
(1991) 10 OHC CK 0002
In the Orissa High Court
Case No : Misc. Appeal No. 370 of 1991

Indian Charge Chrome Limited

APPELLANT

Vs

Asea Stal AB and Others

RESPONDENT

Date of Decision : 11-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1991) 2 OLR 537

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : S.S. Das, B. Sorabji, B.M. Patnaik, S.P. Mishra, S.K. Das, P.K. Choudhury, S. Mohanty and S. Patnaik, for the Appellant; G. Rath, B.R. Sarangi, S.P. Mohapatra, A. Mishra, R.K. Rath, A.K. Mishra, R.N. Misra, A.P. Rath, M. Salve, P.N. Mishra and A. Rath, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal by the plaintiff under Order 43 Rule 1-(r) CPC against an order refusing to grant temporary injunction as prayed for by the plaintiff by vacating ad interim order of injunction granted by the trial Court.

2. Plaintiff is a company which has been registered to carry on the business of production and supply of Charge Chrome. Electrical energy is necessary for such production Therefore, it entered into agreement with defendant Nos. 1 to 3 a consortium of Foreign Organisation to set up a captive power plant of 108 M W capacity for generating 700 million units of energy in the minimum annually. Defendant No. 4 a foreign banker for self and agent of defendant Nos. 5 to 11 Other foreign bankers agreed to finance the setting up of captive power plant. Defendant No. 12 gave guarantee to defendant No. 4 on behalf of plaintiff for payment of the loan amount to plaintiff. Defendant No 13 gave guarentee to defendant No. 12 on behalf of plaintiff for payment of the amount to defendant No. 12. Agreements were entered into in this regard.

3. Defendant No. 1 was to supply the turbines, defendant No. 2 was to supply

boiler and defendant No. 3 were to execute work of setting up of the captive power plant. They were acting in consortium. Before entering into agreements, project report and feasibility report were prepared. It was decided that the production of electrical energy would be based on Talcher Coal. In the project report and the feasibility report, it was provided that the captive power plant would produce electricity, a portion of which would be consumed for production of Charge Chrome and the balance would be sold. Repayment was also envisaged on cash flow basis.

4. After the captive power plant was commissioned plaintiff found that it is not of 108 M W. capacity. Hardly it was 60 M. W capacity. It generated electricity much less than the minimum assured units. During execution of the work, several defects were round and were brought to notice of the consortium which assured to rectify the same. Lastly the consortium offered a package deal believing which plaintiff gave the take- over certificate On basis of such take-over certificate and other clearances given defendant No. 4 paid the amounts agreed upon to the consortium. Thereafter, consortium backed out from the offer of package deal. From the conduct of the consortium plaintiff came to conclusion that fraud has been practised on it. Since as per agreements loan amounts were to be realised from it, a suit has been filed for declaration that the take-over certificate granted by it is void and voidable and other reliefs against defendant Nos, 1 to 12. An application for temporary injunction was filed on basis of which ad interim injunction was granted which was however, vacated by the impugned order. Against the ad interim order of injunction, defendant No. 12 filed an appeal which having become infructuous on account of the interim order has been dismissed.

5. When this appeal was listed for admission, defendant Nos. 4 and 12 entered appearance. After hearing parties, appeal has been admitted and as an interim arrangement direction was given that defendant No. 4 shall not insist on defendant No. 12 for payment. This was for a specific date. Appeal fixed for hearing could not be heard on the date fixed arid Court was not in a position in a situation prevailing at that time to pass any order as the case records were not made available. Learned counsel for defendant No. 4 assured that he would instruct, defendant No. 4 not to insist upon payment till the Court it able to pass orders. On that basis, no demand has been made by defendant No. 4. Since the matter was urgent in nature, appeal was heard finally without issue of notice to defendant Nos. 1 to 3 and 5 to 1.1 who had not entered appearance in the trial Court;

6. There is no dispute that in case the claim of plaintiff would be a breach of contract simplicitor, no temporary injunction would be granted. However, on finding fraud in the transaction, question of grant of temporary injunction would arise. This is also the settled principle for grant of temporary injunction in respect of enforcement of letters of credit and bank guarantees. It is not disputed that same principle would be applicable to guarantees involved in the appeal. After

considering the decision of Supreme Court last of which is reported in (1988) SCC 174 (U. P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd), Division Bench of this Court reported in National Aluminium Co. Ltd. Vs. R.S. Builders (India) Ltd. and Others, observed as follows :

