

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

**In the matter of an Appeal
from a judgment of the
Commercial High Court.**

Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India.

**SC CHC 36/2006
HC (Civil) 42/2002**

Pan Asia Bank Limited, 450, Galle Road, Colombo 03.

Plaintiff

Vs

Defendant

AND

Pan Asia Bank Limited, 450, Galle Road, Colombo 03.

Defendant Appellant

Vs

Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India.

Plaintiff Respondent

BEFORE

: S. EVA WANASUNDERA PCJ.,
K. T. CHITRASIRI J. &
VIJITH K. MALALGODA PCJ.

COUNSEL

: S.A. Parathalingam PC with Varuna
Senadhira for the Defendant
Appellant.
Anura B. Meddegoda PC with Ms. G.
Jayasundera and A.Divya for the
Plaintiff Respondent.

ARGUED ON

: 25.09.2017.

DECIDED ON

: 24.11.2017.

S. EVA WANASUNDERA PCJ.

This Appeal is preferred by the Defendant , Pan Asia Bank Ltd. against the judgment of the Commercial High Court in the case filed against the said Bank by the Plaintiff, an Indian Company which is an enterprise fully owned by the **Government of India**, incorporated under the name and style of Telecommunication Consultants India Limited. The said impugned judgment is dated 02.06.2006.

The Defendant Appellant Pan Asia Bank (hereinafter referred to as the **Defendant Bank**) had issued an **Advance Payment Guarantee** under reference number TCIL / AGR/NT/97 dated 24.07.1997 to the Plaintiff Respondent Company, **Telecommunication Consultants India Limited** (hereinafter referred to as the **TCIL**). A local company by the name of **Nipuna Teleconstructions (Pvt.) Limited**, (hereinafter referred to as **Nipuna**), was the sub-contractor in the work undertaken by TCIL regarding some telecommunications civil work at the villages in Sri Lanka, namely Keselwatte, Wadduwa, Ambalangoda and Hikkaduwa. **TCIL would pay an advance of Rs. 8,964,428/24**, (being 30% of the full contract amount) to Nipuna to commence and perform the work under a contract entered into between TCIL and Nipuna. If Nipuna **fails** to comply with the terms and conditions of the contract, **on the said Guarantee**, money advanced to Nipuna

would be paid to TCIL by the Defendant Bank **on demand**. The Bank had issued the said guarantee as requested by Nipuna to receive the advance payment from TCIL.

The Guarantee was marked as P 1 in evidence and within the Guarantee Bond it reads as follows:

“ In consideration of your paying to the sub-contractor the amount of Rupees Eight Million Nine Hundred and Sixty Four Thousand Four Hundred and Twenty Eight and cents Twenty Four only (Rs. 8,964,428/24), we PAN ASIA BANK LIMITED irrevocably undertake to repay up to the said sum to you despite any objection by the sub-contractor, upon receipt by us of your first demand either by your banker’s authenticated telex or by your letter with the signatures thereon authenticated by your bankers, provided that, in either case, such demand incorporates your declaration stating that the amount claimed is due by reason of the sub-contractor having failed to comply with the terms and conditions of Contract No. TCIL / AGR / NT / 97. The aforesaid demand and declaration shall be accepted as conclusive evidence that the amount claimed is due to you under this Guarantee.”

The trial before the Commercial High Court commenced with 9 admissions and 24 issues. On behalf of the Plaintiff TCIL, K.B.Batra had given evidence and marked documents **P1 to P15**. On behalf of the Defendant Bank, Lakshman Uduwara had given evidence and marked document **D1**. At the conclusion of the trial, the learned Judge of the High Court delivered judgement in favour of the TCIL. Being aggrieved by the judgement, the Bank has filed this Appeal.

TCIL is a company fully owned by the government of India, incorporated under the laws of India and engaged in telecommunication projects in India and other countries as well. TCIL was awarded a contract by Sri Lanka Telecommunications under international competitive bidding to set up an external plant network from the Central Telephone Exchange to the subscriber’s end, including inter alia cabling, ducting, transferring of telephones from one exchange area to another and providing new telephone connections. This project was funded by the World Bank, according to the evidence given by K.B. Batra, the Executive Director of TCIL. In order to complete the tasks undertaken by the contract, TCIL had engaged several sub-contractors including Nipuna to whom TCIL assigned civil works such

as trenching, ducting and other civil construction work. In terms of the contract entered into between the two parties, i.e. Nipuna and TCIL, Nipuna was required to submit an **Advance Payment Guarantee for the value of 30% of the full contract value, which amounted to Rs. 8,964,428.24** which is equivalent to the advance payment made to Nipuna by TCIL, in order to commence work. **As such, pursuant to the request made by Nipuna, TCIL had advanced Rs. 8,964,428.24 to Nipuna against the Advance Payment Guarantee which was issued by the Bank on behalf of Nipuna.**

Thereafter, in view of the unsatisfactory nature of the performance by Nipuna and its failure to commence work in two areas as agreed by the contract, **TCIL terminated the contract and made a claim on the Advance Payment Guarantee Bond from the Bank.** TCIL demanded by letter marked P2 dated 29.01.1998 addressed to the Defendant Bank that immediate payment of the sum of Rs. 8,964,428.24 to TCIL should be made by crediting the said amount to Account No. 20447 which was maintained at the Indian Overseas Bank.

