
(2003) 02 DEL CK 0006

In the Delhi High Court

Case No : IAs 411 and 2431 of 2002 in Suit No. 95 of 2002

Adwel Advertising (P) Ltd.

APPELLANT

Vs

N.D.M.C. and Another

RESPONDENT

Date of Decision : 25-02-2003

Acts Referred:

Citation : (2003) 2 AD 452 : (2003) 1 ARBLR 695 : (2003) 2 BC 345 : (2004) 72 DRJ 500

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : A.M. Singhvi and R.S. Maniktala, for the Appellant; Valmiki Mehta and Amit Bansal, for the Respondent

Judgement

Vikramajit Sen, J.—By this Order, I shall dispose of plaintiff's application under Order XXXIX Rule 1 & 2 and Defendant No. 1's application for vacation of the ex-parte ad interim injunction granted under Order XXXIX Rule 4 of the Code of Civil Procedure. On 14.1.2002, the impugned Bank Guarantee issued by Punjab & Sind Bank (Defendant No. 2) was interdicted from being invoked. The Suit is for the grant of a declaration and permanent injunction that this Bank Guarantee had been obtained by Defendant No. 1 by misrepresentation and, Therefore, ought not to be invoked. A prayer for rendition of accounts has also been made, which I find to be quite extraordinary and novel and, prima facie, made in order to avoid the payment of ad valorem Court Fees. If the contention of the plaintiff is accepted in to, the result on their own showing would be that some recoveries are to be effected by them. If this prayer is not made, the consequences could be fatal.

2. Some of the salient features of the Bank Guarantee reads thus:

" In consideration of the New Delhi Municipal Council (hereinafter called the " Licensor ") and at the request of Adwel Advertising (P) Ltd., 2C, 30 Ferozshah Road, New Delhi 110 001(hereinafter called the " Licensee ") and for the grant of license for displaying advertisement kiosks on electric poles in the NDMC area,

the Licensee is requested to furnish Bank Guarantee equivalent to the estimated amount of four months license fee from any nationalized Bank as security for the due and faithful compliance of terms and conditions of the said license.

We, Punjab & Sind Bank, G Block, Connaught Circus, New Delhi, at the request of licensee do hereby undertake to indemnify the licensor to the entire amount of Rs. 3,33,04,000/- (Rupees three Crore thirty three lakhs four thousand only) against any loss or damages caused or suffered by the said licensor by reason of or due to non payment, short or delayed payment of the said license fee (the decision of NDMC as to non payment, short or delayed payment of the license fee as it falls due under license agreement by or on the part of licensee shall be final), conducive and binding on us. "

3. The contention of Dr. A.M. Singhvi, learned Senior counsel for the plaintiff, centres around the assertion that the advertisement inviting tenders mentions the figure of 10,000 poles and that this figure is also repeated in the " Memorandum of Information " for licensing of electricity poles. The Tender Notice carried in the Indian Express on 2.2.1999, invites sealed tenders for " licensing of spaces on electric poles for display of advertisements on a standard size board measuring 30"x 40" on important major roads within the jurisdiction of New Delhi Municipal Council. Number of electric poles earmarked for the purpose is approx. 10,000. However, with the prior approval of the Competent authority, extra/less poles can be allotted to the licensee on proportionate increase/decrease of license fee. The allotment will be for a period of three years from the date of allotment." The Memorandum mentioned above, states in paragraph 5(iv) that the " allotment shall be made purely on " as is where is basis" and no representation on any account whatsoever shall be entertained in this regard." Clause 9 stipulates that " No. of each electricity poles being licensed for the time being (extra/poles can be allotted to the licensee, on proportionate increase/decrease of license fee) appr. 10,000 (list of major important roads attached)". As emphasised by Mr. Valmiki Mehta, learned counsel for the Defendant, that tenderers such as the plaintiff had been advised in their own interests to visit and see the electric poles for themselves and that no representation on any account whatsoever shall be entertained in this regard. The acceptance of the plaintiff's tender took place on 26.2.1999 in terms of the N.D.M.C.'s letter of that date. Subject has been mentioned as- "Allotment of Electricity poles for display of kiosk in NDMC area numbering approx. 10,000 (Poles)". One of the conditions was the furnishing of the Bank Guarantee, the salient terms of which have already been extracted above. One month after the execution of the Bank Guarantee a license Deed was executed by the N.D.M.C. in favor of the plaintiff. The following recitals of the license Deed dated 15.4.1999 are of significance and are, Therefore, re-produced:-

