

(1997) 11 DEL CK 0084

In the Delhi High Court

Case No : Interim Application No. 10449 of 1997 and Suit No. 2262 of 1997

Lucky Exports

APPELLANT

Vs

Access Maritime Corporation

RESPONDENT

Date of Decision : 04-11-1997

Acts Referred:

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

Citation : (1997) 6 AD 943 : AIR 1998 Delhi 252 : (1997) 4 CLT 292 : (1999) 95 CompCas 869 : (1997) 69 DLT 537 : (1997) 43 DRJ 623

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Mukul Rohatagi, Sanjay Karol, Neeraj Malhotra, Arun Jaitley, Indu Malhotra and Trideep Pais, for the Appellant;

Judgement

D.K. Jain, J.

(1) In this suit for perpetual injunction, seeking to restrain the first defendant-M/s. Access Maritime Corporation, Athens, Greece, from encashing the Bank guarantee No. 009100197, dated 15th July, 1997 in the sum of Us \$ 52,500, issued by the second defendant Syndicate Bank, New Delhi, in favor of defendant No. 1, the plaintiff has filed this application under Order 39, Rules 1 & 2, CPC for grant of ex parte and interim injunction in its favor to the same effect.

(2) The plaintiff is engaged in the trade and business of export of goods and also acts as a charter party, i.e. charterer, hiring vessels for transportation of goods from one port to another. Defendant No. 1 is engaged in the business of carriage by sea, owning vessels, which are given on hire for a particular voyage or for a particular period of time, under a contract termed as "charter party agreement". Defendant No. 2 Bank has furnished the Bank guarantee in question.

(3) On 9th July, 1997, the plaintiff entered into a "charter party agreement" in the capacity of a charterer with the first defendant for the shipment of 7500 M.T. of rice from the Port of Vishakhapatnam (hereinafter referred to as the load port)

to the Port of Novorossisk (hereinafter referred to as the discharge port). The said goods were to be transported aboard the ship named "Danube Trader", belonging to defendant No. 1. Under Clause 26 of the said agreement, the plaintiff was required to furnish a Bank guarantee in the sum of Us \$ 52,500 to secure the amount payable by the plaintiff for the demurrage payable for delay in berthing of the said vessel on account of port congestion at the discharge port for 15 days at Us \$ 3,500 per day. On 15th July, 1997, on the request of the plaintiff the second defendant furnished the guarantee in question. The relevant portion of the Bank guarantee reads as follows: @SUBPARA = "We are informed by our client M/s. Lucky Exports, 8, Aradhana Colony, R.K. Puram, Sector, 13, New Delhi-110066 (hereinafter called the Charterers) that they have entered a charter party agreement dated 9.7.97 (hereinafter called the contract) with M/s. Access Maritime Corp. (hereinafter called the vessel owners) for the shipment of 7500 Mt of rice (the goods) from Vishakhapatnam Port (Load Port) to Novorossisk Port (Discharge Port) and in this connection a Bank guarantee is required for Usd 52500 (USD fifty two thousand five hundred only) being the demurrage payable for delay in berthing on account of port congestion at the discharge port i.e. Novorossisk for 15 days @ Usd 3500 per day i.e. Usd 52500. These 15 days demurrage period to start after the expiry of free time of 13 days and 12 hours which excludes the period from Saturday noon to Monday 8.00 a.m. This free time to start after the date of getting notice of readiness and accepted as per charter party. @SUBPARA = Accordingly, we the Syndicate Bank at the request of charterers do hereby give you our guarantee and undertake to pay you on receipt of your first demand Along with your invoice towards demurrage, telex copy of notice of readiness served to consignee, statement of fact giving lay time and time sheet calculations, duly authenticated by our Bankers with a three days notice of payment waving all rights of objection and defense any amount up to maximum of Usd 52,500 (USD fifty two thousand five hundred only) from the expiry of third day from the date of receipt at this office at F-40, Connaught Place, New Delhi."

