
(2021) 03 TEL CK 0003
In the Telangana High Court
Case No : Writ Petition No. 20918 Of 2020

M/s. Tapaswi Infra Projects India Private Limited	APPELLANT
Vs	
Andhra Bank And Ors	RESPONDENT

Date of Decision : 16-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 21

Citation : (2021) 03 TEL CK 0003

Hon'ble Judges : Abhinand Kumar Shavili, J

Bench : Single Bench

Advocate : Y. Balaji, S. Ravi

Final Decision : Dismissed

Judgement

Abhinand Kumar Shavili, J

1. This Writ Petition is filed seeking a Writ of Mandamus declaring the action of the 2nd respondent in issuing the requisition letter to the 1st respondent-Bank for invocation of the four Bank Guarantees for the amount of Rs.4,40,00,000/- vide reference No.F&A/MKTG/BGINVOCATION/TIPIL/20-2021/22 dt.13-11-2020 and trying to invocation of the bank guarantees by the 1st respondent as illegal, arbitrary, violation of Clause 4 of the Agreement between the petitioner and the 2nd respondent and also against the violation of Covid-19 Regulatory Package Guidelines issued by the Reserve Bank of India (RBI) DT.27-03-2020 and also violation of Article 21 of the Constitution of India and consequently set aside the same.

2. Heard Sri Y. Balaji, learned counsel for the petitioner-company and Sri S.Ravi, learned counsel for the respondents.

3. It has been contended by the petitioner that it is a registered company and it had entered into an agreement with the 2nd respondent on 11-09-2017 for providing financial assistance for procurement of various equipments, materials from different sources for installation, erection, commissioning at different

projects awarded to the petitioner by various authorities. In pursuance to the above said agreement, the petitioner was to provide bank guarantees in favour of the 2nd respondent and accordingly, the petitioner had furnished bank guarantee to a tune of Rs.4,40,00,000/- in favour of the 2nd respondent from the 1st respondent-bank and the said bank guarantees are subsisting. The grievance of the petitioner is that due to Covid-19 pandemic, the petitioner could not pay to the 2nd respondent for the purchases made for the financial assistance provided by the 2nd respondent for procurement of various articles by the petitioner-company and the petitioner has addressed the letters to the 2nd respondent vide letters dt.16-07-2020m 21-08-2020 and 17-11-2020 requesting the 2nd respondent to grant time for payment till 31-12-2020.

4. Learned counsel for the petitioner has further contended that the RBI in Covid-19 Regulatory Package Guidelines dt.27-03-2020 and as per the aid package, directed to grant moratorium of three months for payment of instalments and the RBI has also issued Master Circular Guarantees & Co-acceptances on 22-08-2003 and directed all the banks to follow procedure prescribed under the Master Circular for issuing and maintaining the bank guarantees. But the 2nd respondent, without following the guidelines issued by the RBI, as stated supra, has straight away written a letter to the 1st respondent on 13-11-2020 for invocation of bank guarantees in its favour. In those set of circumstances, the present Writ Petition is filed and this Court was pleased to grant interim stay on 19-11-2020.

5. Learned counsel for the petitioner had contended that as per the agreement entered between the petitioner and the 2nd respondent dt.11-09-2017, the 2nd respondent must give time of minimum of 180 days for clearing the amounts in favour of the 2nd respondent, but without following any of the terms, the 2nd respondent has straight away issued a requisition to the 1st respondent for invocation of bank guarantee. Therefore, the action of 2nd respondent invoking the bank guarantees, without following the procedures prescribed in the agreement entered by the petitioner, is arbitrary and illegal. He further contended that appropriate orders be passed in the Writ Petition directing the respondents not to invoke bank guarantees as the 2nd respondent has not followed the procedure as prescribed in the agreement entered with the petitioner.

6. Per contra, learned counsel for the respondents had contended that the 2nd respondent has provided financial assistance to the petitioner and cleared all the bills for the materials purchased by the petitioner in pursuance to the agreement entered with the petitioner and invoices were also furnished to the petitioner on 28-08-2020 and that the 2nd respondent had demanded for payment of the dues in favour of the 2nd respondent as the 2nd respondent has already paid the said amounts for the purchases made by the petitioner. In all, the 2nd respondent had paid Rs.4,40,00,000/- and when the petitioner was not returning the said amount to the 2nd respondent, the 2nd respondent has no other option to invoke

the bank guarantees and accordingly, the 2nd respondent has written a letter to the 1st respondent on 13-11-2020 and to frustrate the justice, the petitioner has filed the present Writ Petition and obtained stay and therefore, the Writ Petition itself is not maintainable. The transaction is arising out of the terms of the agreement entered between the petitioner and the 2nd respondent and as per the said agreement, there is an arbitration clause and if the petitioner is aggrieved by any violation of the conditions of the agreement, the petitioner can invoke that arbitration clause, which reads as follows:

16.0 Arbitration:

"In the event of any dispute or difference between the parties hereto relating to the interpretation, construction, fulfillment or otherwise of this Agreement, such dispute or difference shall be settled by the process of arbitration by a SOLE ARBITRATOR to be appointed by the Chairman-cum-Managing Director of MSTC. The venue of such arbitration proceedings shall be at the Registered Office of MSTC at Kolkata and the costs of the arbitration shall be borne equally by the parties hereto. The provisions of the Arbitration and Conciliation Act, 1996 and the Rules framed thereunder or any amendment thereto shall apply to such arbitration proceedings. The award of the sole arbitrator shall be binding on both the parties."

