

---

**(1995) 12 DEL CK 0012**

**In the Delhi High Court**

**Case No : I.A. No. 7356 of 1995 in Suit No. 1635 of 1995**

Bhavani Stores Pvt. Ltd.

APPELLANT

Vs

National Fertilizers Ltd.

RESPONDENT

---

**Date of Decision : 14-12-1995**

**Acts Referred:**

**Citation : (1996) 86 CompCas 477**

**Hon'ble Judges : S.D. Pandit, J**

**Bench : Single Bench**

**Advocate : V.P. Singh, Mohit Mathur and Sunil Tyagi, for the Appellant; J.S. Arora and Puneet Arora, for the Respondent**

---

## **Judgement**

S.D. Pandit J.

1. The plaintiff, Bhavani Stores Pvt. Ltd., is a company incorporated in Singapore under the Singapore Companies Act. Defendant No. 1 is a Government of India undertaking, whereas defendant No. 2 is a nationalised bank. In the month of January, 1995, defendant No. 1 had floated a global tender for supplying of one lakh metric tonnes of urea with certain specifications. Bidders were permitted to offer quantities, they could supply and the price at which they could do so the same. The plaintiff gave a tender to supply 25,000 metric tonnes of urea at a rate of 207 US dollars per metric tonne. The said tender of the plaintiff was accepted and contract was given to the plaintiff bearing No. NFL/CMO/IMC/IV/94-95/65, dated February 10, 1995. The period to supply the urea was to expire on March 31, 1995, and the plaintiff was asked to give a performance guarantee for an amount of 2 per cent. of the contract amount. Accordingly, the performance guarantee bond bearing No. 55 of 1995, dated February 13, 1995, for 1,03,500 US dollars was executed by defendant No. 2 in favor of defendant No. 1.

2. It is the case of the plaintiff that the plaintiff had definite arrangements with Mac Danial Co. incorporated in the United States of America for supply of urea.

Defendant No. 1, had given contracts to others at a higher rates. Due to the said unequal rates the international price of urea were jacked. Hence the manufacturer refused to supply urea to the plaintiff at a rate lower than the rate given by defendant No. 1 to other contractors. It is further alleged by the plaintiff that the plaintiff had sought extension of time by one month and the said extension of time was granted by giving time to fulfill the contract till April 30, 1995. His further request for grant of extension of time by one month was also granted. But it is alleged that the extension was granted after a long gap of time and hence the extensions had become unworkable. It is further alleged that on May 25, 1995, a further request was made for extension of time by the plaintiff but the said extension of time was refused and on the contrary on May 29, 1995, defendant No. 1 wrote to defendant No. 2 to mobilise the bank guarantee. The plaintiff further averred that defendant No. 1 had discriminated by granting extension of time to others till June 15, and refusing to grant extension of time to the plaintiff. The plaintiff has, Therefore, filed the present suit u/s 20 of the Arbitration Act for appointment of an arbitrator and to refer the disputes between the parties as per the terms of the contract.

3. The plaintiff has also filed I. A. No. 7356 of 1995 and by the said interim application, the plaintiff is seeking an ad interim injunction to restrain defendant No. 1 from encashing the performance bank guarantee bond No. 55 of 1995, dated February 13, 1995, and to restrain defendant No. 2 from making payment to defendant No. 1 of the said bank guarantee, by alleging that the conduct of defendant No. 1 was discriminatory and fraudulent in not granting extension of time and in asking for the mobilisation of bank guarantee on May 29, 1995, when they had extended the time till May 30, 1995.

4. The claim of the plaintiff is resisted by the defendants by filing their reply. It is contended on behalf of defendant No. 1 that the conduct of defendant No. 1 was not at all discriminatory. There was no question of playing any fraud by defendant No. 1. The plaintiff had utterly failed to perform his part of the contract and, Therefore, as per the terms of the contract defendant No. 1 is entitled to encash the bank guarantee and the encashment of the bank guarantee could not be said to be either illegal or improper. There is neither a prima facie case of fraud nor special equities in favor of the plaintiff and, Therefore, the plaintiff's prayer for ad interim injunction is liable to be dismissed and his application be rejected.