(4) The agreement as also the guarantee provided that the said 15 days demurrage period was to start after the expiry of free time of 13 days and 12 hours with certain other exclusions of time. The free time was to start after the date of getting notice of readiness tendered and accepted as per charter party agreement dated 9th July, 1997. It is not in dispute that the said vessel arrived at the discharge port on 20th August, 1997 and accordingly notice of readiness was issued on the same date. However, the plaintiff claims to have accepted the notice of readiness on 26th August, 1997 through its agent. The vessel finally berthed on 7th September, 1997 at the discharge port and sailed on 20th September, 1997 after the discharge had been completed by the charterer.

(5) The plaintiff received a demurrage invoice, dated 25th September, 1997, issued by the first defendant, detailing the amount of demurrage suffered by it, amounting to Us \$ 53,256.63. The said invoice was accompanied by the time sheet calculation, which reflected that the demurrage had been calculated for the

period from 5th September, 1997, (the day on which lay time/free time expired) and 20th September, 1997 (the date of sailing of the vessel). In the plaint it is averred that the plaintiff thereafter gained knowledge that the first defendant, vide its letter dated 6th October, 1997, addressed to the second defendant, had sought encashment of the Bank guarantee and requested it to transfer the entire amount of the Bank guarantee to its Bank account in Greece. For the sake of ready reference, the relevant portion of the letter, dated 6th October, 1997 is extracted below: @SUBPARA = "We are the vessel's owners and beneficiaries of your Bank Guarantee Letter No. 009100197 issued on request of your clients Messrs Lucky Exports Ltd., New Delhi. @SUBPARA = We hereby inform you that your clients have not paid us the accrued demurrage at discharging port Novorossisk, even though the vessel completed discharge since 20th September, 1997 and relevant documents submitted to them since 25th September, 1997. @SUBPARA = We Therefore exercising our rights to invoke your Bank Guarantee Letter, we attach herein the following documents: @SUBPARA = 1. Original Notice of readiness served to Consignees/Receivers. @SUBPARA = 2. Original Statement of facts duly signed by Consignees/Receivers. @SUBPARA = 3. Original Lay-time and Time Sheet calculation. @SUBPARA = 4. Original Invoice No. 84/97 for the amount of Demurrage at discharging port. @SUBPARA = All above documents are duly authenticated by our Bankers. @SUBPARA = Kindly wire transfer the amount of US\$ 52,500.00 to our Bank account as follows."

(6) Though it is averred in the plaint that the plaintiff had sent a reply, dated 14th October, 1997, to defendant No. 2, objecting to the demand raised against it, no such letter has been filed with other documents.

(7) It seems that though the bank guarantee was invoked on 6th October, 1997, the bank has so far neither remitted any amount nor sent any communication to the first defendant.

(8) Being aggrieved by the decision of the first defendant to invoke the Bank guarantee, the plaintiff has filed the present suit, alleging that the invocation of the Bank guarantee is fraudulent, contrary to its terms, aimed at causing irreparable loss to the plaintiff, apart from being inequitable amounting to unjust enrichment on the part of the said defendant, because, (i) no demurrage having been incurred by defendant No. 1 by delay in berthing of the said vessel on account of port congestion, there was no occasion to invoke the Bank guarantee ,and (ii) the claim made by defendant No. 1 towards "accrued demurrage" relates to the demurrage accrued due to delay in unloading of goods, which is nowhere provided in the guarantee, besides, while calculating the demurrage payable by the plaintiff the days on which discharge could not take place due to bad weather conditions have also been included.

(9) I have heard Mr. Mukul Rohatgi, learned Senior Counsel for the plaintiff at some length. Since a caveat had been filed on behalf of the contesting first defendant, at the time of preliminary hearing it was represented by Mr. Arun Jaitley, Sr. Advocate and I have also heard him.

