

(1999) 12 BOM CK 0083

In the Bombay High Court

Case No : Notice of Motion No. 3747 of 1999 in Suit No. 6759 of 1999

Crest Communications Ltd.

APPELLANT

Vs

State Bank of India and another

RESPONDENT

Date of Decision : 13-12-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 126

Citation : (2000) 1 ALLMR 598 : (2000) 2 BomCR 466 : (2000) 2 BOMLR 193 :
(2000) 3 MhLj 163

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Virag Tulzapurkar and Z. Bharucha instructed by Lex Inde, for the Appellant; Gaurang Khinkhabwala, instructed by y Mulla and Mulla, for the Respondent

Judgement

R.M. Lodha, J.—Heard the learned Counsel for the plaintiff and the learned Counsel for defendants.

2. The suit filed by the plaintiff is for declaration that the services rendered and films provided by the plaintiff to 2nd defendant were in accordance with the specifications under the purchase order and that invocation of performance guarantee by the 2nd defendant be declared to be fraudulent and unlawful and the bank guarantee be cancelled and returned back to the plaintiff. A notice of motion has been taken out by the plaintiff in the suit praying for temporary injunction restraining the 1st defendant from paying to the 2nd defendant a sum of Rs. 6,73,100/- or any part thereof under the performance guarantee dated 8-12-1998.

3. By the purchase order dated December 1, 1998 plaintiff agreed to sell four films to the 2nd defendant details of which have been given therein for a consideration of Rs. 67,30,950/-. The material terms of the said purchase order provide thus; delivery of the material was required to be effected within 30 days

from the date of the receipt of advance as per Clause 7 (i); delivery was required to be made as per the schedule; delivery should be made as per the schedule failing which the order is liable to be cancelled and material shall be procured by the purchasers 2nd defendant from other sources. It is also provided therein that the performance guarantee furnished in the form of bank guarantee for supply of material in time will also be invoked in the event of default. Under clause 7 of the purchase order, 60% of the contractual value of the goods was to be made in advance and 40% of the contractual value of the goods was to be released after the satisfactory installation and testing of the instrument against submission of the documents, namely (i) commercial signed invoice in duplicate for 40% value of the goods and (ii) test and acceptance certificate issued by VSNL. As per purchase order 100% payment was to be released after satisfactory installation and testing of the equipments and presentation of documents stated therein. Clause 6 provides for liquidated damages. The performance guarantee was given by the 1st defendant on behalf of the plaintiff on 8-12-98. The performance guarantee is in the sum of Rs. 6,73,100/ -. The material terms of the performance guarantee read thus:

AND WHEREAS it has been stipulated by you in the contract that the supplier shall furnish you with a Bank Guarantee by a recognised Bank for the sum specified therein as security for compliance with the supplier's performance obligations in accordance with the contract.

AND WHEREAS we have agreed to give the supplier a Guarantee ;

THEREFORE WE hereby affirm that we are guarantors and responsible to you, on behalf of the Supplier, upto a total of Rs. 6,73,100/- (Rupees Six Lacs Seventy-three Thousand One Hundred Only) and we undertake to pay you, upon your first written demand declaring the Supplier to be in default under the contract and without civil or argument, any sum or sums as specified by you, within the limit of Rs. 6,73,100/-(Rupees Six Lacs Seventy-three Thousand One Hundred Only) as aforesaid, without your needing to prove or to show grounds or reasons for your demand on the sum specified therein.

This guarantee is valid until the 10th day of December, 1999.

"Notwithstanding anything contained herein;

(a) our liability under this Bank Guarantee shall not exceed Rs. 6,73,100/- (Rupees Six Lacs Seventy-three thousand one hundred only).

(b) this Bank Guarantee shall be valid upto 10th December, 1999; and

(c) we are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 10th December, 1999 (date of expiry of Guarantee)".

