
(2019) 05 DEL CK 0152

In the Delhi High Court

Case No : Civil Writ Petition No. 3527 Of 2014

M/S Athena Energy Ventures Pvt. Ltd

APPELLANT

Vs

Andhra Bank

RESPONDENT

Date of Decision : 30-05-2019

Acts Referred:

Citation : 2019 AIR (Delhi) 165 : (2019) 261 DLT 254 : (2019) 7 AD(Delhi) 302

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Tarun Johri, Ankit Saini, P.B.A. Srinivasan

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition impugning an action of the respondent (Andhra Bank - hereafter 'the Bank') in debiting a sum of Rs. 68,93,783/- in the petitioner's current account maintained with the Bank. The petitioner also seeks recovery of the said amount along with interest. The Bank had debited the said amount as commission charges for the unexpired period of a bank guarantee that was surrendered by the petitioner.

2. The petitioner claims that the Bank had not informed the petitioner that any such charges would be payable at the time of the issuance of the bank guarantee and therefore, levy of such charges is illegal and contrary to the guidelines issued by the Reserve Bank of India (RBI). The Bank disputes that same and claims that it is entitled to levy such charges.

3. Mr Srinivasan, learned counsel appearing for the Bank referred to a letter dated 04.06.2011 sent by the Bank and submitted that by the said communication, the petitioner was duly informed of the condition to levy such charges.

4. In view of the above, the question that arises for consideration of this Court is

whether the Bank is entitled to charge commission on the unexpired period of the bank guarantee furnished by it.

5. The aforesaid controversy arises in the context of the following facts:

5.1 On 14.02.2007, the petitioner incorporated M/s Athena Chhattisgarh Power Pvt. Ltd. (ACPPL) as a special purpose vehicle (SPV) for the development and implementation of a Thermal Power Project at Singhitarai in the State of Chhattisgarh. Another company - East Coast Energy Pvt. Ltd. - was also incorporated as a SPV for the development of a Thermal Power Project at Kakrapalli in the State of Andhra Pradesh. The petitioner required non-fund based financial assistance in connection with the aforesaid projects. The Bank agreed to provide the non-fund-based facility and sanctioned a facility upto a limit of Rs. 25 crores for furnishing a bank guarantee for the purpose of bidding for sale of power, transmission system and fuel linkage. The said facility could also be utilized for the issuance of bank guarantees on behalf of SPVs incorporated for the execution of the projects. The aforesaid terms were stated in the sanction letter dated 08.07.2009. The said letter specified various terms and conditions, including the margin required (20%), as well as the tenure of the bank guarantee. The said facility was to be secured by the first charge on future receivables of the petitioner as well as personal guarantee of one of the Promoters/Directors of Athena Infra Projects Pvt. Ltd. The sanction letter further specified that the processing charges for the issuance of a bank guarantee would be Rs. 3,12,500/- plus service tax as applicable, which would be paid up-front. Insofar as the commission is concerned, the sanctioned letter indicated that the same would be "as per guidelines".

5.2 The petitioner and the Bank also entered into a Composite Agreement dated 04.08.2009, for a sum of Rs. 25 crores carrying an interest at the applicable PLR of 12% + spread of 3.5% per annum. Thus, the petitioner was liable to pay 15.5% per annum on the loan amount and an additional 2%, if the amount remained overdue.

6. Mr Srinivasan, learned counsel appearing for the Bank explained that the said Composite Agreement would become effective only if the bank guarantee furnished by the Bank was invoked. In such an event, the amount paid to the beneficiary would constitute a loan to the petitioner on the terms as specified in the Composite Agreement.

7. The petitioner states that the Bank had informed it that the Commission for the Bank Guarantee would be at the rate of 0.5% per quarter (equivalent to 2% per annum).

8. On 24.02.2010, ACPPL entered into a Bulk Power Transmission Agreement with Power Grid Corporation of India Ltd. (PGCIL) for evacuation of power from the project developed by ACPPL. On 01.06.2010, the petitioner utilized the non-fund-based facility as sanctioned by the Bank and at the instance of the petitioner, the Bank issued a bank guarantee (Bank Guarantee No.

0084101GPER0007 - hereafter 'the Bank Guarantee') for a sum of Rs. 25 crores in favour of PGCIL, the same was valid till 31.05.2014. The Bank Guarantee was for securing ACPPL's obligations under the Bulk Power Transmission Agreement.

9. On 30.03.2011, ACPPL achieved financial closure for the development and implementation of the projects at Chhattisgarh and therefore, no longer required the facilities from the Bank. On 01.03.2012, the petitioner returned the Bank Guarantee to the Bank and requested for refund of the margin money of Rs. 5 crores that was deposited by the petitioner for issuance of the Bank Guarantee. Although the Bank credited an amount of Rs. 5 crores in the petitioner's current account, it also debited a sum of Rs. 68,93,783/- from the said account in the form of pre-closure / cancellation charges.

