

(2006) 10 KAR CK 0027

In the Karnataka High Court

Case No : MFA No's. 3496, 3498, 3497 and 3499 of 2006

MSPL Ltd. and Ramgad Minerals And Mining Pvt Ltd.

APPELLANT

Vs

Neg Micon (India) Pvt. Ltd.
 MSPL Ltd. and Ramgad
Minerals And Mining Pvt Ltd. Vs Neg Micon (India) Pvt. Ltd.
and ICICI Bank

RESPONDENT

Date of Decision : 13-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : (2007) 4 BC 124

Hon'ble Judges : V. Jagannathan, J

Bench : Single Bench

Advocate : Sundaraswamy Ramdas and Anand, for the Appellant; P.S. Raman for Shreyas Jayasimha, for the Respondent

Judgement

V. Jagannathan, J.—In all these appeals the question involved concerns invoking the bank guarantees and the respondents moved the trial court for recovery of money due to them only in respect of O.S. No. 49 and O.S. No. 50 of 2005 in respect of the contract entered into between the parties and an application was filed seeking temporary injunction under Order 39 Rule 1 and 2 of C.P.C. by the respondent/plaintiff and the appellant filed an application for vacating the injunction under Order 39 Rule 4 of C.P.C. The trial court allowed the I.As. filed by the respondent-plaintiff and restrained the appellant herein from invoking the bank guarantees and further directed the respective parties to keep the bank guarantees current and valid till disposal of the suit. It is this order of the trial court restraining the appellant herein from invoking the bank guarantees that is called in question in all these appeals.

2. Learned Counsel for the parties submitted that though two of the appeals are listed for orders and other two appeals are listed for admission, all the appeals shall be disposed of once for all. Therefore with the consent of the learned Counsel appearing for the parties all these appeals were heard on merits and

hence this common order.

3. Learned Counsel Sri S.S. Naganand for the appellant submitted that as the question involved is almost identical in all these appeals, this Court can take up for convenience the grounds urged in M.F.A.No. 3498/2006 which is in respect of O.S.No. 50/2005 and whatever decision is taken in this appeal, the same will apply to other appeals also.

4. The facts which are necessary for disposal of all these appeals are to the effect that the respondent-company entered into a contractual agreement with the appellant herein for supply, erection and commissioning of 24 Wind Energy Generators (in short called as WEGs) and as per the contractual terms entered into between the parties, the WEGs supplied by the respondent-company were expected to generate 25 lakhs of non - saleable units from 950 kilowatt machines and 18.5 lakhs saleable units from 750 kilowatt machines in a year. The agreement also included a term to the effect that the machines will be made available for operation 95% of to the time every year. The case of respondent-plaintiff is to the effect that inspite of commissioning of WEGs, the appellant, herein refused to release the monies due to the respondent under the contract for supply of WEGs wind mills and the total amount outstanding from the appellant was to the tune of Rs. 3,797 lakhs. Despite repeated requests from the respondent-company the appellant herein did not make the payment, but on the other hand the appellant proceeded to appropriate huge penalty of Rs. 1,132 lakhs. In addition to this the respondent-plaintiff was shocked to receive a communication from the appellant herein to the effect that the appellant would proceed to invoke the conditional performance bank guarantees given by the respondent-company to the appellant. Relying on certain clauses in the conditional performance bank guarantees as well as supply contract costing Rs. 3.4 crores, the respondent-plaintiff approached the trial court praying for a decree directing the appellant herein to pay a sum of Rs. 1681.71 Lakhs with 12% interest till the date of actual payment and further to restrain the appellant herein from invoking conditional performance bank guarantees executed by the respondent.

