
(1997) 01 CAL CK 0007
In the Calcutta High Court
Case No : C.O. No. 9396 (W) of 1996

AIMS India (P) Ltd. and Others

APPELLANT

Vs

Indian Bank and Others

RESPONDENT

Date of Decision : 08-01-1997

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1997) 2 CALLT 179

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—The petitioner who undertook a contract job to manufacture and supply one complete secondary screening system for paper machine (Newsprint) with the respondent No. 2 said to be a "State" within the meaning of Article 12 of the Constitution of India has filed this writ application, inter alia, for the following reliefs :-

"1.A writ of or in the nature of mandamus and/or appropriate directions do issue directing the Respondent No. 1, its servants, agents and/or assigns or otherwise howsoever from acting in terms of or giving effect to or taking any steps in furtherance of the letter dated 3rd June, 1996 and to act in accordance with law;

2. Appropriate writs, orders and/or directions do issue for production of all relevant records and for protection of all rights of the petitioner and for granting the petitioners such relief as in the circumstances shall be just and proper"

2. The admitted facts are that an order was placed by the respondent No. 2 upon the petitioner in respect of the aforementioned contract on 28th March, 1990, pursuant where to a performance guarantee was furnished on 27th February, 1991 which was although valid for a period upto 30th September, 1992 was evidently extended upto 30th June, 1994.

3. By a letter dated 1st June, 1994 a request was made by the respondent No. 2 to respondent No. 1 to extend the bank guarantee upto 30th December, 1994 in regard whereof a request was also made to the petitioner. By a letter dated 7th/14th June, 1994 the respondent No. 2 invoked the bank guarantee in the event the same was not extended upto 30th December, 1994 with a request to the petitioner to extend the same within a period of six months. The said letter reads thus :-

REGD. A/D

Dated 07/14.06.94.

"HNL/FIN/PO/313/23/R.2364

To

Indian Bank,

Jodhpur Park,

Calcutta-700 068.

Sir,

Sub : Extension of Bank Guarantee No. G/2/91 for Rs. 419670/- A/C M/s. AIMS India (P) Ltd.

The validity of the above bank guarantee will be expiring on 30.6.94. You are requested to extend the bank guarantee for another six months i.e. upto 30.12.94. If the party refuses to extend the bank guarantee, please treat this letter as our claim and encash the guarantee. The proceeds may be transferred to our account with Central Bank of India, Mevelloor Branch, Newsprint Nagar P.O. 686 616, Kottayam Dist, Kerala.

Thanking you,

Yours faithfully,

for HINDUSTAN NEWSPRINT LIMITED

Sr. Manager (Finance)"

Admittedly the petitioner did not agree for extension of bank guarantee. The respondent No. 2 again reminded the bank for payment of the amount whereafter the Senior Manager of the respondent No. 1 in terms of its letter dated 21st December, 1995 in reply to the respondent No. 2's letter dated 16/18.9.95 stated :-

"It is curious to note that on your own motion and without any reference to us your company intimated the said Guarantee was extended till 30.6.95 and also requested us to extend the same till 30.9.95. The said extension was never agreed upon by us and no extension was intimated to you in writing in

compliance with paragraph 5 of the said Guarantee."

4. Allegedly, however, despite the same the respondent No. 1 by a letter dated 3.6.96 informed the petitioner that as they did not agree to extension of bank guarantee they were under a contractual obligation to make the said payment. The petitioner thereafter was asked to pay an outstanding balance sum of Rs. 3,35,736/- together with interest at the rate of 22.25% and 6h that date itself a demand draft for a sum of Rs. 4.19,670/- was issued in favour of the respondent No. 2 after the full and final payment under the bank guarantee as claimed by it in its letter of invocation.

