
(1988) 07 CAL CK 0024
In the Calcutta High Court
Case No : F.M.A.T. No. 2805 of 1987

Ashim Ganguly

APPELLANT

Vs

Indian Oxygen Ltd. and Others

RESPONDENT

Date of Decision : 21-07-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : AIR 1989 Cal 150 : (1991) 71 CompCas 241 : 93 CWN 247

Hon'ble Judges : Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajit Kumar Nayak, J.—This is an appeal by the plaintiff and is directed against the order dt. 14-8-87, passed by the Second Assistant District Judge, Alipore in T. S. No. 37/87 of that Court, setting aside an order of injunction granted ex parte in favour of the appellant, restraining the respondent 1, Indian Oxygen Company Ltd. from enforcing the bank guarantees furnished on behalf of the appellant in favour of the respondent company.

2. The short question we are called upon to answer in this Misc. Appeal is whether in the ordinary course of business, Court should interfere by way of injunction to prevent the beneficiary of a bank guarantee from enforcing the same. We feel no hesitation to say and hold in the negative that Court should seldom do it, unless there is a serious dispute and a very good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties.

3. Briefly stated, the facts are that the plaintiff as proprietor and carrying on business in the name and style of M/s. West Bengal Wire Industries having its factory at Kalyani, filed a suit against the respondent 1 Company for recovery of Rs. 18,51,681.98 p. and for a declaration that he actually sustained damages on account of the process loss and other liquidated damages with a prayer for

further declaration that respondent 1 Company is not entitled to enforce the bank guarantees furnished by the plaintiff-appellant pursuant to the express terms of contract between the parties. Pursuant to an offer made by the respondent company, the appellant was entrusted with the job work of collecting metallic wires of different sizes and quality to be delivered back to the respondent company after processing according to specification contained in various agreements which were entered between the parties for the purpose of administrating and regulating the said job from time to time since 1978. The last such agreements are dt. 19th Mar. 1981 and 24th Dec., 1982. The said agreements inter alia provided allowance of process loss in course of such processing, furnishing of bank guarantees and physical verifications. In terms of such agreements the appellant furnished through its Banker, United Commercial Bank, respondent 3, two bank guarantees to the tune of Rs. 3,00,000/- with a specific stipulation that the liability of the bank under the guarantees shall be absolute and unconditional. Unfortunately, according to the appellant, due to higher rate of process loss, reluctance on the part of the respondent company to revise the rate of labour charges and adjust the weightment difference in quantum of raw materials and to supply the required amount of raw materials to make such transaction financially viable, the appellant ran into financial stringency and other troubles and thereby declared closure of his firm with effect from 14-8-86. The appellant had to suffer such loss as the respondent company failed to honour their assurances to help him in this regard. In vain, the appellant requested the respondent company to come to his help in this regard and lastly the company sought to encash the bank guarantees furnished by the appellant. Finding no other way out the appellant was compelled to file the suit and obtained an order of ad interim injunction restraining the respondent from encashing the bank guarantees till the hearing of injunction matter. The respondent Company filed a petition under Order 39, Rule 4 read with Section 151, C.P.C. for setting aside such order of interim injunction denying all the material allegations of the appellant and asserting at the same time that the respondent company had taken into consideration the process loss weightment differences and other incidentals in terms of the agreements between the parties but the appellant declared closure of his firm and failed to send back the materials admittedly lying in the godown in spite of repeated reminders from the respondent company and the same suffered loss in consequence thereof. The respondent company by its letter dated 5-11-86 gave ultimatum to the appellant that on his failure to return the stock, the respondent company would have no other alternative but to enforce the bank guarantees with an intimation to the bank demanding payment in terms of such guarantees. According to the respondent company, the bank, respondent 3 being aided and abated by the appellant also denied the right of the respondent company to enforce such guarantees which runs counter to the accepted principles of Trade and Commerce and public policy as well causing vital prejudice to the financial interest of the respondent company.

4. The learned Assistant District Judge in consideration of the terms of the agreements and the bank guarantees and the material facts and circumstances of the case, allowed the respondent's prayer and set aside the order of injunction granted in favour of the appellant. Being aggrieved by the same, the plaintiff-appellant has preferred the present appeal.

5. In view of appellant's prayer for injunction restraining the respondent company to invoke the bank guarantees based on the allegation of fraudulent and deceitful activities on the part of the respondent company and the denial of the same by the respondent company, we are left at this stage with the questions : --

(1) Whether the demands for enforcing the bank guarantees by the respondent company has been made strictly in accordance with the terms of the guarantees concerned.

(2) Whether there is a serious dispute and a good prima facie case of fraud and special equities against the beneficiary of the guarantees that is the respondent company of which the bank has notice.

6. Undisputedly, the two bank guarantees in question for a total sum of Rs. 3,00,000/- were furnished in favour of respondent 1 by the appellant pursuant to the express terms of the contracts between the parties.