The Defendant Bank, namely the **Pan Asia Bank failed to honour** the Guarantee and after 8 days from the date of the demand, refused to encash the Pay Order issued by the Defendant Bank dated 11.02.1998 and returned the same to TCIL containing the endorsement **“ payment enjoined by Order of Court in D.C.Colombo Case No. 5061 / Spl.”**

The Defendant Appellant Bank indeed refrained from making any payment for **about 8 days** from the date of the demand and the position of the Plaintiff Respondent TCIL in that regard is that the Bank **deliberately failed to make payment** as demanded which the Bank was obliged to do as soon as the payment was demanded, according to the provisions made specifically to that effect, under the Advance Payment Guarantee Bond.

However, the said D.C.Colombo case 5061/Spl. had been filed by Nipuna against the Defendant Appellant Bank seeking an Enjoining Order preventing the Bank from making any payment to TCIL under the Advance Guarantee Bond and had obtained an enjoining order ex-parte restraining the Appellant Bank from paying the amount demanded. TCIL was not made a party to that case but on application made by TCIL to intervene, the District Court had allowed the same. Then TCIL was named as the 2nd Defendant and thereafter Nipuna filed amended answer

and the case proceeded with the enjoining order getting extended from time to time for about 2 ½ years and on **19.06.2001** the stay order was not extended any more. So the **enjoining order lapsed on that day**.

Soon afterwards, TCIL sent a letter of demand dated 27.06.2001 seeking immediate payment under the Advance Guarantee Bond with specific instructions to credit the ESCROW Account No. 20718 at the Indian Overseas Bank. The Appellant **Bank failed to pay once again**, even **after the enjoining order lapsed** in spite of the fact that TCIL sent more letters demanding the payment.

On 24.10.2001, Nipuna moved to withdraw the District Court case No. 5061/Spl. At that time, the 2nd Defendant in that case, TCIL reserved the right to claim the monies due from the Appellant Pan Asia Bank which was the 1st Defendant. While moving for withdrawal, it is evident from the proceedings of 24.01.2001 at page 53 of the Brief before this Court, that the Plaintiff Nipuna's Counsel had specifically mentioned that the reason for withdrawal given by the Plaintiff Nipuna was **the delay in the case from February, 1998 up to 24th October, 2001** which has caused damages already to the Plaintiff Nipuna and that it would be futile to proceed with the case. The District Court Judge had then made order dismissing the action on 24.10.2001.

The very next day, i.e. on **25.10.2001**, the **TCIL demanded payment** once again under the Advance Guarantee Bond from the Appellant Bank. On 06.11.2001, the Appellant Bank had responded through its lawyers that they are not liable to pay as demanded on the alleged basis that **the claim of the TCIL was a fraud done in connivance with Nipuna in order to defraud the Defendant Appellant Bank**.

The Plaintiff **TCIL had then filed action** in the Commercial High Court of Colombo on 15.03.2002 for the recovery of the money with interest. The Defendant, Pan Asia Bank filed answer. The position of the Bank was that **at 2.30 p.m. on 11.02.1998** the Pan Asia Bank **delivered its Pay Order** as demanded under the Advance Guarantee Bond in a sum of Rs. 8,964,428.24 to the Plaintiff TCIL; that **at 3.45 pm on the same day** the Pan Asia Bank received a notice of Interim injunction and an **enjoining order stopping payment** on the demand made by the Plaintiff TCIL ; that on 12.02.1998 when the Defendant Pan Asia Bank received the Pay Order for payment, the Bank **did not make the payment on the said Pay**

Order and the said Pay Order was **returned unpaid** with the endorsement "**payment enjoined by Order of Court in D.C.Colombo Case No. 5061/Spl.**"

I hold that it was quite unlawful, unjust and unreasonable for the Bank not to have paid on demand as and when the demand was made for payment on 29.01.1998 but to have delayed without payment until 11.02.1998, the day on which the Pay Order was issued and later not encashed due to the enjoining order in the case 5061/Spl.

