

(2011) 10 AP CK 0066
In the Andhra Pradesh High Court
Case No : Writ Petition No. 28246 of 2011

GVR Infra Projects Limited, Hyd.

APPELLANT

Vs

Industrial Dev. Bank of India, Mumbai and Others

RESPONDENT

Date of Decision : 24-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 10 AP CK 0066

Hon'ble Judges : Nooty Ramamohan Rao, J

Bench : Single Bench

Advocate : Craghu, for the Appellant; C Rsridharan, for the Respondent

Final Decision : Dismissed

Judgement

Nooty Ramamohan Rao

1. This writ petition has been instituted seeking a writ of mandamus directing the respondents 1 to 3 herein not to entertain any invocation of four bank guarantees furnished by the petitioner herein pursuant to the Memorandum of Understanding entered into by it with the 4th respondent on 23.4.2011.

2. The petitioner company undertakes construction works and other infrastructural facilities. It appears a work was awarded to it by the Government of Pondichery in relation to laying of a road. The 4th respondent has offered to supply certain material, useful for execution of the contract awarded to the petitioner herein by the Government of Pondichery. A Memorandum of Understanding was entered into on 25.1.2011 in terms of which the petitioner company was required to pay the cost of the material supplied by the 4th respondent company upon receipt of payments from the Government of Pondichery. Five different post dated cheques were issued by the petitioner company in favour of the 4th respondent company aggregating to a total of Rs. 8.58 crores. This Memorandum of Understanding was replaced with another Memorandum of Understanding entered on 23.4.2011 pursuant to which four

different bank guarantees have been furnished by the 2nd respondent bank on behalf of the petitioner herein favoring the 4th respondent aggregating to an amount of Rs. 8,33,65,000/-. The bank guarantees furnished were to expire by 22.10.2011 and when the petitioner was taking steps to extend their validity, it has received a caveat petition lodged on behalf of the 4th respondent herein wherein it is averred that the petitioner company may not keep the bank guarantees alive and may allow them to lapse by 22.10.2011 and thus frustrate the interests of the 4th respondent. Since the functioning of the City Civil Courts at Hyderabad had been badly effected due to the ongoing strike of the employees of the said court, the petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution and instituted this writ petition. The petitioner, in effect, seeks an injunction to refrain the 2nd respondent - bank from allowing the 4th respondent to invoke the bank guarantee furnished by it on behalf of the petitioner.

3. The 4th respondent has filed a detailed counter affidavit controverting the statements made in the affidavit filed in support of this writ petition. It is stated that a purchase order has been placed by the petitioner on it on 31.1.2011 for supply of certain material pursuant to which the 4th respondent has supplied the entire material ordered for and inspite of receiving payment from the Government of Pondichery towards first installment of mobilization grant, the 4th respondent has not been paid a single rupee so far and further the 4th respondent has already invoked the bank guarantee on 18.10.2011 and the 2nd respondent bank has received the communication of the 4th respondent invoking the bank guarantees and contrary to the terms of the bank guarantee, the 2nd respondent appears to have contacted the writ petitioner herein and that the petitioner cannot unilaterally extend the validity of the bank guarantee without obtaining the consent for doing so of the 4th respondent. The petitioner having received the entire material supplied by the 4th respondent ought to have demonstrated his bona fides by effecting payment, when it has received huge sums of money towards mobilization grant. It has further contended that the bank guarantees furnished by the petitioner in favour of the 4th respondent are unconditional and unqualified and hence no injunction can be granted restraining the bank guarantee from being encashed by the 4th respondent herein. It is also contended that a writ of mandamus would not have been sought for either for enforcing a contract or for prevention of enforcement of a contract which is purely a private affair between the parties without any public law trappings.

4. Heard Sri C. Raghu, learned counsel for the petitioner and Sri C.R. Sridharan, learned counsel for the 4th respondent.

5. It is not in dispute that the petitioner has furnished four different bank guarantees favoring the 4th respondent herein aggregating to Rs. 8,33,65,000/-. Of the four bank guarantees which are identically worded which are furnished by the 2nd respondent on behalf of the petitioner, it will be appropriate to extract the following clause there from:-

...We hereby unconditionally and irrevocably undertake to pay you, upon your first written demand without demur or argument, any sum or sums within the limits of the Guaranteed Amount, without your needing to prove or to show the grounds or reasons for your demand for the sum. The Guaranteed Amount shall be payable merely on demand by you. A letter from you stating that the amount claimed in the demand notice is due and payable, signed on your behalf, shall be final, binding and conclusive upon, as regards to the amount due and payable by the Bank to you under this guarantee.

6. From a perusal of the above averment contained in the bank guarantee, it becomes clear that it is an unconditional one. It has been agreed by the 2nd respondent - bank to honor the demand made by the 4th respondent without any demur or argument and without the 4th respondent needing to prove or show the grounds or reasons for the demand. The guaranteed amount has been irrevocably undertaken by the 2nd respondent - bank to be paid merely on demand by the 4th respondent. The Undertaking was unequivocal as the 2nd respondent bank has agreed that the demand of the 4th respondent shall be treated as final and binding and conclusive upon the said bank. Therefore, the 2nd respondent - bank has made it's position very clear that on a mere demand or invocation by the 4th respondent, so long as the sum of money demanded therein does not exceed the limit set out in each of those four bank guarantees, the 2nd respondent - bank would honor the demand and would not call upon the 4th respondent to establish or demonstrate the grounds or reasons from such demand.