5. Therefore, on the submissions made before me the points which arise for my consideration and my findings thereon for the reasons hereinafter mentioned are as under :

Issue Findings 1. Whether the plaintiff has proved the prima facie case to get an order of ad interim injunction as prayed for? No. 2. What orders? As per final order.

6. Before going into the merits and the facts of the case it must be mentioned

that the question regarding the encashment of the bank guarantees had cropped up before the apex court in numerous matters and the apex court has laid down various principles for considering the claim for an injunction for encashment of bank guarantees. In the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , the following principles are laid down (headnote of SCC) :

"Commitments of banks must be honoured free from interference by the courts and irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with in order to restrain the operation either of irrevocable letter of credit or of the confirmed letter of credit or of bank guarantee. There must be serious dispute and there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between parties otherwise the very purpose of the bank guarantee would be negated and the fabric of the trading operation would be jeopardised."

7. In the subsequent case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, , the following principles are laid down :

"... the bank must honour the bank guarantee free from any interference by courts. Otherwise, trust in commerce, internal and international would be irreparably damaged. It is only in exceptional cases, i.e., to say in case of fraud or in case of irretrievable injustice, the court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the bank appears to be the same. If the documentary credits are irrevocable and independent, the bank must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defense except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

8. Then in a reasoned decision of the apex court in the case of State Trading Corporation of India v. Jainsons Clothing Corporation [1995] 5 JT 403 [1996] 85 Comp Cas 470, the following principles are laid down :

"The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract under which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract do not give rise to a cause nor is the court justified on that basis, to issue an injunction from

enforcing the contract, i.e., the bank guarantee. The parties are not left with no remedy. In the event the dispute in the main contract ends in the party's favor, he/it is entitled to damages or other consequential reliefs.

It is settled law that the court, before issuing the injunction under Order 39, rules 1 and 2 of the Civil Procedure Code, 1908, should prima facie be satisfied that there is a triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favor of issuing injunction to prevent irretrievable injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favor of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud."

9. Therefore, bearing the above principles in mind, I proceed to consider the facts of the case before me. It is an admitted fact that defendant No. 1 had floated a global tender for supply of 1 lakh metric tonnes of urea with certain specifications in the month of January, 1995. Bidders were permitted to offer the quantities they could supply and the prices at which they could do the same. In pursuance of the said advertisement, the present plaintiff has given his tender to supply 25,000 metric tonnes of urea at the rate of 207 US dollars per metric tonne. It is further an admitted fact that the said tender of the plaintiff was accepted and the plaintiff was given the contract on February 10, 1995, to supply the quantities of urea of 25,000 metric tonnes before the end of March 31, 1995. It must be remembered that it is not the case of the plaintiff that the plaintiff had given a tender for supplying 1 lakh metric tonnes of urea and his tender was not accepted for the whole quantities and that he was given the contract for a partial quantity of the urea required by defendant No. 1. The plaintiff's offer was accepted by defendant No. 1 and the contract to supply the quantity was given to the plaintiff. It is the claim of the plaintiff that other persons were given the contract at higher rates. But as stated earlier it is not the case of the plaintiff that he had offered more quantity than 25,000 metric tonnes and his offer was rejected and defendant No. 1 had given contract to the others at a higher rate. As there was offer of the plaintiff for only the quantity of 25,000 metric tonnes at a specific rate and as defendant No. 1 was in need of more quantity to the extent of three times the quantity offered by the plaintiff, defendant No. 1 was bound to consider and accept the tenders given by others. While accepting the said tenders, if defendant No. 1 happened to accept the higher rate quoted by others, then that act of defendant No. 1 could not be said to be an act committed by defendant No. 1 fraudulently and in order to defraud or cause damage to the plaintiff. It is alleged by the plaintiff that as defendant No. 1 had accepted tenders of others at higher rates, the prices of urea in the international market were jacked up, but the rise in the prices in the international market could not be said to be an act committed by defendant No. 1 to defraud the plaintiff. From the

pleadings of the plaintiff it is not also quite clear as to what were the higher rates given to others. But, even assuming what he says is correct in the circumstances, the act of defendant No. 1 in accepting the offers of others could not be said to be fraudulent or irrational or dishonest.

