

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

MONDAY, THE 26TH DAY OF APRIL 2021 / 6TH VAISAKHA, 1943

WP(C).No.22760 OF 2019(T)

PETITIONER:

COCHIN PORT TRUST,  
REPRESENTED BY ITS CHIEF ENGINEER,  
WILLINGTON ISLAND,  
COCHIN, ERNAKULAM-682 009

BY ADVS.  
SRI.M.GOPIKRISHNAN NAMBIAR  
SRI.K.JOHN MATHAI  
SRI.JOSON MANAVALAN  
SRI.KURYAN THOMAS  
SRI.PAULOSE C. ABRAHAM

RESPONDENTS:

- 1 BANK OF INDIA,  
DADAR (WEST) BRANCH,  
294,S.K. BOLE RAOD,  
NR.PROTUGESE CHURCH,  
DADAR (WEST),MUMBAI,  
MAHARASTRA-400028
- 2 M/S. SHRIKHANDE CONSULTANTS PVT. LTD.,  
33-35,SHANTI CENTRE, 3RD FLOOR,  
PLOT NO.8, SECTOR 17,  
VASHI, NAVI MUMBAI,  
MUMBAI, MAHARASTRA-400 705

R1 BY ADV. SRI.J.HARIKUMAR  
R2 BY ADV. SRI.K.K.VIJAYAN  
R2 BY ADV. SRI.G.RANJU MOHAN  
R2 BY ADV. SRI.K.R.RAJESHKUMAR  
R2 BY ADV. SRI.B.VINOTH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 26-04-2021, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

## **J U D G M E N T**

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***Dated this the 26<sup>th</sup> day of April, 2021***

The petitioner—Cochin Port Trust is aggrieved by the refusal of the 1<sup>st</sup> respondent to encash Bank Guarantee and transfer the same to the petitioner. The petitioner also seeks to declare that invocation of the Bank Guarantee during the claim period is valid invocation and binding on the Bank.

2. The petitioner states that a tender was floated by them for awarding the work of providing consultancy services for design and supervision of flyover and ROB at ICTT area in Vallarpadam. The 2<sup>nd</sup> respondent being the successful bidder, Ext.P1 agreement dated 20.08.2014 was executed with the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent was required to provide a performance security in the form of a Bank Guarantee. The 2<sup>nd</sup> respondent furnished Ext.P2 Bank Guarantee dated 21.07.2014.

3. By Ext.P2, the 1<sup>st</sup> respondent-Bank agreed to pay the petitioner on demand any and all money payable by the 2<sup>nd</sup> respondent to the extent of ₹19,40,000/- at any time up to 30.09.2015. The Bank Guarantee which was valid up to 30.09.2015 was extended as per Ext.P3, up to 30.09.2016. In Ext.P3, it was stipulated that though the period of Bank Guarantee is up to 30.09.2016, the claim period is up to one year after the expiry of the validity of the Bank Guarantee i.e., up to 30.09.2017. The Bank Guarantee was extended from time to time on same conditions. The final extension as per Ext.P8, was up to 31.03.2019 with claim period up to 31.03.2020.

4. Certain defects were noticed in the work of the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent was instructed to inspect the site and suggest appropriate remedial measures. The 1<sup>st</sup> respondent-Bank was informed on 06.06.2019 to return the Bank Guarantee amount until further communication is received from the petitioner. As the 2<sup>nd</sup> respondent did not initiate remedial measures even within a period of one month,

the petitioner invoked the Bank Guarantee on 28.06.2019, 29.06.2019 and 01.07.2019, as per Exts.P10 to P12.

5. By Ext.P13 dated 06.07.2019, the 1<sup>st</sup> respondent informed the petitioner that the Bank Guarantee cannot be paid as the guarantee period has lapsed and only claim period is remaining. The petitioner contends that refusal of the 1<sup>st</sup> respondent to honour the Bank Guarantee is illegal and in violation of the conditions of the Bank Guarantee. The petitioner therefore challenges the refusal of the 1<sup>st</sup> respondent-Bank to realise the Bank Guarantee.