7. A bank guarantee is the result of an agreement and arrangement between the parties. Parties have not chosen to hedge the same with conditionalities. The 2nd respondent bank has agreed to honor the demand of the 4th respondent unconditionally. The important feature of this bank guarantee is that the 4th respondent is not required to establish the grounds or reasons for the demand. Therefore, it is not open to the 2nd respondent - bank to examine as to whether the demand raised by the 4th respondent for payment of the guaranteed amount by the 2nd respondent bank is in accordance with the terms and conditions contained in a separate agreement entered into by and between the petitioner herein and the 4th respondent. Bank Guarantees are furnished, not only as a security for the payments due but essentially to build confidence in both parties for securing faithful and honest compliance of the obligations of the respective parties. It is a measure to build and wrap integrity around the whole transaction, so that no party need have apprehensions in their minds about any possible breach of the terms of the contract by the other. It helps in timely compliance with the terms of the contract.

8. The principles relating to invocation of bank guarantees have been set out in clear terms by the Supreme Court in AIR 1997 1644 (SC) is the following passage:

12. The law relating to invocation of such bank guarantees is by now well settled.

When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honor 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 an injunction to restrain the realization of such a bank guarantee. 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 over ride 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 coexist in some cases.

9. These principles have subsequently been followed in *BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another*, as well as *Vintec Electronics Private Limited Vs. HCL Infosystems Limited*, The Supreme Court had set out the principles relating to grant of injunction restraining the enforcement of bank guarantees in *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company*, in the following words:

14. (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honor it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

10. The said principle has once again been reiterated in Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, Therefore, the principles relating to this subject are now well settled. The guarantee furnished by the bank is required to be honored by it irrespective of any disputes between the principal parties. The exceptions known to this basic premise are, one, fraud laid by one party on the other, as fraud would vitiate the very foundation of the bank guarantee and the second one is where the encashment of bank guarantee would cause irretrievable harm or injustice, to the party at whose instance it was furnished.

11. Fraud is an issue which will have serious ramifications on every system. Fraud and justice can never delve together. They are opposite to each other. Therefore, the ends of justice are required to be preserved, duly preventing the party which has indulged in fraud from securing any unjust benefits there from. For establishing the fraud played by the opposite party, the party who alleges the same has to establish the necessary foundational facts, which are not in dispute at all. In the instant case, all that the petitioner has alleged against the 4th respondent, in the affidavit filed in support of this writ petition is this:

I submit that the 4th respondent has now developed a malafide intention to invoke the bank guarantee fully knowing that we have not received any payment from the department.

12. The statement of the petitioner is too general a statement sans any specific or particular details. It does not contain any data or details as to how the action of the 4th respondent in invoking the bank guarantee becomes malafide or fraudulent. The petitioner has not disputed anywhere about the receipt of the material supplied by the 4th respondent. The petitioner would only plead that it had not yet received the payment from the Government of Pondichery. Whereas the 4th respondent alleges that the petitioner has received a huge sum of money as mobilization grant. Therefore, parties are in disagreement in this regard and respect. While the petitioner alleges that it has not received the money from the Government of Pondichery, the 4th respondent would assert that huge amount was received as a mobilization grant and inspite of the same, the petitioner herein has failed to show his bona fides by making any payment to the 4th respondent. The dispute between the parties in this regard cannot be examined or considered by the 2nd respondent bank. If the petitioner has anticipated that he would have received the payments from the Government of Pondichery latest by 22.10.2011, at the time of furnishing the bank guarantees, it is for the petitioner to reason it out with the 4th respondent for the delay in payment. Further, if the 4th respondent has breached any term of the contract which it entered into with the petitioner herein, the 4th respondent is exposing itself to the risk of being sued by the petitioner for the breach of contract. In view of the

settled principles of law, enunciated by the Supreme Court as noticed supra, the facts of the present case do not warrant an injunction to be issued refraining the 2nd respondent - bank from honoring its commitment to the 4th respondent, on the premise that such invocation is fraudulent. This is not one case where irretrievable injury or harm or injustice would be caused to the writ petitioner by the 4th respondent invoking the bank guarantee furnished by it. The 4th respondent has asserted that it has supplied promptly the entire material asked for by the writ petitioner, which is to be deployed by the petitioner in execution of the work awarded to it by the Government of Pondichery. Therefore, for the value of the goods supplied by it, which remained unpaid the 4th respondent has invoked the bank guarantee. If the 4th respondent were to be prevented from doing so, it would amount to a case of causing harm or hardship to the 4th respondent.

13. Therefore, I do not see any merit in this writ petition and it is accordingly dismissed. But, however, without costs.