10. The plaintiff has alleged in his plaint that he had made definite arrangements with McDaniel Co. Inc. incorporated in the USA for supply of urea to him but from the material on record that claim of his could not be believed. It seems from the letter of McDaniel Co. dated March 1, 1995, produced by the plaintiff that the plaintiff had approached the said company only after he took the contract in question and there was no concluded transaction between the plaintiff and the said McDaniel Co. It is quite possible that the rates might have gone up after the plaintiff took the contract in question and because of the same the plaintiff could not get the urea at a rate which he was expecting and on the basis of which he had given his tender to supply the urea to defendant No. 1. But the failure of the plaintiff to get the urea at a rate which he was expecting in the international market could not be said to be the result of any conduct or activity of defendant No. 1.

11. It is further the claim of the plaintiff that defendant No. 1 had given extension of time to others till June 15, 1995, and defendant No. 1 had refused to give him extension of time as per his letter dated May 29, 1995. It is an admitted fact that the plaintiff was to supply the quantity of urea till March 31, 1995. The plaintiff had sought extension of time twice for a period of one month on each occasion and that extension of time was granted to the plaintiff by defendant No. 1. No doubt in the letter of May 29, 1995, the plaintiff had sought further extension of time, but if the said letters produced by the plaintiff as well as his agent in foreign countries are read, then it would be quite clear that the plaintiff was in need of extension of time till the end of July, 1995. No doubt the plaintiff has averred in his plaint that defendant No. 1 had given an extension of time to others till June 15, 1995. It is also true that that fact is not denied by defendant No. 1 in the written statement to the main suit as well as in reply to this IA. Therefore, that claim of the plaintiff will have to be accepted. But it is very pertinent to note that the plaintiff has nowhere stated in his plaint as well as in the is as to other contractors to whom the extension of time was granted till June 15, 1995, were to supply initially the quantity of urea offered by them on what date. If their initial contract was to supply the urea till end of April or end of May, and if they happen to ask for extension of time by one and a half months or 15 days and on producing positive evidence of their ability to supply the urea then in that case extension of time granted to them could not be said to be illegal or improper. Merely because they were given extension of time till June 15, and the plaintiff's request to extend the time by letter of May 29, 1995, which is communicated, that he wanted the extension of time till nearly the end of July, 1995, then it could not be said that the act of defendant No. 1 is discriminatory. In the letter of Import Export BFB dated May 29, 1995, it has been mentioned that the vessel with play can 5, would be available on June 16,

1995, for loading the cargo and it is further mentioned that the loading of the entire quantity would require 7 to 10 days. But the plaintiff in his letter dated May 29, 1995, has mentioned as under :

"We, Therefore, request you to kindly arrange letter of credit to be valid up to June 30, 1995, for shipment and July 21, 1995, for negotiation."

12. Therefore, in the above circumstances, I say that the plaintiff was under need of extension of time till nearly end of July, 1995. At the cost of repetition, it must be said that it is not known as to when the other contractors were to fulfill their contract and whether the extension of time granted to them till June 15, 1995, was the first extension or second extension of time. Therefore, in the circumstance, it is not possible to accept the contention of the plaintiff that defendant No. 1 has behaved discriminatory towards the plaintiff.

13. It is also alleged by the plaintiff that though defendant No. 1 had given extensions of time they were not given immediately and they were given after long gap of time and hence the extension was unworkable. But that claim of the plaintiff could not be believed and accepted in the absence of material on record. Defendant No. 1 has produced the plaintiff's letter dated March 29, 1995, in which the plaintiff has averred as under :

"Thanks for your letter No. NFL/CMD/IMC/IU/127, dated March 27, 1995, extending the time of shipment up to April 30, 1995, under the ICPO."

14. The above contents clearly show that the extension given by defendant No. 1 on the first occasion was communicated to the plaintiff before March 29, 1995. As a matter of fact it was informed on March 27, 1995, by fax message. The second extension is sought by the plaintiff as could be seen by plaintiff's letter dated May 3, 1995, produced by defendant No. 1 at page 19 up to May 31, 1995, and the plaintiff was informed by fax message on the next date of May 4 of extending the time till May 31. Therefore, in view of these documents, the said claim made by the plaintiff is falsified.

