(1997) 08 MAD CK 0108

In the Madras High Court

Case No : Writ Petition No''s. 12137 and 12152 of 1997 and W.M.P. No''s. 19541 and 19593 of 1997

Chamundi International APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1998) 97 ELT 227

Hon'ble Judges : S.S. Subramanian, J

Bench : Single Bench

Advocate : Shri M. Ranka, for the Appellant;

Judgement

1. Both these Writ Petitions are filed for similar relief against the respondents to release the Bank Guarantee and for bear them from enforcing the Bank Guarantee.

2. W.P. 12152 of 1997 is filed by Bhavani Exporters represented by it proprietress Bhavani Devi, and the other Writ Petition is filed by Chamundi International represented by its proprietor Babulal. Bhavani Devi and Babulal are wife and husband, and it is seen that for the purpose of their business, Tamil Nadu Mercantile Bank and Indian Overseas Bank have given bank guarantee.

3. In the Writ Petition filed by Bhavani Enterprises, i.e., the concern run by the wife, the husband Babulal has filed an affidavit, stating that the petitioner is an export-oriented firm carrying on business in the manufacture of brass artware mainly meant for export. It is said that the main business of the firm consists of importation of raw materials and exportation of the end-product manufactured out of those raw materials, popularly called as the inputs under Duty Exemption Scheme. In both the Writ Petitions, it is averred that the objective of the Duty Exemption Scheme is to make available to registered exporters the necessary inputs for export production at competitive prices without payment of Customs duty so as to promote the exports of the country so vital for the economic

development of the country. It is further averred that before clearance of the first consignment of import under this Scheme, a licence-holder is required to execute a bond with bank guarantee for an amount equal to 25% of the C.I.F. value of the advance licence or for an amount equal to 100% of the Customs duty. The bank guarantee is liable to be forfeited in full or equivalent to the shortfall, if the importer does not fulfil the export obligations as stipulated. It is said that the petitioners have been carrying on their export-oriented business satisfactorily to all concerned, and both of them have an unblemished record. It is also said that they have completely fulfilled the export obligations before 20-7-1997, and a tabular statement has also been filed along with the Writ Petitions. It is further said that on information given by some jealous competitors, the Superintendent of Central Excise, Madras, along with his subordinates conducted a raid on the petitioner-firms. They also conducted raid on the factory premises of the petitioners, and seized number of documents from there. After conducting the search and seizure, petitioners were asked to give certain statements under compulsion, and the same also have been retracted at the earliest opportunity. It is said that statements also have been recorded, but the officers could not pin-point any violation on the part of the petitioners, and so as a punitive nature, they informed their (Petitioners'') bankers to honour the guarantees, which they have given. It is said that the Bank did receive a registered letter from the Assistant Commissioner of Exports and also the Commissioner of Customs of remit a sum of Rs. 4,25,000/-. The Bank has informed the petitioners that they have to deposit certain amounts to honour the same, and they are pressing for payment, and it is further said that the Bank also informed the petitioners that unless necessary preventive orders are obtained from Court, they may not be in a position to withhold the enforcement of the Guarantee, and they will have to pay the same. Both the writ petitions have been filed for the same relief.

4. Petitioners have filed W.M.Ps. also for an interim order of injunction to restrain the 4th Respondent from enforcing the Bank guarantee.

5. When the writ petitions came for admission, I asked the learned Counsel for petitioners whether the writ petitions could be entertained in contractural matters, and that too regarding enforcement of bank guarantee. I also directed him to produce the true copy of the bank guarantee to verify the wordings therein. Learned Counsel accordingly produced copy of the bank guarantee in both the cases, and on going through the same, I find that it is an unconditional bank guarantee. I asked the learned Counsel regarding the Jurisdiction under Article 226 of the Constitution of India, to directing the release of the bank guarantee, and how such a relief could be granted in a writ petition. Learned Counsel submitted that he has discharged all the obligations under the Contract, and if the Bank is allowed to honour the guarantee, it will result in loss to the petitioners, and it will also amount to the person in whose favour the guarantee is given, exercising the power mala fide. According to him, the Court will be extending a helping hand for such mala fides, if they prohibitory order is not given.

