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(1996) 10 AP CK 0050

In the Andhra Pradesh High Court

Case No : Appeal Against Order No''s. 1197, 1198, 1199 of 1996 and Civil Miscellaneous Appeal No''s. 1200, 1201 and 1202 of 1996

Binny Ltd. APPELLANT

Vs

Nizam Sugars Ltd. and Others RESPONDENT

Date of Decision : 01-10-1996

Acts Referred:
Arbitration and Conciliation Ordinance, 1996 — Section 9
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 3(1)

Citation : (1996) 4 ALT 100 : (1997) 88 CompCas 741

Hon'ble Judges : Lingaraja Rath, J;C.V.N. Sastry, J

Bench : Division Bench

Advocate : Amanacharla Krishna Murthy, for the Appellant; N. Vasudeva Reddy, for the Respondent

Judgement

C.V.N. Sastri, J.—All these civil miscellaneous appeals are directed against a common order dated September 23, 1996, passed by the Fifth Additional Judge, City Civil Court, Hyderabad, dismissing the applications filed by the appellant herein under Order 39, rules 1 and 2 of the Civil Procedure Code, 1908, read with section 9 of the Arbitration and Conciliation Ordinance, 1996, seeking temporary injunctions restraining the first respondent herein from enforcing certain bank guarantee furnished by the appellant and also restraining respondents Nos. 2 and 3 banks from making payment to the first respondent under the said bank guarantees pending disposal of the three suits filed by the appellant against the respondents in that behalf.

2. The facts leading to the appeals can be stated briefly :

The appellant entered into three separate contracts dated November 30, 1990, with the first respondent for supply, erection and commissioning of three plants for the manufacture of sugar at Metpalli, Zaheerabad and Bobbili, respectively. For the due performance of the terms and conditions of the said agreements, the appellant furnished certain bank guarantees in favour of the first respondent

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through the banks, respondents Nos. 2 and 3 herein. As disputes arose between the appellant and the first respondent, each blaming the other of committing default, the first respondent invoked the bank guarantees and sought to enforce the same. Asserting that it has a right to get the disputes settled through arbitration and that the first respondent has no right to enforce the bank guarantees in the meantime, the appellant initially filed writ petitions under article 226 in this court to restrain the first respondent from enforcing the bank guarantees and obtained interim orders of status quo but ultimately the said writ petitions were disposed of directing the appellant to approach the civil court. Accordingly, the appellant filed the three suits in the lower court and applied for the grant of orders of temporary injunction in all the suits. The lower court initially granted ad-interim orders of status quo on June 27, 1996. But after hearing the parties, the lower court by the impugned order dated September 23, 1996, dismissed the petitions for the grant of temporary injunction and vacated the status quo orders granted earlier. Aggrieved thereby the appellant has filed the present appeals.

3. The appellant sought to restrain the first respondent from enforcing the bank guarantees mainly on the ground that it (appellant) was declared as a sick industrial company and the Board for Industrial and Financial Reconstruction (BIFR) has formulated a scheme for its rehabilitation and as such the first respondent has no right to invoke the bank guarantees in view of the provisions of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. The lower court, however, found from the very documents filed by the appellant that the appellant was subsequently declared to have ceased to be a sick unit within the meaning of section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985, by an order dated January 12, 1995, by the BIFR in Case No. 48 of 1993, and consequently, the protection of section 22 of the Act is not available to it. Further, the lower court, following an unreported decision of this court in W.A. No. 128 of 1995 and W.P. No. 11632 of 1994, dated April 4, 1995, (since reported as Haryana Telecom Ltd. Vs. Aluminium Industries Ltd. and Another,) held that the provisions of section 22 cannot be invoked to restrain the encashment of bank guarantees. The lower court also held that the appellant did not place on record any evidence to show that there was fraud on the part of the first respondent and that the appellant had also failed to make out a prima facie case and the balance of convenience is also not in its favour and there is no question of irreparable injury to the appellant as in the event of ultimate success in the suit, the appellant can easily recover the entire amount covered by the bank guarantees from the first respondent which is a Government company. Accordingly the lower court dismissed the applications for the grant of temporary injunction.

