(2001) 01 GUJ CK 0054

In the Gujarat High Court

Case No : Appeal from Order No. 374 of 2000

Amrok Logistics Trading Pvt. Ltd. APPELLANT

Vs

Digvijay Cement Company Ltd. and Another RESPONDENT

Date of Decision : 16-01-2001

Acts Referred:
Contract Act, 1872 — Section 126

Citation : AIR 2001 Guj 299

Hon'ble Judges : A.L. Dave, J

Bench : Single Bench

Advocate : B.P. Munshi and Nirali B. Munshi, for the Appellant; Anshin H. Desai, (for No. 1) and R.A. Mishra, (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The present appeal arises out of the order rendered below Exh. 5 in Special Civil Suit No. 128/2000 by the Civil Judge (Senior Division) at Jamnagar on 18-9-2000.

2. The present appellant preferred the said Civil Suit for declaration and injunction against invocation of Bank Guarantee furnished by the appellant to Respondent No. 1 for an amount of Rs. 25 lacs. Respondent No. 2 is a Bank who undertook the guarantee. For sake of convenience, Appellant is addressed to as the plaintiff and respondents No. 1 and 2 are addressed to as defendants No. 1 and 2 in this judgment.

3. The facts leading to the present appeal can briefly be stated as under :

3.1 An agreement was entered into between the plaintiff and defendant No. 1 on February 20, 1999 whereby the plaintiff was appointed as the Consignment Sale Agent (C.S.A.) for the State of Kerala and Tamilnadu on certain terms and conditions. Thereafter, one more agreement was entered into between the said parties on September 6, 1999 whereby the plaintiff was appointed as C.S.A. for the districts of Ernakulam, Idukki, Pathanamthitta, Kottayam & Alleppey of State of Kerala. By virtue of this new agreement the plaintiff was required to provide a Bank Guarantee (BG) for Rs. 25 lacs as per the format of defendant No. 1. The plaintiff was also required to provide post dated cheques worth Rs. 50 lacs for 30 days. Following that agreement one more agreement was entered into between the plaintiff and defendant No. 1 on September 6, 1999 for ''Stevedoring and Transportation''.

3.2 Following the second agreement regarding appointment of the plaintiff as C.S.A., the plaintiff provided a Bank Guarantee given by defendant No. 2 on 12th March, 1999 supposed to be valid up to 31st day of March 2000 on condition that claim in regard to this Bank Guarantee would be entertained only if it is made before 20th day of May 2000. The beneficiary under the said guarantee was indicated to be defendant No. 1.

3.3 Having come to know that the defendant No. 1 was planning to invoke the Bank Guarantee the plaintiff filed the suit in question for declaration and injunction. Plaintiffs case was that the defendant No. 1 was not entitled to invoke and encash the Bank Guarantee and there were serious and genuine disputes regarding accounts. It was contended by the plaintiff that cargo was damaged and there were certain other disputes also between the plaintiff and defendant No. 1. Plaintiff had approached defendant No. 1 for negotiation and for creasing out the differences but before any formula could be worked out it was learnt that defendant No. 1 was planning to Invoke the Bank Guarantee. It was contended that defendant No. 1 has stopped regular supply of consignment under various pretexts. One being non availability of vessels for the transport of the cargo, another was of high charter rates. This created problems with the dealers so far as C.S.A./plaintiff was concerned. It was stated by the plaintiff that if defendant No. 1 is permitted to encash the Bank Guarantee it would result into heavy loss to the plaintiff which cannot be compensated in terms of money.

3.4 Ultimately, a relief of injunction against defendant No. 1 was sought against encashment of the Bank Guarantee.

4. Defendant No. 1 came out with a reply at Exh. 17 stating that the suit is misconceived and that the plaintiff had concealed vital facts from the Court. Defendant No. 1 has come with a case that even if there were some adjustments to be made, money was due from plaintiff to defendant No. 1. For that purpose and for creasing out the differences in the accounts, a meeting was held on June 17, 2000 at Ahmedabad between a representative of the plaintiff and defendant No. 1. In that meeting an authorised representative of the plaintiff was preserit and had agreed in writing that an amount of Rs. 50,63,892.74 was due and payable by the plaintiff to defendant No. 1. The plaintiff was avoiding to make the payment under one pretext or the other and this suit is also a step towards the avoiding of payment.

5. It was contended that it was agreed in the Bank Guarantee that the amount of Rs, 25 lacs would be unequivocally and unconditionally paid to the defendant No.