7. The essential terms for enforcing the bank guarantees and imposing an obligation upon the U.CO. Bank, Ballygange Circular Road Branch, are as follows : --

1. We do hereby guarantee the due fulfilment of the terms of the aforementioned contract by the contractors and undertake and promise to pay to IOL an amount not exceeding Rs. 2,00,000/- (Rupees two lakhs only) against any loss or damage caused to or suffered by or would be caused to or suffered by IOL by reason of any default on the part of the contractor in performing and/or observing the terms of the aforementioned contract and any subsequent amendments thereof.

2. We, UCO Bank, Ballygunge Circular Road Branch, do hereby undertake and promise to pay the amount due and payable under this guarantee without any demur, merely on a demand from IOL stating that the amount claimed is due by way of loss or damage caused to or suffered or would be caused to or suffered by IOL by reason of default on the part of the contractors to perform the terms of the contract as aforementioned. Any such demand made on us shall be conclusive as regards the amount due and payable by us under this guarantee and shall be payable by us notwithstanding any dispute raised by the contractors, our liability under this guarantee being absolute and unconditional.

3. The decision of IOL as to whether the contractors has made any default or defaults and the amount to which IOL is entitled by reason thereof shall be binding on us and we shall not be entitled to ask IOL to establish its claim under

this guarantee but we shall pay the same forthwith without any objection.

8. So, on the face of it, the bank undertakes to pay forthwith without any objection the sums guaranteed under these documents without any demur, merely on demand regardless of the disputes raised by the contractors and such liability of the bank under the guarantees being absolute and unconditional. As such, it is not a conditional guarantee. Prima facie, the bank is bound to release the guaranteed amount, merely on demand as the enforcement of the same is entirely dependent upon its terms which is absolutely silent as to any conditional enforcement pending the quantification or assessment of any damage or determination of breach of the terms of contract between the parties. The view that banks cannot be absolved of their responsibility to honour their obligations is based on the time honoured practice and elaborate commercial system that has been built up on the footing that bank guarantees or Letters of Credit "constitute the life blood" of international trade and commerce which thereby impose upon the banker an absolute obligation to pay under such documents which parties furnish as security at the time of entering into contracts. "

9. This question and the position of law as stated was raised and considered in numerous cases and there are authorities galore, both foreign and Indian in support of the same.

10. In *Elia v. Matsas* Lord Denning (1966) 2 LR 495, M. R. while refusing to issue an injunction observed "a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation."

11. Similar such view was expressed by Justice Kerr in *Mercantile Ltd. v. National Westminster Bank Ltd.* (1977 3 WLR 752) when he observed -- "It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. Except in exceptional cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts."

12. The trend of law in India has developed in the same line. In *United Commercial Bank Vs. Bank of India and Others*, , Supreme Court observed that High Court was wrong in granting temporary injunction and if such temporary injunction were to be granted in a transaction between a banker and a bankers the whole banking system in the country would fail. Reiterating his earlier view expressed in *United Commercial Bank Vs. Bank of India and Others*, and approving the trend of law developed in *Mercantile Ltd. v. National Westminster* (1977 3 WLR 752), *Edward Owen Engineering Ltd. v. Barclays Bank* (1977 3 WLR 746), *Elia v. Matsas* (1966 2 LR 495) (supra) A. P. Sen, J. held in *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, that the obligation of the Bank under a letter of indemnity is absolute and upon demand by the beneficiary the

bank is liable to honour such obligation regardless of any controversy between the parties about fulfilment of contract. In coming to such conclusion the unconditional wording in the letter of indemnity weighed very much in further finding, by the Court that there was no equity in favour of the appellant.

13. More or less, the same view was taken by this Court in its decision in the case of State Bank of India Vs. The Economic Trading Co. S.A.A. and Others, and also in the case of B.S. Aujla Company Pvt. Ltd. Vs. Kaluram Mahadeo Prosad and Others, . Going a step further and following the principle already enunciated by Lord Denning in *Elia v. Matsas* (supra). Justice Sabyasachi Mukharjee in his decision in *Texmaco Ltd. Vs. State Bank of India and Others*, held that in the absence of special equities arising from a particular situation -- as existing in the case of *Elia* to prevent irretrievable injustice which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in performance 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. This view expressed by Justice Mukharjee in *Texmaco* was endorsed on appeal by the Division Bench of this Court as reported in *Texmaco Ltd. Vs. State Bank of India and Others*, and in that connection Court also considered another earlier Division Bench decision of this Court reported in *The Minerals and Metals Trading Corporation of India Ltd. Vs. Surajbalaram Sethi and Another*, . So it is now well settled principle of law in India as well as in England that irrevocable commitment or obligation of banks either in the form of confirmed bank guarantee or letter of credit must be honoured free from interference by the Court, though it may not be treated as sacrosanct or sacred as the holy book and may be touched and pricked when there is any serious dispute and good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. The Supreme Court has expressed the same view in its latest decision reported in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, . It has however been held by Justice Sabyasachi Mukharjee in that decision that the party wronged thereby or a maltreated party to the contract is not without any remedy and is not to suffer any injustice which is irretrievable. His remedy lies in an action for damages. Justice Sethi in his concurring view in the said decision has gone a step further opining that the question of examining the prima facie case or balance of convenience does not arise if the Court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

14. Now coming to the instant case in question, we have already seen prima facie at this stage of the suit that the liability or the obligation of the United Commercial Bank under the two guarantees in question for a total sum of Rs. 3,00,000/- are absolute and unconditional in nature. The bank thereby undertook and promised to pay to the beneficiary the sums guaranteed as per terms of the contract, merely on demand without any demur or protestation, notwithstanding any dispute to be raised by the contractors that is the appellant.

