

OCD-33

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
[Commercial Division]

AP-COM/277/2025

GALLANT EQUIPMENT PVT LTD
VS
RASHMI METALIKS LTD.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date : 16th April, 2025.

Appearance :

Mr. Suvasish Sengupta, Adv.
Mr. Sanjib Bandyopadhyay, Adv.
Mr. Sounak Banerjee, Adv.
Mr. Rohit Das, Adv.
... for the petitioner.

Mr. Debrup Bhattacharjee, Adv.
... for the respondent.

1. This is an application for interim reliefs, under Section 9 of the Arbitration and Conciliation Act, 1996.
2. The petitioner and the respondent entered into an agreement named and styled as “Goods & Service Order”, dated July 5, 2023. In terms of the said order, core curing oven was to be supplied to the respondent. The oven was to be manufactured upon approval of the specifications and drawings by the respondent. The same was to be delivered within 60 days from the date of receipt of the confirmed order and advance payment.

3. As per the purchase order, the respondent was obliged to pay 50% advance, against the submission of an advance bank guarantee of equal value. The said bank guarantee would be valid up to the delivery of the complete materials at the site of the respondent. It was further agreed that balance 50% would be paid after inspection by the engineers of the respondent and prior to despatch, the petitioner was obliged to submit 20% bank guarantee which would be valid up to 12 months after the final installation. The petitioner was required to supply the said goods within 60 working days after receipt of the confirmed order and advance payment.
4. It is submitted by learned Advocate for the petitioner that the said purchase order contains a dispute resolution clause, for resolution of disputes by arbitration. The agreement was subject to the jurisdiction of Kolkata. An amount of Rs.50 lakhs was transferred to the account of the petitioner on September 27, 2023 as advance payment and the petitioner furnished an Advance Bank Guarantee (in short ABG) of the like amount.
5. According to the petitioner, although the oven was lying ready for delivery on October 27, 2023, the respondent failed to take delivery of the same. The respondent did not inform the petitioner the reason for not taking the oven. The petitioner apprehends that the respondent may, at any point time, invoke the ABG and such

action will put the respondent in an irreversible situation, inasmuch as, the oven which was manufactured upon huge investment by the petitioner will remain unutilized and the petitioner will suffer irreparable loss and injury in not being paid for the work done on the basis of the purchase order. If the bank guarantee is invoked, the amount of 50 lakhs paid to petitioner for the completion of the work, will revert back to the respondent. The petitioner will be left with no financial gain from the said business transaction.

6. Learned Advocate for the respondent submits that there cannot be an injunction against invocation of a bank guarantee. A bank guarantee is a separate agreement between the bank and the beneficiary. The respondent has a right to invoke the bank guarantee, irrespective of the contract between the parties. Reliance is placed on the decision of this Hon'ble Court in the matter of **Hindusthan Paper Corporation Ltd. Vs. Keneilhouse Angami** reported in **1989 SCC OnLine Cal 208**.
7. It is further submitted that there are a number of business transactions between the parties and this is one of such purchase orders amongst many, which has given rise to a dispute. The reliefs claimed in the application are in the nature of final reliefs and cannot be allowed. The issues are to be adjudicated by the learned Arbitrator, upon evidence.

8. Heard the learned Advocates for the respective parties.
9. The payment terms were as follows:
 - a) *50% Advance will be paid against submission of Purchase Order acceptance copy along with submission of equivalent value Advance Bank Guarantee, the validity of ABG will be up to delivery of complete materials at Rashmi site.*
 - b) *50% will be paid after inspection by RML Engineers and Prior to Despatch with submission of 20% Performance Bank Guarantee(PBG) which validity up to 12 months after the date of final installation.*
10. There is no quarrel with the proposition of law that, injunction against invocation of bank guarantee should not ordinarily be issued. The parties before this Court had entered into an agreement which contains an arbitration clause. There are live disputes. As such, an application under Section 9 of the Arbitration and Conciliation Act for interim protection, is maintainable before the Court. The question is what kind of interim relief can be granted by this Court, in the facts and circumstances of this case.
11. This Court cannot ignore the fact that some kind of protection is to be given to the petitioner in aid of the final relief. The reliefs claimed herein are more or less in the nature of final relief, but the petitioner cannot be expected to suffer losses at the whims of the respondent. A purchase order was placed by the respondent.