5. It is alleged that upon receipt of a notice from the petitioner that a writ petition be moved, the respondent No. 1 by a letter dated 20th June, 1996 which is contained in annexure "A" to the Supplementary Affidavit and received by the petitioner by 10th July, 1996 informed it that it had foreclosed a term deposit for a sum of Rs. 7,60,514/- together with the margin money as also deducted the Income Tax at source without issuing any notice.

6. The learned Counsel appearing on behalf of the petitioner inter alia, submitted that keeping in view the facts and circumstances of this case the action of the respondent No. 1 must be held to be mala fide and, thus the impugned letter dated 3rd June, 1996 as contained in annexure "G" should be quashed. The learned counsel contends that the respondent No. 1 had no authority to make any payment after expiry of the bank guarantee and in any event, such payment could not have made after the due date purported to be on the instruction of the higher authorities in flagrant violation of the terms of Bank guarantee.

7. The learned Counsel appearing on behalf of the respondent No. 1 on the other hand, submits that no writ application is maintainable and in support of his aforementioned contention reliance has been placed on United Commercial Bank Vs. Bank of India and Others, , Banwari Lal Radhe Mohan Vs. Punjab State Co-operative Supply and Marketing Federation Ltd. and Another, and The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, .

8. It is contended that in view of the letter dated 7.6.94 whereby and whereunder the bank guarantee was invoked within the period of its validity, it had no other option but to pay the said amount as it was bound to do under law.

9. The learned Counsel appearing on behalf of the respondent No. 2 produced the records and also placed before this court the relevant materials for the purpose of showing that the bank guarantee has rightly been invoked.

10. The only question which arises for consideration in this application is as to whether the respondent No. 1-bank can be said to have acted arbitrarily in making payments to the petitioner on 3.6.91.

11. It is not in dispute that the respondent No. 2 asked the respondent No. 1 to extend the bank guarantee purported to be in terms of the bank guarantee dated 27.2.91 which contained the following clause :-

"Subject to the maximum limit of our liability as aforesaid this guarantee will cover all your claim or claims against the vendor from time to time arising out of or in relation to your such advance payment to the vendor as aforesaid and in respect of which your demand or notice in writing be issued on us before the date of expiry of this guarantee mentioned above."

12. The respondent No. 2 had invoked the bank guarantee within the validity period thereof. It's letter dated 1st, June, 1996 as also 7th/10th June, 1996 clearly postulates that the respondent No. 2 should either extend the bank guarantee and falling which the said letter may be treated as its claim and encashment of the bank guarantee. By reason of the said letter the proceeds thereof were directed to be transferred to their accounts with Central Bank of India, Mevelloor Branch, Newsprint Nagar, P.O. Kottayam Dist. 686 616, Kerala, A copy of the said letter was also sent to the petitioner stating, "Since you have not yet supplied the material guarantee period is not over against our purchase order cited above, you are requested to get the P.G. extended for a further period of six months."

13. The bank guarantee in question is admittedly a performance guarantee, whether the petitioner had violated the conditions of contract as a result whereof the respondent No. 1 was entitled to invoke the bank guarantee or not is essentially a question of fact. Such a question cannot be gone into by this court in exercise of its writ jurisdiction. Moreover, admittedly the respondent No. 1 had paid the amount to the respondent No. 2 and in that view of the matter, the question which now arises for consideration is as to whether the respondent No. 1 can be directed to release the amount in question in favour of the petitioner.

14. The claim of the petitioner is essentially a money claim. The bank guarantee is a contract between the bankers and the beneficiary. Although the same had been furnished at the instance of the petitioner, it cannot be said that the agreement was a tripartite one.

15. The Supreme Court in United Commercial Bank Vs. Bank of India and Others, stated the law thus :-

"The authorities are uniform to the effect that a letter of credit constitutes the sole contract with the banker, and the bank issuing the letter of credit has no concern with any question that may arise between the seller and the purchaser of the goods, for the purchase price of which the letter of credit was issued. There is also no lack of judicial authority which lay down the necessity of strict compliance both by the seller with the letter of credit and by banker with his customer's instructions. In *English, Scottish and Australian Bank Ltd. v. Bank of South Africa* (1922) 12 LI LR 21 , Bailhache, J. said :-

It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict

accord with the credit as opened."

