

(1984) 03 MAD CK 0027
In the Madras High Court
Case No : C.R.P. No. 2777 of 1983

Arul Murugan Traders

APPELLANT

Vs

Rashtriya Chemicals and Fertilisers Ltd., Bombay and Another

RESPONDENT

Date of Decision : 29-03-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Contract Act, 1872 — Section 126

Citation : AIR 1986 Mad 161 : (1986) 59 CompCas 399 : (1984) 97 LW 598

Hon'ble Judges : Sathiadev, J

Bench : Single Bench

Advocate : S. Gopalaratnam, for the Appellant; S. Ramasubramaniam, of King and Partidge, for the Respondent

Judgement

1. Petitioner is the plaintiff in O.S. 163 of 1982 on the file of the Sub Court, Gobichettipalayam. It filed the suit against respondents herein, for

grant of a permanent injunction restraining them from recovering the sum of Rs. 85,639-89 from the State Bank of India, Gobichettipalayam

branch till they establish their claim against the plaintiff in a court of law. Pending disposal of the suit, in I.A. 737 of 1982, it sought for grant of a

temporary injunction under O. 39 R. I and S. 151 C.P.C. restraining respondents from realising the said amount by enforcing the bank guarantee till

the disposal of the suit. Courts below having rejected the relief, this civil revision petition is preferred.

2. The plaintiff claimed as follows. The first defendant manufactures Nitrogenous and other chemical fertilisers. The plaintiff was appointed as a

dealer under Ex. B 25 dt. 25-9-1980 for the sale and distribution of its products in certain territories of TamilNadu. As and when plaintiff informs

second defendant specifying the requirements, allocation would be made by issue of delivery notes to the concerned warehouse and thereafter,

plaintiff will receive the supply. Second defendant issues invoices, whereupon plaintiff makes payments. In order to assure prompt payment of

invoices, plaintiff was directed to furnish bank guarantee, and, it had furnished two bank guarantees totaling Rs. 1 lakh under Exs. B 13 and B 14dt.

17-6-1979 for Rs 50,000 each issued by State Bank of India, Gobichettipalayam. Though plaintiff was prompt in payment of invoices, it

understands that some of the officials of second defendant, supplied products to retailers and other parties closely known to them, and to avoid

detection, for record Purposes they bring those transactions under any one of the recognised dealers in a clandestine manner, and so long as

payments are received within time from such clandestine purchasers, there was no trouble. But when it finds, the officials in order to exculpate

themselves demand payments from authorised dealers, and that was how, a demand for Rs. 1,261,183-69 was made on the plaintiff by letter dt.

17-7-1982 (Ex.. A. 4) Defendants having threatened to invoke the bank guarantee, in default of payment of the amount so claimed, it sent a reply

on 1-8-1982 (Ex. A. 5) requesting for, details to be furnished. But second defendant had not chosen to give any reply so far. Out of the claim

made, plaintiff admits liability only for Rs. 43,543-50 and has already paid a sum of Rs. 20,735 on 29-7-1982, and is prepared to pay the balance

at any time. It disputes liability only for Rs. 85,639-89. In para 7 of the plaint, it refers to certain communications, to show how the demand made

by the second defendant was fraudulent. When the product was not actually supplied, the bank, as the surety, is also not liable to pay the amount

as per the terms in Exts. B. 13 and B. 14, Bank guarantees have been invoked only to save the skin of the officers of the defendants, who have

committed fraud, and hence, the suit had been filed.

3. Second defendant in the written statement had repudiated this claim, stating that, when irrevocable bank guarantees had been furnished, a

demand having been made by letter dt. 1- 10-1982 for payment of a sum of Rs. 1,29,183-69, plaintiff had unjustly intercepted it by filing the suit.

The Bank had violated the terms of the bank guarantee. It is due to inability to pay debts, in spite of taking delivery of goods, the suit had been

filed on false grounds. After referring to the procedure adopted in selling goods, the allegations made in paras 6 to 9 of the plaint have been denied

In the light of a decision in *United Commercial Bank Vs. Bank of India and Others*, the Bank has no other option than to honour the bank

guarantee.

