

(2001) 07 DEL CK 0171

In the Delhi High Court

Case No : IA. No. 1213 of 2000 in Suit No. 255 of 2000

M/s Goa Telecommunications and Systems Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-07-2001

Acts Referred:

Citation : (2001) 93 DLT 713 : (2001) 60 DRJ 308

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Mr. V.N. Kaura and Mr. Abhinav Vashist, for the Appellant; Mr. Prashant Bhusan, for the Respondent

Judgement

J.D. Kapoor, J.—This is an application under Order 39 Rules 1 & 2 for interlocutory injunction by way of restraining the defendants, their servants, agents, officers, representatives from and in any manner encashing or attempting to encash or acting further to demands dated 18.1.2000 issued for encashment of bank guarantees issued by Syndicate Bank, Panaji, Goa, defendant No. 4 and also for restraining defendant No. 4 from acting on the demand of defendants 1-3 and from disbursing or paying any money to the said defendants.

2. The facts relevant for the aforesaid application are in brief as under:

The plaintiff was one of the successful bidders to a tender floated by the defendant No. 1 and 2 for supply of optical fibre line terminating equipment in the year 1995 and the defendants placed an Advance Purchase Order (APO) on the plaintiff for supply of two items as referred in para 3 of the plaint for a total contract value of Rs. 9,17,56,000/-.

3. In terms of Clause 1 of the said Advance Purchase Order, the plaintiff furnished a Bank Guarantee (No. 24/95) of the Syndicate Bank, Panaji, Goa in the sum of Rs. 30,36,000/-. A detailed and final Purchase Order was placed by the plaintiff on 31.1.96 which was a consolidated purchase order for supply of

both the aforesaid items. In respect of one item the defendants rejected the plaintiff's sample. In the meanwhile the Bank guarantee which was furnished by the plaintiff in response to the Advance Purchase Order expired on 30.4.99.

4. In order to maintain cordial relations with the defendants, the plaintiff, by letter dated 13.7.99, agreed to replace the said expired guarantee by a fresh guarantee subject to the condition that replaced guarantee shall be for a value calculated as a percentage of the value of the purchase order dated 30.1.96 in accordance with Clause 4.1 of the General (Commercial) Condition of the contract. The plaintiff furnished the fresh guarantee for Rs. 22,62,103/- as against the sum of Rs. 30,36,000/-.

5. There was no response to the plaintiff's proposal and in fact by letter dated 20.10.99 the defendants 1 to 3 made a demand on the plaintiff for payment of Rs. 30,36,000/- the amount covered by the said bank guarantee, inter alia, on the ground that the plaintiff has not performed its contractual duties/obligations under the purchase order dated 31.1.96 and has, Therefore, purportedly committed breach of the contract.

6. However, the plaintiff while making its position clear sent a letter dated 2.12.99 to the defendants informing that even if the said bank guarantee had been alive, it was not encashable for the full amount as it was far in excess of the amount contractually required to be secured and also that in any event since one of the two items have already been supplied in full, the defendants were not entitled to recover the entire secured amount. In spite of this defendant No. 2 threatened to encash both the bank guarantees furnished by the plaintiff as security in two other contracts to recover the said amount of Rs. 30,36,000/- and revealed its entitlement to do so for the first time under the "Set-off" clause in conditions governing the purchase order dated 31.1.96. At the same time defendants 1-3 also issued two demands claiming a total sum of Rs. 27,36,160/- being the balance after adjusting the payment of Rs. 2,99,840/- issued by the defendants addressed to the Syndicate Bank, Panaji, Goa for encashment furnished by the plaintiff in two other purchase orders/contracts which were not related to the purchase order dated 31.1.96.

7. It is averred that the aforesaid Purchase Orders against which the two impugned bank guarantees were furnished by the plaintiff were fully executed and supplies there under concluded and the defendants 1 and 2 have also issued the Final Inspection Certificate to the plaintiff in respect thereto, the entire action of the defendants in firstly demanding from the plaintiff the full secured amount of Rs. 30,36,000/- is completely illegal and without any basis and the said defendants have no authority whatsoever under any provision of the contract governing the said Purchase Order, much less the purported "Set-Off" Clause, to recover the amounts purportedly and allegedly due in one contract from bank guarantees furnished by the plaintiff in other contracts.

8. It is further averred that even if it is assumed that the defendant shall the

authority to do so, the demand made by the defendants for encashment of the said two bank grantees is invalid as it is not in accordance with the said bank guarantees which can, in accordance with their terms, be encased only to recover damages in the event of breach of only those Purchase Orders in relation to which they were furnished.

9. The "Set-Off" Clause in the purchase order dated 31.1.96 under which the said bank guarantee is sought to be encased by the defendants is incorporated as Clause 21 of Section III of the General conditions Contract and reads as under:

"21.0 Set-Off - Any sum of money due and payable to the contractor (including security deposit refundable to him under this Contract may be appropriated by the Purchaser or the Government or any other person or persons contracting through the Government of India and set off the same against any claim of the purchaser or Government or such other person or persons for payment of a sum of money arising out of this contract or under any other contract made by the contractor with the purchaser of the Government or such other person or persons contracting through Government of India".

