

**Jms Mining Services Pvt. Ltd. Vs. Dcs Ltd.**

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**SooperKanoon Citation :** [sooperkanoon.com/52843](http://sooperkanoon.com/52843)

**Court :** Kolkata

**Decided On :** Jun-24-2015

**Judge :** Indira Banerjee

**Appellant :** Jms Mining Services Pvt. Ltd.

**Respondent :** Dcs Ltd.

**Judgement :**

ORDER

SHEET IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE G.A.No.1803 of 2015 A.P.O.T.No.230 of 2015 With A.P.No.208 of 2015 JMS MINING SERVICES PVT.LTD.Versus DCS LTD.-AndG.A.No.1805 of 2015 A.P.O.T.No.231 of 2015 With A.P.No.209 of 2015 JMS MINING SERVICES PVT.LTD.Versus DCS LTD.-AndG.A.No.1807 of 2015 A.P.O.T.No.232 of 2015 With A.P.No.210 of 2015 JMS MINING SERVICES PVT.LTD.Versus DCS LTD.BEFORE: The Hon'ble JUSTICE INDIRA BANERJEE -AndThe Hon'ble JUSTICE SAHIDULLAH MUNSHI Date : 24th June, 2015.

For Appellants : Mr.Abhrajit Mitra, Sr.Adv.with Mr.Jishnu Chowdhury, Mr.Soumabha Ghose, Mr.Sandip Dasgupta & Mr.Ravitej Chillumuri, Adversus For Respondents : Mr.Dhruba Ghosh with Mr.Sarathi Dasgupta, Mr.Dipendra Nath Chunder & Mr.Arijit Basu, Adversus These appeals being A.P.O.T.No.230/ 2015, A.P.O.T.No.231/ 2015 and A.P.O.T.No.232/ 2015 are against three several ad-

interim orders dated 1st April, 2015 passed by the learned Single Judge, restraining the appellants from encashing the bank drafts issued by the concerned bank in favour of the appellants, upon invocation of certain bank guarantees.

The applications being G.A.No.1803/ 2015, G.A.No.1805/2015 and G.A.No.1807/2015, filed in connection with the said three appeals are inter alia, for leave to appeal against and stay of operation of the said orders under appeal.

The issues in all the three appeals and the three connected applications being identical, and the parties thereto being the same, the three appeals and the connected applications were heard together and are being disposed of by this common judgment and order.

Madhya Pradesh State Mining Corporation Limited, hereinafter referred to as MPSMCL, was allocated the contract for development and operation of the Bicharpur Coal Block.

MPSMCL entered into a joint venture agreement with ACC Mineral Resources Limited, hereinafter referred to as AMRL, pursuant to which a joint venture company in the name of MPAMr.(Bichar) Coal Company Limited, was constituted and AMr.was appointed to develop and operate the Bicharpur Coal Block with liberty to appoint sub-contractors for activities related to the development and operation of the said coal block.

Accordingly, AMr.entered into an agreement with the appellant, JMS Mining Services PVT.Ltd., formerly known as Joy Mining Services PVT.LTD.The appellant further entered into contracts with the respondent, DCS Ltd., formerly known as Delta Construction Systems LTD.In terms of the said contract the appellant issued work orders to the respondent for jobs in connection with the development and operation of the Bicharpur Coal Block.

In terms of the contracts by and between the appellant and the respondent, the respondent had to furnish unconditional bank guarantees and performance security as specified in the contracts/work orderS.issued by the appellant to the respondents.

After the work orders were issued, orders were passed by the Supreme Court dated 25.08.2014 and 24.09.2014 for cancellation of allocation of coal blocks including the Bicharpur coal block allocated to MPSMCL.

The appellant, therefore, instructed the respondent to stop further work.

The respondent has contended that before the said orders of the Supreme Court cancelling the allocation of the Bicharpur coal block to MPSMCL were passed, the respondent had proceeded with the work to a considerable extent.