4. The trial court held that documents produced by defendants show that there could not have been clandestine sale of products to third parties,

and hence the plaintiff has not made out a "prima facie case of fraud. Relying upon *Tarapore and Co. Vs. V/O Tractoroexport and Another*, it

held that it is only under extraordinary circumstances, courts would injunct the Bank guarantee from being invoked. The appellate court also

concurred with these findings.

5. Mr. S. Gopalaratnam, learned counsel for the petitioner, submits that it will not be his endeavour to claim that a court can in a light hearted

manner grant interim injunctions, preventing a bank guarantee or a letter of credit being honoured on time. He has taken considerable pains to

analyse the decisions hereunder referred to, to show that the correct view to be taken is to proceed on the basis that a bank guarantee or a letter

of credit and the like, must be allowed to be effective instruments so as to secure payment, irrespective of whatever be the disputes raised between

the seller and the buyer, and that only in extraordinary circumstances, an injunction could issue. With fraudulent intention if a party to the contract

invokes a bank guarantee, no court could allow an illegality being committed, merely because the relief claimed is in respect of a bank guarantee or

letter of credit. He respectfully submits that, in spite of specific instances adverted to by plaintiff to show that fraud had been committed, this

essential factor had been evasively dealt with by courts below, and that by continuing to keep the bank guarantees alive, during the pendency of the

proceedings, defendants would not, in any manner, be prejudiced.

6. As to what should be the approach made by courts when bank guarantees are Invoked, after referring to Ss. 126, 128, 133, 140 and 145 of

the Indian Contract Act, dealing with indemnity and guarantee, he refers to *United Commercial Bank Vs. Bank of India and Others*, wherein it

was held that it is a well established rule that a Bank issuing or confirming a letter of credit, is not concerned With the underlying contract between

the buyer and the seller. After referring to the decision in *Harbottle Ltd. v. National Westminster Bank Ltd.*, (1977) 3 WLR 752, it is stated

therein as follows -

We would like to adopt a passage from his judgment at page 761: it is only in exceptional cases that the Courts will interfere with the machinery of

irrevocable obligations assumed by bank³".

Dealing with the scope of O. 39 Rr. I and 2, it was held that, unless plaintiff establishes that there was a bona fide connection between the parties,

or a serious question to be tried and balance of convenience is taken into account, an interim injunction would be wholly unwarranted. In para 41 it

is stated.

A letter of credit sometimes resembles and is analogous to a contract of guarantee to warrant interference by injunction.

Counsel for defendants also relies upon the same decision to plead that courts cannot intercept Bank guarantees being invoked, and that inter se

disputes between contracting parties cannot be taken into account by the Bank.

7. The contention of Mr. S. Gopalaratnam, learned counsel, is that, the decisions of the Supreme Court in *Tarapore and Co. Vs. V/O*

Tractoroexport and Another, , and *United Commercial Bank Vs. Bank of India and Others*, , are to the effect that usually courts should refrain

from granting injunctions to restrain performance of the contractual obligations arising out of a letter of credit or a bank guarantee. But there is no

absolute bar against courts granting interim injunction, under O. 39 Rr. 1 and 2 and S. 151 C.P.C. if circumstances warrant. He would point out,

that in none of the decisions, it had ever been held that courts are powerless to injunct the invocation of letter of credit or bank guarantees. He

submits that the courts below misconstrued, that this matter does not fall within the exception contemplated in the said decisions. Before

proceeding further, he points out that the observation in *Elia v. Matsas* (1966) 2 Lloyd's Rep. 495, to the effect that a letter of credit sometimes

resembles and is analogous to a contract of guarantee, overlooks the fact that a letter of credit could not come within the definition of S. 126 of the