"From the aforesaid decision it clear that Court's interference in enforcing bank guarantees must be minimal. It is in the case of fraud or to prevent irretrievable injustice that Courts interferes to prevent enforcement of bank guarantees. Of course, bank guarantee has to satisfy the conditions laid down therein before a bank can be called upon to make payment as per the guarantee. If the terms of the bank guarantee be unconditional the bank has to proceed without demur. The payment of bank guarantee cannot be made subject to the claim and counter-claims arising out of the main contract between the parties. If a bank guarantee were to state that payment shall be made notwithstanding any dispute between the parties, the bank would be obliged to do so. To determine whether a bank guarantee is conditional or unconditional, it is the document of the guarantee which is to be scanned".

Latest decision on the subject brought to my notice is of Supreme Court reported in General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, where it has been observed :

"...The Bank cannot be interdicted by the Court at the instance of respondent-1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court In the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the bank guarantee."

7. In background of the aforesaid principle laid down by the highest Court of the land and of this Court, it is to be examined whether plaintiff has been able to satisfy prime facie case, balance of convenience and irreparable damage in its favour for grant of temporary injunction since it is the settled principle of this Court in the decision reported in ILR 1973 Cut. 1309 (Orissa State Commercial Transport Corporation Ltd represented by its Secretary Shri C. B. S. Ramachandra Rao v. Satyanarayan Singh and Anr.) that all the three conditions are to be satisfied for grant of temporary injunction which principle has been followed in subsequent decisions of this Court without any departure.

8. A passage in 1988 (I) SCC 174 (supra) expressed by Sabyasachi Mukherjee, J. (as he then was) is to be usefully quoted. It reads as follows:

"...that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and o there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be nagatived and the fabric of trading operations will get jeopardised". It was further observed that the Bank must honour the bank guarantee free from interference by the Courts. Otherwise, trust

in commerce internal and international would be irreparably damaged It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. In the concurring opinion one of us (K. Jegannath Shetty, J) has observed that whether it is a traditional bond of performance guarantee the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, It has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the Courts talk about is fraud of an "agerrigious nature as to vitiate the entire underlying transaction".

In General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, it was observed that it Is fraud on the beneficiary, not fraud on some body else.

9. In this case defendant No. 4 has already paid to defendant Nos 1 to 3. Defendant Nos. 5 to 11 are not directly connected with the captive power plant and defendant No. 4 is their agent. Since defendant Nos. 5 to 11 are not concerned and defendant Nos. 1 to 3 have already received payment from defendant No. 4, there is no question of any restraint on them. Injunction, if at all, would be on defendant No. 4, defendant No. 12 and defendant No. 13 Mr. Salve, learned counsel for defendant No. 13 has fully supported plaintiff-appellant Therefore, there is no question of injuncting defendant No. 13. Question of grant of injunction is to be considered vis-a-vis defendant No. 4 and defendant No. 12.

10. Defendant No. 12 is a creature of the statute being constituted under the Indian Development Bank of India Act, 1968 and its function is statutory in nature. It gave the guarantees to defendant No. 4 under orders of the Supreme Court and had no question of scrutinising and being satisfied about the eligibility of plaintiff for being secured. Therefore, guarantee of defendant No. 12 would be subject to control of Court and would not be governed under the principles of guarantee of a Banker in facts and circumstances of this case. Where there would have been scope for defendant No. 12 to enter into agreement independent of direction of Court, the principle of Banker's guarantee would have been applicable. Therefore, while considering the question of injuncting defendant No. 12 the principle laid down by Supreme Court in the various decisions would not be strictly applicable although the principle shall have bearing on the question.

11. Defendant No. 4 is the lender and plaintiff is the borrower. Principle of guarantee would not be strictly applicable to it. General principle of injuncting a lender would be applicable. Even then, injunction against enforcement of bank guarantee being more strict than general principle of injunction, I shall examine it in the same standard.

12. Coming to injunction against defendant No. 12, term in the guarantee may be extracted. It reads as followed :

"Section 2 Payment:

2.1. If the Borrower does not pay any amounts when due or the Loan shall be declared default, the Guarantor shall forthwith without protest of any kind, pay the full amount due and payable under the Agreement upon first demand hereunder. All payments made hereunder shall be free and" clear of any deduction for any present or future taxes, levies, duties, charge or other imposts, withholdings, commissions, set-offs, conditions, back expenses of costs of remittance of any nature so that the Lender and/or any assignee shall receive the full amount due to the Lender and/or any assignee according to the stipulations of the agreement."

