

(2013) 08 CAL CK 0076
In the Calcutta High Court
Case No : M.A.T. No. 1283 of 2013

Sarda Energy and Mineral Ltd.

APPELLANT

Vs

W.B. Power Development Corporation Ltd.

RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Citation : (2014) 2 CHN 413

Hon'ble Judges : Arun Mishra, C.J.; Joymalya Bagchi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J.—The appeal is directed against the judgment and order dated 20.08.2013 passed by the learned Single Judge dismissing the writ petition challenging invocation of unconditional bank guarantee by respondent No. 1, West Bengal Power Development Corporation. Respondent No. 1 in terms of the tender floated for the purpose of dismantling/demolition and disposal of decommissioned 4 × 120 MW units of Santaldih Thermal Power Station issued a Letter of Intent for awarding the aforesaid contract in favour of the appellant No. 1. In the said letter of Intent, the appellant No. 1 was advised to submit a bank guarantee of (sic). 5,000,00,00/- only (Rupees five crore only) for contract performance in favour of the respondent No. 1 Corporation as per the enclosed format and to issue acceptance letter within 26.04.2013. In response thereto, the appellant No. 1 by letter dated 25th April, 2013 accepted the said Letter of Intent and submitted a bank guarantee issued by Union Bank of India, Main Branch, Raipur in favour of the respondent No. 1 Corporation for the aforesaid sum.

2. Subsequently, the respondent No. 1 Corporation by a fax dated 13.08.2013 invoked the aforesaid bank guarantee. Such fact was communicated to the appellants by letter dated 16.08.2013. Challenging such invocation, the writ petition was filed before the learned Single Judge.

3. Learned Single Judge held that the action of the respondent No. 1 Corporation was in terms of the bank guarantee furnished by appellant No. 1 and therefore there was no necessity to invoke the extraordinary powers of this Court under Article 226 of the Constitution.

4. Learned counsel appearing for the appellants submitted that the respondent No. 1 Corporation acted fraudulently by issuing the Letter of Intent on one hand and on the other hand simultaneously instructing removal of goods from the site in question. He further submitted that no acceptance letter had been issued by M/s. M.S.T.C. in terms of clause 7 of the tender conditions and hence, the underlying contract had not been entered by and between the parties. He further submitted that the letter of invocation was not served upon the appellants and they were subsequently intimated the same by their banker. He accordingly submitted that a grave case of fraud is made out against the respondent No. 1 Corporation and in the facts of the case the learned Single Judge erred in dismissing the writ application.

5. Learned counsel appearing on behalf of the respondent No. 1 Corporation submitted that the appellant No. 1 had accepted the Letter of Intent and had duly furnished the bank guarantee in terms thereof. He further submitted that the respondent No. 1 Corporation acted in terms of the bank guarantee and there was no illegality in the invocation of the said unconditional guarantee. He relied on *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*, and AIR 1996 SC 131.

6. The issue in the instant case is whether invocation of the bank guarantee was lawful or not.

7. The appellants had without demur furnished the unconditional bank guarantee in terms of the Letter of Intent by which they were awarded the underlying contract. In the said bank guarantee the bank undertook as follows:

".....guarantee and undertake to pay the WBPDCCL, on demand any and all money payable by the SEML to the extent of Rs Five Crore as aforesaid at any time up to 21/07/2014 (day/month/year) without any demur, reservation, contest, recourse or protest and or without any reference to the SEML. Any such demand made by the WBPDCCL on the Bank shall be conclusive and binding notwithstanding any difference between the WBPDCCL and the SEML or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority,"

(emphasis supplied)

8. The guarantee further provided that:

"The Bank shall not be released of its obligations under these presents by any exercise by the WBPDCCL of its liberty with reference to the matters aforesaid or any of them or by reason or any other acts of omission or commission on the part of the WBPDCCL or any other indulgence shown by the WBPDCCL or by any other matter or thing whatsoever which under law would but

for this provision have the effect of relieving the Bank."

(emphasis supplied)

9. It is therefore clear that the bank guarantee was an unconditional one and demand of respondent No. 1 Corporation for its invocation was to be treated as conclusive and binding upon the bank notwithstanding any dispute between the appellants and the respondent No. 1 Corporation or any act or omission on the part of the respondent No. 1 Corporation whatsoever.

