In the present petition, it is not the case of the petitioner that fraud of which the bank had notice. Merely because the beneficiary has not issued a letter or notice nor quantified the loss amount, in my opinion, are not sufficient to issue a restraint order or to interfere with the invocation of the performance guarantee. Thus, I

do not find any merit in the submissions of the learned senior counsel. Similarly, reliance placed on the decision in Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, is of no avail. As regard the relief No. (ii) of para 7, learned Counsel for the petitioner was fair enough to state at the outset of the arguments, that a. dispute has already been raised by the petitioner for the decision of the competent authority in terms of the contract. No sooner, the authority gives a decision parties shall be free to resolve their dispute in terms of the contract.

6. In the result, this petition fails and is accordingly dismissed summarily. Order accordingly.