1 on demand in writing. Defendant No. 2 had given this Bank Guarantee on behalf of defendant No. 1. The guarantee is unconditional and therefore no injunction can be granted against encashment of the Bank Guarantee.

6. Defendant No. 2 Bank has filed reply at Exh. 27 denying the averments made in the plaint. Defendant No. 2 agreed to having issued a bank guarantee. It came with a case that defendant No. 1 gave a letter of request to encash the bank guarantee but as the original bank guarantee which was in custody of defendant No. 1 was not produced before defendant No. 2. Defendant No. 1 was asked to produce the same before the payment is made. In the meanwhile injunction was granted and therefore the payment is not made.

7. The Trial Court after considering the rival side contentions in light of the documents furnished by both the sides came to the conclusion that plaintiff is not entitled to temporary injunction as prayed for and dismissed the application Exh. 5. It is this order which is subject-matter of challenge in this appeal.

8. At this stage it would be appropriate to note that plaintiff initially preferred Suit No. 153/2000 at Ernakulam and that Court ultimately transferred the suit to the Court of Janagar on ground of want of jurisdiction. However, ex-parte ad-interim-injunction against encashment of the said Bank Guarantee came to be granted. Said order was vacated by the order impugned in this appeal.

9. The plaintiff/Appellant is aggrieved by refusal on the part of the Trial Court to stay the encashment of the Bank Guarantee. Learned Advocate by Mr. B.P. Munshi, appearing for the plaintiff submitted that the Court below had grossly erred in interpreting the law as well as the evidence on record. According to Mr. Munshi, he does not dispute a settled legal proposition that injunctions are to be granted slowly against encashment of Bank Guarantee. He submitted that this is what is the proposition applicable in general where Bank Guarantee is unconditional and irrevocable. Mr. Munshi stated that the Court below failed to appreciate that the Bank Guarantee, in the instant case is not unconditional but a conditional one. If the document is read it would indicate that it is subject to conditions incorporated in the original agreement between the plaintiff and defendant No. 1. No case is made out on behalf of defendant No. 1 for encashment of Bank Guarantee. He submitted that the plaintiff has genuine disputes about the liability. The plaintiff wants reconciliation of accounts and is ready to pay whatever amount that may be due to defendant No. 1. In fact according to the plaintiff an approximate amount of Rs. 85,000/- is due from defendant No. 1 to the plaintiff and if defendant No. 1 encashes an amount of Rs. 25 lacs the plaintiff would be put in difficulty. Mr. Munshi, places reliance on certain clauses incorporated in the Bank Guarantee as well as the agreement between the plaintiff and defendant No. 1 dt. 6-9-1999. He relied upon certain decisions to support his case.

10. Mr. Mihir Joshi, learned Advocate appearing for respondent No. 1 submitted that the law regarding Bank Guarantee is well settled. According to him the Bank

Guarantee in question is unconditional one. He submitted that the document has to be read as whole and not in piecemeal. According to Mr. Joshi, the disputes regarding accounts or reconciliation thereof are not relevant factors so far as encashment of Bank Guarantee is concerned. Mr. Joshi, tried to indicate that although the case is tried to be made out by the plaintiff about differences in account and reconciliation thereof there are hardly any differences worth a name. Mr. Joshi, submitted that conduct of party is also required to be seen. He submitted that although there is a specific clause in the agreement regarding the agreement being subject to jurisdiction of Jamnagar Court, the plaintiff preferred the suit at Ernakulam and obtained ex-parte orders. He therefore urged that plaintiff has not come with clean hands, and therefore also, would not be entitled to a discretionary relief in form of injunction. He has drawn attention of this Court to the document dt. June 17, 2000 which is signed by an authorised representative of the plaintiff wherein he has admfted that an amount of Rs. 50,63,892.74 ps. Is due from the plaintiff to defendant No. 1. He submitted that if the document is properly read the contention regarding the representative having stated that it is subject to confirmation with books of accounts maintained by the plaintiff, is applicable only to the amount of receipts and not the liability which is determined after verification of accounts. Mr. Joshi, therefore urged that this appeal may be dismissed.

11. Mr. B. P. Munshi, in reply submitted that as such there is no suppression of any fact by the plaintiff. The plaintiff has approached the Court with clean hands and the Court may peruse the relevant documents, particularly, the affidavit in reply filed on behalf of the plaintiff wherein there is a specific mention about settlement of accounts on June 17, 2000. He therefore urged that the appeal, may be allowed.