" WHEREAS the licensee M/s Andwel Private Ltd. is desirous of being allowed the privilege of allotment of electricity poles for display of kiosk in NDMC area for a period of 3 years w.e.f. 10.3.99 and has approached to the licensor for the grant

of requisite license subject to payment of license Fee at the rate of Rs. 83,26,000/- (Eighty three lakhs twenty six thousand) per month for the first w.e.f. 10.3.99 to 9.3.2000, @ Rs. 1,02,11,000/- (Rupees one crore two lakh eleven thousand) per month for the Second Year w.e.f. 10.3.2000 to 9.3.2001 and @ Rs. 1,29,21,000/- (Rupees one crore twenty nine lakhs twenty one thousand) per month w.e.f. 10.3.2001 to 9.3.2002 for the three year for carrying on the trade of display of advertisements on the electricity poles.

WHEREAS in consideration of licensees Tender application dtd. 17.2.99 the Licensor has decided vide Chairperson order dated 24.2.99 to all the Licensee to display of advertisement on electricity poles in NDMC area for a period of 3 years w.e.f. 10.3.99 on Licenece Fee @ Rs. 83,26,000/- per month for the first year w.e.f. 10.3.99 to 9.3.2000, @ Rs. 1,02,11,000/- per month for the Second Year with effect from 10.3.2000 to 9.3.2001 and @ Rs. 1,29,21,000/- per month w.e.f. 10.3.2001 to 9.3.2002 for carrying on the trade of display of advertisement on electricity poles at a monthly fee as mentioned above."

4. Thereafter, the plaintiff addressed a letter to the N.D.M.C. dated 24/1/2000, in which, after making a reference to Clause 25 of the Terms & Conditions of the allotment, it had informed the latter of their desire to surrender the allotment made to them. The plaintiff also expressed its intention to observe Clause 25, including payment of license Fee for the notice period and that on the expiry of three months, and thereafter its liability of further payment would cease. Thus, the agreement continued for over one year. There are a number of other letters which the plaintiff claims to have addressed to the N.D.M.C., receipt of which is denied. On or about 3.5.2000, the N.D.M.C. responded to the plaintiff's letter dated 24/1/2000, received by it on 4/2/2000, claiming that a sum of Rs. 35,78,771/- was due as arrears of license Fee. In respect of the substantial shortfall in the number of poles available in the N.D.M.C. area for display of advertisement the N.D.M.C. addressed a letter to the plaintiff in October, 2000 offering to charge license Fee for 6762 electricity poles with effect from 2.3.2000; and stating that the arrears of license Fee with interest worked out to Rs. 2,06,05,647/- . Thereupon, the plaintiff had sought for a meeting to discuss the matter. The N.D.M.C. 's request to clear the outstanding was not adhered to. After further parleys between the parties, the plaintiff's request for a review was turned down by the N.D.M.C., which re-affirmed the Report of its Vigilance Committee to the effect that there were 8227 poles in existence. On or about 17.10.2002, the Defendant had sent a reply to the plaintiff's letter dated 21/3/2002, mentioning therein the physical verification of electricity poles on the 112 roads which were mentioned in the tender documents which were carried out by a team of senior officers under the supervision of the Director (Vigilance) and it was found that the final figure of electricity poles was 8227 as against 6762 earlier intimated to the plaintiff. In this letter, it was also conveyed that " the Chairman, NDMC may agree to give you reduction in license fee by taking the figure of 8227 as a number of electric poles w.e.f. the date of the commencement of the contract i.e. 10.03.99, provided you pay the balance

license fee calculated on the aforesaid principles which remains payable by you and is to the tune to Rs. 1,02,83,099/- within 10 days of the receipt of this letter" . The prevailing dispute between the parties is only whether the figure of 6762 claimed by the plaintiff, or 8227 claimed by the NDMC, should be taken into account for calculating the arrears of license fee with effect from the commencement of the contract. According to the plaintiff, if the former is taken into consideration it would have made an over-payment, thereby necessitating a recovery from the N.D.M.C., and thus making it wholly inequitable for the Bank Guarantee to be invoked.

5. The law as it has been enunciated by the Apex Court, in AIR 1997 1644 (SC) , is to be found in these words of the Court:

"12 The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, Therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

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14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the *Itek Corpn.* case, 566 Fed Supp 1210. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favor of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US

Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, Therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek case* (supra) there was a certainty on this issue. Secondly, there was good reason in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

15. Our attention was invited to a number of decisions on this issue -- among them, to *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, and *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, as also to *National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another*, . The latest decision is in the case of *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, where this Court has summed up the position by stating:

"The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee."

