

(1999) 03 DEL CK 0004

In the Delhi High Court

Case No : I.A. No. 5489 of 1998 and In Suit No. 1334 of 1998

J.T. Mobiles Ltd

APPELLANT

Vs

Deutsche Bank Limited and Others

RESPONDENT

Date of Decision : 18-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1999) 3 AD 573 : AIR 1999 Delhi 358 : (1999) 78 DLT 837 : (1999) 49 DRJ 611 : (1999) 2 ILR Delhi 361 : (1999) 3 RCR(Civil) 678

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : Mr. Arun Jaitley and Mr. Atul Jain, for the Appellant; Mr. Soli J. Sorabjee, Attorney General of India, Mr. R.N. Trivedi, Addl. Solicitor General, Mr. Rajiv Nayar and Mr. Rakesh Tikku, for the Respondent

Judgement

Dalveer Bhandari, J.—This Order shall dispose of the plaintiff's application bearing I.A. No. 5489 of 1989 under Order 39 Rules 1 and 2 read with Section 151 CPC in Suit No. 1334 of 1998.

2. The plaintiff filed a suit for permanent injunction. This Court while issuing summons to the defendants also granted an ad interim ex parte injunction on 6.7.1998. The injunction order was in respect of encashment of financial bank guarantee pertaining to Andhra Pradesh and Karnataka Circles. As far as Andhra Pradesh circle is concerned, the ex-parte injunction granted by this Court was vacated on 15.2.1999. Now this order shall dispose of the matter pertaining to financial bank guarantee in respect of Karnataka circle.

3. The relevant portion of the financial bank guarantee submitted by the plaintiff in respect of Karnataka Circle reads as under:-

"In consideration of the President of India acting through the Telecom Authority (hereinafter called 'the Authority') having agreed to grant a license to M/s. J.T. Mobiles Ltd. of 777-G, 100 Feet Road, Indranagar, HAL 2nd Stage, Bangalore 560

008 (hereinafter called "the Licensee") to establish, maintain and operate cellular Mobile Telephone Service (hereinafter called "the Service") in Karnataka Circle in accordance with the letter of intent No. 842 - 53 (B) 96 - VAS dated 15th January, 1996 hereinafter called "the Licence) " on the terms and conditions contained in the said licence, which inter alia provides for production of a Bank Guarantee to the extent of Rs. 500,000,000 (Indian Rupees Five hundred million only) under the said license by way of security for payment of the said license fee as well as such other fees or charges required to be paid by the Licensee under the Licence. We Deutsche Bank A.G. Bangalore Branch (hereinafter referred to as "the Bank") at the request of the Licensee hereby irrevocably and unconditionally guarantee to the Authority that the licensee shall pay all the dues, including but not limited to, the license fee, access charges etc. to the Authority."

The amount of the above mentioned guarantee has been increased from 500,000,000 to Rs. 1,266,363.636/- on 14.2.1997.

4. The bank guarantee was primarily furnished by way of security for payment of the license fees as well as such other charges as may be required to be paid by the licensee under the licence. The letter dated 25.1.1999 sent by the Government of India to the plaintiff clearly indicates that the total license fees which the plaintiff is under an obligation to pay as on that date was Rs. 265,72,78,640 (Rupees Two hundred and sixty five crores seventy two lakhs seventy eight thousand six hundred and forty only). This is not disputed by the learned counsel appearing for the plaintiff and he fairly stated that after the Installment of March 1997 nothing has been paid by the plaintiff towards the license fees pertaining to the Karnataka circle. The plaintiff rushed to the Court and filed a civil suit along with an injunction application immediately after the Government of India had sent a letter to Deutsche Bank at Bangalore asking them to pay the proceeds under the financial bank guarantee bond.

5. Written statement and reply to the injunction application have been filed by defendants 2 and 3. In the written statement it is incorporated that it was very clearly and unequivocally agreed to between the plaintiff and the defendants that if the due license fees payments were not received in time plus within a grace period of ten days, the same shall be recovered by encashing the financial bank guarantee.

