(1981) 03 DEL CK 0035

In the Delhi High Court

Case No : O.M.P. No. 153 of 1980 and I.A. No. 3744 of 1980

Damodar Paints Pvt. Ltd. APPELLANT

Vs

Indian Oil Corporation Ltd. and another RESPONDENT

Date of Decision : 16-03-1981

Acts Referred:

Citation : AIR 1982 Delhi 57 : (1983) 54 CompCas 114 : (1982) ILR Delhi 707 : (1981) RLR 369

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Judgement

Charanjit Talwar, J.—The petitioner, Damodar Paints Pvt. Ltd., entered into an agreement to supply specialised coal tar to M/s. Indian Oil Corporation Ltd. (hereinafter "the Corporation") respondent No. 1 herein. The petitioner in compliance with the requirements of clause 15 of the general purchase conditions of the said contract furnished to the Corporation a performance bank guarantee issued by the State Bank of Hyderabad, respondent No. 2 herein.

2. It is the admitted case of the parties that the bank guarantee furnished is irrevocable. The bank on demand had undertaken to pay to the Corporation any amount specified in the notice of demand up to an aggregate limit of Rs. 1,80,000. The bank guarantee provides that it will not be determined or affected by any dispute or disputes between the petitioner and the Corporation and, further, under that guarantee, the bank has waived all rights to deny its liability towards the Corporation even if the petitioner had, at any time, required the bank to stop payment.

3. It is the petitioner''s case that certain disputes have arisen between the parties and the same having been referred to an arbitrator under the terms of the arbitration clause contained in the general purchase conditions of the contract, the demand made by the Corporation upon the bank for encashing the bank guarantee is liable to be stayed till an award is made.

4. By the present petition the petitioner is seeking permanent injunction restraining the Corporation from making any demand for payment or from encashing or enforcing the bank guarantee furnished by the bank, respondent No. 1.

5. While admitting the petition to a regular hearing Luthra. J. issued a temporary injunction in terms of the prayer made in I.A. No. 3744 of 1980, retaining the Corporation from encashing or enforcing the said bank guarantee.

6. Identical relief is sought by the petitioner in the main petition, O.M.P. No. 153 of 1980, as well as in I.A. No. 3744 of 1980). Therefore, this order disposes of both.

7. In support of the contention that disputes having been referred to an arbitrator, the demand made by the Corporation on the bank is liable to be stayed till the award is made, learned counsel for the petitioner relied upon an unreported Division Bench Judgment of this court in F.A.O. (OS) 45 of 1978 (Scooter India Ltd. v. R. D. Verma and Co.) decided on 15th November, 1978. That was a first appeal directed against the order granting temporary injunction in the suit filed by the plaintiff-respondent, restraining the defendant-appellant, Scooter Indian Ltd., from encashing the bank guarantee furnished by the Andhra Bank Ltd. The plaintiff in that suit was to supply some cranes to M/s. Scooter India Ltd. Under the contract a performance guarantee with regard to those cranes was furnished by the Andhra Bank Ltd. On behalf of the plaintiff. The cranes were supplied but the defendant complained that they were not as per specifications. In the suit filed by M/s. R. D. Verma three reliefs were claimed : (1) that the contract has been duly performed, (ii) Therefore, the remainder of the price is payable by the Scooters India Limited to R. D. Verma & Company, and (iii) meanwhile the bank guarantee should not be realised by Scooters India Limited. One of the issues framed in that suit by the single judge was, "Whether the cranes supplied by the plaintiff are in accordance with the specifications ?"

8. Because of the above issue, the Division Bench, comprising of V. S. Deshpande C.J. and N. N. Goswamy J., upheld the order of temporary injunction restraining the defendant from encashing the bank guarantee. It was observed :

"While we agree with the general principle that the bank guarantee should be able to be realised without recourse to a court of law and without any condition, we cannot ignore the special circumstances of this case cited above. It is only because all the three parties are before the learned Single Judge and issue No. 4 between Scooters India Limited and R. D. Verma and Company is being decided, that we are, as an exceptional case, inclined not to interfere with the temporary injunction granted in this case."

9. The above-cited decision cannot be said to lay down the law that in a case where the disputes have been referred to an arbitrator, the performance bank guarantee furnished by a party be not encased till the award is made. The above observations clearly show that the bank guarantee is liable to be encased without

any recourse to a court of law. In an earlier part of this judgment, agreeing with the submission of the counsel for the defendant-appellant therein to the effect that the appellant should be allowed to recover the amount of the claim from the bank without having to file a suit for that purpose, as the contract between the appellant and the bank was independent and autonomous, the Division Bench has observed :

"This is perfectly correct and normally Scooters India Limited would have been able to realise the bank guarantee from the bank without filing a suit and leave it to R. D. Verma & Company to litigate the whole question."

10. This decision, Therefore, is of no assistance to the petitioner herein as it was made in view of the peculiar circumstances of that case.

11. Learned counsel for the Corporation has brought to my notice another unreported recent judgment in F.A.O. (OS) No. 78 of 1980, Premier Tyres Ltd. v. State Trading Corporation of India Ltd. - since reported in [1981] 51 Comp Cas 316, in which it was held (at p. 329) :

"It is now well settled that performance guarantee stands on a footing similar to an irrevocable letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice : See Lord Denning, Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All ER 976; [1978] 1 QB 159."

12. Drawing support from the above-cited authority, learned counsel for the Corporation contended that the bank having given the performance guarantee, must honour it according to its terms and, Therefore, no case is made out for restraining the Corporation from enforcing the said bank guarantee.

13. It is pertinent here to note that the view taken by Dalip Kapur J. to the contrary in suit No. 567A of 1979 (International Building and Furnishing Co. (Pvt.) Ltd.) decided on 11th October, 1979, was not approved by the Division Bench in Premier Tyres'' case [1981] 51 Comp Cas 316.

14. The contention of Mr. Ganguli that since there is difference of opinion in the two decisions of the Division Benches of this court in Scooter India Limited and Premier Tyres cases [1981] 51 Comp Cas 316, the matter be referred to a larger Bench, has to be rejected.

15. As noticed above, the legal proposition settled in both these cases is the same. It was only because of the special circumstances obtaining in Scooter India Limited''s case that the order restraining the enforcement of the bank guarantee in that case was made.

16. In the present petition I cannot go into the merits of the disputes. It is for the arbitrator to adjudicate upon them. The contract between the Corporation and the bank is independent and distinct. The bank is absolutely bound to make payment on demand.

17. In view of the clear enunciation of law on the question raised before me, in Premier Tyres'' case [1981] 51 Comp Cas 316, this petition fails and is hereby dismissed.

18. In view of my decision in the main petition, O.M.P. No. 153 of 1980, I.A. No. 3744 of 1980, seeking interim injunction also fails and is dismissed. The temporary injunction granted by Luthra J. on 18th November, 1980, in I.A. No. 3744 of 1980, against the Corporation and the bank, is vacated.

19. The parties are left to bear their own costs.

