

(2018) 05 DEL CK 0306
In the Delhi High Court
Case No : CS(OS) No.1011 OF 1998

M/S VIDESH SANCHAR NIGAM LIMITED	APPELLANT
Vs	
AXIS BANK LIMITED & ANR.	RESPONDENT

Date of Decision : 23-05-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 80

Citation : (2018) 05 DEL CK 0306

Hon'ble Judges : VALMIKI J.MEHTA

Bench : Single Bench

Advocate : Gopal Jain, Mayank Sapre

Judgement

VALMIKI J. MEHTA, J.

1. The subject suit has been filed by the plaintiff/M/s Videsh Sanchar Nigam Limited for recovery of Rs.2,57,56,350/- along with interest at 24% per annum from the defendant no.1/UTI Bank Ltd.(as originally known), being the unpaid balance of the bank guarantee dated 20.7.1996 issued by the defendant no.1.

2. The facts of the case are that the defendant no.1/bank at the request of the defendant no.2 issued the subject bank guarantee dated 20.7.1996

(Ex.PW1/5) for a total amount of Rs.4,20,00,000/-. The bank guarantee was given because of reserving space segment by the plaintiff in an Intelsat

Satellite IS-704 at 66 degrees East with a guaranteed 36 Mhz bandwidth transponder for a lease of 10 years with effect from 1.4.1995. The Intelsat

Satellite was in the C-band Spot Beam Transponder covering Indian sub-continent and some portions of the Middle East. The plaintiff partially invoked

the bank guarantee by its letter dated 7.2.1997 (Ex.PW1/6) for an amount of

Rs.1,62,43,650/-, and which was paid by the defendant no.1/bank.

Thereafter, the plaintiff issued its letter dated 12.7.1997 (Ex.PW1/12) asking for payment of the balance amount of Rs.2,57,56,350/-, and which

amount the defendant no.1/bank failed to pay, resulting in filing of the subject suit for recovery with interest.

3. The defendant no.1/bank filed its written statement and the basic facts were not disputed of the issuance of the bank guarantee, of the fact that the

bank guarantee was for Rs.4,20,00,000/-, the fact that an amount of Rs.1,62,43,650/- was paid under the invocation letter dated 7.2.1997 and for the

balance amount of Rs.2,57,56,350/- the bank guarantee was invoked for being paid vide letter dated 12.7.1997 (Ex.PW1/12). The basic defence of the

defendant no.1/bank was that there cannot be repeated invocations under the bank guarantee. Defendant no.1/bank also contended that the subject

bank guarantee was no longer valid on account of a subsequent agreement dated 31.7.1996 (Ex. PW1/4) entered into between the plaintiff and the

defendant no.2.

4. The following issues were framed in this suit on 26.8.2003:-

1. Whether the agreement dated 31.7.1996 entered into between the plaintiff and defendant no.2 is valid and binding qua defendant no.1?OPP.

2. Whether the invocation by the plaintiff of the amount of Rs.1,62,43,650/- qua defendant no.1, by its letter dated 7th February 1997 addressed to

defendant no.1 extinguishes the full liability of defendant no.1 under the Bank Guarantee No.23/96-97 dated 20th July, 1996? OPD.

3. Whether the plaintiff is entitled to receive from defendant no.1 the remaining sum of Rs.2,57,56,350/- plus interest accruing thereon at the rate of

24% per annum from 12th July, 1997 till the date of decree or payment in full and final, whichever is earlier? OPP.

4. Relief.â??

5. Issue no.3 was modified vide order dated 14.2.2006 to read as under:-

3. Whether the plaintiff is entitled to receive from defendant nos. 1 and 2, jointly and severally, remaining sums of Rs.2,57,56,350/- plus interest

accruing thereon @ 24% per annum from 12th July, 1997? OPP.â??

Issue Nos.2 and 3

6. Issue nos.2 and 3 can be disposed of together inasmuch as the issue in this

case is basically a legal issue. I may note that the plaintiff filed its affidavit by way of evidence of its witness Sh. Satish Gopal Ranade and who was not cross-examined by the defendant no.1/bank, and as so recorded in the order dated 25.8.2009. Even the plaintiff did not cross-examine the DW-1, Sh. Lokinder Bisht inasmuch as the issue only is with respect to the fact as to whether there can be successive invocations of the bank guarantee.