6. Mr. Arun Jaitley, the learned Senior Counsel appearing for the plaintiff submitted that the bank guarantee cannot be invoked because invocation letter is not in terms of the bank guarantee. While refuting this argument, Mr. Soli Sorabjee, the learned Attorney General, submitted that the letter dated 31.3.1998 by which the bank guarantee was invoked is absolutely clear and the invocation has been done in conformity with the financial bank guarantee. Mr. Sorabjee also stated that at the time when the invocation was made on 31.3.1998, the bank guarantee submitted by the plaintiff was alive and consequently the injunction order granted by this Court is liable to be vacated.

7. The letter dated 31.3.1998 was sent by the defendant-Union of India to Deutsche Bank AG, Bangalore Branch and copies have been endorsed among others to the plaintiff as well. The said letter is reproduced as under:-

"This has reference to your letter (FAX) dt. 28.3.98 regarding withdrawal of our claim on the subject guarantee lodged vide this office letter No. 9-2/98-LF dated 12.3.98. As requested by you, therein, we are not withdrawing our claim for the reasons that the above mentioned Company have arranged extension of the Guarantee only up to 15.4.98 against the actual requirement of 15.2.99 and further they have failed to pay the license fee by the stipulated time, to the tune of Rs. 139,25,87,553/- which includes an interest component of Rs. 12,62,23,917/- calculated up to 31.3.98.

2. However, you may continue to have recorded our lien and await further instructions regarding payment of the proceeds of the guarantee to us.

3. If the company approaches you for extension of the guarantee till 15.2.99 or thereafter, we have no objection for issuance of the same.

The receipt of this letter may kindly be acknowledged."

8. Bare reading of the aforesaid letter leads to the only conclusion that the defendant 2 & 3 have invoked the bank guarantee for the non-payment of the license fee.

9. Mr. Jaitley, the learned Senior Counsel for the plaintiff has referred to some letters and documents to demonstrate that it was a case of conditional invocation of the bank guarantee and in the facts of the case the bank guarantee could not be invoked by the defendants 2 & 3. Repudiating the submission of the learned counsel for the plaintiff it was submitted on behalf of defendants 2 & 3 that there is no question of conditional invocation of the bank guarantee. The letter dated 31.3.1998 by which the bank guarantee has been invoked is in consonance with the terms of the bank guarantee.

10. Learned Attorney General also referred to the letter dated 15.4.1998 sent by the defendant-Union of India to Deutsche Bank in which it is mentioned that the plaintiff has failed to discharge its contractual obligation to extend the validity of the above bank guarantee as per terms and conditions of the license agreement. It is also mentioned that this letter of 15.4.1998 is in continuation of the earlier letter dated 31.3.1998.

11. Mr. Jaitley, the learned Senior Counsel for the plaintiff has also pointed out that the defendants 2 and 3 have adopted the policy of "pick and choose". The bank guarantees of similarly placed licencees have not been invoked. This allegation has been categorically denied by the learned Attorney General. He submitted that despite several extensions given to the plaintiff, the outstanding dues towards license fees have not been cleared. The outstanding license fees due from the plaintiff far exceeds even the bank guarantee amount available as security with the defendants. The total bank guarantee amount is about Rs. 126

Crores, whereas admittedly even according to the Government of India letter dated 25.1.99 the total amount due as on that date was Rs. 265,72,78,640/-. This is not disputed by the plaintiff. Even after encashing the bank guarantee the defendants 2 and 3 would be able to recover only a small portion of the license fees, out of the total outstanding license fees. It was submitted that the purpose of asking the plaintiff to furnish bank guarantee was to seek security on behalf of the plaintiff company for its due observance of its contractual obligations/duties in accordance with the license agreement. Though the bank guarantee is not in lieu of the license fees, it is a security to meet the exigency of non-payment of license fees by the plaintiff. It is clearly borne out from the facts of this case that the plaintiff is repeatedly making defaults in making the license fees payment and has failed to perform the contractual obligations.

