
(2014) 03 AP CK 0086

In the Andhra Pradesh High Court

Case No : Writ Petition No. 30384 of 2013

Harbin Power Engineering Co. Ltd.

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (2014) 4 ALD 159 : (2014) 3 ALT 151

Hon'ble Judges : P. Naveen Rao, J

Bench : Single Bench

Advocate : C.R. Sridharan, Advocate for the Appellant; Deepak Bhattacharjee, Counsel for Respondent No. 1, Mrs. Padma Sharanappa, Counsel for Respondent No. 2 and Mr. B. Nalin Kumar, Counsel for Respondent No. 3, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P. Naveen Rao, J.—After the amendment, the prayer of the petitioner is to direct the respondent No. 1 not to disburse/honour the invoked Bank Guarantee No. 1303911FG0000223 dated 03.02.2011 by the respondent Nos. 2 and 3 i.e., Nagarjuna Construction Company Limited, Registered Office at Plot No. 41, Nagarjuna Hills, Panjagutta, Hyderabad and NCC Power Projects Limited, Registered Office at 4th Floor, M.J. Towers, Road No. 12, Banjara Hills, Hyderabad and consequently, direct the respondent Nos. 2 and 3 to return the said Bank Guarantee to the petitioner, pursuant to the Termination Agreement dated 20.01.2012. The petitioner is a company incorporated under the Laws of Peoples Republic of China having its Registered Office in China and a Reserve Bank of India approved Liaison Office in Mumbai, India. It is engaged inter alia, in the business of supply of power plant machinery. NCC Power Projects Limited/respondent No. 3 is a company incorporated under the Companies Act, 1956 and engaged in the business of building, owning and operating power plants. It being a power generating company desired to build, own and operate a pulverized coal fired thermal power plant consisting of 2 X 660 MW Super Critical boiler based

power plant at Painapuram village, Mathukur mandal, Nellore district in Andhra Pradesh and appointed its group company M/s. Nagarjuna Construction Company Limited/respondent No. 2, which is also a company incorporated under the Companies Act, 1956, engaged inter alia in the supply and erection of power plant equipments, as the Contractor.

2. On 11.4.2011 a supply contract was executed between respondent Nos. 2, 3 and the petitioner for supply, CIF to provide certain supplies (including the engineering equipment and design thereof) for the project, all of which to be provided outside India and on a fixed price (CIF).

3. Supply contract envisaged three Advance payment Guarantees (APG) by the supplier. On 3.2.2011, petitioner submitted the first advance payment guarantee for Two Million US Dollars (for short USD 2M) through respondent No. 1 with counter guarantee from Bank of China. The Bank Guarantee was valid upto 15.5.2013 with the claim period up to 15.7.2013. The counter guarantee of Bank of China was, however, valid up to 14.6.2013 and claim period upto 14.8.2013. Against the submission of the first advance payment guarantee, respondent No. 3 made advance payment of USD 2M to the petitioner. Petitioner also submitted performance bank guarantee as well as the second advance payment guarantee for the next trench of 5% advance payment (which was due after 2 months of commence date). No advance payment was made against the second advance payment guarantee, by respondent No. 3 to the petitioner.

4. On 20.1.2012 after mutual consent, the contract was bilaterally terminated by petitioner and respondent No. 2. On 6.9.2012 a notice was received by the petitioner's banker-the Bank of China from respondent No. 1 quoting the invocation of the first advance payment guarantee on the ground of "default on the part of the petitioner" under the terms of the supply contract. This necessitated process of negotiation resulting in respondent No. 3 putting on hold invocation of first Advance Payment Guarantee. The period of bank guarantee was extended from 15.5.2013 to 15.8.2013 and claim period from 16.8.2013 to 15.10.2013. The counter guarantee of bank of China was also extended to be valid upto 14.9.2013 and claim period upto 14.11.2013.

5. On 9.10.2013, respondent No. 3 requested the petitioner to extend the Bank Guarantee till March, 2014 and to inform of such extension on or before 11.10.2013. Petitioner was put on notice that as per Reserve Bank of India guidelines, Bank Guarantee has to be encashed if validity is not extended. Since respondent No. 3 did not receive any intimation of extension of Bank Guarantee, respondent No. 3 invoked Bank Guarantee. Hence this writ petition.