7. Let us see the language of the bank guarantee in this case. The relevant portion of the bank guarantee reads as under:-

â??RE: Bank Guarantee in respect of Agreement dated 4th April, 1995 between Videsh Sanchar Nigam Limited and M/s. Srishti Video Corp.

Limited. M/s. Srishti Videocorp Limited a public company incorporated under the Companies Act, 1956 and having its registered office at 24/56,

Birhama Road, Kanpur-208 001 (hereinafter called â??the companyâ?) has entered into an agreement dated 4th April, 1995 (hereinafter referred to

as â??the said agreementâ?) with Messers Videsh Sanchar Nigam Limited (hereinafter referred to as â??VSNLâ?) whereby VSNL has agreed to

manage a 36MHz Transponder lease from Intelsat on the terms and conditions mentioned therein. It has been agreed that a bank guarantee for

Rs.4.20 crores (Rupees Four crores and Twenty Lakhs only) shall be given by the company in favour of VSNL for due and faithful performance of

the terms and conditions of the said agreement. UTI Bank Ltd., (Name of the Bank) having its office at Kanchanjunga Building, 18, Barakhamba

Road, New Delhi â?" 110 001 has at the request of the company agreed to give the guarantee as hereinafter contained:

1. We, UTI Bank Ltd. hereby undertake and assure VSNL that if the Company shall in any way fail to observe or perform the terms and conditions

of the said agreement or shall commit any breach of its obligations thereunder, the bank shall on demand and without any objection or demur shall

undertake and agree to pay to VSNL the said sum of Rs.4.20 crores (Rupees Four crores and Twenty lakhs only) or such lesser amount as the

VSNL may demand without requiring the VSNL to have recourse to any legal remedy that may be available to it to compel the bank to pay the same.

2. Any such demand shall be conclusive as regards the liability of the company to VSNL to pay or as regards the amount payable by the bank under

this guarantee. The bank shall not be entitled to withhold payment on the ground

that the company had disputed liability to pay or has disputed the quantum of the amount or that any arbitration proceeding or legal proceeding is pending between the company and VSNL regarding the claim.

3. We the bank further agree that this bank guarantee shall remain in full force until 19th July, 1997; for amount equivalent to the manual intelsat lease

charges. The company shall be obliged to furnish to VSNL before 19th April, 1997, the renewed Bank Guarantee. Failure to furnish such renewed

Bank Guarantee by the company to VSNL. VSNL shall have the right to invoke the existing Bank Guarantee of Rs.4.20 crores (Rupees Four crores

and Twenty lakhs only) within 3 (Three) months, from 19th April, 1997, and the bank shall make the payment of the abovesaid amount to VSNL

without any recourse or protest or objection on any ground.

4. The bank further agrees with the VSNL that VSNL shall have the fullest liberty without the consent of the bank and without affecting in any way

the obligations hereunder to vary any of the terms and conditions of the said agreement or to extend the time for performance of the said agreement

from any of the powers exercisable by the VSNL against the company and to forbear to enforce any of the terms and conditions relating to the said

agreement and the bank shall not be relieved from its liability by reason of such failure or extension being granted to the company or through any

forbearance, act or omission on the part of the VSNL or any indulgence by VSNL to the company or any other matter or thing whatsoever which

under the law relating to sureties would but for this provision have the effect of relieving or discharging the guarantor.

5. Notwithstanding anything to the contrary contained in the text above, our Bank's liability under this guarantee is restricted to Rs.4.20 crores

(Rupees Four crores and Twenty Lakhs only) and our guarantee shall remain in force until 19th July, 1997. Unless a demand or a claim under the

guarantee is made on us in writing on or before 19th July, 1997 all your rights under the said guarantee shall be forfeited and we shall be relieved and

discharged from all liabilities hereunder:

6. This guarantee is given under Bank's power to give this guarantee and Smt. IL Bhat and Shri R.K. Bniwal who have signed it on behalf of the

bank have authority to do so. For UTI BANK LTD. sd/- sd/-
Authorised Signatory Authorised Signatory Power of Attorney

No.??(underlining added)