12. The principle pertaining to the grant of injunction of performance bank guarantees have been crystallized in a number of decisions rendered by their Lordships of the Supreme Court. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . Sabyasachi Mukherjee, J. (as his Lordship then was) spoke on behalf of the Court in that case. In para 28 of the judgment, it is enumerated that "in such kind of cases, the usual argument of strong prima facie case is of no avail and on that basis injunction from invocation of bank guarantee ought not to be granted. 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 there should be a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of furnishing the bank guarantees would be negated and the fabric of trading operation will get jeopardised. It is further observed in the judgment that commitments of banks must be honoured 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 be done, the Court should interfere". In paras 34 and 35, the Court has observed that this is not a case where irretrievable injustice would be done by the enforcement of bank guarantee. This is also not a case where a strong prima facie case of fraud in entering into a transaction has been made out. If that is the position, then the High Court should not have interfered with the bank guarantee. In this case Shetty, J. in his concurring judgment has observed that the crux of the matter relates to the obligation assumed by the bank under a performance guarantee. Whether the obligation is similar to the one arising under a letter of credit? Whether the court could interfere in regard to such obligation and if so, under what circumstances? It is further observed in the Judgment that the question of examining prima facie case or the balance of convenience does not arise, if the court cannot interfere with unconditional commitment made by the bank in the guarantees in question. In the concluding portion of the Judgment, the Court observed that the sound banking system may, however, require more caution in issuance of irrevocable documentary

credits. It would be for the banks of safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is an established fraud.

13. In General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, their Lordships of the Supreme Court while placing a strong reliance on their earlier Judgment in U.P. Cooperative Federation case (supra) observed as under:

"the demand is under the bank guarantee and as per the terms thereof, the Bank has to pay, and the Bank was willing to pay as per the undertaking. 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."

14. In AIR 1997 1644 (SC) the Court observed as under:-

"The law relating to invocation of such bank guarantee 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 honour 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 the 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 bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

15. In the celebrated case of Bolivinter Oil SA Vs. Chase Manhattan Bank (1984) 1 All ER 351 Sir John Donaldson, M.R. observed as under:-

"...The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

The aforesaid passage as approved and followed by their Lordships of the Supreme Court in U.P. Co-op. Federation Ltd. Vs. Singh Consultants and Engineer (P) Ltd. (supra)

16. In Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, their Lordships of the Supreme Court relied on earlier judgments of the Supreme Court and reiterated the legal position in the matter of bank guarantees and directed that all courts must strictly follow the legal position as crystallized by the Supreme Court. The relevant observations made in para 32 are reproduced as under:-

"When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

17. If the principles enunciated in various Supreme Court cases are carefully analysed, then the conclusion is irresistible that the courts would be justified in interfering and even granting injunction against invocation of performance guarantee only in those extremely exceptional cases where the fraud has been specifically pleaded and established and irretrievable harm, loss or injury may be caused to the parties if injunction is not granted.

18. When the facts of the instant case are examined in the perspective of the clear enunciation of law, then, the no stretch of imagination, the instant case can be brought into the category of those extremely exceptional cases where the fraud has been pleaded and established and irretrievable loss, harm and injury would be caused to the parties if the defendants are not restrained from invoking the bank guarantee. In the instant case the bank guarantee was furnished as a security to meet the exigency of nonpayment of license fees by the plaintiff. Admittedly, as on 25.1.1999, the plaintiff had to pay Rs. 265,72,78,640/- (Rupees Two hundred and sixty five crores seventy two lakhs, seventy eight thousand six hundred and forty only).

19. Even according to the plaintiff nothing towards license fee was paid after March 1997. Therefore, by lapse of time the amount of outstanding license fee must have further increased. There is no foundation of fraud or special equities which has been laid in this case by the plaintiff. There is no question of irretrievable loss to the plaintiff in case the injunction is vacated because the learned Attorney General has given an undertaking that in case ultimately the plaintiff's suit is decreed, in that event the Union of India shall pay the amount to the plaintiff.

20. On consideration of totality of facts and circumstances of this case, the

injunction granted by this Court on 6.7.1998 has to be vacated. I order accordingly. The defendants 2 and 3 would be entitled to costs from the plaintiff which are quantified at Rs. 10,000/-.