Specifications and drawings were approved by the respondent. The petitioner manufactured the oven, but the respondent did not take delivery of the same. The respondent failed to assign reasons as to why the oven was not taken by the respondent. The advance payment of 50% was made subject to the petitioner furnishing a bank guarantee of a similar amount. The ABG is to remain valid till delivery of the product. Thus, delay in taking delivery will keep the ABG alive and the petitioner will be at a risk of invocation, and at the mercy of the respondent.

12. It is now well settled that principles of Order 39 Rules 1 and 2 and Order 38 Rule 5 of the Code of Civil Procedure are not strictly applicable to applications under Section 9 of the Arbitration and Conciliation Act, 1996. As long as the petitioner makes out a case for interim protection, till the issues are decided by the learned Arbitrator, this Court should not hesitate to grant such reliefs and protection.

13. It is not in dispute that the drawing and specifications were approved by the respondent some time in July, 2023. It is also the specific case of the petitioner that the oven was ready for delivery some time in October, 2023 which is within the period of 60 days from the date of receipt of advance payment. The fact that the purchase order contained a clause for advance payment, itself, prima facie, indicates that the investment to be made by the

petitioner in the manufacture of oven, was subject to an advance payment and the petitioner was required to furnish an advance bank guarantee as a security, so that the money paid in advance is utilized for the right purpose and not squandered around by the petitioner. Innumerable e-mails annexed to the application clearly indicate that time and again the respondent was requested to inspect the product and take delivery thereof. There is not a single e-mail from the respondent's end, refusing to take delivery of the goods on any ground whatsoever. The respondent remained silent. Some time in 2023, had also asked the bank to invoke the guarantee. However, the bank guarantee was not invoked as it was extended by the petitioner. The conduct of the respondent gives rise to an apprehensive that the bank guarantee can be invoked at any point of time. The bank guarantee expires on May 15, 2025.

14. The conduct of the respondent, as discussed hereinabove, prima facie, indicates that the respondent is not inclined to fulfil its obligations under the purchase order. It would have been a different case altogether, in the event a single document was produced by the respondent, indicating that the petitioner had been cautioned or warned that there was either delay in manufacture of the product or that the end product was not as per the drawing and specification approved by the respondent.

15. The respondent has relied upon two letters, dated July 28, 2023 and July 31, 2023, indicating that the finalization of the manufacture of the oven was still under process. Today, the documents are relied upon to show that delay had been committed by the petitioner. However, this Court finds that after these communications, the advance payment was made on 27th September, 2023 and the advance bank guarantee was deposited by the petitioner on 19th September, 2023, that is, prior to receipt of the advance payment. Thus, the contents of the e-mails dated July 28, 2023 and July, 31, 2023, prima facie, do not disclose any ground for non-acceptance of the finished product. These documents are prior to the advance being paid and the oven having been manufactured.
16. Under such circumstances, a strong, prima facie, case has been made out. The Court directs that, in the event the respondent invokes the bank guarantee of Rs.50 lakhs, the amount of Rs.50 lakhs shall be deposited with the learned Registrar, Original Side, High Court, Calcutta for a period of three months. In the meantime, the petitioner shall invoke the arbitration clause and thereafter the parties will be at liberty to approach the learned Arbitrator for further interim reliefs. The fate of the money, if deposited upon invocation of bank guarantee as directed herein above, shall be decided by the learned Arbitrator.

17. In the event the said amount of Rs.50 lakhs is deposited, the learned Registrar, Original Side shall keep the said amount of Rs.50 lakhs invested in an auto renewable, short term interest bearing fixed deposit account, with any nationalised bank.
18. With the above observation, AP(COM) No. 277 of 2025 stands disposed of.

(SHAMPA SARKAR, J.)

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