4. The advance payment of 60% was made by the 2nd defendant to plaintiff as per the purchase order on 11-10-98 but it seems that the script was not

finalised. The communication ensued between the parties and ultimately in the month of June 1999 it appears that the film scripts were finalised by the 2nd defendant. Three films were supplied by the plaintiff to the 2nd defendant in the month of June 1999 itself while the 4th film was supplied by the plaintiff to the 2nd defendant in the month of July 1999. It also appears from the communication dated 6-7-99 sent by 2nd defendant to the plaintiff that the films supplied by the plaintiff under the purchase order were found to be satisfactory. In the said communication, the 2nd defendant has recorded that the films produced by the plaintiff had come up very well. The plaintiff was also paid thereafter the remaining value of goods. After completion of contract and receipt of 100% payment of the supply made by the plaintiff and the fact that the films were found satisfactory by the 2nd defendant, the plaintiff wrote to the 2nd defendant for release of the bank guarantee. There are four letters dated August 25, 1999, August 30, 1999, September 2, 1999 and October 4, 1999 on record requesting the 2nd defendant for release of the bank guarantee. However, the 2nd defendant did not release the bank guarantee and instead sought to invoke the bank guarantee necessitating the filing of the present suit.

5. Opposing the notice of motion, the 2nd defendant has filed an affidavit in reply. It is stated therein that the plaintiff was bound to supply the films within 30 days from the date of receipt of advance. The advance of Rs. 14,38,570/- being 60% of the contract value was released on 11-12-98. In terms of the purchase order, the plaintiff was liable to deliver the films on or before 10-1-99 which was not done and accordingly, under Clause 6 of the purchase order they are liable to pay liquidated damages at the rate of 0.1% subject to maximum of 5% of the total value of the purchase order which is approximately Rs. 3,36,548/-. In the affidavit in reply it is also stated that the product of the plaintiff was not upto the mark and on several occasions the films have to be returned to the plaintiff for carrying out necessary changes. In the circumstances, the 2nd defendant has stated that there is no case for grant of any temporary injunction restraining the invocation of bank guarantee.

6. Mr. Virag Tulzapurkar, the learned Counsel appearing for the plaintiff made two-fold submission: (i) that the films were supplied to the 2nd defendant as soon as scripts were finalised by the 2nd defendant and the same were accepted by 2nd defendant without any demur and the performance of the contract having been completed, the 2nd defendant is not entitled to invoke the bank guarantee. In this connection, Mr. Tulzapurkar relied upon the judgment of the Apex Court in *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, and (ii) that under the terms of the bank guarantee, the 2nd defendant could invoke the bank guarantee by written demand declaring the supplier (plaintiff) to be in default under the contract and since there is no declaration by the 2nd defendant that the plaintiff is defaulter, the 2nd defendant is not entitled to invocation of bank guarantee. In support of this contention, Mr. Virag Tulzapurkar relied upon the judgment of the Apex Court in *Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*, .

7. Per contra Mr. Gaurang Khinkhabwala, the learned Counsel appearing for the 2nd defendant strenuously urged that the bank guarantee furnished by the plaintiff is unconditional and since the facts and circumstances of the case do not make out case of any fraud or irretrievable injustice, question of granting any temporary injunction restraining the 2nd defendant from invoking the bank guarantee does not arise. He urged that the plaintiff committed default in delivering the films in time as per the purchase order and, therefore, no case for grant of temporary injunction is made out. Mr. Khinkhabwala relied upon the judgments of the Apex Court in AIR 1997 1644 (SC) and Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

8. There is no doubt that the courts are slow in granting temporary injunction to restrain realisation of unconditional bank guarantee and the grounds upon which the temporary injunction could be granted are now well settled. In order to restrain the invocation of bank guarantee, there should be good prima facie case of established fraud and special equities in the form of preventing irretrievable injustice. It is only in exceptional cases i.e. in cases of fraud or in cases of irretrievable injustice that the Court should interfere. In the back drop of well known two exceptions of established fraud and irretrievable injustice, the question arises in the present case whether case of interference in invocation of bank guarantee by this Court is made out.