10. The petitioner sought a refund of the said amount, however, the Bank did not accede to the said request. On 11.02.2013, the petitioner filed a complaint before the Banking Ombudsman. However, that was rejected on the ground that it was beyond the pecuniary jurisdiction of the Banking Ombudsman specified in Clause 12(5) of the Banking Ombudsman Scheme, 2006. The petitioner appealed against the order of the Banking Ombudsman (Order dated 23.10.2013) before the Customer Service Department, RBI, Mumbai. The petitioner also challenged the same before the Banking Codes and Standards Board of India. However, the said appeals were rejected as the same were found to be not maintainable.

11. Mr Johri, learned counsel appearing for the petitioner submitted that the commission charged on the unexpired term of the Bank Guarantee is illegal, as at the time of issuance of the Bank Guarantee, the petitioner was not informed that any such charges would be levied. He submitted that the same was contrary to the Circulars issued by the RBI, which required the Bank to disclose to the borrower all information regarding loan including information regarding pre-payment option and charges. He relied upon the decision of the Coordinate Bench of this Court in DLF Limited v. Punjab National Bank: (2011) 180 DLT 435 in support of his contention.

12. Mr Srinivasan, learned counsel appearing for the Bank countered the claim made by the petitioner, essentially, on two fronts. First, he submitted that the decision in the case of DLF Limited (supra) was not applicable as the petitioner was not a borrower. He submitted that the Bank had not extended any loan to the petitioner but only provided the service of issuing the Bank Guarantee. Second, he submitted that the petitioner had requested for the commission charges to be charged on a quarterly basis instead of on an annual basis and this request was acceded to, subject to charging commission for the unexpired term of the bank guarantee. He referred to the letter dated 04.06.2011.

13. Mr Johri, learned counsel appearing for the petitioner submitted that the letter dated 04.06.2011 was never received by the petitioner and also finds no mention in any other documents.

Reasons and Conclusion

14. The first and foremost issue to be considered is whether the Bank was obliged to disclose the charges to the petitioner at the time of acceding to the request for providing non-fund based assistance. The Reserve Bank of India (RBI), by a Circular dated 25.11.2008, has advised all banks that the loan application forms in respect of all categories of loans should be comprehensive and should include information about the fees/charges payable by the borrower. The relevant extract of the said Guidelines, which were a part of the Fair Practices Code for Lenders, is set out below:-

"Please refer to our Circular DBOD.No.Leg.BC.65 /09.07.005/2006-07 dated March 6, 2007 wherein banks / FIs were advised that loan application forms in respect of all categories of loans irrespective of the amount of loan sought by the borrower should be comprehensive. It should include information about the fees/charges, if any, payable for processing, the amount of such fees refundable in the case of non acceptance of application, pre-payment options and any other matter which affects the interest of the borrower, so that a meaningful comparison with that of other banks can be made and informed decision can be taken by the borrower.

2. It has come to our notice that some banks levy in addition to a processing fee, certain charges which are not initially disclosed to the borrower. It may be mentioned that levying such charges subsequently without disclosing the same to the borrower is an unfair practice.

3. Banks / FIs are therefore advised to ensure that all information relating to charges / fees for processing are invariably disclosed in the loan application forms. Further, the banks must inform 'all-in cost' to the customer to enable him to compare the rates charged with other sources of finance.

15. Subsequently, by a circular dated 10.12.2008, RBI had clearly stated that levy of charges, which were not initially disclosed to the borrower, would constitute unfair practices. Paragraph 2 of the said Letter is set out below:-

"2. It has come to our notice that some banks levy in addition to a processing fee, certain charges which are not initially disclosed to the borrower. It may be mentioned that levying such charges subsequently without disclosing the same to the borrower is an unfair practice."

16. In DLF Limited (supra), the Coordinate Bench of this Court had examined the question of levy of pre-payment charges and not initially disclosing the same and had held that the banks would not be entitled to levy such charges. This Court is of the view that the said decision would be equally applicable in the facts of this case notwithstanding that the petitioner has not borrowed any amount from the Bank. The extension of a non-fund-based facility is also a form of financial assistance, albeit, non-fund based. It is also relevant to note that the parties had entered into a Composite Agreement in terms of which the petitioner would be obliged to repay the amount of the Bank Guarantee in the event that the same was encashed.

17. The decision in DLF Limited (supra) rested on the principle that a person, who is visited with any charges for a facility, should be aware of the same at the time of availing the facility and not at the time of discharging the same. This is a principle of fair play and fair practice, which the banks are obliged to follow. It would make little difference whether the facilities extended by the banks are fund based or non-fund based.

18. The next question to be examined is whether the petitioner had agreed to the levy of such pre-payment charges on the surrender of the bank guarantees prior to the expiry of its validity.