Contract Act, and hence, in so far as India is concerned, the bank guarantee like the one issued in the present matter, cannot be equated to a letter

of credit. He points out that, even in the said decision, no analysis had been

made anywhere as to how a bank guarantee could be equated to that of a letter of credit, and that it is only a passing reference made in the course of the judgment. He pleads that the emphasis laid in Tarapore and Co. Vs. V/O Tractoroexport and Another, , cannot be imported to the same extent, when bank guarantees are involved. At this juncture, he refers to Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, wherein it was held that, "A case is an authority only for what it actually decides and not for what may logically follow from it every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case in which such expressions are to be found. Observations in the judgment which were really not necessary for the purposes of the decision and go beyond the occasion have no binding authority and merely have persuasive value"". Hence it is rightly contended that by referring to the decision of Lord Denning in United Commercial Bank Vs. Bank of India and Others, it would not mean that a bank guarantee and a letter of credit, are equitable. In view of what has been stated in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, , no difficulty exists in understanding the correct legal principles to be followed, when bank guarantees are involved. Though in Tarapore and Co. Vs. V/O Tractoroexport and Another, it was in respect of a letter of credit, in United Commercial Bank v. Bank of India AIR 1961 SC 1426, as to how a bank guarantee should be dealt with having been well laid down, what further requires to be considered is, whether plaintiff's case would be an exceptional case warranting interference by court. That there can be exceptional cases was recognised in R. D. Harboile Ltd. v. National Westminster Bank Ltd., (1977) 3 NN LR 752 and this view having found approval by the Supreme Court, it is not as if, in no case a bank guarantee could be intercepted from being honoured. Even in Ellian v. Matsas (1966) 2 Lloyd's Rep. 495, it is stated that circumstances may arise such as to warrant interference by injunction" and it was a case" wherein the Court granted injunction, treating it as a special case, because the ship owners in breach of the undertaking, imposed a further fee, and hence, they have disabled themselves from acting on

the guarantee.

8. To show that extraordinary or exceptional or special cases would arise wherein courts would be inclined to injunct the invocation of bank

guarantees, UCM Investments v. Royal Bank of Canada (1982) 2 All ER 720 is relied upon, wherein it was held that the system of confirmed

irrevocable documentary credits had been developed in international trade to give the seller an assured right to be paid before he parted with

control of the goods and that does not permit of any disputes with the buyer as to the performance of the contract of sale to be used as a ground

for non-payment or reduction or deferment of payment, but to this general statement of principle as to the contractual obligations of the confirming

bank to the seller, there is one established exception; that is where the seller, for the purpose of drawing on the credit, fraudulently presents to the

confirming bank documents that contain, expressly or by implication, material representations of facts which to his knowledge are untrue, The

exception for fraud, on the part of the beneficiary seeking to avail himself of the credit, is a clear application of the maxim *exturpi causa non oritur*

actio or, if plain English is to be preferred "fraud unravels all". The Courts will not allow their process to be used, by a dishonest person to carry

out a fraud. In *R. D. Harbottle v. National Westminster Bank* (1977) 2 All ER 862, also it was held that only in exceptional cases would the courts

interfere with the machinery of irrevocable obligations assumed by banks, and that courts have a discretion to grant interlocutory injunctions,

whenever it is just or convenient to do so. In *Maharashtra State Electricity Board, Bombay Vs. Official Liquidator*, High Court, Ernakulam and

Another, , it was held that a bank issuing a guarantee cannot raise the plea that it is liable only to the extent of any loss that may have been

sustained by the party, on whose behalf it has issued bank guarantee and not for the whole amount, and that the liability is absolute and

unconditional. *B.S. Aujla Company Pvt. Ltd. Vs. Kaluram Mahadeo Prosad and Others*, , is to the effect that in the absence of a clear case of

fraud to the knowledge of the bank, it is a well settled principle of balance of convenience that a court should not grant injunction restraining

payment in terms of the letter of credit. An injunction would issue under O. 39 Rr. 1 and 2, only if the plaintiff establishes that he has a *prima facie*

case, meaning thereby that there was a bona fide contention between the parties, or a serious question to be tried. On behalf of defendants, apart

from relying upon Tarapore and Co. Vs. V/O Tractoroexport and Another, and United Commercial Bank Vs. Bank of India and Others,

reference is also made to UCM (Investments) v. Royal Bank of Canada (1982) 2 All ER 720 and Vinay Engineering v. Neyveli Lignite

Corporation (1983) 96 MLW 61.