15. No doubt by their fax message dated May 4, 1995, the plaintiff was granted extension of time till May 31, 1995. It is not also in dispute that on May 29, 1995, the plaintiff had informed defendant No. 2 to encash the bank guarantee. In view of these admitted facts of writing letter to defendant No. 2 to encash the bank guarantee it has been urged before me by Shri V. P. Singh, learned counsel for the plaintiff, very vehemently that this act of defendant No. 1 is a fraudulent one. But, if the material on record is read carefully then that submission of his could not be accepted because there is a letter by fax of May 29, 1995, to defendant No. 1 by the present plaintiff and in that letter the plaintiff has sought extension of time to supply the urea till nearly end of July, 1995. Thus, by his own letter the plaintiff had shown that he was not in a position to supply the urea on or before May 31, and when the plaintiff himself had informed defendant No. 1 about his inability to supply the urea then defendant No. 1 was quite justified in asking for the mobilisation of the bank guarantee on the claim that

the plaintiff had failed to perform his part of the contract.

16. The terms of bank guarantee are running as under :

"This is to certify that at the request of the sellers, we Indian Bank are holding in trust in favor of the buyers, the amount of US \$ 103,500 to pay to the buyers on demand immediately without protest or demur or reference to the sellers if the sellers fail to perform all or any of their obligations under the said contract or supply material short than the contracted quantity as revealed by draft survey at the discharge port or if penalties are levied due to quality deviations (nutrients/moisture/particle size) from contractual specifications as revealed by discharge port analysis report or liability towards dead freight and dispatch/demurrage not settled. The decision of the buyers duly communicated in writing to the bank that the sellers have failed to perform all or any of the obligations under the contract, or have delivered short quantity at the discharge port as per survey report at the discharge port/or penalties have been levied due to quality deviations (nutrients/moisture/particle size) from contractual specifications as per analysis report at the discharge port or have not settled dispatch/demurrage and dead freight shall not be questioned and shall be final and conclusive (irrespective of the stand that may be taken by or on behalf of the sellers), the said amount of US \$ 103,500 will accordingly, forthwith be paid without any conditions or proof whatsoever."

17. If the above terms of the bank guarantee are seen along with the plaintiff's own fax message dated May 29, 1995, then it could not be said that the act of the defendant in writing a letter on that day to the bank to mobilise the bank guarantee is an act of fraud.

18. Therefore, in view of the above discussions, I am unable to hold that the plaintiff has made out any case of fraud. The plaintiff has also failed to show that the plaintiff has got any case of suffering irretrievable injustice in the present case. The plaintiff's conduct is a clear conduct of breach of contract between the plaintiff and defendant No. 1 and defendant No. 1 is quiet justified in asking for the mobilisation of the bank guarantee. The learned advocate for the plaintiff has cited before me the case of Banwari Lal Radhe Mohan Vs. Punjab State Co-operative Supply and Marketing Federation Ltd. and Another, , Hariprashad and Co. Ltd. v. Sudarshan Steel Rolling Mills [1980] 50 Comp Cas 709; V. K. Constructions Works Ltd. v. Bank of Rajasthan [1992] DRJ 23 and Punj Sons (P.) Ltd. v. Hong Kong and Shanghai Bank Corporation [1991] DRJ 20. But all these cases are not applicable on all fours to the facts before me. Similarly, in view of the above-quoted decisions of the apex court, it is not necessary to discuss them in detail.

19. Therefore, in the above circumstances, the plaintiff is not entitled to get the ad interim injunction to restrain defendant No. 1 from encashing the bank guarantee and restrain defendant No. 2 for making payment of the bank guarantee to defendant No. 1.

20. Thus, I hold that the present I. A. No. 7356 of 1995 deserves to be rejected.

I, Therefore, order that I. A. No. 7356 of 1995 stands dismissed with costs of Rs. 2,000 and the interim injunction passed on July 17, 1995, on this application stands vacated.