The other recent decision is in *Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another*, .

16. Clearly, Therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee".

6. In *U.P. State Sugar Corporation case* (supra), the arguments raised to support the continuance of the injunction were that the beneficiary had terminated the contract on the incorrect ground that time was of the essence of the contract, and that the chances of making any recovery if it succeeded in the Arbitration was illusory since the fortunes of the rival company now lay in the hands of BIFR.

These arguments did not find favor with the Courts which was constituted of M.M. Punchi and Sujata Manohar JJ. These passages were relied upon by a Bench of the Supreme Court comprising K.S. Paripoornan, K. Venkataswami and B.N. Kirpal, JJ. in the case *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd.*, and another, . It is clear that the Apex Court has spoken in one voice and with unanimity, on this aspect of the law.

7. S.C. Aggarwal and G.T. Nanavati, JJ, who decided the disputes raised in the *Hindustan Steelworks Case* (supra), after considering several previous decisions of the Apex Court including *U.P. Cooperative Federation Ltd. V. Singh Consultants & Engineers (P) Ltd.* (1988) SCC 174 , *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd.* and another, , *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, and *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, held as follows:

"We are, Therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, Therefore, not right in restraining the appellant from enforcing the bank guarantees".

8. The law pertaining to the Court's power to grant an injunction against the invocation of over-payment pursuant to Bank Guarantee may briefly be stated to be possible only where the plaintiff succeeds in showing that the Bank Guarantee was furnished as a result of the fraud of egregious nature perpetrated by the Defendant and that if the injunction were to be declined, an irretrievable injustice would be caused to the plaintiff. Mr. Mehta, learned Senior Counsel for the Defendant, states that the exact number of poles was not indicated and that the plaintiff had sufficient time to carry out its own inspections and investigations, as it was, in fact, advised by the N.D.M.C.

9. Counsel for the parties have relied on *Ningawwa Vs. Byrappa and Others*, , *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, , *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, , *Svenska*

Handelsbanken Vs. M/s. Indian Charge Chrome and others, , Rigoss Exports International (P) Ltd. Vs. Tartan Infomark Ltd. and Others, , Khardah Company Ltd. vs. Raymon & Co.(India) Private Ltd., Tharumal & Anr. vs. Madrassa Talimul Islam, JT 1994 (4) 137. In my view, a detailed discussion of the ratio set down in the judgments is not necessary and would only result in these orders becoming prolix.

10. Reliance is also placed by Mr. Mehta on Sections 17 & 18 of the Indian Contract Act, 1872 in substantiating his contention that the N.D.M.C. cannot be accused of any fraud or misrepresentation. Prima facie, this contention is well founded, since the N.D.M.C. had pointedly indicated that the figure of 10,000 was only an approximation. Mr. Mehta has further contended that assuming that a fraud had taken place, the plaintiff ought to have repudiated the contract forthwith, keeping in perspective the fact that the plaintiff had raised the controversy of the number of poles, and the delay for the parties to arrive at a consensus. On this controversy, the subsequent termination of the contract, at the instance of the plaintiff, appears, prima facie, to manifest the exercise of the option to render the contract voidable. It is not explained why the option was exercised after such delay. It is altogether possible that the Petitioner had allowed the contract to run till it was reasonably certain that it would not be as lucratively profitable as the Petitioner had anticipated. What is significant is that I am unable to find the existence of any fraud or misrepresentation on the part of the N.D.M.C., such as would persuade me to exercise the extremely extraordinary powers for interdicting the encashment of the Bank Guarantee. The ex-parte ad interim injunction, that was granted on the first date of the hearing, had taken into consideration the intention to suddenly invoke the Bank Guarantee after almost 24 months of the surrender of the license. However, during this period, the N.D.M.C. had actually taken into consideration the plaintiff's Objections, and there would be no justification, Therefore, for holding against it on this count. However, for the claim of arrears to the tune of Rs. 1,02,83,099/- in October, 2002, it would be proper to permit the N.D.M.C. to invoke the Bank Guarantee for a sum of Rs. 1,02,83,099/-. It is ordered accordingly. These Orders shall be without prejudice to the rights and contentions of either of the parties.

11. The applications stand disposed of in the above terms.

12. Copy of this Judgment be given dusty to the learned counsel for the parties.