Bills raised by the respondent for the work done remained unpaid.

Disputes and differences arose between the appellant and the respondent in respect of the work allegedly done by the respondent pursuant to the contracts with the appellant.

The contracts between the respondent and the appellant contain provisions for adjudication of disputes through arbitration.

On the apprehension that the appellant might invoke the bank guarantees, the respondent filed three applications for interim relief under Section 9 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act.

In the petitions filed by the respondent under Section 9 of the 1996 Act, which were more or less identical, the respondent stated that the respondent was taking steps for reference of its claim to arbitration in accordance with the arbitration clause as mentioned in the respective contracts/ work orders. The grounds for interim relief in the three applications are identical and are extracted hereunder from the FIRs application.

20.

Your Petitioner states and submits that the facts and circumstances of the case justify to pass an Ex-Parte ad-interim injunction restraining the respondent from invoking Original bank guarantees and from encashment of performance security cheques all dated 21.10.2013.

21. Your Petitioner reasonably apprehends that the Respondents past conduct does not inspire any confidence in the bonafides of the Respondent.

Your Petitioner respectfully submits that in the backdrop of the Respondents fraudulent conduct there is sufficient cause to apprehend that the Respondent is intent upon seeking to defeat your Petitioners legitimate and bona fide claims.<sup>22</sup>

The entire attitude and demeanour of the Respondent clearly indicates that the Respondent is seeking to not only avoid paying your Petitioners legitimate claims but also to clandestinely invoke the bank guarantee and performance security unless the Court gives its protection. The applications were moved on 23rd March, 2015 whereupon the learned Single Bench passed the following order in each of the three applications :Citing urgency and referring to various pleadings contained in this application, the petitioner seeks to move the matter, ex parte.

This Court, however, is of the view that the respondent may be granted an opportunity to respond to the allegations and/or contentions made in the instant application.

As such, this Court directs service of notice together with a copy of the instant application upon the respondent by Speed Post.

Let this matter appear under the same heading on 30th March, 2015 It appears that on 30th March, 2015, being the returnable date, the application appeared in the list but could not be taken up for consideration.

On the same day, the appellants invoked one set of bank guarantees.

On 1st April, 2015, when the application was taken up, the attention of the Honble Court was drawn by the respondent to the conduct of the appellant, in invoking the bank guarantee on the returnable date, whereupon the Court passed three identical orders.the relevant part whereof is set out hereinbelow:On 30th March, 2015, this matter could not be taken up for consideration.

It is noticed that on 30th March, 2015 itself - being the returnable date - the respondent wrote to the Branch Manager, State Bank of Patiala, M.G.Road,

Secunderabad, invoking at least one of the bank guarantees.

Having regard to the tenor and purport of the order dated 23rd March, 2015, it cannot, but be observed that the conduct of the respondent, prima facie, is mala fide in nature.

The reason is, although this Court was neither fettered and/or shackled from passing an ex parte ad interim order, as prayed by the petitioner on 23rd March, 2015, nevertheless, it was of the view that the respondent was required to be granted an opportunity to respond to the allegations and/or contentions made in the application.

As such, the matter was adjourned till 30th March, 2015.

However, immediately upon receipt of the Courts order on 27th March, 2015, (the fact of which is borne from the tracking report annexed to the affidavit of service filed in Court today).the respondent chose to invoke one of the bank guarantees on 30th March, 2015, on the returnable date, itself, when the matter was supposed to be taken up for consideration in the presence of the respondent.

This conduct is neither required to be appreciated nor encouraged under any circumstances.

As such, there shall be an ad interim order in terms of prayer (a) of the petition until further orders or when the matter is taken up for consideration next, whichever is earlier.

There shall also be a further order restraining the respondent from encashing the bank drafts issued by the concerned bank upon receipt of the letter of invocation of the bank guarantee, until further orders of this Court. Mr.Ghosh appearing on behalf of the respondent argued that the respondent had made out a case of special equity for grant of an interim order in its favour restraining the appellants from invoking the bank guarantees.