6. It is now well settled that in commercial transactions, when unconditional guarantee is given, the beneficiary is entitled to realise the proceeds under the Bank Guarantee, and the Bank is not entitled to question the circumstances under which it is enforced, nor can the beneficiary be compelled to release the bank guarantee, for, that is a matter which the beneficiary has to decide. Regarding Court''s interference, in a guarantee case, recently, the Supreme Court has held in AIR 1997 1644 (SC) , after considering all the previous cases, that unless fraud is pleaded and irreparable injury is also prima facie proved, neither an interim order could be granted, nor the suit could be entertained by Court. In the said decision, their Lordships have held thus :-

"When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting injunction to restrain the enforcement of bank guarantees. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases." [Paras 12 and 16]

As regards the exceptional ground of fraud the following observations of Sir John Donaldson, M.R. in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., :

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be and made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank''s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank''s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged." [Para 12]

Irretrievable injury, which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised, must be of the kind which was the subject matter of the decision in the Itek Corpn. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. A mere apprehension that the other party will not be able to pay, is not enough.

In this case, petitioners have no case that there is any fraud on the part of the Customs Authorities. The wordings of the bank guarantee also show that the Bank is bound to pay the amount as and when demand is made, and it is also said that the entire amount guaranteed shall become payable, and the Bank shall pay the same without any demur. The Bank has no grievance in paying the amount, and it has already informed the petitioners about the demand made by the Customs Authorities. It has also intimated them that it is bound to pay, and has requested the petitioners to deposit the amount in bank.

7. Learned Counsel for petitioners vehemently contended that the liability of the petitioners itself is in question, and an illegal seizure has also been affected by the Customs Authorities. He also wanted this Court to take note of the fact that even the Assistant Commissioner of Customs has endorsed the case of the petitioners that they have discharged all their obligations. I do not think in a matter like this. This Court has to look into the inter se dispute between the petitioners and the Customs Authorities. The Bank is bound to honour the guarantee and that too without any demur when demand is made. If there is any dispute between petitioners and Customs Authorities, that is a matter which they have to agitate separately.

8. I have already said that in both these cases, they have no case of fraud. There cannot be any question of irretrievable injury since the person honouring the Bank Guarantee is the Government of India. Petitioners have no case that they will not be in a position to realise the amount if ultimately it is found that the petitioners were not liable to pay the amount.

9. Learned Counsel for the petitioner brought to my notice Chapter VII of the Export and Import Policy of the Ministry of Commerce, Government of India, which deals with Duty Exemption Scheme, which is referred to in the Writ Petition.

10. He made specific reference to Clauses 49, 50, 51, 54, 59, 62, 62(d), 63, 67, 71 and 74. It is true, the provisions of the said Chapter may be of some relevance to resolve the dispute between the petitioners and the Customs Authorities. Insofar as invocation of bank guarantee is concerned, as I have said earlier, the inter se dispute between the petitioners and the Customs Authorities is not to be considered. It is an unconditional bank guarantee, and the Bank has agreed to honour the same, as and when demand is made. Learned Counsel also submitted that the Customs Authorities have invoked the guarantee even without informing the petitioners, and, simply writing a letter and honouring the guarantee, violates the principles of natural justice. According to them, they

should have at least given an opportunity to the petitioners to submit their explanation.

11. I do not think, such a contention could be accepted. The question whether an explanation has to be taken from the petitioners has nothing to do with the invocation of the Bank Guarantee, in view of the specific provisions contained therein. There is an independent clause, though it relates the same transactions.

12. In my opinion, none of the arguments advanced by learned Counsel for petitioners could be accepted. Moreover, since the jurisdiction of this Court is also limited in matters of this Nature, I do not think I should admit these writ petitions and retain them on file by issuing notice to respondents. The Writ Petitions are, therefore, dismissed inlimine. Consequently the W.M.Ps are also dismissed. It is made clear that the dismissal of the Writ Petitions will not be bar for the petitioners taking any legal recourse against the Customs Authorities, if they are entitled to.