6. Heard the learned counsel for petitioner Sri C.R. Sridharan, learned counsel for respondent No. 1 Sri Deepak Bhattacharjee, learned counsel for respondent No. 2 Ms. Padma Sharanappa and learned counsel for respondent No. 3 Sri B. Nalin Kumar.

7. Elaborate submissions are made by counsel on either side on various issues

concerning the dispute involved in the writ petition. Plethora of decisions are cited. Learned counsel for third respondent Sri B Nalin Kumar, raised preliminary objection on maintainability of the writ petition.

8. As with regard to the maintainability of the writ petition, learned counsel Sri C.R. Sridharan made the following submissions:

(1) Courts can interfere with the invocation of the bank guarantee if it is not strictly as per the terms of the bank guarantee; vitiated by fraud; causes irretrievable injury.

(2) The bank guarantee was conditional. Without satisfying the conditions, first respondent sought to accept invocation.

(3) The bank guarantee was not invoked within the time prescribed in the bank guarantee and therefore invocation was illegal.

(4) The invocation is vitiated by fraud played by respondents 2 and 3. The contract was terminated by agreement dated 20.1.2012. The said termination agreement binds both respondents 2 and 3 and therefore invocation of bank guarantee is illegal. Second respondent is a holding company of third respondent and therefore termination agreement dated 20.1.2012 binds third respondent also. Third respondent is an organ of second respondent. Second respondent was acting on behalf of third respondent. Offices of both respondents are located in the same premises. Several Directors of both companies are same. Using of "NCC Infra" logo on the letter head invoking bank guarantee also shows the second respondent and third respondent are same.

(5) Unless restraint is imposed on the respondent bank in invoking the bank guarantee, petitioner would be put to irreversible injury and same cannot be remedied. Relationship of the petitioner and respondents 2 and 3 reached to a stage that there cannot be a possibility of valid negotiations.

(6) Since clear violations as pointed out above are noticed, this Court can entertain writ petition, more over, relief sought by the petitioner is against State Bank of India, which is an instrumentality of the State and therefore writ petition is maintainable.

9. Principles deducible from the decisions cited by learned counsel for petitioner insofar as maintainability is concerned are as under:

(1) Any person can invoke the extraordinary jurisdiction of High Court under Article 226 to enforce his legal right. Ordinarily such right should be personal or individual right of the petitioner. The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, .

(2) Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad. That Courts are

reluctant in granting injunction against invocation of bank guarantee except in the case of established fraud or where irretrievable injury was likely to be caused to the guarantor. Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, .

(3) Action of renewability should be gauged not on the nature of function but public nature of the body exercising that function and such action shall be open to judicial review even if it pertains to the contractual field. The State action which is not informed by reason cannot be protected as it would be easy for the citizens to question such an action as being arbitrary, M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, .

(4) The doctrine of lifting the veil has been applied in the case of holding company and subsidiary company. The same, however, is not universal principle. To a limited extent, in certain situations, the holding company was held omnipotent in the affairs of the subsidiary. Krishi Foundry Employees Union Vs. Krishi Engines Limited and Others, .

(5) State Bank of India as also the nationalised banks are "States" within the meaning of Article 12 of the Constitution of India. Bank of India and Others Vs. O.P. Swarnakar etc.,

10. Learned counsel for respondent No. 3 Sri B. Nalin Kumar on the issue of maintainability of writ petition made the following submissions:

(1) The grievance of the petitioner is against communication dated 9.10.2013 by respondent No. 3 to invoke the bank guarantee, petitioner and respondent No. 3 are private entities and there is no public law element involved and therefore writ petition is not maintainable. Even after granting amendment of writ petition prayer as sought in W.P.M.P. No. 42270 of 2013, the substituted prayer sought restricts the relief only to the consequential relief originally sought for in the main prayer in the writ petition and same is impermissible.

(2) That even when action of an instrumentality of the State is assailed, a writ petition is maintainable only if such action involves public law element. Even though respondent No. 1 bank is an instrumentality of the State, while revoking of bank guarantee it was only complying with terms of contract and therefore there was no public law element in this case.

(3) Petitioner has an alternative remedy by way of arbitration and normally writ petition is not maintainable when efficacious alternative remedy is available. There are several disputed questions of fact raised in the writ petition and therefore writ petition is not an appropriate remedy and writ Court cannot adjudicate disputed questions of fact.