10. The relevant term requiring demand to be made in a specific manner contained in the bank guarantee reads as under:

"We, Syndicate Bank, Panaji Branch do hereby undertake to pay the amounts due and payable under this Guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the government by reason of breach by the said Contractor(s) of any of the terms or conditions contained in the said Agreement or by reason of the Contractor(s) failure to perform the said Agreement....."

11. According to the plaintiff the purported "Set-Off" Clause and the terms of the Bank Guarantee shows that the action of defendants 1 to 3 in attempting to encash the bank guarantees is not only completely invalid, illegal and without any contractual or equitable basis, but is also a completely mala fide action tantamounting to a fraud being played on the plaintiff.

12. Defendants, on the contrary accused the plaintiff for having failed to complete the contractual obligation and the purchase order was short closed and thereafter the plaintiff was requested to send a performance bank guarantee amount to the defendant but the request was not complied with and only a partial amount of Rs. 2,99,840/- was sent against the total amount Rs. 30,36,000/- and Therefore to realise the balance amount the defendants are within their right to invoke the Set-Off Clause.

13. As is apparent the whole controversy revolves around that fact whether the invocation is in terms of the bank guarantee or not s there is a distinction between the guarantee for due performance of the work contract and the guarantee given towards security deposit to that contract. It is settled law that

the invocation of bank guarantee should be in terms of the bank guarantee alone unless elements of fraud and irretrievable damages are involved.

14. In view of this settled position of law with regard to the relationship between banker and customer, the legal position governing the grant or refusal of injunction with regard to the bank guarantee is also beyond the pale of controversy.

15. The court should always be reluctant in the case of a confirm bank guarantee to interfere with the same. In other words it should refrain from injuncting against its encashment as doctrine of due performance of contract is not applicable to encashment of bank guarantees. The above view receives support and confirmation from the following decisions of the Supreme Court:

1. Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., .

2. Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, .

3. Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

16. Observations of the Supreme Court in Hindustan Steelworks vs. Tarapor & Co. case need to be reproduced. These are as under:

"Whether the bank guarantee is towards security deposit or mobilisation advance or contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee.

17. The main objection of the plaintiff is with regard to the authority to invoke the bank guarantee in question by switching in the Set-Off Clause i.e. Clause 21 of the Contract which states that any claim of the purchaser or the government or any other person or persons contacting through the Government of India and Set Off the same against any claim of the purchaser or government or such other person or persons for payment of a sum of money arising out of this contract or under any other contract made by such other person or persons contracting through Government of India.

18. The contention of learned counsel for the plaintiff in brief is that the invocation is not in terms of the bank guarantee in as much as bank guarantee was in respect of contract NO. SE/APO/18/98-99 while the invocation is being sought in respect of purchase order CPO/105/95-96 dated 31.1.96.

19. There is no dispute with regard to the legal preposition that the invocation of the bank guarantee has always to be in terms of the bank guarantee. In

Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , it was held that a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary of the bank guarantee constitute a separate distinct and independent contract.

20. In the aforesaid case bank guarantee was furnished to the Chief Engineer and chief Engineer was nowhere defined in the bank guarantee nor was it provided therein that the Chief Engineer was inclusive of Executive Engineer. It was held that the bank guarantee was inviolable by none except by the Chief Engineer. Since the Bank guarantee in that case was invoked by Executive Engineer, it was held to be wholly wrong as the bank was under no obligation to pay the amount covered by the Performing Guarantee to the Executive Engineer.

21. If the applicant/plaintiff succeeds in showing that the invocation of the guarantee is not in terms of the bank guarantee it will be entitled for interlocutory injunction, otherwise no. Admittedly the bank guarantee was given in respect of contracts SE/APO/18/98-99 and SE/APO/28/98-99 dated 1.9.98. The invocation is being sought in respect of purchase order CPO/105/95-96 dated 31.1.96.

22. Let us see what does the controversial Clause of the guarantee contemplates. Said Clause reads as under:

We, Syndicate Bank, Panaji Branch do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of breach by the said Contractor(s) of any of the terms or conditions contained in the said Agreement or by reason of the Contractor(s) failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee where the decision of the Government these counts shall be final and binding on the bank.

23. Clause 21 of the Agreement is a Set-Off Clause that has already been set out above.

24. As is apparent from the aforesaid clause of the bank guarantee, mere statement in the letter of invocation that the amount is due by way of loss and damages was sufficient as the bank was not concerned as to how the loss has been caused or suffered by the Government. Letter invoking the bank guarantee reads as under:

"1. This has reference to your letter No. Italtel/99-Y2K/453 dated 2.12.99 forwarding cheque No. 863268 dated 28.7.99 for Rs. 2,99,840/- against

encashment of the above mentioned bank guarantee.