16. This bench was also recently in A.C. Roy Co. and others Vs. Union of India and others, relying upon a large number of Supreme Court decisions, decisions of this court as also Patna High Court, *enter alia*, held that a dispute under a bank guarantee is a private dispute and the same does not involve any public element and, thus no writ is maintainable.

17. This court in the aforementioned decision has relied upon in the decisions of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, . Food Corporation of India and others Vs. Jagannath Dutta and others, , State of Punjab and Others Vs. Ajudhia Nath and Another, and Amerendra Kumar Vs. State of Bihar and Others, .

18. Further in A.C. Roy (*supra*), the recent Supreme Court decisions were noticed in the following terms :-

19. In State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, , the apex court held :-

"It is not also an executive or administrative act to attract the duty to act fairly. It was-as has been repeatedly urged by Shri Ramaswamy- a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract."

20. Yet again the Supreme Court recently in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , held :-

"We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and condition of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating, of tenders or by negotiation."

21. It was held-"Right to enforce Bank guarantee arises out of a contract qua-contract".

22. There is no public law element involved in it.

23. Thus a writ will not issue in the matter of enforcement of bank guarantee unless there exists a public law element.

24. Even otherwise, normally a court will not issue an injunction restraining enforcement of a bank-guarantee.

25. It is to be noted in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , the Supreme Court held clearly that except in the case of fraud, no injunction can be issued restraining the principal from enforcing a bank guarantee in the following terms :-

"The High Court was also in error in considering the question of balance of conveniences. In law relating to bank guarantees, a party seeking injunction from encasing of bank guarantee by the suppliers has to show prima facie case of established fraud and an irretrievable injury. Irretrievable injury is of the nature as noticed in the case of Itek Corporation Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers or suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for effecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed by the Indian Courts could not be executable in Sweden."

26. This aspect of the matter has also been considered by a Division Bench of this court in Indian Bank v. Metallurgical Engineering Consultants (India) Ltd. reported in 1994 CRILJ 295.

27. In Texmaco Ltd. Vs. State Bank of India and Others, , Sabyasachi Mukherjee, J, (as His Lordship then was) held that in the absence of special equities arising from a particular situation which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in performances of bank guarantee and in the absence of any clear fraud, the Bank must pay to the party in whose favour guarantee is given on demand, if so stipulated.

28. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , a Division Bench of the Supreme Court comprising Sabyasachi Mukherjee, (as the learned Chief Justice then was) and K. Jagannath Shetty, JJ upon following a large number of Indian as also English decisions including Texmaco (supra) held :-

"On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases what is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere."

29. It was further observed :-

"Recently again the Supreme Court in The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, clearly held that in a case of unequivocal and unconditional contract of bank guarantee by supplier or his failure for shipment of goods; no injunction should be granted against the corporation from invoking the bank guarantee except in a clear case of fraud."

30. In view of the aforementioned decisions it must be held that the writ petition is not maintainable and the remedy of the petitioner, if any, is to file an appropriate suit.

31. No case of fraud or irretrievable injury has been made out in the instant case. It is also not possible to agree with the learned Counsel for the petitioner that the Bank had acted arbitrarily only because the amount in question has been paid at the instance of the higher authorities. The higher authorities were entitled to rectify the mistake committed by the inferior authorities who by reason of the doctrine of "Administrative Discipline" was bound to follow. So far as the validity of the purported letter dated 3.6.1991 is concerned, I am of the opinion that in this proceeding, it would not be proper to consider as to whether the Respondent Bank was entitled to invoke the Bankers "lien" or not.

For the reasons aforementioned, there is no merit in this application which is accordingly dismissed but in the facts and circumstances of this case there will be no order as to costs.