6. The 1<sup>st</sup> respondent filed a counter affidavit in the writ petition and contested the claim of the petitioner. The 1<sup>st</sup> respondent pointed out that it has been categorically stated in Ext.P3 that the Bank is liable to pay the guarantee amount only if the petitioner makes a written claim or demand on or before the expiry of the renewed guarantee. The claim period of one year over and above the validity period is incorporated as per Exception 3 to Section 28 of the Contract Act, by the Banking Laws Amendment Act, 2012 with effect from

18.01.2013.

7. The 1<sup>st</sup> respondent contended that the petitioner cannot have any advantage by the incorporation of a clause in terms of the said Exception 3 to Section 28 of the Indian Contract Act, in the Bank Guarantee. The right of the petitioner to have the Bank Guarantee invoked, is only during the currency of the Bank Guarantee and not during the extended claim period of one year. No relief can therefore be given to the petitioner in this writ petition.

8. The 2<sup>nd</sup> respondent also filed a counter affidavit. According to the 2<sup>nd</sup> respondent, the clause regarding arbitration in case of dispute, is applicable to the contract. The clause would take in dispute relating to encashment of Bank Guarantee also. The consultancy work was completed on 30.04.2018. A team of experts from the 2<sup>nd</sup> respondent Firm visited the site, inspected the work and presented a report to the petitioner regarding the remedial measures to be taken. The 2<sup>nd</sup> respondent stated that despite the fact that the contract period and obligation are over, the 2<sup>nd</sup> respondent is

ready to associate with the petitioner to address any issues related to structural safety.

9. The learned Standing Counsel for the petitioner argued that the invocation of the Bank Guarantee was done by the petitioner within the time period. According to the petitioner, it is settled law that invocation of the Bank Guarantee after the validity period but within the claim period, is perfectly lawful and ought to be respected. Exts.P2 to P8 Bank Guarantees are irrevocable and unconditional. The Bank Guarantee is an independent agreement between the petitioner–beneficiary and the Bank. The Bank Guarantee therefore can be invoked by the petitioner regardless of any dispute between the petitioner and the 2<sup>nd</sup> respondent, contended the learned Standing Counsel for the petitioner.

10. Heard the learned Standing Counsel for the petitioner, the learned Standing Counsel for the 1<sup>st</sup> respondent and the learned counsel for the 2<sup>nd</sup> respondent.

11. Ext.P8 Bank Guarantee Extension reads as follows:-

“Extension of BG No.00151PEBG140103 dated 21.07.2014 from 01.11.2018 to 31.03.2019 for ₹19,40,000/- on behalf of Shrikhande Consultant Pvt. Ltd.

At the request of M/s. Shrikhande Consultants Pvt. Ltd. we the Bank of India, Dadar (west) Branch Mumbai 400 028 extend the validity of captioned Bank Guarantees upto 31.03.2019. All the other terms and conditions shall remain unchanged.

We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee only if you serve upon us a written claimer demand on or before expiry of this renewed guarantee. All other terms & condition mentioned in the guarantee as originally issued/renewed earlier remained unchanged.

The Bank Guarantee shall be valid upto 31.03.2019 with one year claim period i.e. upto 31.03.2019.

Notwithstanding anything contained here above our liability under the Guarantee is restricted to ₹19,40,000/- (Rupees Nineteen Lac Forty Thousand Only) and this guarantee is valid upto 31.03.2019. We shall be released and discharged from all liabilities hereunder unless a written claim for payment under this guarantee is lodged/claimed on or before 31.03.2020 irrespective of whether or not the original guarantee is returned to us.”

It is evident that the validity of the said guarantee is only up to 31.03.2019. Even according to the petitioner, demands were made only on 28.06.2019, 29.06.2019 and 01.07.2019 which dates are subsequent to the period of validity of Bank

Guarantee.

12. The petitioner has a case that they have informed the 1<sup>st</sup> respondent on 06.06.2019 to retain the Bank Guarantee amount until further communication is received from the petitioner. But, Ext.P8 specifically provides that the 1<sup>st</sup> respondent shall be released and discharged from all liabilities unless a written claim is lodged on or before 31.03.2019. The written demand of the petitioner is admittedly after the said date.