In case No. 5061/Spl, Nipuna had complained that the claim of TCIL was fraudulent and that is the reason why he prayed for an enjoining order from court to stop payment and succeeded. That case got dragged on until 13.06.2001. Nipuna and TCIL had got tired of prolonged litigation by that time because the case had not even reached the stage of leading evidence. Therefore the parties to that case as Plaintiff and Defendant, namely Nipuna and TCIL had decided to put an end to the contest. By that time the Plaintiff TCIL had stopped operations in this country and their workmen who would have had to give evidence in court with regard to the non commencement of work by Nipuna in two stations etc. had been posted by TCIL to work in other countries and the cost of bringing them down would be very high. As such due to all these practical problems the parties in case 5061/Spl had arrived at a settlement between themselves. The agreement between them had been to get the money due from the Pan Asia Bank to the TCIL on the Advance Guarantee Bond and the same to be shared between the parties. It was not a secret. It was so informed to court.

Any parties before any court in a civil matter have a right to sort out their problems in any way they feel and inform court and resolve the matter before court as an amicable settlement. As agreed between the contesting parties, namely Nipuna and TCIL, they had filed a **joint motion** praying that the case be dismissed without costs and that the Pan Asia Bank be required to credit Indian Overseas Bank Account No. 20718 with a sum of Rs. 8,964,428.24. In this case the Pan Asia Bank was an intervening party and they had no contest on the substantial matters but the money due to TCIL on the Advance Guarantee Bond was retained with them. The District Court did not make any order with regard to the money due from the Bank to TCIL.

Even after the conclusion of that case, from where the enjoining order had arisen for the Bank not to pay the money, there seems to be no reason why the Bank should not honour the Advance Guarantee Bond. However the Bank failed to pay on the basis that there was fraud in the claim.

The trial Judge in the Commercial High Court has analysed the evidence before court and had reached the conclusion that there is no fraud in this matter and no fraud has been proved by the Defendant Bank who alleged that there was fraud. Having gone through the documentary as well as oral evidence placed before the Commercial High Court I also do not see any evidence which can be categorized under fraud. The Escrow account being opened and operated by Nipuna and TCIL to share what is received by TCIL from the Bank does not amount to any fraud since it is a private agreement to reach a settlement and put an end to litigation. The Bank should pay the guaranteed money to the TCIL on demand as agreed in law according to the conditions in the Advance Payment Guarantee Bond.

In the case of **Edward Owen Engineering Ltd. Vs Barclays Bank International Ltd. 1978 1 Lloyds Law Reports 166; 1 QB 159**, relied on by both parties, Lord Denning states thus:

“ A Bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with relation between the supplier and the customer nor with the question whether the supplier had performed contractual obligation or not, nor with the question whether the supplier is in default or not. **The Bank must pay according to its guarantee on demand if so stipulated, without proof or conditions.** The only exception is when there is a **clear fraud** of which the Bank had notice. ”

The only exception for non payment is the presence of a clear fraud. In the case in hand there is no clear fraud. The Bank had failed to demonstrate by any evidence that there is any **clear fraud**. In fact there is no evidence of fraud. It is only conjecture and no proof. In such an instance there is no way that the Bank can be without payment in a guarantee bond.

Any Bank does not issue an Advance Guarantee Bond to any person or company without some form of security. The Defendant Bank must be holding onto the security which was provided to the Defendant Bank by Nipuna. The Defendant

Bank does not lose anything which cannot be recovered when issuing a Bond of that nature to any of its customers. My observation is that with all that financial backing, having issued the Advance Payment Guarantee Bond, the Defendant Bank has acted quite wrongly, unfairly and unjustly in this instance. Legally, the Bank is strictly bound to pay on demand in accordance with the terms of the guarantee bond.

In the case of **R.D.Harbottle (Mercantile) Ltd. Vs National Westminster Bank Ltd. 1978 QB 146**, Kerr J, observed as follows:

“ It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by Banks. They are the **lifeblood of International Commerce**. Such obligations are regarded as collateral to the underlying rights and obligations between merchants at either end of the banking chain. Except possibly in **clear cases of fraud** of which the banks have notice, **the Courts will leave the merchants to settle their disputes** under the contracts by litigation or arbitration as available to them or stipulated in the contracts.”

In the case in hand, accordingly, the settlement of their disputes between Nipuna and TCIL should be left alone, only to themselves and the Bank **cannot in anyway interpret such a settlement as a fraud**. There is no other obvious reason as to why the Pan Asia Bank calls it a fraud.

In the case of **Intertec Contracting A/S Vs Ceylinco Seylan Development Ltd. and another 2002, 2 SLR 246** Justice Udalagama had followed Lord Denning with approval.