Mr.Ghosh submitted that the Honble Single Bench had by its earlier order dated 23rd March, 2015, given opportunity to the appellant to make this submissions.

However, on the returnable date itself, the appellant invoked the bank guarantees.

The conduct of the appellant was uncalled for.

As pointed out by Mr. Ghosh, the learned Judge observed, and in our view, rightly, that this conduct is neither required to be appreciated nor encouraged under any circumstances.

Perhaps the appellant ought to have waited for a day before invoking the bank guarantee.

However, the question before us is, whether the Court ought to have passed an order of injunction, in effect, restraining the appellant from invoking the bank guarantee.

It is well settled that the bank guarantee constitutes an independent contract between the bank and the beneficiary of the bank guarantee.

The Court cannot go into the underlying disputes relating to the contract between the beneficiary of the bank guarantee and the person, at whose instance, the bank guarantee had been issued, to restrain the invocation of a bank guarantee.

Banks cannot be restrained from invoking a bank guarantee except in cases of fraud, special equity or irretrievable injustice.

There can be no dispute that the bank guarantees in this case, are unconditional bank guarantees and it cannot be said that the invocation is not in terms of the bank guarantee.

In *U.P. Corporation Federation LTD. versus Singh Consultants & Engineers [P]. LTD.* reported in 1988[1]. SCC174 the Supreme Court held commitments of banks must be honoured free from interference by the Courts.

Otherwise, trust in commerce internal and international would be irreparably damaged.

It is not only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere.

In General Electric Technical Services Co.Inc.

versus Punj Sons [P].LTD.reported in 1991[4].SCC230 the Supreme Court held - 22.

In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee.

The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled.

Such a couRs.is impermissible.

The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury. In U.P.State Sugar Corporation versus Sumac International LTD.reported in 1997[1].SCC568 the Supreme Court held - 12.

The law relating to invocation of such bank guarantees is by now well-settled.

When in the couRs.of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes.

The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

The very purpose of giving such a bank guarantee would otherwise be defeated.

The Courts should therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee.

The Courts have carved out only two exceptions.

A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee.

Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so.

The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Mr.Ghosh emphatically argued that the respondent had done a considerable amount of work and had raised the bills on the appellant which had not been paid.

The respondent could not continue with the contract work by reason of the orders of the Supreme Court.

It was the appellant, who had instructed the respondent to stop the work.

There was no fault on the part of the respondent.

The contract stood frustrated by reason of the orders of the Supreme Court.

The bank guarantees could not, therefore, have been invoked.

On the other hand, Mr.Abhrajit Mitra, appearing on behalf of the appellant, argued that there are two sets of bank guarantees in question, the mobilisation advance guarantees and the performance bank guarantees.

The bank guarantees are all unconditional.

The appellant has only invoked the mobilisation guarantees as would appear from the invocation notices dated 31st March, 2015.

Mr.Mitra argued, and rightly, that in the application under Section 9 of the 1996 Act, there was no case of fraud made out, barring a single casual statement that the conduct of the appellant was fraudulent.

As held by a Five Judge Bench of the Supreme Court in Bishundeo Narain and Anr.

versus Seogeni Rai and Jagernath reported in AIR 1951 SC280 cited by Mr.Mitra, in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid.

There can be no departure from them in evidence.

General Allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion.

In Svenska Handelsbanken versus M/S.Indian Charge Chrome and ORS.reported in (1994) 1 SCC502 cited by Mr Mitra, the Supreme Court held In law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima facie case of established fraud and an irretrievable injury. Mr.Mitra pointed out that the respondent had in its applications under Section 9 of the 1996 Act, annexed a letter dated 27th January, 2005 of the appellant demanding refund of unadjusted advance of Rs.4.42 crores.

Mr.Mitra submitted that the respondent cannot deny that mobilisation advance to the extent of Rs.4.42 crores given by the appellant to the respondent remains unadjusted.