(4) Bank guarantee executed is irrevocable and it was unconditional. It has to be paid on demand and bank had no option but to honour the demand. In terms of the bank guarantee a demand is a valid demand, if made in writing and within the expiry of the claim period i.e., 15.10.2013. Literally speaking "invoking" means making a claim or demand and demand was made within the time. Terms

of the bank guarantee clearly stipulate separate period of validity and last date for lodgement of the claim. Last date for lodgement of the claim was 15th October, 2013 and there was no violation of the said term.

(5) Bank guarantee was invoked in terms of the conditions of the bank guarantee and by an authorised person. Mr. M.V.S. Subba Raju, authorised by Board of Directors on 28.7.2012 to represent on behalf of the respondent No. 3 company, and therefore, he had validly exercised the power delegated to him in invoking the bank guarantee. "NCC Infra" is the logo of the group of companies and merely because "NCC Infra" logo is printed on the letter head invoking the bank guarantee, it cannot be inferred that the invocation emanated from another company.

(6) Judicial review in matters concerning invocation of bank guarantee is available only if "fraud" of egregious nature is alleged and proved and "irretrievable injury" is established. Petitioner has not satisfied both conditions. In this case, vague allegations of fraud are made which are baseless. Respondents 2 and 3 are independent entities and therefore decisions of one company does not automatically bind another. As per Tripartite Supply Agreement, entered into by the petitioner, respondents 2 and 3, petitioner is a "supplier", third respondent is "owner" and second respondent is a "contractor". Thus, independent relationship exists between petitioner and second respondent; petitioner and third respondent and second and third respondents. Thus, termination of the contract between petitioner and second respondent does not bind the third respondent. It has no bearing on other terms of supply contract and right of the third respondent to invoke bank guarantee. That the petitioner has not established any irretrievable loss or injury.

11. In support of his contention, learned counsel relied on following decisions:

National Highway Authority of India Vs. Ganga Enterprises and Another, , Binny Ltd. and Another Vs. V. Sadasivan and Others, , State of Jammu and Kashmir Vs. Ghulam Mohd. Dar and Another, , The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, , State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , Meghmala and Others Vs. G. Narasimha Reddy and Others, , Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, , Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, .

12. Learned counsel for respondent No. 1 Sri Deepak Bhattacharjee submits that the bank guarantee is unconditional therefore bank has no option but to honour the same as and when a claim is made. Contract of bank guarantee is an independent contract and bank is bound by the terms of guarantee agreement. It is not for the bank to look into the nature of the claim made or existence of a liability or otherwise. It is not for the bankers to find out who has raised the claim. No allegation of fraud is made or established by the petitioner and bank has not played any fraud. Learned counsel adopts the submissions made by Sri Nalin Kumar, learned counsel for respondent No. 3 with reference to other issues.

MAINTAINABILITY OF WRIT PETITION:

13. Petitioner, second and third respondents entered into supply contract agreement on 11.4.2011. The supply contract agreement defines petitioner as "supplier", third respondent as "owner" and second respondent as "contractor". The contract describes that the "owner" and the "contractor" entered into an agreement for supplies to the project of third respondent on fixed price and the supplier is an approved sub-contractor in relation to the supplies agreed to be provided by the contractor. It also describes that the supplier desires to provide and contractor desires to obtain certain supplies. The supply contract is governed by the terms incorporated therein. The contract envisages provision of three advance payment guarantees and one performance guarantee. The terms of contract clearly delineate that respondents 2 and 3 are independent of each other and supply contract is necessitated as a consequence to contract entered by the second respondent and third respondent for provision of various supplies required for the project of the third respondent. On behalf of petitioner bank guarantee is furnished.

14. Bank guarantee which is subject matter of this writ petition was invoked by the third respondent. Such invocation is primarily challenged on the ground that the contract was terminated on 20.1.2012 which envisages release and return of bank guarantees to the petitioner and therefore the question of invocation of the bank guarantee by third respondent after 20.1.2012 would not arise. The termination agreement is between the "contractor" and the "supplier" i.e., petitioner and second respondent and does not reflect the consent of "owner" i.e., third respondent for such termination. Therefore third respondent claims the terms of termination agreement dated 20.1.2012 only bind the petitioner and second respondent and does not bind the third respondent.

15. Whether the termination agreement dated 20.1.2012 would necessarily bind the third respondent also and the third respondent could not have invoked the bank guarantee is a matter which requires consideration in appropriate proceedings. Since the issue in this writ petition is confined to the maintainability of the writ petition on an invocation of the bank guarantee, no finding is recorded on the contention of the petitioner regarding binding nature of the termination agreement dated 20.1.2012 on the third respondent.

