

**HIGH COURT OF MADHYA PRADESH : JABALPUR**

**(Division Bench)**

**W.P. No.29049/2018**

*M/s Jaiprakash Associates Ltd., Rewa*

**-Versus-**

*State of M.P. and others*

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Shri Sanjay K. Agrawal, Advocate for the petitioner.  
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**CORAM** :

**Hon'ble Shri Justice S.K. Seth, Chief Justice.**

**Hon'ble Shri Justice Vijay Kumar Shukla, Judge.**

<i>Whether approved for reporting ?</i>	Yes.
<i>Law laid down</i>	An injunction against the invocation of an absolute and an unconditional bank-guarantee cannot be granted except in situations of egregious fraud or irretrievable injury
<i>Significant paragraph Nos.</i>	10

**ORDER**

**(Jabalpur, dtd.18.12.2018)**

**Per : Vijay Kumar Shukla, J.-**

Heard on admission.

2. Invoking writ jurisdiction under Article 226 of the Constitution of India the petitioner has prayed for issuance of an order/direction in the nature of injunction restraining the respondents from invoking performance of bank guarantee, Annexure-P/3 and also for quashing of the communication dated 10-12-2018, Annexure-P/17, whereby the bank guarantee furnished by the petitioner for not carrying out its contractual obligation/duty in accordance with the agreement is intended to be encashed.

3. The facts adumbrated, in a nutshell, are that tenders were invited by the respondents for the Project, namely, Naigarhi Micro Irrigation Project (Part-II) for supply of water from Bahuti Canal System near Village – Bhatigawan at R.D. 13050 M of Dagadpur Distributory and delivering it to farmers' fields @ duty 0.35 litre/sec/ha through pressurised pipeline system for micro irrigation in the Culturable command area of 25000 hectares out of Gross command area of about 46451 hectares for Naigarhi Micro Lift Irrigation Project-II.

4. Being a successful tenderer, a letter of award dated 9-8-2017 was issued to the petitioner and an agreement in that behalf was entered into between the parties on 25-9-2017. As per agreement the work was to be commenced with effect from 25-9-2017. Completion period of the work was 36 months including the rainy season.

5. By the impugned communication, Executive Engineer, Keoti Canal Division, Rewa has asked the Bank for encashment of the bank guarantee, as the petitioner has failed to achieve the physical milestones as specified in the agreement and could not fulfil its contractual obligations and has breached the conditions of

the contract, and the petitioner has been held liable to pay the liquidated damages.

6. Contention of the petitioner is that the contract has not yet been terminated by the respondent and the period of contract has not been completed and therefore, the bank guarantee would not have been invoked. Further, there is sufficient security lying with the respondents and, therefore, invocation of the bank guarantee is illegal and arbitrary.

7. The law relating to invocation of bank guarantee is no longer *res integra*. It is trite law that invocation of bank guarantee can be passed only in case of fraud.

8. 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 up by **Roskill, LJ in Howe Richardson Scale Co. Ltd. v. Polimex-Cekop and National Westminster Bank Ltd. (1978) 1 Lloyd's Rep 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 v. Bank of India, AIR 1981 SC 1426, Supreme Court in para 41 of the judgment also quoted with approval the following observations of Lord Denning in Elian 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.’”

9. 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.

**10.** The issue has been examined recently by the Hon'ble Supreme Court in a judgment reported as **Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and another, (2016) 10 SCC 46**, wherein it has been held as under:

“12. An injunction against the invocation of an absolute and an unconditional bank-guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. *In Himadri Chemicals Industries*

*Limited v. Coal Tar Refining Company, (2007) 8 SCC 110*, at paragraph -14: (SCC pp.117-18).

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

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

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

13. Guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should

honour it ... “without any demur, merely on a demand from GMB (appellant) stating that the aid lead promoter failed to perform the covenants...”. It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ...“conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.”

11. In view of the aforesaid judgments, we find that no case is made out for interference in the order/communication impugned, in writ jurisdiction under Article 226 of the Constitution of India.

**Accordingly, the writ petition is dismissed.** No order as to costs.

**(S.K. Seth)**  
Chief Justice

**(Vijay Kumar Shukla)**  
Judge

*ac.*