9. The decisions make it quite clear that there is no absolute rule prohibiting grant: of interim injunction relating to Bank guarantees and in

exceptional cases courts will interfere with the machinery of irrevocable obligations assumed by banks, and that the plaintiff must establish a prima

facie case, meaning thereby that there is a bona fide contention between the parties or serious question to be tried, and further the balance of

convenience is also a relevant factor. If the element of fraud exists, then courts step in to prevent one of the parties to the contract from deriving

unjust enrichment by invoking bank guarantee.

10. Hence, the primordial aspect to be considered is, whether there is a bona fide contention between the parties or a serious question to be tried,

so as to make out a prima facie case. The only contention of the plaintiff herein is, that defendants have practised fraud upon it and hence they

cannot invoke the bank guarantee. In paragraphs 6 and 7 of the plaint, the specific instances, relating to the alleged fraud, are placed. In the written

statement, except for a vague denial, not even a single instance had been explained away by reference to any of the documents. When a party to a

proceeding pleads fraud by referring to certain transactions and furnishes particulars to sustain the said contention and if the opposing party rests

content by general denials, the only course open to the court, at this stage of the matter, is to act upon the claims of the plaintiff, provided they are

plausible and seemingly worthy of belief. Even in the counteraffidavit filed to the I.A. except for stating the usual nature of transaction adopted

between the parties, and the decision in United Commercial Bank Vs. Bank of India and Others, , no particulars are furnished to show as to how

far the plea of fraud, as raised, is unsustainable. As for the trial courts, in para 6, it has simply catalogued in seriatim all the documents filed by

contesting parties. In para 7, it takes up the only point relating to forgery

pleaded, regarding Ex. B 28. It compares the signature found therein with that in Exs. B26 and B27, and states that on a superficial comparison, it is unable to make out forgery. No other factual claims made by the petitioner, had been dealt with. Plaintiff filed 1. A. 46 of 1983, for sending Ex B 28 for opinion of a handwriting expert. But it was rejected, on 192-1983, holding that ""no finding need be given for the present to dispose of I.A. 7,37 of 1982"" and hence the petition was closed with liberty to file a separate petition for the same prayer at the time of trial, if necessary. Having stated that no finding need be given for the present on the aspect of forgery, it had proceeded to dispose of the matter only on the ground that plaintiff had failed to establish forgery. It has unjustly prevented plaintiff from establishing an important factual claim, by refusing to send Ex B 28 to a handwriting expert to give his opinion as to its genuineness.

When a plea of fraud is made, by claiming that a particular document has been forged, the trial court ought not to have stood in the way of relevant evidence being adduced, even at this stage of the matter. By preventing the plaintiff from adducing relevant evidence, and in spite of holding that no finding need be given for the present on the aspect of forgery pleaded, it had erroneously proceeded to render the only finding that Ex. B 28 does not appear to be forgery. It is on this sole ground it held that plaintiff had not made out a prima facie case.

11. As for the appellate court, in paragraph 6 alone it deals with the prima facie nature of the case. After referring to Exts. B25, 13, 14 and 10 it holds that, when plaintiff had received four delivery orders and four invoices, it must naturally be taken that it had taken delivery of the goods covered by the delivery orders from the warehouse: It further observes that, when signatures of the person who took delivery on behalf of the plaintiff are found, Exts. B I to B8 go to show that all the goods covered by the invoices have in fact been supplied to the plaintiff, and hence there is no warrant for the plaintiff's contention, that the defendants have played fraud in supply of goods to strangers and making the invoices in the name of the plaintiffs. Mr. S. Gopalaratnam learned counsel for the plaintiff, argued at great length, by referring to each one of the documents, to show that lower appellate Court had relied on documents filed by defendants, without looking into the inherent discrepancies existing therein, and