15. The next question to be seen is if at this stage of suit we do really find a serious dispute and a good prima facie case of fraud and special equities against the beneficiary that is the respondent company to debar them from enforcing the bank guarantee and the bank has notice thereof. On a careful scrutiny of the plaint, the petition for injunction, the affidavits sworn by the parties, the latest agreements dt. 19-3-81 and 14-12-82 between the parties, we do not find at this stage of the suit when evidence has not been adduced by the parties, a good prima facie case of fraud and special equities to warrant any Court to issue an order of injunction restraining the respondent from encashing the bank guarantees or the bank from performing its obligation to pay to the respondent. We do not find any concrete material at this stage that respondent company agreed to modify or amend or enhance the rates of labour charges, process loss and weightment differences beyond that as stipulated in the contracts of 1903 of 1981 and 1412 of 1982. According to the appellant's own case appearing in the plaint as well as in his affidavits, repeated representations in writings for reversion of such rates went unheeded by the respondent company and there is no material whatsoever to show that the respondent company agreed or assured to supply fixed quantity of raw materials to the appellant to utilise his optimum production capacity to make it a viable concern. It is an admitted position on the part of the plaintiff-appellant that he failed to send back the materials lying with him on repeated demands made by the respondent and for closure of the factory as he ran into financial difficulties. The respondent company in the several affidavits sworn on their behalf have asserted that they gave no such assurances to the plaintiff-appellant regarding the revision of the various rates as claimed by the plaintiff-appellant. There is no dispute that the respondent company demanded of the bank in question the respondent 3, to make payment and honour their obligation thereby as per terms of the bank guarantees in favour of the respondent. However, even if we concede the general principle of non-interference by the Courts in respect of the letter of credits and bank guarantees the Court cannot be oblivious or shut its eyes altogether to the traders adopting dishonest and unscrupulous practice and to a situation giving rise to special equities in favour of a particular party to a contract so as to make an exception to the general principles of non-interference by the Court. As we have already seen the appellant has failed to show such a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties to issue an injunction in his favour restraining thereby either the respondent 1 or respondent 3 from making payment or encashing the bank guarantees standing in favour of the respondent company.

16. To sum up, therefore, as we have already seen the plaintiff brought the suit praying for a decree for a sum of Rs. 18,51,681.89 p. on a declaration that he has sustained loss on account of liquidated damages and the respondent company is not entitled to invoke the bank guarantees executed by the plaintiff in favour of the respondent 1 company and the plaintiff obtained the impugned order of interim injunction against the respondent company. The said ex parte

order of interim injunction was set aside by the trial Court, pursuant to an application filed by the respondent company under Order 39, Rule 4 read with Section 151, C.P.C. as the plaintiff failed to establish a prima facie case.

17. Against the ex parte order of ad interim injunction, relief can be obtained by the party aggrieved under Order 39, Rule 4 as well as under Order 43, Rule 1, C.P.C. When a party chooses to have the relief under Order 39, Rule 4, C.P.C. the trial Court is empowered to vary, alter or cancel the order of injunction, if there are suitable or good reasons to do so. This is exactly what has been done by the trial Court in the case in hand in view of the facts and circumstances and reasoning given by the court concerned. We entirely agree with the line of reasoning and the decision of the trial Court in this regard and find no reason whatsoever to interfere with the same. We make it clear our findings as such, at this stage, is strictly confined to the question of enforcing the bank guarantees by the respondent company in terms of the guarantees in question and cast no reflection regarding the merit of the case of the plaintiff to recover damages on the strength of the contracts entered between the parties. The interim order of injunction based on the petition under Order 39, Rule 1 and 2, C.P.C. and the subsequent petition filed by the respondent company under Order 39, Rule 4, C.P.C. have been heard at length by the trial Court on the basis of affidavits and counter-affidavits, filed by the respective parties. Notwithstanding the consequent cancellation of such order of interim injunction by the trial Court, on the finding that there is no prima facie case to enable the plaintiff to have an order of injunction in his favour, confirmed as well by this Court, the hearing of the main injunction petition, still remains. Parties may choose to have such hearing if they so like as there is nothing in law to debar them from doing so.

18. The result is the appeal fails and the order passed by the learned trial Judge dt. 14-8-87 is hereby confirmed. In view of the facts and circumstances of this case, we make no order as to costs.

A.M. Bhattacharjee, J.

19. I agree.