10. We, therefore, are of the view that the learned Single Judge rightly held that the reference to the alleged wrongful acts of the respondent No. 1 Corporation in instructing simultaneous removal of materials from the site has no relevance to the liability of the bank in the matter of invocation of the aforesaid bank guarantee.

11. Furthermore, the conditions of the tender itself provided that the materials were being sold on "as is where is basis" and on "no complaint basis".

12. In view of the unequivocal and unconditional liability of the bank to honour the said bank guarantee any reference to dispute relating to depletion of quality or quantity of materials at the site which was being sold on "as is where is basis" and on "no complaint basis" cannot be said to be of any substance.

13. We also do not find any merit in the submission of the learned counsel for the appellants that the underlying contract had not commenced as letter of acceptance had not been issued by M.S.T.C. to the successful bidder. The Letter of Intent had been issued by the respondent No. 1 Corporation to the appellant No. 1 awarding the contract in its favour and the latter had duly accepted the same and furnished the bank guarantee in favour of the respondent No. 1 Corporation in terms thereof. The contractual relationship had therefore been duly entered into and there is nothing in the terms of the bank guarantee that the viability in respect thereof was to commence with reference to Clause 7 of the tender conditions.

14. We are also in agreement with the learned Single Judge that there was no legal duty cast on the respondent No. 1 Corporation to communicate its letter of invocation to the appellants. In fact, the terms of the bank guarantee provided that the same was to be invoked without any reference to appellant No. 1. Nevertheless the banker informed the appellants of such invocation. Thus we find no unfairness in the invocation of the bank guarantee by respondent No. 1 Corporation in the instant case.

15. The appellants have been unable to make out a case of egregious fraud or irretrievable injustice or any special equity so as to necessitate interference in the invocation of the said bank guarantee.

16. Learned Single Judge has adequately protected the interest of the appellants by observing that no observation in the impugned order shall affect the remedies

available to them under the underlying contract.

17. None of the cases cited on behalf of the appellants are of any assistance to them.

18. In *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, the Apex Court held that the bank issuing a guarantee is not concerned with the underlying contract between the parties. Such ratio, in fact, militates against the arguments advanced by the appellants.

19. In AIR 1997 1644 (SC) the Apex Court held that a person seeking an injunction on bank guarantee must not only establish fraud but must also establish that the fraud was within the knowledge of the bank who had issued the guarantee. We are of the opinion that no such case has been demonstrated by the appellants in the present factual matrix.

20. In *Hindustan Construction Co. Ltd. v. State of Bihar & Ors.*, (1998) 8 SCC 436, the Apex Court found that the bank guarantee had been invoked by an Executive Engineer although the terms provided that the same could be invoked only by the Chief Engineer. In the cited case, the bank guarantee was a conditional one unlike the present case. In terms of the present unconditional bank guarantee the demand of the respondent No. 1 Corporation was to be treated as final and binding irrespective of the disputes between the parties, including acts of commission or omission on the part of the respondent No. 1 Corporation. The case is, therefore, clearly distinguishable on facts from the present one.

21. In *Makharia Brothers Vs. State of Nagaland and Others*, the terms of the bank guarantee necessitated the State to initiate a suit or action to enforce its claim within six months of its expiry, failing which the bank shall stand released or discharged from the liabilities thereunder. No such condition is evidenced from the bank guarantee in the instant case.

22. In *Dai-ichi Karkaria Private Ltd., Bombay Vs. Oil and Natural Gas Commission Bombay and another*, a Single Judge of Bombay High Court dealt with the expression "fraud" at paragraphs 29 and 30 of the judgment. We are of the opinion that no case of egregious fraud has been made out in the facts of the present case and the judgment is clearly distinguishable on facts.

23. In *Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others*, a Single Judge of this Court granted injunction on the ground that the condition of the bank guarantee necessitated that the demand for invocation must state that the conditions for its invocation have been fulfilled. In the instant case, the bank guarantee provided that the demand on the part of the respondent No. 1 Corporation is to be construed to be final and binding and hence we are of the opinion that the aforesaid decision is not relevant in the facts of this case.

24. In *Satluj Jal Vidyut Nigam Ltd. Vs. Jai Prakash Hyundai Consortium*, an

injunction was granted on invocation of a bank guarantee executed alien to the terms of the underlying agreement. In the instant case, the appellants accepted the Letter of Intent and furnished the bank guarantee in terms thereof. The case is, therefore, clearly distinguishable on facts.

25. We find no reason to interfere with the impugned order. The appeal and all connected applications are accordingly dismissed.