hence the court had not applied its mind to the contents of these documents. Merely because four delivery orders and invoices exist, it had proceeded on a presumption that plaintiff must have taken delivery of goods from the warehouse, when its main grievance is that, they are documents brought into existence by the officials of the defendants in the clandestine dealings indulged in by them. This criticism is not without substance, because, the appellate order does not deal with the points taken by the plaintiff, as to why such documents cannot be put against it and of the discrepancies existing therein. Even the limited materials which plaintiff had referred to in para 7 of the plaint had not been dealt with by the courts below, to show that there is no serious question to be tried between the parties. Though he has taken more than one point to show discrepancies and obvious defects in the documents relied upon by defendants, only a few are dealt with hereunder, for the limited purpose of finding out whether this case would come under the category of exceptional or special cases, as held by the Supreme Court.

12. Item No. 1 : Under Ex. A.5 dt. 21-3-1982, plaintiff asked defendants to furnish a copy of accounts till date from the beginning. Under Ex. A 2 dt. 21-5-1982, defendants informed the Bank that ""the party had settled fully their dues with us and as on date their debit balance is nil"". Plaintiff states that in spite of it, under Ex. A. 4, dt. 17-7-1982, they state that the opening balance is Rs. 3279-79, but no explanation is forthcoming as to how this amount became due.

Item 2: As for Ex A7, the invoice, admittedly there is no delivery challan issued.

Item 3 : Ex B 8 is the delivery challan for the invoice under Ex. B 9. This shows that G. R. Anantharaman (brother of G. R. Srinivasan, who is the sole proprietor of the plaintiff firm) took delivery of 20 tons by lorry TMR9475 on 24-5-1982, whereas Ex. B12, the certificate produced by defendants and issued by warehouse at Salem, discloses that 10 tons were delivered on 24-5-1982, and one ton on 1-6-1982, and 9 tons on 3-6-1982, and the lorry numbers also vary. Hence, it is pleaded that Ex B 8 does not prove delivery of the goods covered by Ex. B9.

Item 4 : In Ex B2, an invoice, the word "Dindigul" is scored out and over written as "Salem" whereas in the two copies received by plaintiff, only

Dindigul warehouse is shown as the place from where delivery had been effected.

When these copies of invoices were sought to be marked as additional documents, the lower appellate Court has refused to receive that I.A. 95 of 1983 filed for additional documents to be received, was dismissed on 30 -4-1983. Item 5 : As for Ex. B 1, a delivery challan, it, shows delivery by lorry TMT 4142, whereas Ex B 12 the concerned invoice shows that the lorry number is TMT 4242, and here again, Dindigul had been scored out and Salem had been written.

Item 6 : In Ex. B 3, the name of the person to receive delivery is not filled up. But yet the second defendant has put his signature, as if he had attested the signature of the person "who is to take delivery". The delivery had been made to one A. Govindaswami, who does not represent the plaintiff. In respect of this consignment, Ex. B12, the certificate of the warehouse manager is to the effect that delivery was made through lorry TNL 3579, and not TNL 4889 which is mentioned in the delivery challan. In Ex. B6 also, there is alternation regarding the warehouse from where the goods are to be cleared.

Item 7 : In Ex. B5, the delivery challan, it shows that one V. Raman received delivery on 2-6-1982, in TNL 3579, whereas the corresponding certificate of the warehouse manager (Ex. B12) shows that delivery was through lorry TNL 4889.

Item 8 : Ex. B7 is an invoice showing that the name of the warehouse had been corrected as Salem. But no delivery challan is produced. But still Ex. B 12, written by Manager of Salem warehouse shows that delivery was effected under order No. 404517, dt. 19-6-1982, which cannot be correct.