5. The appellant herein contested the said suit of the respondent by contending in its written statement that it was the appellant rather than the respondent who has incurred loss because of failure on the part of the respondent to fulfill the conditions of the contract as well as for violation of the conditional performance bank guarantees. To be more specific, the contention of the appellant before the trial court is to the effect that there was delay in commissioning of WEG wind mills and secondly the machines did not operate 95% of time every year and therefore because of the inherent defects in the WEGs supplied by the respondent the minimum guaranteed power was not generated and as such the appellant was put to great loss since the appellant had in the course set up wind mills for the project in order to supply electricity generated to the KPTCL. Therefore referring to the various clauses of the contract entered into between

the parties and the required target being not met by the respondent company, the appellant taking note of the loss of generation of electricity in terms of kilowatts, contended before the trial court that it is the appellant which is put to great loss and therefore the respondent is due to the appellant company in a sum of Rs. 45,68,07,920/-. A counter claim was also made by the appellant herein in respect of loss incurred by it and therefore the appellant not only prayed for dismissal of the suit filed by the plaintiff but prayed for a decree in its favour to the tune of above said sum and in addition to grant interest at 12% p.a. on the amount liable to be recovered under the bank guarantees in a sum of Rs. 805.20 lakhs.

6. The learned trial Judge after considering the pleadings of the parties and the I.A. filed for temporary injunction and also taking note of the stand taken by the appellant herein for vacating the temporary injunction, came to the conclusion that the bank guarantees executed by the respondent was conditional performance bank guarantees and as such the appellant herein cannot be permitted to invoke the bank guarantees and therefore finding that the respondent herein having made out a prima facie case, the trial court ultimately passed the order on I.A.III allowing the temporary injunction sought for by the respondent and at the same time restrained the appellant herein from invoking the conditional performance bank guarantees executed by the respondent bearing Nos. 2004005 IBGP 0061, 2004005 IBGP 0060, 0009 BG 00037904, 0009 BG 00047904 and 0009 BG 00047804. It further directed the respondent to keep the bank guarantees current and valid till the disposal of the suit. Consequently I.A.VI filed by the appellant herein u/o 13 Rule 4 came to be rejected.

I have heard the submissions made by the learned Counsel Sri S.S. Naganand for the appellant and learned senior counsel Sri P.S. Raman for the respondent.

7. Learned Counsel Sri S.S. Naganand for the appellant took this Court through the voluminous documents that is produced in this case and pointing to the terms and conditions agreed to in between the parties in respect of supply, erection and commission of WEGs wind mills, submitted that the respondent company failed to meet the contractual requirements and therefore, the appellant had every right to invoke the conditional bank guarantees. Secondly it was submitted that the trial court did not look into the documents produced by the appellant.

Those documents will show the loss occasioned to the appellant-company in terms of low generation of power and the machines not being in operation for 95% of the time every year. Therefore, the finding of the trial court is erroneous and perverse because the available material on record was not looked into by the trial judge. Another important submission made by the learned Counsel is to the effect that, a plain reading of the performance guarantee which is produced at page 73 of the paper book will go to indicate that the decision of the company regarding non-fulfillment of the guarantee regarding the performance of the

machine shall be final and binding on all the parties mentioned in the deed of guarantee subjected to clause No. 3. Relying on this term appearing in the bank guarantee, it is submitted that once the respondent-company had failed to meet the requirement as per the agreed terms both in respect of power generation and the operation of machines, the appellant is at full liberty to invoke the bank guarantee and therefore, the trial court did not take these facts into consideration. It was further argued that the condition relating to power generation is not to be linked with the condition concerning the operation of the machines for 95% of the time during the year. Therefore, if these factors were taken note of by the trial court, the impugned order would not have been passed, but on the other hand, the appellant would have been permitted to proceed to invoke the bank guarantees.

8. In support of the above submissions, learned Counsel also referred to the decision of the Hon'ble Supreme Court in the case of BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, and submitted that the courts generally will not interfere with bank guarantees and that the bank concerned is bound to make payment irrespective of any contractual dispute between the principal and the contractor. It was further submitted that the rule that a bank guarantee be honoured in accordance with its term, has to be followed generally. But there are only two exceptions to the said rule and these two exceptions are one relating to fraud and the other one is when there are special equities in granting injunction, such as irretrievable injury or irretrievable injustice. Therefore, relying on the aforesaid decision of the Apex Court, it is submitted that the trial court could not have restrained the appellant from invoking the bank guarantees. Yet another submission made was to the effect that no irreparable injury is caused to the respondent if the appellant is permitted to invoke the bank guarantees.