16. On bare look at the bank guarantee, it is clear that it is an unconditional bank guarantee. There are only two limitations i.e., maximum limit of 2 Million US Dollars and the claim period. As long as these two conditions are satisfied, the bank has no authority to deny invocation. Whether there was any failure on the part of the petitioner which enabled the third respondent to invoke the bank guarantee or the third respondent was wholly unjustified in invoking the bank guarantee is again a matter which requires to be agitated in an appropriate proceedings.

17. In Hyderabad Urban Development Authority, reconstituted as Hyderabad

Urban Development Authority and The Vice Chairman and Managing Director, Hyderabad Urban Development Authority and Others Vs. M/s. IBC Knowledge Park Pvt. Ltd. and The State of A.P. and Others, a Division bench of this Court reviewed the case law on the subject of maintainability of writ petition in contractual matters. In para 48, the Division Bench summarised the principles deducible from precedents. Para 48 reads as under:

48. On an analysis of the above decisions of the Supreme Court, it is dear that contractual obligations may fall under judicial review if there is some public law element involved therein. Where the dispute lies within the contractual field pure and simple in the realm of private law a writ petition is not maintainable. In such cases, the relations between the parties are governed by the contract which determines the rights and obligations of the parties inter se. However, where there is an element of arbitrariness or unreasonableness, illegality, irrationality or procedural impropriety in the action of state authorities offending Article 14 of the Constitution of India, even in respect of a dispute arising out of a private contract, the Court, in exercise of its power of judicial review under Article 226, can entertain the matter and grant relief as per law.

Thus, though judicial review in matters of contractual obligations is permissible, but such review must be within the permissible limits and in public interest and in accordance with the principles laid down by the Supreme Court. It must be intended to prevent arbitrariness or favoritism and it must be exercised in the larger public interest. It depends upon the facts and circumstances of each case. In cases where there is an element of arbitrariness, illegality or irrationality in the action of the State or its instrumentality the Court can interfere and grant relief....

18. When State or "other authority" within the meaning of Article 12 enters into ordinary contract with private persons, parties are governed by the terms of the contract and aggrieved party is not entitled to seek redress under Article 226 for breach of contract. Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, .

19. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute"....Praga Tools Corporation case (9 supra) (para 6 of the judgment cited supra).

20. Writ of mandamus can be issued only when a question involving public law character arises for consideration and High court should not entertain a writ petition involving disputed questions of fact. State of Jammu and Kashmir case (cited 8 supra).

21. In normal circumstances, judicial review principles cannot be used to enforce contractual obligations, even if such contracts are entered into by the Government or Government authorities. Binny Limited case (cited 7 supra).

22. In National Highways case (cited 6 supra) Supreme Court held as under:

It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil (2006(6) SCC 293), State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , and Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, . This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr. Dave, however, relied upon the cases of Veriganto Naveen Vs. Government of Andhra Pradesh and Others, and Harminder Singh Arora Vs. Union of India (UOI) and Others, . These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.

23. No public law element is involved in this case. The question involved is based on terms of contract entered by parties. Therefore, writ petition is not maintainable.

24. The bank guarantee is a contract between the bank and beneficiary of the guarantee. Bank is a promisor. It is also a security given to the beneficiary by a third party. It is in the nature of special contract, depends upon the happening of the specific event and gets dissolved once it is discharged. Obligations arising out of the bank guarantee are independent but arising out of specific contract between the parties. The first respondent is bound to honour the guarantee given by it as per its choice irrespective of any dispute raised by the customer (petitioner). The first respondent is not concerned with the relationship between the petitioner and the third respondent. It is also not concerned with the question whether the petitioner has performed his contractual obligations or not nor the question whether the petitioner was in default. Existence of any dispute between the petitioner and third respondent as is sought to be projected In this writ petition, is not a ground for issuing any injunction to restrain the enforcement of the bank guarantee.

25. In matter concerning the bank guarantee ordinarily High Court in exercise of power of judicial review under Article 226, cannot entertain a writ petition. There are only two exceptions to this normal rule i.e., "fraud" and "irretrievable harm or injustice to one of the parties" concerned.