Item 9 : Under Ex. A. 5, dt. 3-8-1982, on plaintiff realising that clandestine transactions have been put through in his name, made a request for a copy of the accounts to be furnished, but till date, defendants have not furnished the required particulars. Instead, within seven days, under Ex. A. 6, dt. 11-8-1982, second defendant had addressed one Amirthalingam, stating that Kannan was being sent in connection with the settlement of plaintiffs accounts amicably. Kannali had written on Ex. A6 stating that he could not meet Amirthalingam, and that there is urgency in settling the accounts of the plaintiff. This bears the date 14-8-1982. Defendants rely upon Ex. B24, of the same date, to claim that Anantharaman had signed

on behalf of the plaintiff, stating that the goods covered by the four disputed delivery orders had been received. It is in respect of this document

plaintiff states, that it is a rank forgery. If such a letter had been sent to defendants, then in the ordinary course of business, the sea] of the

defendants must find a place therein.

13. Courts below have passed orders only on documents and not on any oral evidence. When so many discrepancies have been pointed out and

when plaintiff had relied upon them and was able to show that in sonic of the documents relevant lorry numbers are not there or concerned

signatures are not affixed, in the background of the claim made that officers of the respondents have indulged in clandestine dealings, and that,

under the disputed invoices, plaintiff had not received goods, t he courts below have miserably failed to look into the prima facie case pleaded by

the plaintiff. As for the claim made in para 7 of the plaint, defendants have Rot placed any material so far, as to how the claim made therein is beset

with any incorrectness or misconception of facts. The added feature is that when Ex. B 28 is claimed to be a forged document, the first endeavour

of the court ought to have been to secure the opinion of the handwriting expert, when plaintiff was prepared for such a course to be adopted. If it is

a forged document, then the element of fraud pleaded becomes relevant, and which would disentitle defendants from invoking the bank guarantee.

That was the main reason why they have opposed the application.

14. As already pointed out, in spite of the trial court stating that no finding need be given for the present on the genuineness of the document, it had

proceeded to hold that plaintiff had not made out a prima facie case only on the aspect of forgery, and on no other point raised by the plaintiff. As

for the lower appellate court, it would not refer -to a single document relied upon by the plaintiff. It has failed to analyse the contents of the

document marked by the defendants, but had proceeded on a surmise that when the delivery order and invoices are present, naturally it should

mean that the goods have been delivered, forgetting that the case of tRe plaintiff is that the goods covered by the said documents were not

delivered to it. If only courts below, which are duty bound to do this analysis, had done it, it would not have resulted " in considerable judicial time

of this court being spent on a matter like this. Subordinate courts shall not avoid

their duty, to analyse contents of documents, which are relevant to find out the prima facie case.

On what is stated above, it is quite obvious that the suit involves serious questions to be tried, and particularly, relating to the plea of fraud, which courts have invariably held as a significant factor to be taken into account, whenever a relief is claimed for interdicting the enforcement of a bank guarantee.

15. On balance of convenience, in the plaint itself it is admitted that a sum of Rs. 43,543-50 is payable. The plaintiff being a small dealer, if bank guarantees are invoked, in spite of a prima facie case having been made out, and compelled to part with a sum of Rs. 85,639-89, it would ruin its business prospects. By allowing the bank- guarantee to be kept alive, defendants cannot be prejudiced.

16. Hence, the revision petition is allowed, subject to the following conditions -

(i) Plaintiff to deposit in the trial court a sum of Rs. 20,735, on or before 15-6-1984;

(ii) It must keep the two bank guarantees alive, during the pendency of the proceedings, by renewing them from time to time, 30 days before the expiry of the periods of respective guarantees, failing which, it will be open to defendants to invoke the bank guarantees.

17. On behalf of the defendants it is stated that, when State Bank of India is not impleaded as a party, no relief as prayed for could be granted.

This would not be any impediment, because the relief asked for is to prevent defendants from invoking the bank guarantees. As per clause 4 of

Exts. B 13 and B 14, unless the amount claimed had become due by reason of buyer's failure to pay the Corporation invoices, they cannot be

invoked. It is the claim of the plaintiffs that in the absence of supply of goods, the amount had not become due. Without the amount becoming due,

defendants cannot invoke the bank guarantees. That is the reason why the relief is confined only against the defendants, preventing them from

invoking Exts. B 13 and B 14 the bank guarantees. Hence, the civil revision petition is allowed with costs. Counsel's fee Rs. 250.

18. Petition allowed.