8. Bank guarantee is an independent contract between the bank which issues the bank guarantee and the beneficiary of the bank guarantee. The bank in this case is defendant no.1 and the plaintiff is the beneficiary. The contract of bank guarantee has to be performed as per its terms independent of any disputes between the beneficiary of the bank guarantee and the person at the request of whom the bank guarantee is issued. The bank guarantee contract in the present case only specifies the upper limit of the bank guarantee for being invoked i.e for Rs.4,20,00,000/-, and there is no clause in the bank guarantee reproduced above that it cannot be invoked more than once. Therefore there can be various invocations under the bank guarantee, provided the invocations are within the periods specified in the bank guarantee, and upto the limit of the bank guarantee. The disputed invocation in the present case is dated 12.7.1997, Ex.PW1/12, and the last date for invoking the bank guarantee was 19.7.1997. Therefore, invocation is admittedly for the balance amount of the bank guarantee and before the last date for invocation i.e 19.7.1997. I therefore hold that the defendant no.1/bank was liable to pay under the bank guarantee.

9. Learned Senior Counsel for the plaintiff has also rightly relied upon EMAAR MGF Construction Pvt. Ltd. vs. Delhi Development Authority & Ors., 175 (2010) DLT 585, wherein a Learned Single Judge at the stage of disposal of an injunction application has held that there can be more than one invocation under a bank guarantee. Relevant paras of the judgment are paras 61 to 65 and which read as under:-

61. Having heard learned Counsel for the parties, considered their respective submissions, and in view of the settled position of the law on the subject, I am of the view that the petitioner is not entitled to seek a restraint on the encashment of the bank guarantees in question for the amount of Rs.183 crores, or to any other relief as prayed for.

62. I may first deal with the submission of learned ASG that the bank guarantees in question could not have been invoke partially and repeatedly, and that if a partial invocation had been resorted to by the respondent DDA, the same would have lapsed for the remaining balance amounts even before the expiry of the period of currency of the said guarantees.

63. On this submission being made, learned counsel for the respondent Bank of

India was asked by the court to specifically take instructions as to the normal banking practice in such situations. Learned counsel for the State Bank of India has stated that a bank guarantee, unless there is a limitation contained in its terms that it could be invoked only once, could be invoked repeatedly during its currency, partially, so that the aggregate amount invoked by the beneficiary does not exceed the maximum amount payable under the bank guarantee.

64. A perusal of the bank guarantees in question dated 12.6.2008 (issued by State Bank of Patiala), the validity whereof was extended vide extension dated 27.9.2010; and the bank guarantee dated 11.6.2008 (issued by State Bank of India), the validity whereof was extended vide extension dated

27.9.2010 upto 31.12.2010, does not support the submission made by Ms. Jaisingh. The said bank guarantees, inter alia, state that the said banks

do hereby unconditionally and irrevocably undertake to pay to DDA an amount not exceeding without any demur or merely on a demand

in writing from DDA, received by the bank on or before..... stating that he amount claimed is due and payable by project developer. Any such

demand received by the bank on or before shall be conclusive as regards the amount due and payable by the bank under this guarantee.

However, the banks liability to this guarantee shall be restricted to an amount not exceeding..... The bank guarantees further recite our

liability under this agreement shall not exceed It further states we shall be liable to pay guaranteed amount or any part thereof only and

only if you serve upon us a written claim or demanded on or before.....

65. From the aforesaid language used in the bank guarantees in question, it cannot be inferred that there is any limitation therein that they could be

invoked only one. The upper limit of the amounts for which these bank guarantees were furnished, have been indicated in the respective guarantees.

Therefore, up to the upper limit/ceiling fixed in the said bank guarantees, the beneficiary could invoke the guarantees repeatedly during their currency,

such that the total amount invoked/drawn on the bank guarantees does not exceed the upper limit/ceiling amount for which they are furnished.

(underlining added)

10. In view of the above, issue nos. 2 and 3 are decided in favour of the plaintiff and against the defendant no.1/bank and it is held that the plaintiff is

entitled to recovery of the amount of Rs.2,57,56,350/- from the defendant no.1/bank.

Issue no.1

11. Issue no.1 is now taken up for discussion. The contention of the defendant no.1/bank is that the subject bank guarantee dated 20.7.1996/Ex.PW1/5

which was for an amount of Rs.4.20 crores stands revoked and no longer remained valid on account of an agreement dated 31.7.1996/Ex.PW1/4

entered into between the plaintiff and the defendant no.2. The question is that whether the defendant no.1/bank is justified in so contending.

