

(1995) 12 DEL CK 0049

In the Delhi High Court

Case No : I.A. 11983/95 in S. No. 2746/95

M/s. Coronation Constructions Pvt. Ltd.

APPELLANT

Vs

M/s. Gujarat Heavy Chemicals Ltd. and another

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Citation : (1995) 12 DEL CK 0049

Hon'ble Judges : S.D. Pandit, J

Bench : Single Bench

Advocate : Mr. Mukul Rohtagi and Mr. Sudhir Makkar, for the Appellant; Mr. Arun Jaitley and Mr. Kamal Budhiraja, for the Respondent

Judgement

S.D. Pandit, J.—Petitioner M/s. Coronation Construction Pvt. Ltd., is engaged in the business of construction and mining. The respondent is having its factory at Strapada Verayal, District Junagarh, Gujarat for manufacturing Soda Ash and for the said factory they are in need of about 1200 M.T. of lime stone per day. They are owing various mines and they approached the petitioner in August 1994 for taking the contract of mining lime stone from their mines. The petitioner had showed his readiness and willingness to take up the contract by his letter dated 2.9.1994 and ultimately agreement between the parties took place on 1.11.1994. It is alleged by the petitioner that he was carrying out the mining work through mechanical means and he had informed the respondent that he would carry out the mining operations through mechanical means. For the purpose of conducting mining operations by mechanical means a sizer was required and the respondent was also made aware of the same. After the conclusion of the contract petitioner had started the work in November 1994 by using manual labour. It is further claimed that from 11/13-4-1995 the representative of respondent No. 1 and two directors of the petitioner had visited England for approving the sizer but in spite of this respondent No. 1 did not take any decision on the sizer and has not provided the sizer to the petitioner. For want of sizer both the petitioner as well as respondent No. 1 were suffering and

according to the petitioner he had suffered loss to the tune of Rs. 2.50 crores. As the sizer was not available petitioner was not in a position to carry out the mining operations. According to him, the respondent No. 1 had asked him by letter dated 8.11.1995 to extend the bank guarantee before 15.11.1995 for further period of one year. Though the petitioner had informed respondent No. 1 that he was taking steps to extend the bank guarantee before 15.11.1995 and though he had written to his banker, the respondent should not be in haste in encashing the bank guarantee if he failed to extend it before 15.11.1995. But the respondent No. 1 did not accept the said request of the petitioner and by its letter dated 28.11.1995 had asked the respondent No. 2 banker of the petitioner to encash the bank guarantee and the petitioner was also informed about the repudiation of the contract. Therefore, petitioner has filed the present petition u/s 20 of the Arbitration Act to refer the disputes which have arisen between the petitioner and the respondent as per the terms of the contract between the parties.

2. Along with the suit petitioner has also filed IA. 11983/95 seeking an order of ad-interim injunction to restrain the respondent No. 1 from encashing the bank guarantee and to restrain the respondent No. 2 from honouring the respondent No. 1's claim for encashment of the bank guarantee. It is the contention of the petitioner that, as a matter of fact, there was no reason for respondent No. 1 either to take steps to encash the bank guarantee or to repudiate the contract as the petitioner was all along ready and willing to perform his part of the contract on getting the sizer and the respondent No. 1 was also ready and willing to continue him as his contractor and the contract in question. Though the period of the bank guarantee was no come to an end on 30.11.1995 the bank guarantee was payable to the respondent till 30.1.1996 and merely because the petitioner could not extend the period of the bank guarantee on 15.11.1995, as claimed by respondent No. 1, the respondent No. 1 was not justified in asking for the encashment of the bank guarantee. Petitioner, Therefore, seeks an ad-interim injunction to restrain the respondent No. 1 from encashing the bank guarantee.

3. Show cause notice was issued to the respondents. Respondent No. 1 has entered appearance and has contested the claim of the plaintiff by filing the reply.

4. It is contended on behalf of the respondent No. 1 that the respondent No. 1 was not at all to provide the sizer to the petitioner. As per the terms of contract between the parties the responsibility of purchasing the sizer was that of the petitioner. The petitioner was to employ manpower or mechanical methods for breaking, sizing and storing of lime stone as per the specification of respondent No. 1. The contract further clearly mentions that it was the duty of the petitioner to deploy all the required equipment and respondent was only to provide assistance to the agency in obtaining those equipment on lease/hire-purchase. The respondent accordingly paid Rs. 1,00,00,000/- by way of mobilisation advance to the petitioner and the respondent was all along ready and willing to cooperate with the petitioner but the petitioner has not taken proper steps in