26. In Mahatma Gandhi Sahakra case (cited 13 supra) Supreme Court held as under:

In our considered opinion, if the bank guarantee furnished is an unconditional and Irrevocable one, it is not open to the bank to raise any objection whatsoever

to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot (sic) prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

27. On the issue of fraud, Supreme Court in Meghamala case (cited 11 supra) held that fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the Court. Though the context was different, but the parameters set out by the Supreme Court would apply to the case on hand.

28. Fraud must be an egregious nature such as to vitiate the entire transaction. The evidence must be clear both as to the fact of fraud and as to the benefits for which the bank knows that any demand for payment already made or which may thereafter be made, is fraudulent. Fraud must be by beneficiary and not of anyone else. The dispute between the parties relating to the termination of the contract cannot make invocation of the bank guarantee fraudulent. The Supreme Court in case of Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, held as under:

.....We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner.

28-A. In the case on hand, petitioner's contention on the issue of fraud was that there was termination of agreement between the petitioner and second respondent and third respondent was having the knowledge of termination of contract and termination envisages return of the bank guarantees and that second and third respondents are one and the same; the offices of both companies are located in the same premises; that second respondent is holding company of third respondent; that the letter head used for invoking the bank guarantee relating to the group of companies is same; that some of the Directors of the second respondent company are also Directors of the third respondent company and therefore they are one and the same and when once second respondent agreed for termination of the contract which also stipulates refund of the bank guarantee, invocation of the bank guarantee by the third respondent is nothing but playing fraud.

29. Second respondent and third respondent being independently registered companies, merely because one is subsidiary of the other as part of the group of companies, it cannot be inferred to hold that agreement entered by one company also binds other company in the group. The terms of supply contract prima facie

show that the obligations flowing out of the contract between petitioner and third respondent are independent of obligation between petitioner and second respondent. Terms of termination agreement dated 20.1.2012 do not reflect the consent of third respondent and prima facie it cannot be said that said terms bind the third respondent. Thus, it is open to the third respondent to invoke bank guarantee and by invoking bank guarantee, it cannot be said that third respondent has committed fraud. The third respondent has only relied upon the provisions of clauses of contract and exercised right to invoke the bank guarantee. The grounds of challenge on "fraud" presented by petitioner are not egregious nature to interdict the invocation of bank guarantee.

30. To avail second exception, the exceptional circumstances should be such which make impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established.

31. In AIR 1997 1644 (SC) , Supreme Court referred to the decision of Federal Court of America in Itek Corporation v. First National Bank of Boston (566 Fed Supp 1210), In that case injunction was granted by the American Court as the U.S. Government blocked Iranian assets under the jurisdiction of USA and cancelled the export contract/therefore, the Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under those circumstances and therefore realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff therein.

32. Petitioner has failed to establish the irretrievable injury that is caused to the petitioner by invoking the bank guarantee. Petitioner operates its transactions through a registered office of the company located in India. Third respondent is a reputed company having huge turnover and is a well established company. The third respondent is bound by the obligations of the contract as well as the provisions of the Companies Act, 1956. Remedies are available to the petitioner under the local laws, in addition to the provisions of the contract entered into with the third respondent. It is always permissible for the petitioner to raise a dispute and if he succeeds, can always recover the amounts now sought to be encashed by the third respondent.

33. Case of Vinitech Electronics (cited 12 supra) is similar to the facts of this case. In said case, plea of fraud as well as irretrievable injustice/injury were raised. Supreme Court held that the fraud if any must be egregious nature so as to vitiate the underlying transaction and while seeking such equity irretrievable injury should not be vague and should be supported by evidence.

34. On various aspects agitated by the petitioner, there are serious disputed questions of fact, which cannot be gone into by this Court in exercise of power of judicial review under Article 226 of Constitution of India.

35. As noticed above and the principles of law laid down in the precedents referred to above, this case does not fit into the two exceptions set out for

entertaining the writ petition in matters of bank guarantee. Petitioner has neither established fraud of egregious nature nor has shown special equities for interference by this Court on the question of causing irretrievable injury/injustice, if the bank guarantee is invoked. Thus, on both grounds as well as on the scope of interference in matters concerning bank guarantee in particular and in contract matters in general, the writ petition fails. The objection raised by learned counsel for third respondent on maintainability of writ petition is upheld. Extensive submissions are made on merits and other procedural aspects by the counsels on either side. However, in view of my decision on maintainability of writ petition, they are left open to be agitated in appropriate proceedings.

Accordingly, the writ petition is dismissed. Squeal to the same the miscellaneous petitions, if any stand dismissed. No costs.