4. Sri A. Krishna Murthy, learned counsel appearing for the appellant, sought to assail the order of the lower court by contending that the lower court erred in its view as to the non-applicability of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, to bank guarantees and that in the unreported

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judgment which was relied on by the lower court the effect of the amendment to section 22 introduced in the year 1993 was not taken into account. He has also submitted that section 9 of the Arbitration and Conciliation Ordinance, 1996, confers wide powers on the court to grant injunction even in respect of bank guarantees. He finally submitted that the appellant has not committed any default in performing its part of the contracts and the dispute between the parties has to be settled through arbitration and the first respondent has no right to enforce the bank guarantees.

5. We do not, however, find any merit in the submission made by learned counsel for the appellant. Even assuming for the sake of argument that section 22 of the Sick Industrial Companies (Special Provisions) Act, as amended in 1993, takes within its ambit even encashment of bank guarantees, inasmuch as the appellant in the instant case was admittedly declared by the BIFR to have ceased to be a sick industrial company, vide order dated January 12, 1995, the said section is of no avail to the appellant. In this view of the matter, it may not be necessary to go into the question raised regarding the scope of section 22. Even otherwise, the principles regarding the scope of section 22. Even otherwise, the principles regarding the grant of an injunction restraining the enforcement of bank guarantees are no longer in doubt as the same have been reiterated time and again by the apex court in a catena of decisions. In its latest judgment in Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, , the Supreme Court has, once again, reiterated the well-established rule that an injunction restraining encashment of bank guarantees can be granted by the court only in case of fraud or in case where irretrievable injustice would be done if the bank guarantee is allowed to be encashed. The apex court further held in the said case that the existence of a serious dispute on the question who had committed breach of the contract or that the contractor had a counter-claim against the beneficiary or that the disputes between the parties had been referred to the arbitrators, etc., are not valid grounds for granting an injunction restraining the enforcement of bank guarantees. It was also held therein that the contract of bank guarantee between the bank the beneficiary is independent of the primary contract between the party furnishing the bank guarantee and the beneficiary and, therefore, encashment of an unconditional bank guarantee does not depend upon adjudications of the dispute between the parties to the primary contract. In the instant case, it cannot be disputed that the bank guarantees in question are unconditional and they are payable on demand by the first respondent. It is also stipulated therein that the first respondent shall be the sole judge of whether the appellant has committed any breach of the terms and conditions of the contract and the extent of loss, damages, etc., caused to or suffered by the first respondent shall be final and binding on the guarantor and the right of the first respondent to recover from the guarantor the amount stipulated under the bank guarantee shall not be affected or suspended by reason of the fact that any disputed or disputes have been raised by the appellant with regard to its liability or that the proceedings are pending before

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any tribunal, arbitrator(s) or court with regard thereto. Apart from pleading that there is a serious dispute as to who committed the default which has to be settled through arbitration only, the appellant has not raised any plea of fraud on the part of the first respondent and much less is there any prima facie proof of fraud. It is, therefore, futile to contend that the appellant has made out a case for the grant of temporary injunction as sought for. Learned counsel for the appellant, however, sought to draw support from the following observations of the apex court in Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others,

"The appellant wrote to the first respondent on February 21, 1994, that the plant was completed and so all bank guarantees have served their contractual requirements. On a perusal of the relevant clauses in the contract, executed between the appellant and the first respondent, and the communication of the first respondent dated June 10, 1994, it is fairly clear that the stipulations or conditions mentioned as per clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the plan was admittedly taken over by the first respondent. The guarantee given by the Citi Bank, N.A., dated May 10, 1989, appearing in volume 11 at pages 122 to 126, will ensure only till successful completion of the trial operations and the plant is taken over. That event having ensured, the invocation of the guarantee given by the Citi Bank dated May 10, 1985, in the sum of Rs. 2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to respondents Nos. 1 and 4 deserves to be issued on that score. The court below was in error in not doing so. We hereby restrain respondents Nos. 1 and 4 from, invoking the bank guarantee aforesaid."

6. The said observations merely show that in that case the purpose for which the bank guarantee was given was already fulfilled and as such there was no occasion for enforcing the bank guarantee. We fail to see how the said observations can render any assistance to the appellant in the instant case.

7. We are also not impressed with the argument that section 9 of the Arbitration and Conciliation Ordinance, 1996, confers wide powers on the court in the matter of grant of injunction even in respect of bank guarantees. The said section merely enables the court to grant interim relief by way of injunction in fit case. There is nothing in the said section to warrant the assumption that the well-established principles governing the grant of temporary injunction like prima facie, balance of convenience and irreparable injury are not applicable to the exercise of the power under the said section.

8. For all the foregoing reasons, we find no merit whatsoever in the appeals and they are accordingly dismissed.

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