9. Adverting to the facts of the present case, it would be seen that under the terms of the purchase order the plaintiff was required to supply four films to the 2nd defendant for a consideration of Rs. 67,30,950/- to be paid by 2nd defendant. 60% of the consideration was paid by the 2nd defendant to the plaintiff on 11-12-98. The delivery was to be effected by the plaintiff within 30 days therefrom. However, there is sufficient material to show prima facie that the script was not finalised by the 2nd defendant enabling the plaintiffs to maintain the time schedule of delivery. The script for the films was finalised by the 2nd defendant in the month of June 1999 and there is no dispute that in the month of June itself three films were supplied. The fourth film was also supplied immediately thereafter in the month of July, 1999. Not only that the 2nd defendant accepted the supply of films made by the plaintiffs without any demur or objection but they recorded their satisfaction of the films supplied by the plaintiffs vide their communication dated July 6, 1999. Of course in the said communication certain suggestions were made for improving the films but no objection whatsoever was raised about the alleged supply or quality of the films made by the plaintiff. The 2nd defendant having been satisfied with the supply, made the remaining payment of 40% to the plaintiff. The purchase order stipulates 100% of the value of the goods to be paid after full satisfaction. When the 2nd defendant has paid full price to the plaintiff upon receipt of films, it has to be presumed prima facie that the contract has been performed by plaintiffs to the satisfaction of the 2nd defendant for which the performance guarantee was given. In Larsen and Toubro Limited v. Maharashtra State Electricity Board and others (supra) the Apex Court observed thus:

"10. Items 3 and 5, though come under the same category, are not similar in content and scope. Item 3, relates to Bank Guarantee furnished by the Citi Bank, N.A. in the sum of Rs. 2.72 crores. It is a conditional Guarantee. Copy of the document is available in paper book Volume II at pages 122 to 126. The relevant portions in the Guarantee in Volume 11 at pages 124 and 125 of the paper book, are as follows:

"AND WHEREAS at the request of the contractors, we, CITY BANK, N.A. (hereinafter referred to as "The Bank)" has agreed to guarantee Rs. 2,72,39,850/- (Rupees Two crores, Seventy Two lakhs, Thirty Nine thousand, Eight hundred fifty only) covering the amount of the said payments till successful completion of trial operations.

In pursuance of the said agreement and in consideration of the board making the said payment to the contractors, the Bank hereby agree with the Board as follows:

1. The Bank hereby agree unequivocally and unconditionally to guarantee the said amount released by the Board till successful completion of trial operations in due performance of the contract and undertakes to at Bombay within 48 hrs. on demand in writing from MSEB, or any officer authorised by it in this behalf of any amount up to and not exceeding Rs. 2,72,39,850/- (Rupees Two crores, Seventy Two lakhs, Thirty Nine thousand, Eight hundred fifty only) to the Maharashtra State Electricity Board on behalf of the contractors

2. That the guarantee hereby given shall be continuing guarantee up to 19th May, 1990. The validity of this Bank Guarantee will be extended one month prior to its present validity at the request of the Board for suitable period(s) till successful completion of trial operations".

11. Volume II, pages 46 to 108, contains a copy of the Agreement executed between the appellant and the first respondent-Board. The following clauses therein at paragraphs 70.1, 70.2, 70.3 and 40.4.01 appearing at pages 92 to 95 are relevant in this connection. They are as follows:

"70.1. i)

ii)

iii) After the pre-commissioning tests are satisfactorily completed equipment shall be considered ready for initial operation. During initial operation, the complete equipment shall be operated integral with sub-system and supporting equipment as a complete plant.

70.2 TRIAL OPERATION

i) After satisfactory initial operation, the plant shall then be put on trial operation. The period of trial operation shall be 30 days from the date of completion of initial operation. During the period of trial operation, all the necessary adjustments in the plant/equipments shall be made by the Contractor

and make ready the same in all respects for performance and guarantee test. Out of the total period of 30 days of trial operation, the plant shall run for at least a period of 100 hours at the rated capacity. Out of these 100 hrs. a minimum of 20 hours of operation at the rated load shall be established for the mode of operation from wagon tippler to the bunker. 70.3 PERFORMANCE TESTS AT SITES.

i) B1The performance test shall be conducted at site by the Contractor, after successful completion of trial operation. The duration of the performance test of the plant at the rated capacity shall be of 2 hours. Performance Guarantee test shall in any case be conducted within 45 days of successful completion of trial operation or within the extended period as can be mutually agreed. In case the performance test cannot be conducted within a period of 75 days after successful completion of trial operation due to reasons solely attributable to owner, the time frame and method of conductance of the same shall be discussed mutually and finalised.

xxx xxx xxx

v) Any special equipment, tools and tackles required for the successful completion of the performance tests shall be provided by the Contractor free of cost."