12. In my opinion for two reasons the defendant no.1/bank is completely unjustified in arguing the extinction and effacement of the bank guarantee

dated 20.7.1996/Ex.PW1/5 on the ground that there is an agreement dated 31.7.1996 between the plaintiff and the defendant no.2 for two reasons.

13.(i) The first reason as to why the agreement dated 31.7.1996 entered into between the plaintiff and the defendant no.2 did not bring to an end the

subject bank guarantee dated 20.7.1996/Ex.PW1/5 becomes clear from para 14 of the agreement dated 31.7.1996/Ex.PW1/4. This para 14 containing

four sub-paras upto para 14.4 reads as under:-

14. Bank Guarantee

14.1 The Customer shall provide to VSNL a Bank Guarantee in a form acceptable to VSNL for an amount equal to one year lease rental charges

within one month from the date of execution of this agreement.

14.2 The Customer undertakes that the Bank Guarantee as above shall be renewed annually for the entire term of this agreement as mentioned in

clause 1.

14.3 Until such time the Bank Guarantee is furnished as above by the Customer, VSNL shall hold the earlier security furnished by the Customer and

deal with such security (including Bank Guarantee) furnished under the earlier agreement dated 4.4.1995 in respect of dues payable and outstanding

under the earlier agreement as also under this agreement at its discretion.

14.4 The Customer states that he has already initiated and obtained executed Bank Guarantee for Rs.4.20 Crores in terms of letter

No.HQ/CFO/96/07 dated 25.4.1996 from VSNL in pursuance to the earlier agreement dated 4.4.1995. The parties agree that the Customer shall

furnish the said Bank Guarantee to VSNL immediately and the said Bank Guarantee shall remain valid for the purpose of this agreement as security

for the charges payable for the first year commencing from 1.4.1996. On furnishing of such Bank Guarantee VSNL agrees to release the security

held as per clause 14.3 above. For the subsequent years the Customer agrees and undertakes to furnish the VSNL the Bank Guarantee equivalent to

the annual charges payable under clause 13 of this agreement.â?? (emphasis added)

(ii) A reading of the aforesaid para 14, and especially sub-paras 14.3 and 14.4, show that the earlier subject bank guarantee of Rs.4.20 crores will

continue to remain valid unless the same is substituted by another bank guarantee got issued by the defendant no.2 in favour of the plaintiff. Obviously

this was so because there were charges which were payable by the defendant no.2 to the plaintiff under the agreement dated 31.7.1996/Ex.PW1/4

and for which charges there had to be a bank guarantee. Since the agreement dated 31.7.1996 was in modification of an earlier agreement dated

4.4.1995 entered into between the plaintiff and the defendant no.2, and under that earlier agreement the subject bank guarantee was already given,

therefore, for claim of the charges of the plaintiff, there had to be a bank guarantee and consequently till a fresh bank guarantee was given by the

defendant no.2 to the plaintiff for charges payable under the agreement dated 31.7.1996/Ex.PW1/4, the subject bank guarantee continued for the

charges which were payable under the new agreement dated 31.7.1996/Ex.PW1/4, and which is absolutely and completely clear from paras 14.3 and

14.4 of the agreement dated 31.7.1996/Ex.PW1/4. It is not the case of either the defendant no.1/bank or the defendant no.2 that pursuant to sub-paras

14.3 and 14.4 of the agreement dated 31.7.1996/Ex.PW1/4 entered into between the plaintiff and the defendant no.2, that the defendant no.2 had

given a new/fresh bank guarantee in substitution of the subject bank guarantee dated 20.7.1996/Ex.PW1/5. I do not find any such case of the

defendant nos.1 and 2 as per their pleadings which state that a fresh bank guarantee was given by the defendant no.2 to the plaintiff in substitution of

the subject bank guarantee dated 20.7.1996/Ex.PW1/5, and which earlier bank guarantee was to otherwise continue for payment of charges under the

new agreement dated 31.7.1996/Ex.PW1/4 in terms of subparas 14.3 and 14.4 of the agreement dated 31.7.1996/Ex.PW1/4. In my opinion therefore

it is quite clear that the agreement dated 31.7.1996/Ex.PW1/4 did not automatically lead to extinguishing of the subject bank guarantee dated 20.7.1996/Ex.PW1/5 and this subject bank guarantee dated 20.7.1996/Ex.PW1/5 continued inasmuch as no fresh bank guarantee was given by the defendant no.2 to the plaintiff for substitution of the subject bank guarantee and as per various sub-paras of para 14 of the agreement dated 31.7.1996/Ex.PW1/4.