7. Learned counsel for the 2nd respondent had further contended that the 2nd respondent is a Central Public Sector Enterprises under Government of India, Ministry of Steel and the 2nd respondent has provided financial assistance to the petitioner for purchases made by it and paid on behalf of the petitioner and thereafter, the 2nd respondent has been requesting the petitioner to repay the amounts strictly in accordance with the agreement. When the petitioner was not repaying the said amounts in favour of the 2nd respondent, the 2nd respondent has no other option except to invoke the bank guarantees provided by the petitioner in favour of the 2nd respondent.

8. Learned counsel for the 2nd respondent had relied upon the judgment of the Supreme Court in *Standard Chartered Bank v. Heavy Engineering Corporation Ltd. and others* 2020 (1) ALT 62 = Civil Appeal No.9288 of 2019, wherein it was held:

"19. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three Judge Bench of this Court in *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another* 3 {(1996) 5 SCC 450} held thus:

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank

guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5.The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties." (emphasis supplied)

9. Learned counsel for the 2nd respondent had further relied upon the judgment of the Supreme Court in *Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd and others* AIR 2016 SC 4502, wherein it was held:

"12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* [*Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110] , at para 14: (SCC pp. 117-18)

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage

of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

10. He has also relied upon the judgment of the Supreme Court in *Ansal Engineering Projects Ltd. V. Tehri Hydro Development Corporation Ltd. and others* (1996) 5 SCC 450, wherein it was held:

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere

invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] (SCC at p. 79). This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.* [(1996) 5 SCC 34 : JT (1996) 6 SC 295] , it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of

injunction, therefore, was reserved with certain directions with which we are not concerned in this case."

11. Learned counsel for the 2nd respondent had further contended that if the petitioner has alleged even any fraud or mis- representation against the 2nd respondent, the 1st respondent is bound to honour the bank guarantees executed in favour of the 2nd respondent-bank. The petitioner cannot have any such grievance. If the petitioner is having any grievance in respect of any violation of the agreement entered with the respondent-bank, it is always open for the petitioner to invoke the arbitration clause in the agreement. Therefore, the present Writ Petition is not maintainable.

12. He had further contended that all through the petitioner has been requesting to grant time for clearing dues in favour of the 2nd respondent up to 31-12-2020 vide letters dt.16-07-2020, 21-08-2020 and 17-11-2020. Even looking from that angle also, 31-12-2020 is already over long back and as per the request of the petitioner, the petitioner was granted time till March 2021. In spite of that the petitioner is not clearing the dues in favour of the 2nd respondent. Even as per the averments made in the writ affidavit and also to the letters addressed by the petitioner to the 2nd respondent on 16-07-2020, 21-08-2020 and 17-11-2020, the petitioner was requesting time up to December 2020. Even though December 2020 is also over and another 2 ½ months is already granted to the petitioner for clearing the dues in favour of the 2nd respondent, in spite of the same, the petitioner has not cleared the dues. Therefore, there are no merits in the Writ Petition and the same is liable to be dismissed.

13. This Court, having heard the rival submissions made by the parties, is of the considered view that the petitioner is complaining about violation of terms of agreement dt.11-09-2017 entered with the 2nd respondent. If the petitioner is having any grievance, it is always open for the petitioner to invoke arbitration clause in the agreement and pursue his remedy in accordance with law. As long as the petitioner has not alleged any fraud or mis-representation against the 2nd respondent, the question of interfering in the present Writ Petition directing the respondents not to invoke the bank guarantees provided by the petitioner in favour of the 2nd respondent would not arise.

From the catena of judgments, referred to above, unless and until fraud, coercion and mis-representation were attributed in favour of the beneficiary of the bank guarantees, the bank guarantees cannot be interfered with by the Courts.

14. Admittedly, in the instant case, the petitioner has not attributed any mala fides or fraud against the 2nd respondent and even if the bank guarantees are invoked by the 2nd respondent, it is always open for the petitioner to pursue his remedies in accordance with agreement clause and agitate the same before the Arbitrator in accordance with the agreement dt.11-09-2017 and if the petitioner succeeds in the arbitration proceedings, he can claim the amount of

Rs.4,40,00,000/-. Therefore, this Court is not inclined to interfere with the Writ Petition.

15. Accordingly, the Writ Petition is dismissed. However, the petitioner is given liberty to invoke arbitration clause in the agreement dt.11-09-2017. No costs.

16. Miscellaneous petitions, if any, pending in this writ petition, shall stand closed.