(10) It is contended by Mr. Rohatgi that though notice of readiness was sent by the first defendant on 20th August, 1997 but it was actually accepted by the agent of the plaintiff only on 26th August, 1997 and, Therefore the free time of 13 days and 12 hours, as stipulated in the guarantee was available to the plaintiff up to 11th September, 1997 and thus the vessel having been berthed on 7th September, 1997 no demurrage is payable by the plaintiff under the charter party agreement. In the alternative, it is urged that even if the lay time/free time is to be counted from 21st August, 1997 the demurrage would be payable from 5th September, 1997 to 7th September, 1997 only and not up to 20th September, 1997 (when the vessel actually sailed), as calculated by defendant No. 1. Thus the main thrust of Mr. Rohatgi's contention is that the invocation of the Bank guarantee, not being on its terms, to prevent irretrievable injustice to the plaintiff, interim injunction as prayed for, deserves to be issued. In support reliance is placed on a decision of the Supreme Court in Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, .

(11) On the other hand Mr. Jaitely, while inviting attention of the Court to various documents, which in terms of the Bank guarantee were required to be sent by the first defendant to the Bank, placed on record by the plaintiff, has urged that it is clear from Clause 20 of the charter party agreement ,dated 9th July, 1997 and "Gencon Charter"--a standard charter agreement governing the cargo shipping, that the lay time has to commence from the date of notice of readiness and not from the date of its acceptance, as contended by the plaintiff. He has also pointed out that the details about the daily position of the vessel, reflected in the "Details of daily working", were duly signed and accepted by the agent of the plaintiff and now at this stage the plaintiff is estopped from challenging the same. On the question of irretrievable loss, learned Counsel has submitted that Clause 29 of the charter party agreement provides for resolution of disputes by arbitration and, Therefore, the plaintiff can claim relief before the Arbitrators and so no irretrievable injustice can be said to exist. He has placed reliance on a recent decision of the Supreme Court in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. & Anr., Jt 1997 (5) Sc 417.

(12) It is fairly well settled that a Bank guarantee is an independent contract whereby the Bank undertakes to unconditionally and unequivocally abide by its terms and it cannot be affected by disputes between the parties to the underlying transaction. It creates an irrevocable obligation on the Bank to perform the contract in terms thereof and on occurrence of the event mentioned therein, the Bank guarantee becomes enforceable. It is only in rare or exceptional cases like, (i) a case of fraud of egregious nature of which the Bank has the knowledge, and (ii) allowing an encashment would result in irretrievable harm to one of the parties concerned that the Court may interdict encashment of bank guarantee.

(13) Taking note of its various earlier decisions, in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , the Supreme Court held as follows:

".....IN case of confirmed Bank guarantee/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud... @SUBPARA = ...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms.. @SUBPARA =there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of Bank guarantee."

(14) Similar principles have been reiterated in the recent decision of the Supreme Court in *Dwarikesh Sugar Industries*" case (supra). In the said decision, on the question of irretrievable injury, the Court observed that it has to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution.

(15) Applying the above principles on the facts of the present case, I feel that the plaintiff has failed to make out a prima facie case of fraud and special equities in its favor in the form of preventing irretrievable injustice to it.

(16) Since a lot of emphasis has been laid by learned Counsel for the plaintiff on the date of acceptance of notice of readiness dated 20th August, 1997 on 26th August, 1997 to appreciate the contention, it would be expedient to extract the relevant portion of the said notice. It is as under:

"PLEASE be advised that the M/s. "Danube Trader" arrived at Novorossisk Road at 20.8.1997/1445 L.T. hours and is in every respect ready to load - discharge cargo as per charter party dated Mumbai 9.7.1997. @SUBPARA = Nor Send by TLX/FAX. @SUBPARA = Accepted nor accepted as per C/P dated 9.7.1997 @SUBPARA = Dated 26.8.1997 hours 800 a.m. @RS.RIGHT = Your very truly @RS.RIGHT = SEAL"