This clause in the guarantee agreement creates obligation of defendant No. 12 to pay defendant No. 4 upon first demand by defendant No. 4 if the plaintiff does not pay any amounts when due or the loan is declared default There is neither any demand nor there is declaration of default. Much before the same suit has been filed alleging fraud in the transaction. On receipt of the plaint, defendant No. 12 was required to make an investigation whether there was fraud and how defendant No. 4 is connected therewith. In (1988) 1 SCC 174 Shetty, J. observed at page 197 in paragraph-53:

" ...If the Bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the Court for an injunction."

When this is the position, defendant No. 12 without making any enquiry ought not to have entered appearance to contest the claim of plaintiff, ought to have waited till order of the Court. Instead it has contested the claim which may give rise to a suspicion that it is anxious to pay to defendant No. 4 in terms of U. S. Dollars which is now precious for our republic. If defendant No. 12 which gave the guarantee by direction of the Supreme Court was not happy about the filing of the suit by plaintiff, it could have approached the Supreme Court which gave the direction to get an order to discharge its obligation to defendant No. 4 and ought to have acted upon such direction.

13. There is no allegation of fraud against defendant No. 12. Fraud is alleged against defendant Nos, 1 to 4. Therefore, it is to be examined Whether the allegation of fraud against defendant Nos. 1 to 4 has been prima facie made out by plaintiff.

14. Mr. G. Rath, learned counsel for defendant No. 12 in course of his submission while submitting that on the materials available a case of fraud against defendant No. 4 has not been made out submitted that if at all, some elements of fraud

may be available against defendant Nos. 1 to 3. Mr. Soli Sorabji however, strenuously contended that not only defendant Nos 1 to 3 but also Defendant No. 4 are active participants of fraud practised on the plaintiff.

15. Defendant No. 13 issued a global tender for execution of work of captive power plant, Defendant No. 2 on basis of such global tender offered to Defendant No. 1, by Telex on 5-10-1982 On 29-1-1983 Defendant No. 4 addressed a letter to Defendant No, 13 offering financial assistance referring to Defendant No. 2's arrangement for easy terms. On 31-3-1983 Defendant No. 4 described the credit facilities which can be given by Defendant No. 4. In spite of the fact that each party entered into separate agreements, the facts contained therein give a clear idea that Defendant No. 4 had knowledge of the nature of work to be executed by Defendant Nos. 1 to 3. Thus, there was collaboration with such "inks that agreement of Defendant No. 4 cannot be separately read at this stage while considering the question of injunction.

16. I need not detailly deal with conduct of Defendant Nos. 1 to 3. It shall be sufficient to shortly state that I carry an impression on reading the documents filed that Defendant Nos.1 to 3 had no capacity to execute the work of 108 M, W. Captive Power Plant. Even if they had capacity, the execution was not perfect. They had knowledge that the power plant is to be commissioned based on Talcher Coal. They, however, commissioned the same on Australia Coal. All these were within their knowledge. Defendant No. 4 was linked with them in such manner that for the purpose of considering the question of injunction, Defendant No. 4 ought not to be delinked and treated separately.

17. It is true that plaintiff gave the clearances and lastly the take-over certificate. There is a term in the take-over certificate that the same is without prejudice to rights of plaintiff under law. Thus, the taking over certificate is not unconditional. Defendant No. 4 ought to have made some enquiry about the meaning of the term "without prejudice" and ought to have obtained clarification from the plaintiff. There is no clear explanation of Defendant No. 4 why no clarification was sought for from the plaintiff. If clarification would have been sought for, plaintiff could have brought to notice of defendant No. 4 the various deficiencies of Defendant Nos. 1 to 3 and after getting such clarification Defendant No. 4 would have called upon Defendant Nos. 1 to 3 to clarify the allegations. If Defendant No. 4 would not have been in a position to come to any conclusion it could have requested Defendant Nos. 1 to 3 to approach the Arbitrator before payment is made so that on adjudication of dispute between plaintiff on the one hand and Defendant-Nos. 1 to 3 on the other, payment could have been made. There is no explanation of Defendant No. 4 in this respect. It is true that plaintiff failed to bring to notice of Defendant No. 4 its grievances about the nature of execution of work by Defendant Nos. 1 to 3. If the same would have been brought to notice of Defendant No 4 and in spite of it Defendant No. 4 would have paid to defendant Nos. 1 to 3 basing upon clearances given by plaintiff, a strong prima facie case of fraud by Defendant No. 4 could have been

made out. However, on the facts as presented at this stage it cannot be stated that Defendant No. 4 is innocent as it claims to be.