In the case of **Hemas Marketing Pvt. Ltd. Vs Chandrasiri and Others 1994 2 SLR 181**, Justice Ranarajah in the judgment inter alia states that ,
“ **A mere plea of fraud** put in for the purpose of bringing the case within the exception and which rests on the **uncorroborated statements of the applicant will not suffice.....”**

I am of the opinion that the Pan Asia Bank has done exactly that. For the purpose of not wanting to honour the demand, the Bank has merely pleaded that there exists fraud and has stayed without paying the demand as legally obliged to pay to the TCIL **from 29.01.1998 up to date**. The Bank has failed to prove fraud at all

except making a statement in evidence given by the witness of the Bank. In my opinion, the settlement entered into between the TCIL and Nipuna is no fraud by itself. It is a settlement to end litigation by the contesting parties.

The learned Judge of the Commercial High Court has carefully analyzed documents led in evidence by the Plaintiff TCIL itself before the High Court. The settlement contained in P 13 and P 14 by which TCIL and Nipuna had entered into an agreement between themselves and opened the Escrow Account, at the time when the District Court case No. 5061 was alive, was not a secret. Those documents were documents of the Plaintiff and Defendant and **not of the Pan Asia Bank**. There existed no illegality of such a settlement. The Bank cannot be heard to say that those documents submitted to Court amounts to a fraud. The Commercial High Court Judge had correctly come to the finding that the allegation by the Bank regarding **fraud was not proven** at all.

As I see, by not having honoured the demand on the Advance Payment Guarantee Bond as agreed, the Telecommunications Consultants of India Limited which is the Government of India Enterprise has been let down by the Pan Asia Bank. The whole purpose of obtaining an Advance Payment Guarantee from a contractor before paying him an advance prior to the commencement of the work as agreed by way of Agreements, has failed in this case. The most important clause in the Advance Payment Guarantee is to “**pay on demand**” without a question being posed to the person to whom the guarantee is given by the Bank. The Defendant Bank should have firstly paid on demand and then litigated against the company Nipuna on whose behalf the Advance Guarantee Bond was issued.

In the instant case, the Pan Asia Bank had received the demand to pay the TCIL on 29.01. 1998. The Bank delayed the Pay Order for a total number of 11 working days leaving out the date of the demand i.e. 29.01.1998, until 2.30 p.m. of 11.02.1998. The Pay Order which was issued on 11.02.1998, when submitted to the Bank for payment on 12.02.1998, the Bank did not make the payment on the said Pay Order but was returned unpaid with the endorsement that the District Court had enjoined the Bank not to pay. To my mind a question arises of the meaning of “on demand”, which is the key word in the Advance Payment Guarantee Bond.

Does it mean that the Bank has to pay on the very day the demand is made or does it mean that the Bank has to pay on that very hour of the day of the demand? The word demand attracts urgency. It means that the payment should be done then and there or as soon as possible. It means that the payment should not be delayed on whatever account.

In this case it is necessary to see what the Bank witness had to say when the question was asked about the delay in the Bank deciding to pay it factually after 11 working days in the calendar. I assume that it is after the Bank receives the demand on any particular date, that it has to pay forthwith. When the witness of the Bank, Mr. L. Uduwara was questioned under cross examination as to when the **demand was received** by the Bank he had not given any answer. The reason which can be assumed by his silence is that the Bank **does not want to admit and accept** the date since the pay order was issued very much later than when it was demanded.

Anyway there is no way that the Bank can account for such a delay. I hold that the delay was willful, illegal and contrary to law. I would like to set it down that under any Advance Payment Guarantee Bond in the commercial world, **the Bank guaranteeing the Payment under the Bond should make payment forthwith or as early as possible**. The Defendant Bank has acted unlawfully and has evaded payment quite wrongly against the interest of the very person who had the trust in the Bank when the Advance Payment Guarantee Bond was issued. The Defendant Bank had not got any notice with regard to any fraud by the time payment was demanded. At the end of the case also the Defendant Bank has failed to prove any fraud on the part of the TCIL.

I do hereby affirm the judgment of the Commercial High Court. The Pan Asia Bank is directed to honour the Advance Payment Guarantee Bond and pay the amount demanded on the Bond, forthwith. The Plaintiff Respondent Telecommunication Consultants India Limited is entitled to the reliefs as prayed for in paragraphs (a) and (b) of the Plaintiff filed by the said company in the Commercial High Court dated 15.03.2002 as decided by the learned High Court Judge in his judgment dated 02.06.2006.

The Appeal is dismissed with costs.

Judge of the Supreme Court

K.T.Chitrasiri J.

I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.

I agree.

Judge of the Supreme Court