(17) From the above it is evident that what is accepted by the agent of the plaintiffs that the vessel had arrived at the discharge port on 20th August, 1997 at a particular time and was ready to load--discharge cargo as per charter party and nothing more. Once the notice or readiness is accepted without protest, it is axiomatic that it relates back to the date when the vessel's readiness is intimated and the date of so called acceptance loses its significance. Obviously the date of acceptance would be material if the readiness of the vessel is doubted and a note to that effect is appended by the party accepting it. Therefore, prima facie, the submission of learned Counsel for the plaintiff that the lay time/free time has to commence from the date of acceptance is devoid of substance. Having critically examined the clause pertaining to the determination of lay time, there appears to be not much force in the argument that for determining the total period for which the demurrage is payable, the lay period of 13 days and 12 hours as stipulated in the agreement, has to be excluded from

the total period from the date of readiness to the date of sailing of the vessel, irrespective of the fact whether there has been delay in berthing/discharge on account of port congestion or bad weather or for some other reason. I say no more lest it may cause prejudice to either of the parties in the final trial of the suit or in adjudication proceedings before the Arbitrator. Same would be the position on the question whether the delay in berthing or discharge was on account of port congestion or bad weather, as alleged by the plaintiff. All these are triable issues. Having regard to the material placed on record by the plaintiff, I have no hesitation in coming to the conclusion that the plaintiff has failed to make out even a prima facie case that the invocation of Bank guarantee in question is vitiated by any fraud--much less an established fraud, warranting interference by this Court in its encashment. The decision of the Supreme Court in Larsen & Toubro's case (supra), relied upon by learned Counsel for the plaintiff is clearly distinguishable on facts and is not applicable to the facts of the present case. In that case one of the Bank guarantees, the encashment whereof was interdicted by the Court, was a conditional guarantee and was to be good for payment till successful completion of trial operations. The Apex Court found that from the material on record, including the communications between the party at whose instance the Bank guarantee was furnished and the beneficiary, it was clear that the stipulations or the conditions mentioned in the underlying agreement, had been successfully fulfilled and the plant was admittedly taken over by the beneficiary and, Therefore there was no occasion to invoke the Bank guarantee and thus, it was not encashable on its terms and in order to prevent irretrievable injustice, its encashment had to be injuncted, which is not the case here. In the present case, the purpose for which the Bank guarantee was furnished had not elapsed when it was sought to be invoked and in fact is still alive.

(18) As regards the contention that the invocation of the Bank guarantee as sought to be done vide defendant No. 1's letter dated 6th October, 1997, is not in its terms inasmuch as the amount claimed by the first defendant is towards "accrued demurrage", related to the demurrage accrued due to delay in unloading of the goods and not on account of delay in berthing on account of port congestion, I, prima facie, feel that in the light of the precise details furnished by the first defendant to the guarantor Bank, there is hardly any scope for such an argument. In any event, as noticed, above, it is a highly debatable issue, touching upon the merits of the claim, with which the Bank has no concern and has rightly not raised any objection to that effect. In terms of the guarantee whatever information/document was required to be furnished by the first defendant to the Bank, for the purpose of invoking the Bank guarantee, was furnished and the Bank was obligated to honour its commitment under the guarantee. As noted above, the Bank chose to keep quiet on the subject. Since the Bank is not represented before me, it may not be fair to comment on its conduct but the facts speak for themselves. To say the least, the conduct of the bank in sitting tight over the demand made by the first defendant vide its letter

dated 6th October, 1997 cannot be commended. Having regard to the language of the Bank guarantee, I do not find any force in the plea of improper invocation raised by the plaintiff.

(19) As regards the question of irretrievable injustice to the plaintiff, as noted above, the charter party agreement provides for adjudication of disputes by arbitration and if the plaintiff feels that the amount under the Bank guarantee has been wrongly recovered by the first defendant, it is open to it to prefer a claim before the Arbitrators. Thus, it cannot be said that there is no possibility of recovery of the amount, which may be remitted by the Bank under the guarantee, from the beneficiary by way of restitution.

(20) For the foregoing reasons I am of the considered view that the plaintiff has failed to make out a prima face in its favor for grant of ad interim injunction, restraining the first defendant from encashing the Bank guarantee in question. The balance of convenience also does not lie in its favour. Accordingly, the application, being devoid of merit, is dismissed.

(21) Needless to say that the view expressed above, is tentative for the limited purpose of decision in this application and shall not be construed as expression of opinion on the merits of the controversy between the parties.