

Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd and Another
[2001] SGHC 170

Case Number : Suit 245/2000, SIC 587/2001
Decision Date : 05 July 2001
Tribunal/Court : High Court
Coram : G P Selvam J
Counsel Name(s) : Choy Chee Yean (Rajah & Tann) for the plaintiffs; K Sureshan and John Thomas (Colin Ng & Partners) for the first defendants; Daniel Chua (Wong Partnership) for the second defendants
Parties : Samwoh Asphalt Premix Pte Ltd — Sum Cheong Piling Pte Ltd; Another

Banking – Performance bonds – Performance guarantee – Demand guarantee – Beneficiary making demand – Application to restrain beneficiary from receiving moneys due under guarantee – Whether demand justified – Nature and purpose of demand guarantee – Whether application for interlocutory restraint order proper

Judgment:

1. The plaintiffs in this case, Samwoh Asphalt Premix Pte Ltd, sought an interlocutory restraint order against the first defendnats, Sum Cheong Piling Private Limited ("SC Piling"), the beneficiaries of a performance guarantee ("PG"). The performance guarantee was issued by Ecics-Coface Guarantee Company (Singapore) Ltd (the "guarantors"). The order sought was to restrain SC Piling from receiving moneys due under the PG.
2. There was a principal contract between SC Piling and the Ministry of Defence for the construction of a runway and associated works. SC Piling sub-contracted part of the contract works to the principal subcontractor, Gim Chuan Contractor Pte Ltd ("Gim Chuan").
3. Gim Chuan made a subsidiary sub-contract (the "sub-sub-contract") with the plaintiffs. The plaintiffs, then secured a guarantee from the guarantors.
4. The performance guarantee read as follows :

THIS GUARANTEE is given the 30th day of September 1999 (One thousand nine hundred and ninety nine) BY ECICS-COFACE Guarantee Company (S) Ltd of 7 Temasek Boulevard, Suntec Tower One #11-01, Singapore 038987 (hereinafter called "the Guarantor")

IN FAVOUR OF

Sum Cheong Piling Pte Ltd (Main Contractor, including its assigns and successors in law) of 45 Gul Road, Jurong, Singapore 629350 (hereinafter called "the Main Contractor")

WHEREAS

(1) By a Subcontract (hereinafter called "the Contract") dated the 30th day of September 1999 and made between Samwoh Asphalt Premix Pte Ltd (hereinafter called "the Nominated Subcontractor") of the one part and Gim Chuan

Contractor Pte Ltd (hereinafter called "the Principle Subcontractor") of the other part whereby the Nominated Subcontractor has agreed and undertaken to perform and complete SC99/017/99087 – Construction, completion and maintenance of runway, associated taxiways as stated therein (hereinafter called "the Works") in consideration for the sum of S\$11,850,000.00 (Singapore Dollars Eleven Million Eight Hundred Fifty Thousand only).

(2) The Guarantor has agreed to guarantee the due performance of the Contract in the manner hereinafter appearing.

In consideration for the Main Contractor not insisting on the Nominated Subcontractor paying S\$500,000.00 as a Security Deposit for the Contract, the Guarantor hereby undertakes as follows :

1. The Guarantor unconditionally and irrevocably undertakes and covenants to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by the Main Contractor up to a maximum aggregate sum of S\$500,000.00 (Singapore Dollars Five Hundred Thousand only) without requiring any proof that the Main Contractor is entitled to such sum or sums under the Contract or that the Nominated Subcontractor has failed to execute the Contract or is otherwise in breach of the Contract. Any sum or sums so demanded shall be paid forthwith by the Guarantor unconditionally, without any deductions whatsoever and notwithstanding the existence of any differences or disputes between the Main Contractor and the Nominated Subcontractor arising under or out of or in connection with the Contract or the carrying out of work thereunder or as to any amount or amounts payable thereunder and notwithstanding that such differences or disputes have been referred to arbitration or are the subject of proceedings in Court or is in the midst of any other means of dispute resolution.

2. The Guarantor shall not be discharged or released from this Guarantee by any arrangement made between the Nominated Subcontractor and the Main Contractor without the assent of the Guarantor or by any alteration in the obligations undertaken by the Nominated Subcontractor or in the Works to be done thereunder or by any forbearance whether as to payment time performance or otherwise or by any other indulgence or matter of whatever nature accorded by the Main Contractor to the Nominated Subcontractor.