2. In this connection your kind attention is drawn to this office letters of even no. dated 21.10.99 and 30.11.99 wherein your company were requested to pay Rs. 30,36,000/- i.e. equivalent to the bank guarantee amount on account of failure of contractual obligation against DOT Purchase Order No. CT/PO/105/95-96 dated 31.1.96 for the supply of OLTE and digital Mux.

3. In our letter dated 30.11.99, it was clearly mentioned that in case full payment is not received within 15 days, we shall be constrained to recover the amount from other bank guarantee available with this office.

4. While accepting the payment of Rs. 2,99,840/- as partial payment, the balance amount is being recovered from other bank guarantees available with this office by invoking set off clause of purchase order under reference."

25. By virtue of Clause 21 any sum or money due and payable under the contract can be appropriated by the purchaser or the Government or any other person or persons contracting through the Government of India and set Off the same against any claim of the purchaser or Government or such other person or persons for payment of a sum of money arising out of this contract or under any other contract made by the contractor with the purchaser of the Government or such other person or persons contracting through Government of India.

26. Thus the defendants were well within their right to invoke the bank guarantee though given in respect of a different contract after setting off the same against any claim of the purchaser under any other contract made by the contractor with the defendants.

27. Reliance by learned counsel for the applicant upon the decision made in Driplex Water Engineering Limited vs. Indian Oil Corporation FAO(OS)185/1999 is misplaced as in this case the invocation of the bank guarantee by the defendant-corporation was found to be not in terms of the bank guarantee. Similarly the ratio in Driplex Water Engineering Limited Vs. Indian Oil Corporation & Another FAO(OS) 185/1999 relied by the learned counsel does not come to its rescue. In Driplex Water the bank guarantee said that it was unconditional and irrevocable guarantee but at the same time it required serving of a notice of demand by the defendant on the bank and such a notice also required the defendant to state the amount of claim as retention cum performance. The bank guarantee provided that the amount so stated by the defendant in any demand claimed or notice of retention-cum-performance as between bank and the defendant for the purpose of the bank guarantee shall be conclusive.

28. Since it was observed that the invocation was not in consonance with the terms of the guarantee in as much as notice did not mention that there was a claim against the plaintiff and that it merely stated that the bank guarantee was being invoked as per the terms of the bank guarantee, that the invocation was held to be not in terms of the guarantee.

29. The difference of facts of the instant cases and the case referred above is of earth and sky.

30. In the instant case the defendants have made a claim in respect of past contract which was permissible under Clause 21 of the Agreement and the bank guarantee specifically mentioned that the bank shall pay the amount due and payable under the guarantee without any demur or merely on a demand from the Government stating that the amount claimed was due by way of loss or damage caused or would be caused to or suffered by the Government by reason of any breach by the said Contractor of any of the terms or conditions contained in the said Agreement or by reason of the contractor's failure to perform the said Agreement.

31. Since Clause 21 of the Agreement provided that if some of money due and payable by the contractor under this contract may be appropriated by the purchaser or Government or any other person or persons contracting through the Government of India and Set Off the same against any claim of the purchaser or Government or such other person or persons for payment of a sum of money arising out of this contract or under any other contract made by the contractor with the purchaser of the Government or such other person or persons contracting through Government of India, the objection of the plaintiff that the defendant was not empowered to invoke the bank guarantee in respect of a past contract is wholly groundless and without any substance whatsoever.

32. I deem it needless to discuss in detail the authorities cited by the learned counsel for the plaintiff in support of his contention that the bank guarantee has been invoked in respect of past contract and not in respect of the contract to which it pertained and Therefore is not in terms of the bank guarantee as the facts are pronounced distinguishable.

33. The authorities cited by the learned counsel are to the effect that unless the bank guarantee invoked is as per terms of the guarantee its invocation is bad in law. The authorities relied upon are:

- (i) Ansal Properties and Industries Ltd. Vs. Union of India and others,
- (ii) Puri International (P) Ltd. Vs. National Building Construction Co. Ltd., .

34. The Supreme Court has cautioned the courts to be slow in granting the injunction to restrain the realisation of such a bank guarantee and in a decision in AIR 1997 1644 (SC) has made the following observations with regard to the bank guarantees:

"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 realisation of such a bank guarantee. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain enforcement of bank guarantees. 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. 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."

35. In view of the undisputed legal position that the contract of bank guarantee is independent of the primary contract and encashment of an unconditional bank guarantee is not dependent upon the adjudication of dispute between the parties to the primary contract and since there is a stipulation that the bank shall pay the amount covered by the guarantee of payment without any demur and there is no plea of fraud or irretrievable injury neither has the applicant good prima facie case nor does the balance of convenience lie in its favor nor is the applicant going to suffer irreparable loss and injury.

36. The aforesaid reasons persuade me to decline the interlocutory injunction against the defendants. The application has no merit and is hereby dismissed.