This has not been denied in the application under Section 9 of the 1996 Act filed before the learned Single Bench.

It cannot be said that there was any special equity in favour of the respondent.

Mr.Mitra rightly argued that what cannot be claimed directly, cannot be claimed indirectly.

If no injunction could be obtained against the bank restraining the bank from making payment against the bank guarantees, injunction ought not to have been issued, restraining the appellant from encashing the drafts issued to the appellant upon invocation of the bank guarantees.

Mr.Ghosh has made lengthy arguments attacking invocation of the bank guarantees in question and argued that the invocation was totally arbitrary, wrongful and mala fide.

In support of his submission, Mr.Ganguly referred to conditions in the contracts with regard to recovery of mobilization advance.

However, as observed hereinabove, the Court cannot go into the merits of underlying disputes between the beneficiary of the bank guarantee that is the appellant and the person at whose instance the bank guarantee, has been issued that is the respondent.

There can be no doubt that in exceptional cases of fraud, irretrievable injustice and special equity an injunction may be granted restraining the invocation of a bank guarantee.

The judgement in Hindustan Construction Co.LTD.versus State of Bihar and ORS.reported in AIR 1999 SC3710 cited by Mr.Ghosh, was rendered in the facts of the case before the Supreme Court, where the bank guarantee was not unconditional and invocation was found not to be in terms of the bank guarantee.

In Jainsons Clothing Corporation versus State Trading Corporation of India LTD.and Anr.

a Division Bench held that if non-performance was the result of frustration of the contract, in which case performance is excused by law, the bank guarantee cannot be invoked.

However, the aforesaid judgement is also distinguishable on facts.

Perhaps, as rightly argued by Mr.Ghosh, the contracts between the appellant and the respondent have been frustrated by reason of the orders of the Supreme Court

cancelling the coal block allocation.

However, the appellant is still, in our prima facie view, entitled to adjustment of mobilization advance.

It is the case of the appellant that the appellant has only invoked the mobilization advance bank guarantees and not the performance bank guarantees.

In *Ashim Ganguly versus Indian Oxygen LTD.& ORS.* reported in AIR 1989 Calcutta 150, cited by Mr. Ghosh, a Division Bench of this Court held:- So it is now well settled principle of law in India as well as in England that irrevocable commitment or obligation of banks either in the form of confirmed bank guarantee or letter of credit must be honoured free from interference by the Court, though it may not be treated as sacrosanct or sacred as the holy book and may be touched and pricked when there is any serious dispute and good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties.

The Supreme Court has expressed the same view in its latest decision reported in (1998) 1 SCC 174 *U.P. Co-operative Federation Ltd. v. Singh Consultants*.

It has however been held by Justice Sabyasachi Mukharjee in that decision that the party wronged thereby or a maltreated party to the contract is not without any remedy and is not to suffer any injustice which is irretrievable.

His remedy lies in an action for damages.

Justice Sethi in his concurring view in the said decision has gone a step further opining that the question of examining the prima facie case or balance of convenience does not arise if the Court cannot interfere with the unconditional commitment made by the bank in the guarantees in question. The submission of Mr. Ghosh of the existence of special equity in favour of the respondent is also difficult to accept since the letter of invocation clearly indicates that it is the bank guarantees covering unutilised mobilisation guarantee which have been invoked.

If any excess amount or any amount not payable to the appellant has been appropriated by invocation of the bank guarantees, the respondent can claim

refund of the amount with interest and may be even damages in the arbitration proceedings.

It may be pertinent to record the undertaking of Mr.Mitra, appearing on behalf of the appellant, that the performance guarantees shall not be invoked.

The orders under appeal are set aside.

The applications along with the connected appeals are disposed of.

Learned Counsel appearing on behalf of the respondent prays for stay of operation of this order.

The prayer for stay is considered and refused.

(INDIRA BANERJEE, J.) (SAHIDULLAH MUNSHI, J.) K.

Banerjee A.R.[C.R.].

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