

(2007) 09 BOM CK 0019

In the Bombay High Court

Case No : Appeal No. 484 of 2007 in Arbitration Petition No. 193 of 2007

Global Aviation Services Pvt. Ltd.

APPELLANT

Vs

Malaysia Airlines System Berhad and IDBI Bank (formerly
United Western Bank Limited)

RESPONDENT

Date of Decision : 20-09-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2007) 6 ALLMR 599 : (2007) 4 ARBLR 441 : (2007) 6 BomCR 422 :
(2008) 2 MhLj 401

Hon'ble Judges : Swatanter Kumar, C.J.;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : A.Y. Bookwala and Gautam Mehta, instructed by Rajani Associates,
for the Appellant; Haresh Jagtiani instructed by Anil D" Souza, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—The Learned Single Judge has, by the order impugned in these proceedings, declined to grant an injunction on the invocation and encashment of certain Bank Guarantees. The application before the Learned Single Judge was made in a Petition u/s 9 of the Arbitration and Conciliation Act, 1996. The Appellant and the First Respondent entered into a General Sales Agency Agreement on 28th January 2004 in pursuance whereof, the Appellant agreed to facilitate, promote and expand the business of the First Respondent and for that purpose to act as a General Sales Agent of the First Respondent on the terms and conditions stipulated therein. A Bank Guarantee was issued by the Second Respondent on 21st March 2003. The guarantee contained a recital of the fact that the First Respondent had agreed to extend to the Appellant, credit for the freight collected by the Appellant on behalf of the First Respondent to the extent of an amount of Rs. 1 crore pursuant to the GSA Agreement. By the Guarantee, the Bank irrevocably and absolutely guaranteed the due and punctual payment by the Appellant to the First Respondent of such sum or sums of money as may from time to time or at any time during the continuance of the

agreement become due to the First Respondent from the Appellant. The Guarantee contained a stipulation that the total payment in terms thereof would not exceed in aggregate Rs. 1 crore and that payment shall be made to the First Respondent on receipt of a written demand accompanied by a statement certifying the amount due and unpaid by the Appellant. The Guarantee also contained a stipulation that it shall cover all credits and any other sum, due and payable by the Appellant to the First Respondent under the GSA Agreement for a period of one year from 24th March 2003. The Guarantee was invoked on 3rd May 2007. The Appellant instituted proceedings u/s 9 of the Arbitration and Conciliation Act, 1996, seeking an order of restraint on the encashment of the Guarantee. An injunction was refused by the Learned Single Judge on 12th June 2007 which has led to the filing of this appeal.

2. A Bank Guarantee, it is well settled, has to be honoured in accordance with its terms. The law contemplates an exception to this principle when there is a clear fraud on the part of the beneficiary of which the Bank has notice. The fraud has to be of an egregious nature so as to vitiate the entire underlying transaction. The second exception is in a situation where the intervention of the Court is warranted on the ground that there are special equities in favour of the grant of injunction such as when an irretrievable injustice would occur if an injunction were not to be granted. These principles which emerge from the decided cases have been reiterated in recent judgments of the Supreme Court in *BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, and Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, a decision rendered on 7th August 2007 in Civil Appeal No. 3522 of 2007.

3. In the present case, it has not been urged before us either that there was a fraud on the part of the beneficiary of the Guarantee or that there are special equities which would warrant the grant of an order of injunction. The submission urged is that the invocation of the guarantee is not in terms of the guarantee. While placing reliance on the letter of invocation, Counsel for the Appellant urged that the guarantee was invoked on account of service tax liability which under the terms of the underlying contract could not be fastened upon the Appellant. The duty to collect service tax was, according to the Appellant, not cast upon it under the GSA Agreement and consequently, the invocation was not proper.

4. In the affidavit in reply which was filed before the Learned Single Judge, the First Respondent set up the defence that the Appellant had failed in its duty and obligation as a General Sales Agent in not drawing the attention of the First Respondent to the possibility of being exposed to the payment of service tax. Clause 22 of the GSA Agreement provided as follows:

22. TAXATION, FOREIGN EXCHANGE CONTROLS AND REGULATORY REQUIREMENTS

The GENERAL SALES AGENT shall constantly advise MAS on matters, pertaining to local taxation practices, foreign exchange controls and all other applicable

regulatory requirements. Upon instruction from MAS, the GENERAL SALES AAGENT shall prepare, submit and carry out all necessary filings, reports and actions on behalf of MAS to the tax, foreign exchange and other regulatory authorities in accordance with the local laws.

According to the First Respondent, the Appellant owed a duty to it in terms of Clause 22 and had the Appellant not been negligent in the discharge of its duty, the First Respondent would have taken care to recover the amount of service tax from its customers which in law it was entitled to do.

5. The Learned Single Judge came to the conclusion that the submission urged on behalf of the Appellant raised an issue as regards the interpretation of the agreement. According to the Learned Single Judge, such an issue of interpretation had to be finally decided in the arbitral proceedings and no case had been established for the grant of an injunction within the parameters settled by precedents on the subject. The Learned Single Judge held that if the First Respondent was held eventually not to be entitled to retain the amount, the Appellant will be entitled to claim a refund.

6. Having heard Learned Counsel, we are of the view that the Learned Single Judge was justified in taking the view that a case for the grant of an interim injunction had not been made out on the basis of the settled parameters as they emerge from decided cases. By the terms of the guarantee, the Bank has furnished an assurance which is irrevocable and absolute in nature, for the due and punctual payment by the Appellant to the First Respondent such sum or sums of money as may become due and payable during the continuance of the GSA Agreement. The Bank accepted the obligation that it would pay on receipt of a written demand accompanied by statement of the First Respondent certifying the amount due and unpaid by the Appellant. The guarantee covered all credits and any other sum that was due and payable under the agreement. The invocation was therefore within the terms of the guarantee. The case of the First Respondent is that the Appellant was in breach of its obligation under Clause 22 of the GSA Agreement. The Appellant disputes this position as well as its liability in pursuance of the provisions of Clause 22 as asserted by the First Respondent. A dispute in regard to the interpretation of the underlying contract cannot furnish a ground for restraining the invocation of a Bank Guarantee. The underlying disputes will be dealt with by the Arbitral forum. In a judgment of the Delhi High Court delivered by the Learned Chief Justice, in *Continental Construction Ltd. v. Satluj Jal Vidyut Nigam Ltd.* 2006 (1) Arb. L.R. 321, it has been held that while the Court certainly cannot go into the merits of the disputes, it would not be a sound proposition of law to assert that the Court cannot even look into the underlying contract to examine whether a guarantee has been encashed as per its terms or is not a result of fraud or an act falling under the heads of irretrievable injustice or special equities. The judgment will not assist the Appellant, since in the facts of the present case there is no material to establish fraud, irretrievable injustice or special equities. The invocation of the guarantee

cannot be regarded, for the reasons already indicated, as not being in accordance with the terms of the guarantee.

7. In these circumstances, we do not find any merit in the appeal. The appeal shall accordingly stand dismissed.