19. As noticed above, the sanctioned letter dated 08.07.2009 did not contain any indication as to the commission that would be charged on the facility entitled by the Bank. It merely stated that the same would be as per bank guidelines. The letter forwarding a bank guarantee or the Bank Guarantee in question also did not disclose any charges for the commission payable by the petitioner. It was stated on behalf of the petitioner that the Bank had informed the petitioner that it would be liable to pay 2% per annum as commission. This is not disputed by the Bank. Admittedly, the only commission of 2% was charged by the Bank at the time of issuance of the Bank Guarantee on 01.06.2010. The Bank further called upon the petitioner to remit the commission for the next year commencing 01.06.2012. At that stage, the petitioner sent a letter dated 01.06.2011 requesting that the bank guarantee commission may be recovered on a quarterly basis instead of annually. In its letter, the petitioner also pointed out that the commission being charged by the Bank was higher than the commission being paid by the petitioner to other banks (which was stated to be 0.375% per quarter). A similar request also made earlier by a letter dated 21.04.2011. The Bank sent a letter dated 18.06.2011 acceding to the aforesaid request. The said letter is set out below:-

"To,

The Chairman & managing Director

M/s-Athena Energy Ventures Pvt. Ltd.

Hall No-1, First Floor, NBCC Tower,

15, Bhikaji Cama Place,

New Delhi - 110066

Dear Sir,

Reg: M/s- Athena Energy Ventures Pvt. Ltd. - Modification of sanction terms & conditions

Ref: Your request letter dtd 21.04.2011 and 01.06.2011

With regard to the captioned reference; we communicate the decision of the Competent Authority in approving the following against terms and conditions stipulated there under

Ø Reduction in the processing charges to Rs.200.00 per lakh plus taxes against stipulated charges of Rs.300.00 per lakh

Ø Collection of BG commission on quarterly basis instead of annual basis.

All other terms and condition stipulated vide sanction letter No. 084/01/S-89 dtd 28.03.2011 shall remain unaltered.

Yours faithfully

s/d

(R. Padmanabhan)

Deputy General Manager"

20. It is apparent from the said letter that all the terms and conditions, as stipulated earlier, remained unaltered. In these circumstances, the contention that the petitioner had introduced an additional condition for acceding to the request by a letter dated 04.06.2011 cannot be accepted. The petitioner claims that the letter dated 04.06.2011 was never received. Although, this was disputed, the Bank has not produced any communication indicating the petitioner's acceptance of the said letter. Thus, without going into the controversy as to whether the letter was received by the petitioner or not, it is clear that the petitioner would not be bound by the same. It is not disputed that any change in the terms required the consent of the petitioner. It is, thus, noticed that the letter dated 18.06.2011 has also been signed on behalf of the petitioner.

21. At this stage, it is also necessary to examine the basis on which the Bank had deducted the sum of Rs. 68,93,783/-. The calculation of the said amount was provided by the Bank in its letter dated 29.04.2013 and the same is set out below:-

S. No.

Particulars

Amount

1.

Commission to be collected for 4 years

2,00,00,100/-

2.

Commission collected only for 1 year 3 quarters

87,50,037/-

3.

Unexpired period commission for 9 quarters (commission not collected)

1,12,50,063/-

4.

Reduction of 1 quarter (3 months) commission*

12,50,007/-

5.

Balance (3-4)

1,00,00,056/-

6.

Refund of 50% commission after reducing one quarter of unexpired period, i.e.
Rs.1,00,00,056/-

50,00,024/-

7.

Commission to be collected (3-6)

62,50,039/- + S.T. @ 10.30%

22. According to the Bank, the Commission on the unexpired term of the Bank Guarantee has been calculated in terms of the head office Circular No. 309 dated 08.12.2011.

23. The relevant extract of the Circular relating to refund of commission on unexpired period on return of bank guarantee is set out below:-

"6. Refund of Commission on unexpired period on Return of Bank Guarantee:

As and when the Guarantees are cancelled at the request of the constituents, the period of unexpired guarantee should be reduced by 3 months and 50% of the commission collected thereon can be refunded to the parties.

In respect of "A" rated accounts where the commission collected is Rs. 50,000/- or more per annum, Branches are permitted to refund 100% of BG commission applicable to unexpired period excluding the quarter in which original BG was returned, provided the original guarantee bond is returned duly discharged. (Cir.No.274 Ref.No.26/35 dated 11.11.2008)"

24. It is seen from the above that in respect of "A" rated accounts where the commission collected is Rs. 50,000/- or more per annum, banks are entitled to refund 100% of the bank guarantee commission applicable to the unexpired

period, excluding the quarter for which the original bank guarantee was returned. No submissions were made by either party as to why the said provision is not applicable. Therefore, it is not possible for this Court to examine whether the petitioner's case falls in the category of "A" rated accounts as indicated above.

25. Be that as it may, since it is not disputed that the petitioner was informed that the commission for the facility of Bank Guarantee would be 2% per annum and the petitioner was not informed about any pre-payment charges, the levy of any commission for the unexpired term of the Bank Guarantee is unsustainable.

26. The petition is, accordingly, allowed.

27. The Bank is directed to refund the amount of Rs. 68,93,783/- along with interest at the rate of 6% per annum.