(iii) The second reason for holding that the defendant no.1/bank continues to be liable under the subject bank guarantee dated 20.7.1996/ Ex.PW1/5 is para 4 of the subject bank guarantee dated 20.7.1996. This para 4 makes it clear that the liability of the defendant no.1/bank to the plaintiff will continue irrespective of the contract between the plaintiff and defendant no. 2 being varied as between the plaintiff and defendant no. 2. Para 4 of the subject bank guarantee dated 20.7.1996 clearly states that no consent of the defendant no.1/bank is necessary for the agreement between the plaintiff and defendant no. 2 to be varied, and even if the existing agreement between the plaintiff and defendant no. 2 was varied, the same would not affect the obligations of the defendant no.1/bank under the subject bank guarantee. In fact, as already stated in para 8 above, a bank guarantee is an independent contract between the bank and the beneficiary. A bank guarantee being an independent contract between the bank and beneficiary, unless and until the beneficiary has agreed for the bank guarantee to be extinguished, the bank will continue to be liable under the bank guarantee, more so when there is no communication which is issued by defendant no. 2 to the defendant no. 1 that the subject bank guarantee no longer remains valid as a fresh bank guarantee has been given by the defendant no.2 to the plaintiff under the agreement dated 31.7.1996/ Ex.PW1/4.

14. In view of the aforesaid discussion, issue no. 1 is decided in favour of the plaintiff and against the defendants by holding that by the contract dated 31.7.1996/Ex.PW1/4 the liability of the defendant no.1/bank under the subject bank guarantee dated 20.7.1996/Ex.PW1/5 was not extinguished and merely because there was a subsequent agreement dated 31.7.1996/Ex.PW1/4 between the plaintiff and defendant no. 2, the same would not be binding on the defendant no.1/bank for termination of its liability under the subject bank guarantee, more so and especially because no fresh bank

guarantee was given by defendant no.2 to the plaintiff in terms of various sub-
paras of para 14 of the agreement dated 31.7.1996/ Ex.PW1/4 executed

between the plaintiff and defendant no. 2.

Interest

15. Since the transaction is a commercial transaction, and the plaintiff had duly
served notices to the defendant no.1/bank through its Advocates, and

copies of which notices have been exhibited as Ex.PW1/17, Ex.PW1/19,
Ex.PW1/20 and Ex.PW1/22, the plaintiff is entitled to interest at the rate of

12% per annum simple. I may note that actually the plaintiff may be entitled to
interest at the rate of 18% per annum in view of Section 80 of the

Negotiable Instruments Act, 1881 which provides for grant of interest at 18% per
annum simple in case of a dishonoured negotiable instrument, a bank

guarantee being a negotiable instrument, however, the Supreme Court in the
recent chain of judgments reported as *Rajendra Construction Co. v.*

Maharashtra Housing & Area Development Authority and Others (2005) 6 SCC
678, *McDermott International Inc. v. Burn Standard Co. Ltd.* and

Others, (2006) 11 SCC 181, *Rajasthan State Road Transport Corporation v. Indag
Rubber Ltd.*, (2006) 7 SCC 700, *Krishna Bhagya Jala Nigam Ltd.*

v. G. Harischandra Reddy and Another, (2007) 2 SCC 720 & *State of Rajasthan
and Another Vs. Ferro Concrete Construction Private Limited*

(2009) 12 SCC 1 has held that once the litigation remains pending for a long
period of time, and since the changed economic scenario has resulted in

consistent fall in the rates of interest, Courts are duty bound to reduce the high
rates of interest. Accordingly in the fact of this case, I hold that

plaintiff will be entitled to interest at the rate of 12% per annum simple from
12.7.1997 till the date of filing of the suit, and also at this same rate

pendente lite and future till payment by the defendant no. 1/bank to the plaintiff.

Relief

16. The suit of the plaintiff is decreed against the defendant no.1/bank for a sum
of Rs.2,57,56,350/- with interest at 12% per annum simple from

12.7.1997 till the date of filing of the suit, and also pendente lite and future
interest at the same rate of 12% per annum simple till payment by the

defendant no.1/bank of the decretal amount to the plaintiff. Plaintiff will also be
entitled to costs in terms of the Rules of this Court. Decree sheet be

prepared.