12. Having regard to the contentions raised by both the sides what is required to be determined by this Court is whether, in the instant case, the Bank Guarantee was conditional? There is no dispute about the legal position that where the Bank Guarantee is unconditional, no injunction can be granted against invocation/ encashment of such Bank Guarantee. According to the plaintiff, the Bank Guarantee is conditional one and unless the conditions are indicated to be fulfilled, defendant No. 1, the beneficiary under the guarantee is not entitled to its encashment whereas according to defendant No. 1 the Bank Guarantee is unconditional one and defendant No. 1, is therefore, entitled to encash the same irrespective of dispute in accounts.

13. The case therefore rests on interpretation of Bank Guarantee which can be done at the trial stage, after considering all the evidence that may be adduced by the parties concerned. At this stage, only prima facie the documents and evidence are required to be looked into and considered.

14. According to the plaintiffs learned Advocate Mr. Munshi, Clause (2) of the guarantee indicates that the Bank guarantees to pay an amount not exceeding Rs. 25 lacs against any loss or damages occurred or suffered by or would be

caused or suffered by Shri. Digvijay Cement Co. Ltd. by any reason whatsoever of non-fulfilment of any obligation of the consignment agreement. Mr. Munshi, therefore submitted that the defendant No. 1 is required to indicate that a loss is suffered on account of non-fulfilment of any obligation under the consignment agreement dated September 6, 1999. This having not been shown, defendant No. 1 is not entitled to encashment of Bank Guarantee which is not considered by the trial Court. Mr. Munshi, also drew attention of this Court to para 3 of the Bank Guarantee wherein it is stated that by virtue of the agreement plaintiff is required to furnish a Bank Guarantee of Rs. 25 lacs as a security of performance of agreement by A.L.T.P. as per the said agreement. Mr. Munshi, submitted that if these two clauses are read together it would necessarily indicate that the Bank Guarantee was subject to be governed by an agreement entered into between the plaintiff and defendant No. 1 on September 6, 1999 and therefore the trial Court ought to have granted injunction in favour of the plaintiff.

15. On the other hand Mr. Mihir Joshi, has drawn attention of this Court to Clause (1) of the Bank Guarantee wherein it has been stated that the bank, defendant No. 2 agrees unequivocally and unconditionally to pay at Digvijay Gram on demand in writing from Shri. Digvijay Cement Co. Ltd. or any officer authorised by it. In this behalf any amount up to and not exceeding Rs. 25 lacs under the Bank Guarantee. Mr. Joshi submitted that the Bank Guarantee is therefore unconditional and unequivocal and is required to be fulfilled only on demand in writing from defendant No. 1. Mr. Joshi submitted that for an interpretation entire document is to be read.

16. A document for being interpreted is required to be read as a whole. This would also indicate the intention of parties. In the instant case the whole case rests on interpretation of documents of Bank Guarantee. It has also to be kept in mind that at this stage the evidence is to be seen prima facie. If the documents narrated is to be seen, it has been categorically observed that Bank unequivocally and unconditionally agrees to pay the amount of Bank Guarantee. The Interpretation suggested by Mr. Munshi is that for encashment of Bank Guarantee it has to be shown by defendant No. 1 that defendant No. 1 has suffered any loss by reason of non-fulfilment of any obligation under the concerned agreement. It would lead to a situation whereby Bank Guarantee cannot be encashed until adjudication on such question by a competent Court. If such interpretation is accepted, the very purpose behind furnishing the Bank Guarantee would get frustrated as no bank guarantee can be encashed till Court gives a verdict that the beneficiary of the B. G. has suffered loss due to non-fulfilment of obligation under the contract.

17. Prima fade, if the document is read it cannot be said that the Interpretation given to the Bank Guarantee by the trial Court is absurd or perverse where the Bank Guarantee is found to be unconditional one. The law is well settled and no injunction could have been granted and as such no interference can be made against invocation of Bank Guarantee by the Court.

18. The plaintiff has not come out with a case of fraud or misrepresentation giving rise to special equity nor it is the case of the plaintiff that in event of his success at the trial it would not be possible for the plaintiff to realise the Bank Guarantee amount from defendant No. 1. No interference is therefore called for.

19. A dispute of accounts, by itself, will not provide a ground for grant of stay against encashment of Bank Guarantee. If this is permitted to be done the purpose behind resting transaction on the basis of Bank Guarantee will be marred which would ultimately affect trade and commerce and economic development. This Court finds no reason to Interfere with the impugned order.