"70.4.0. Upon successful completion of all the performance tests at site, the owner shall issue to the Contractor a "Taking Over Certificate" as a proof of the final acceptance of the equipment...."

The first respondent-Board intimated the appellant by communication dated 10-6-1994 thus :

"After reasonable completion of the Coal Handling Plant work as per the contract 2 M Part-A, capacity operation of the various equipment of C.H.P. were planned from 15th January, 1994. Rates as well as design capacity trials also tried. Certain points for stabilisation which were pointed to L & T were attended. Since these trials are generally satisfactory as per Clause Nos. 70.2 and 70.3, all the commissioned equipments under the contract of 2M Part-A are taken over by MSEB for regular operation and maintenance from 10th June, 1994 as per Clause No. 70.4 of Contract Agreement Vol. 1."

The appellant wrote to the first respondent on 21-2-1994 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 10-6-1994, 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 Plant was admittedly taken over by the first respondent. The Guarantee given by the City Bank, N.A. dated 10th of May, 1989 appearing in Volume II at pages 122 to 126 will enure only till successful completion of the

trial operations and the plant is taken over. That event having ensued, the invocation of the Guarantee given by the City Bank dated 10-5-1985 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 1 and 4 deserves to be issued on that score. The Court below was in error in not doing so. We hereby restrain respondents 1 and 4 from invoking the Bank Guarantee aforesaid."

10. The Apex Court thus observed that the contract having been successfully fulfilled, invocation of Bank Guarantee if permitted would cause irretrievable injustice. The present case is also a case where guarantee was furnished by 1st defendant for performance of the contract and the said contract has been performed completely to the satisfaction of the 2nd defendant. The plaintiff has, thus, been able to show special equities in the form of preventing irretrievable injustice. Prima facie if the 2nd defendant is permitted to invoke bank guarantee it would definitely cause irretrievable injustice to the plaintiff and to prevent that, a case for temporary injunction is made out.

11. Besides that, it would be seen that under the terms of the performance guarantee, the bank is under obligation to pay the guaranteed amount or any part thereof upon written demand by the 2nd defendant (beneficiary) declaring the supplier (plaintiff) to be in default. Mr. Khinkhabwala, the learned Counsel appearing for the 2nd defendant strenuously argued that the guarantee being unconditional by mere demand the bank is liable to make payment of guaranteed amount to 2nd defendant and there is no necessity of any declaration by the 2nd defendant that the plaintiff is defaulter under the contract. The terms of the performance guarantee read as a whole clearly indicate that the guarantee furnished by 1st defendant is unconditional. However, for invocation of bank guarantee what is required of beneficiary is to make a written demand declaring the supplier (plaintiff) to be in default. The learned Counsel for the 2nd defendant could not show that in the written demand made by 2nd defendant the supplier (plaintiff) has been declared to be in default under the contract.

12. Recently, in Hindustan Construction Co. Ltd. & others v. State of Bihar & others (supra), the Apex Court while reiterating the principles which govern Court interference in invocation of bank guarantee highlighted that such performance guarantee has to be invoked in accordance with the terms and conditions of the guarantee. In paragraph 21 of the report, the Apex Court held thus :---

"21. As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. Since the Bank Guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank Guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank Guarantee could be invoked by none except the Chief Engineer. The invocation was thus

wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance Guarantee" to the Executive Engineer."

13. In the present case also though, the 2nd defendant has made demand to 1st defendant for the invocation of bank guarantee, the said demand, prima facie is not in accord with the terms and conditions of the performance guarantee in as much as there is no declaration by the 2nd defendant that the plaintiff is defaulter under the contract. Moreover there could not have been such declaration by 2nd defendant since the 2nd defendant accepted the supplies made by the plaintiff under purchase order without demur to its satisfaction.

14. For all these reasons, I am satisfied that the notice of motion deserves to be made absolute by following order :---

i) The 1st defendant is restrained during the pendency of suit from paying to 2nd defendant a sum of Rs. 6,73,100/- or any part thereof under the performance guarantee dated 8-12-98.

15. Certified copy expedited.

16. Notice of Motion made absolute.