securing the sizer. As per the terms of the contract petitioner was to supply 75,000 M.T. of lime stone per quarter and it further mentions that in case petitioner failed to maintain supply of minimum quantity then the respondent was entitled to terminate the contract. Respondent has further contended that as a matter of fact that petitioner himself had abandoned the work as respondent was in dire need of lime stone they had to engage another agency but they had made it quite clear to the petitioner that they were ready and willing to continue the petitioner's contract provided petitioner was in a position to get his sizer and to supply the required quantity of lime stone. It is contended that the bank guarantee in question was towards the mobilisation advance paid to the petitioner and as the petitioner has abandoned the work and as there was to possibility of adjustment of the advance payment as per the terms between the parties against the supply to be made by the petitioner respondent had no other alternative than to encash the bank guarantee. The encashment of the bank guarantee is not at all illegal or against the terms of the contract between the parties. The respondent is forced to take this step due to the conduct of the petitioner. Therefore, in these circumstances, the claim of the petitioner by way of this interim application deserves to be rejected.

5. There is no dispute over the fact that the bank guarantee in question is given by the petitioner after having received Rs. 1,00,00,000/- as mobilisation advance. Thus, the bank guarantee in question is not a performance guarantee. Petitioner has produced the document of bank guarantee and for the purpose of deciding the controversy the following terms of the said documents are relevant, which are reproduced below :

"Whereas M/s. Coronation Constructions Pvt. Ltd., New Delhi (Contractor) on request of GHCL has agreed to provide an irrevocable and unconditional bank guarantee to GHCL for an amount of Rs. 100 lacs (Rupees One Hundred Lacs) towards the mobilisation advance and interest due thereon given to the Contractor by GHCL in terms of such contract."

"We do hereby guarantee and undertake to pay GHCL unconditionally, immediately on demand in writing, any or all unpaid monies claimed by GHCL, without any demur, recourse or without any reference to Contractor."

6. Before considering the contentions of the parties it is necessary to bear in mind the principles regarding granting of temporary injunction preventing the mobilisation of bank guarantees laid down by the Apex Court from time to time. In the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , the following principles are laid down :

"Commitments of banks must be honoured free from interference by the court and irrevocable commitment either in the form of a confirmed bank guarantee or an irretrievable letter of credit cannot be interfered with in order to restrain the operation of either irrevocable letter of credit or of the confirmed letter of credit or the bank guarantee. There must be serious dispute and 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 guarantee would be negatives and the fabric of trading operations would be jeopardised."

In the case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, , the following principles are laid down :

"The bank must honour the bank guarantee free from Interface by the courts. Otherwise the trust in the 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. Jagannath Shetty, J.) has observed, "where it is traditional bond or bank 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 defense except in case of fraud. The bank's obligation of course should not be extended to protect the unscrupulous party, that is the party which is responsible for fraud. But the banker must be sure of his ground before declining to pay. The nature of fraud that the court talks about is "fraud" of an egregious nature as to vitiate the entire underlying transaction."

Then in a recent case of The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, , the same principles are affirmed by laying down the following principles :

"The grant of injunction is a discretionary power in equity jurisdiction. The contract or guarantee is trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It treats an irrevocable obligation to perform the contract in the terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to cause nor is the court justified on that basis to issue an injunction from enforcing the contract, i.e., bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favor he/it is entitled to damages or other consequential reliefs.

It is settled law that the court before issuing the injunction under Order 39 Rule 1, 2 CPC should prima facie be satisfied that there is triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favor of issuing injunction to prevent remedial injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract unless there is a specific plea of fraud or special equities in favor of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in the execution of the contract of

guarantee, but not the contract either the original contract or any of the subsequent event that may happen as a ground for fraud."

7. Bearing the above principles in mind I proceed to consider the facts before me.

8. At the cost of repetition it must be stated that it is an admitted fact that the petitioner has been paid Rs. 1,00,000/- as mobilisation advance before he executed the bank guarantee in favor of the defendant and the bank guarantee in question has been obtained from the petitioner as a security for the mobilisation advance taken by him. From the pleadings of the petitioner as well as the documents on record it is quite clear that petitioner is not in a position to supply the agreed quantity of lime stone from the three mines of the respondent in every quarter. It is also an admitted fact that since October 1995 the petitioner has also stopped the mining work which he was carrying to some extent by manual labour till October 1995. The mobilisation advance was paid to the petitioner with an agreement to pay interest on the same @ 1%. The said mobilisation advance was to be adjusted towards the payment to be made to the petitioner for the supply of lime stone at the minimum quantity of 75,000 tonnes per quarter which was subsequently reduced but the petitioner has not, admittedly, supplied the agreed quantity of the lime stone from which there could be adjustment of the mobilisation advance. The material on record shows that the petitioner had requested the respondent to pay Rs. 12,00,000/- and odd amount towards labour charges of his sub-contractor and the respondent has accordingly paid the same.