18. Inference of fraud is to be drawn not from individual events. Each event by itself may not be sufficient for drawing inference of fraud. Totality of the events cumulatively have the effect of fraud. In this case, if the facts and correspondences from the stage of global tender till the suit is filed are considered together, a clear impression of fraud in the transaction of captive power plant by defendant Nos. 1 to 3 is created and defendant No. 4 cannot be fully dissociated from it.

19. Coming to balance of convenience, if injunction is granted, payment to defendant No. 4 would be delayed if no injunction is granted, defendant No. 12 would pay as defendant No. 4 periodically on demand and fall back on plaintiff to pay the dues. Plaintiff is to pay on cash flow basis as per the project and feasibility reports. On account of generation of electrical energy which is far less than the assured units, there is no scope for payment on cash flow basis. It has to divert its capital for payment of loan and in that process become owner of a sick industry which is more a liability than asset. While on account of delayed payment defendant No. 4 may have some effect on its good will, plaintiff shall have to sacrifice its entire good will. That may amount to liquidation of plaintiff. Therefore, balance of convenience is in favour of plaintiff to grant of injunction.

20. In this connection, it is to be considered whether the suit in effect is only on account of breach of contract. Although Mr. P. M. Misra learned counsel for defendant No. 4 and Mr. C. Rath, learned counsel for defendant No. 12 relying on the Annexure to the plaint and some reliefs claimed submitted that it is a simple case of breach of contract, I am not able to accept the same I am satisfied on the facts as discussed earlier that it is a case based on fraud perpetuated on plaintiff and on account of such fraud there is irretrievable injustice to plaintiff. Entire object of the plaintiff in registering itself as a company may be frustrated In the peculiar circumstances of this case which are not comparable to the fact as revealed in the various decisions, special equities are in favour of the plaintiff. This conclusion also supports inference of irreparable injury.

21. Next point for consideration is the nature of injunction that would be granted. For this purpose, it is to be remembered that the entire loan amount is not to be paid at a time by plaintiff. Period of payment by plaintiff to defendant No. 4 is till 1998. If plaintiff does not pay any installment, there is scope for defendant No. 4 to recover the entire loan. If the period of payment is extended, suffering of defendant No. 4 may be for the extended period only. Defendant No. 4 is a banker and its business is to earn interest for the loans. Defendant No. 4 has power to extend the period of payment stipulated in the agreement. In fact original period has been modified by defendant No. 4. Therefore, term of agreement would not be completely violated if the period is extended. During pendency of the suit, defendant Nos. 1 to 3 have addressed a letter where there is hope that they may be able to rectify the defects in the captive power plant to

bring it to 108 MW capacity with annual minimum units being generated. That would assist plaintiff to pay the loan on cash flow basis. Taking these circumstances into consideration, I am inclined to hold that a direction to defendant No. 4 not to insist on defendant No. 12 for payment for two years till end of 1993 and direction to defendant No. 12 not to pay defendant No. 4 till that period on the basis of guarantee or till disposal of suit whichever is earlier would serve ends of justice. For this period of deferring payment plaintiff shall pay interest at 18% in place of subsidised interest for the amount due during this period. I direct accordingly.

22. Before closing, I cannot restrain myself to express that huge foreign exchange being involved in the project. Central Government should investigate into the entire affairs relating to the Commission of the captive power plant which may reveal facts to assist Central Government to change its policy in the matter of global tender and foreign financial assistance.

23. I record my appreciation to the valuable assistance given to me by Mr. Soli Sarabji with his learned associates Mr. G Rath with his learned associates, Mr. Salve with his learned associates and Mr. P. N. Misra with his learned associates but for which it would not have been possible for me to deliver this judgment within a short time. To avoid length of the judgment, I have not referred to all the decisions cited by them or their submissions elaborately.

24. In the result, appeal is allowed. No costs. Trial Court shall make a reference to District Judge, Cuttack to transfer the suit to any other Court of Subordinate Judge within his jurisdiction having less pendency where the suit can be disposed of early.