20. Mr. Joshi places reliance on certain decisions in case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, . The case regarding the Bank Guarantee was considered. In that case the Apex Court held that an amount of the Bank Guarantee is bound to be paid to the beneficiary unless fraud or special equity is prima facie made out as a triable Issue by specific pleading and strong evidence so as to prevent Irretrievable injustice to the parties. In the instant case such conditions are not fulfilled by the plaintiff. It may also be noted that the Bank Guarantee is specifically stated to be "unequivocal and unconditional" and the Bank has agreed to pay "without any demur" the stipulated amount "on demand" being made by the beneficiary. Under the circumstances no interference is called for.

20.1 A reliance was placed by the learned Advocate for the appellant on Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, wherein it has been laid down that the Bank Guarantee in unequivocal and unconditional terms undertakes to pay the amount without any demur or objection and Irrespective of any dispute. Court would refrain from issuing injunction. The Court further held that however, if Bank Guarantee is conditional, the beneficiary cannot have unfettered right to invoke the guarantee and the Court can Issue injunction against invocation of the Bank Guarantee in view of the facts of the case. In that case the clause governing the Bank Guarantee and interpretation in the document of the Bank Guarantee read as under" that in the event of the obligations expressed in the said clause of abovementioned fraud have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of advance mobilisation loan from the contractor under the contract "The Court observed that by referring specifically to Clause (9) the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligation under the contract were not fulfilled by the appellant HCCL. The Court observed that the Bank Guarantee could be Invoked only in the circumstance referred to in Clause (9) whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. In the instant case there is no such reference to the contract or any Clause thereof. As such this decision will not help the appellant.

21. In this very judgment the Apex Court has however observed that the terms

of Bank Guarantee are extremely material since the Bank Guarantee represent an independent contract between the Bank and the beneficiary. Both the parties would be bound by the terms thereof. The Invocation therefore will have to be in accordance with the terms of the Bank Guarantee or else invocation itself would be bad.

22. In the case of Adanl Export Ltd. v. Hindustan Organic Chemical (2000) 3 Guj LR 2759 it was held that Injunction against Invocation of Bank Guarantee can be granted alter examining terms of the Bank Guarantee. If on facts it is found that there was no concluded contract between the parties and the matter was at offer and negotiation stage, the principle that Injunction can be granted only in case of fraud, will not apply. It applies to concluded contracts. In the instant case the facts are different and there is no case of fraud or unconcluded contract.

23. It may be noted that the above decision is challenged before Apex Court in SLP (Civil) No. 18553/200. Apex Court has granted Special Leave and the order impugned therein is stayed by the Apex Court by order dt. 12-1-2001.

24. In the case of Dai-ichi Karkaria Private Ltd., Bombay Vs. Oil and Natural Gas Commission Bombay and another, it was held that an injunction can be granted against Invocation, if it is found that it was obtained under economic duress. In the instant case such is not the case. Therefore it will not help the Revisioner.

25. In the case of Gujarat Sidhee Cement Ltd. v. Caldyn Apparetaby GMBH (1997) 3 Guj LR 2357 which says that where a Bank has given a Guarantee and the amount is payable on demand by the promisor the Court cannot injunct the Bank from discharging its obligations. In the instant case it is categorically mentioned in the Bank Guarantee that the amount is payable on demand without demur.

26. In the case of Banerjee and Banerjee v. Hindustan Steel Works Construction Ltd. AIR 1986 Cat 374 wherein it was held that if the Bank Guarantee is conditional and if it is found to have been obtained by fraud or misrepresentation or by suppression of material facts by the beneficiary, while seeking enforcement of Bank Guarantees it would give special equity in favour of the principal debtor to stop the payment by the Bank. In the Instant case no such allegations are made and therefore the decisions will not apply in the present case.

27. In the case of Vijay Sinh Amarsinh & Co. Jamnagar v. Hindustan Zinc Ltd., Udaipur (1992) 1 Guj LR 639 it was held that in case of a Bank Guarantee or irrevocable Letter of credit, the beneficiary must be allowed to have the advantage thereof and the Courts should not grant injunction against encashment of rights under such documents. These agreements are in the interest of general trade and international commerce.

28. If the facts of the present case are seen no clause is found in the Bank Guarantee which would make it conditional and subject to certain clause that may be part of the principal agreement between the parties. On the contrary the

Bank Guarantee unequivocally stales that it is unconditional and unequivocal and the Bank agrees to pay on demand without any demur the amount of Bank Guarantee. The interpretation sought to be made by Mr. Munshi, learned Advocate for the appellant cannot be accepted prima facie at this stage.

29. In absence of any allegation about any fraud or special equity this Court is not inclined to accept this appeal. The appeal therefore must fail. Appeal stands dismissed. No costs.