3. This Guarantee shall take effect from the date hereof

and remain in full force and effect for the duration of the Contract until :

(a) the date of issue of Final Completion Certificate for the Subcontract or

(b) the date of issue of the Final Account Certificate for the Subcontract; whichever shall be later. For the purposes of this Guarantee the absence of a Final Completion Certificate or Final Account Certificate shall be conclusive evidence that such certificate has not been issued. Notwithstanding the foregoing claims presented by the Main Contractor within three months of the expiry of this Guarantee shall be valid and binding upon the Guarantor.

5. It is to be noted that there is no direct written contract between the plaintiffs and SC Piling.

6. At the same time the performance guarantee is an independent guarantee between the guarantors and SC Piling.

7. One thing is clear. If the PG had not been issued the plaintiffs would not have been awarded the sub-sub-contract. It is however clear that the plaintiffs were under certain implied obligations SC Piling. There was a letter of intent signed by the plaintiffs and SC Piling. Pursuant to that there was interaction between all three parties.

8. It was in these circumstances that there arose disputes involving the main contractor, the sub-contractor and sub-contractor. The plaintiffs and SC Piling asserted claims against each other.

9. Furthermore the plaintiffs asserted that the contract between them and Gim Chuan was at an end. It was in these circumstances that SC Piling made the demand under the PG. The guarantors were prepared to honour their undertaking. But the plaintiffs applied for a restraint order against SC Piling and made the guarantors a party to the proceedings.

10. The PG in this case, though called a "performance guarantee" was as a matter of construction a "demand guarantee". What is now called a demand guarantee was at one time known as "performance bond". An accurate and useful definition of a demand guarantee appears in the **ICC Uniform Rules on Demand Guarantees** (URDG). It reads as follows :

A demand guarantee (hereinafter referred to as "Guarantee") means any guarantee, bond or other payment undertaking, however named or described, by a bank, insurance company or other body or person (hereinafter called "the Guarantor") given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgment or an arbitral award) as may be specified in the Guarantee,

such undertaking being given

(i) at the request or on the instructions and under the liability of a party (hereinafter called "the Principal"), or

(ii) at the request or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter "the Instructing Party") acting on the instructions of a Principal to another party (hereinafter "the Beneficiary").

11. The beneficiary under a demand guarantee is ordinarily entitled to payment on the mere presentation of a demand. It is unnecessary to go beyond a mere demand. But, of course, the beneficiary must act in good faith with a clear conscience. There must be no abuse of the right to demand.

12. The purpose of the demand guarantee is first to serve as a deterrent – that is to say to subject the instructing party to act with a sense of reason and responsibility vis--vis the beneficiary. Next, the purpose of a demand guarantee is to serve as an expeditious remedy. If there are disputes they must be settled between the instructing party and the beneficiary at a later date. In this respect, it shifts the onus of establishing a wrongful demand to the instructing party at a convenient time. An application for interlocutory restraint is improper.

13. In this case there was a demand guarantee, though called a performance guarantee. The Courts should be slow to interfere or tinker with that contractual arrangement.

14. The Court must lean in favour of giving effect to a document and a demand under it than nullifying it. Given that learning of the law, one of the purposes of the PG was to be deterrent against the plaintiffs walking out of the contractual obligations. In other words the PG is a sort of indemnity or insurance to SC Piling the main-contractor. Without such a performance guarantee the main contractor will be at the mercy of the plaintiffs.

There was a clear implied contractual relationship between the plaintiffs and SC Piling. It was a direct relationship. There was also a direct contractual relationship between SC Piling and the guarantors, who wanted to honour their undertaking under the PG. The demand was justified because it was made to achieve the very purpose for which it was procured by SC Piling. The guarantee was given in substitution of a cash deposit. A payment under the demand resulted in SC Piling having cash as originally anticipated. The onus shifted to the plaintiffs to take steps to resolve the disputes with SC Piling without involving the guarantors.

15. The plaintiffs argued that the demand was unconscionable. In my view it was the conduct of the plaintiffs that was unconscionable. It was unconscionable because in order to procure the contract they arranged for the PG without the PG they would not have been awarded the contract. Having procured the contract they acted in a manner that would have left SC Piling in a lurch in a situation where time was very important.

16. For these reasons I denied the order.

Sgd:

G P SELVAM
JUDGE

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