13. The Standing Counsel for the petitioner strongly urged that the claim period of Ext.P8 extends up to 30.03.2020 and before the said date written demand was made to the 1<sup>st</sup> respondent-Bank. The extended claim period is in terms of Exception 3 to Section 28 of the Contract Act. Exception 3 to Section 28 of the Contract Act reads as follows:

**“Exception 3 - Saving of a guarantee agreement of a bank or a financial institution -**

This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement



making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.”

14. The extended period of claim provided for under Exception 3 to Section 28 of the Contract Act is therefore intended for extinguishment of the rights or discharge of any party from any liability under a Bank Guarantee/agreement. To arise a right under the Bank Guarantee Agreement, a demand has to be made within the period of validity of the Agreement. Having not made any demand within the validity period of the Bank Guarantee, the petitioner is not entitled to invoke the Guarantee during the claim period after the expiry of the validity period of the Bank Guarantee.

The writ petition is therefore without any legal merit and is hence dismissed.

Sd/-  
**N. NAGARESH, JUDGE**

## APPENDIX

### PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE RELEVANT PAGES OF THE AGREEMENT FOR THE WORK OF PROVIDING CONSULTANCY SERVICES FOR DESIGN AND SUPERVISION OF FLYOVER AND ROB AT ICTT AREA IN VALLARPADAM
- EXHIBIT P2 TRUE COPY OF THE BANK GUARANTEE OF THE 1ST RESPONDENT DATED 21.07.2014 ISSUED TO THE PETITIONER
- EXHIBIT P3 TRUE COPY OF THE BANK GUARANTEE EXTENSION DATED 16.10.2015 ISSUED TO THE PETITIONER
- EXHIBIT P4 TRUE COPY OF THE BANK GUARANTEE EXTENSION DATED 28.09.2016 ISSUED TO THE PETITIONER
- EXHIBIT P5 TRUE COPY OF BANK GUARANTEE EXTENSION DATED 01.03.2017 ISSUED TO THE PETITIONER
- EXHIBIT P6 TRUE COPY OF BANK GUARANTEE EXTENSION DATED 15.01.2018 ISSUED TO THE PETITIONER
- EXHIBIT P7 TRUE COPY OF BANK GUARANTEE EXTENSION DATED 13.08.2018 ISSUED TO THE PETITIONER
- EXHIBIT P8 TRUE COPY OF BANK GUARANTEE EXTENSION DATED 05.01.2019
- EXHIBIT P9 TRUE COPY OF THE LETTER DATED 06.06.2019 ISSUED BY THE PETITIONER TO THE 1ST RESPONDENT
- EXHIBIT P10 TRUE COPY OF THE LETTER OF INVOCATION DATED 28.06.2019 (WITHOUT ENCLOSURES) ISSUED BY THE PETITIONER TO THE 1ST RESPONDENT

EXHIBIT P11 TRUE COPY OF THE LETTER OF INVOCATION  
DATED 29.06.2019 (WITHOUT ENCLOSURES)  
ISSUED BY THE PETITIONER TO THE 1ST  
RESPONDENT

EXHIBIT P12 TRUE COPY OF THE LETTER OF INVOCATION  
DATED 01.07.2019 (WITHOUT ENCLOSURES)  
ISSUED BY THE PETITIONER TO THE 1ST  
RESPONDENT

EXHIBIT P13 TRUE COPY OF THE EMAIL DATED  
06.07.2019 ISSUED BY THE 1ST  
RESPONDENT TO THE PETITIONER

RESPONDENTS' EXHIBITS:

EXHIBIT R2 (A) TRUE COPY OF THE INSPECTION REPORT  
PRESENTED BY THE RESPONDENT

EXHIBIT R2 (B) TRUE COPY OF THE LETTER DATED  
20.8.2019 ISSUED BY THE PETITIONER TO  
THE 2ND RESPONDENT

EXHIBIT R2 (C) TRUE COPY OF THE LETTER DATED  
10.9.2019 ISSUED BY THIS RESPONDENT TO  
THE PETITIONER