9. From the facts it would be quite clear that the petitioner has abandoned the work in question since October 1995 and the dues of the respondent of the original mobilisation advance of Rs. 1,00,00,000/- Along with interest thereon for a period of more than one year are outstanding. The petitioner is alleging that he could not supply the agreed quantity of lime stone and he had to abandon the work for the non-supply of the sizer by the respondent. It is the contention of the respondent that it was not at all the responsibility of the respondent to supply the sizer to the petitioner and it was the responsibility of the petitioner himself to have all the equipments for mining lime stone from the three mines of the respondent. The petitioner has filed the present petition to refer the disputes between the parties to the arbitrator and one of the dispute is regarding the controversy as to whether the petitioner was to have the sizer or whether the respondent was to supply the sizer to the petitioner. Therefore, in my opinion, it would not be proper as well as just for me to make any observations pertaining to this controversy between the parties as this controversy is to be ultimately resolved by the arbitrator. Because my observations are likely to cause prejudice to both the sides and they are likely to weigh and prejudice the finding of the arbitrator. But, I would only mention there that the term Nos. 1(B) and 2 and 8 of the contract between the parties, which read as under :

1. BCCPL will employ manpower or mechanical methods for breaking sizing and sorting of lime stone as per GHCL's quality standards and specifications or as

directed by GHCL from time to time.

2. The Agency shall raise and size the limestone as per the directions of GHCL and under the overall control and supervision of the personnel of GHCL. For carrying out this work efficiently, the Agency shall deploy all required equipment. GHCL will provide assistance to the Agency in obtaining these equipment of lease/hire purchase.

8. The agency shall supply 300,000 (+10%) MTs of limestone per annum, ensuring a minimum output of 75,000 (+10%) MTs per quarter to GHCL, effective from first week of December, 1994."

10. Learned counsel for the petitioner vehemently urged before me that even after the writing of the letter by the respondent to their bank the respondent has written letter on the same day, i.e., on 20.11.1995 to the petitioner showing its readiness and willingness to continue with the contract if he was to continue the said contract. Therefore according to him, when that is the position the respondent is not at all justified in encashing the bank guarantee. He further submitted that respondent is likely to bring a sizer after 2/3 months and after they have obtained the sizer the petitioner is ready and willing to continue with the contract with the respondent and, Therefore, the bank guarantee in question should not be encashed. But these submissions of him are to be taken into consideration Along with the admitted fact that in October, 1995 the petitioner has abandoned the work and he has also moved his machinery from the mines of the petitioner to other sites. Thus, the admitted position is of the petitioner abandoning the work in question. The bank guarantee in question is obtained for the purpose of securing the mobilisation advance which was to be adjusted against the quantity to be supplied by the petitioner and for the last four quarters petitioner has not supplied the agreed quantity. The mobilisation advance was to be adjusted against the payment to be made to the petitioner on his supplying the agreed quantity but as there is no supply of any quantity on account of the petitioner abandoning the work the respondent has no opportunity to have the recovery of the mobilisation advance. By asking for encashment of the bank guarantee it could not be said that the respondent is trying to take any advantage or to cause a direct loss to the petitioner. By encashment of the bank guarantee what the respondent is going to get is the refund of the amount paid by them to the petitioner as mobilisation advance and their dues are more than the said mobilisation advance. The question as to whether the respondent has committed the breach of contract or whether the petitioner has committed breach of contract by abandoning the work and who is entitled to get damages are to be decided by the arbitrator and then the arbitrator has to decide as to whether the petitioner is entitled to get any damages or whether the respondent is entitled to get any damages because of the breach of contract between them. But as the position stands today by granting the injunction sought for by the petitioner the court will be causing irreparable loss or injury to the respondent then to the petitioner. The court's order will be amounting to giving disadvantage

of the process of law to the petitioner. From the material on record it is not possible to hold that the petitioner has made out any case of fraud or irretrievable injustice. Learned counsel for the plaintiff has cited before me the case of Larsen & Toubro Ltd. v. Maharashtra State Electricity Board and other JT 1995 (7) 18, but the said case is not of any assistance to him in view of the facts of this case. plaintiff has no case of either fraud or irretrievable injustice.

11. Therefore, in these circumstances, the petitioner is not entitled to get an ad-interim injunction sought for. I, Therefore, hold that the interim application filed by the petitioner will have to be dismissed.

12. IA. 11983/95 is dismissed. The interim order of status-quo dated 27.11.1995, shall stand vacated.