9. On the other hand, learned senior counsel Sri. P.S. Raman appearing for the respondent, referring to the document produced and in particular, the conditional bank guarantee, submitted that a close reading of the performance bank guarantee would leave no doubt in any one's mind as to the nature of the bank guarantee that was given to the respondent by the appellant company. It is his submission that the bank guarantee was a conditional one and that it is not unconditional bank guarantee so as to permit the appellant to invoke the same. In this connection my attention was drawn to the clause which provides for the WEG's being tested for their power curve performance as mentioned in the supply order by a certified agency like O-WET, NAL, TERI or any other competent agency and once it is so certified that the WEGs have not generated the power as per the authenticated power-curve of each machine and then the company will have the right to each claim against the bank guarantee. Relying on this condition in the performance bank guarantee, learned senior counsel submitted that since the said conditions were not satisfied in the instant case, the appellant had no right to invoke the bank guarantees and therefore, the trial court was right in granting temporary injunction in favour of the respondent. It was also

submitted that the respondent company incurred huge losses on account of the delay in payment by the appellant herein and having regard to the magnitude of the loss occasioned to the respondent, the amount of the bank guarantee is hardly negligible inasmuch as it is only to the tune of Rs. 805.20 lakhs. Further it was submitted that whether the respondent had failed to meet the required units of power generation and whether the respondent has also failed to ensure that the machines were kept in operation for 95% of the time every year, are matters which require detailed examination at the trial and therefore, the trial court has considered all these aspects of the matter and has rightly refrained the appellant herein from invoking the bank guarantees. Learned senior counsel also referred to the letter issued by the appellant to submit that the contract entered into between the parties concerning the bank guarantee, relates to the performance/availability of the machines mentioned in the supply order. In other words, the guarantee is in respect of the performance as well as the availability of the machines and that these two go together.

10. So far as the law relating to bank guarantees being invoked is concerned, learned senior counsel referred to the decision of the Hon'ble Supreme Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, to contend that the injunction against invocation of bank guarantee shall be in accordance with the terms of the bank guarantee. In other words, the point that the learned senior counsel wanted to drive home is that, unless the bank guarantee indicates that it was of an unconditional nature, the trial court is certainly right, in restraining the appellant from invoking the bank guarantee. In the instant case, it is the submission of the learned senior counsel that the bank guarantee is a conditional performance bank guarantee. Therefore, relying on the aforesaid decision of the Apex Court, it is submitted that application of the law laid down by the Apex Court in the decision referred to by the learned Counsel for the appellant would depend upon the facts and circumstances of each case and the terms agreed to between the parties. Another decision referred to by learned senior counsel is with regard to the interference by the appellate court in the matter of exercise of discretion by the trial judge and referring to the Apex Court ruling in the case of Wander Ltd. and Another Vs. Antox India P. Ltd., it is submitted that interference by the appellate court will be called for only where it is shown that the court of first instance has exercised its discretion arbitrarily or capriciously or perversely or where the court had ignored settled principles of law regulating grant or refusal of interlocutory applications. If the discretion had been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

11. In the light of the submissions made and the rulings cited by the respective sides, the point that requires consideration is, whether the bank guarantee given by the respondent to the appellant is an unconditional bank guarantee or whether it is a conditional bank guarantee and the answer to this question would ultimately decide the fate of these appeals. The learned Counsel for the

appellant, Sri. Naganand submitted that as the respondent company had failed to generate the required units of power and secondly, as the machines were found not in operation for 95% of the time of the year, necessary ground for invoking the bank guarantee have been made out and as such, the trial court could not have refused the appellant from invoking the bank guarantee. The fact that the machines were not available through out the year for operation to the extent of 95% is an admitted fact as could be seen from the pleadings of the party and the minutes. Since both the parties made claim over the other in respect of loss occasioned to each of them, the trial court will be required to go into the details of the stand taken by respective sides and as we are dealing with the matter at the interlocutory stage and as the submission made by the learned Counsel for the appellant is mainly concerning the bank guarantee, it is to be seen as to whether the bank guarantee is an unconditional one giving the appellant the liberty to invoke it, the moment there was failure on the part of the respondent in fulfilling the requirement of the performance of the Wind Mill as well as the availability of the machines as stated in the supply order.

12. The bank guarantee which is produced at page 69 of the paper book refers to the decision of the company i.e., the appellant herein which shall be final in so far as non-fulfillment of the guarantee regarding the performance of the machine. However, it is also observed from the said bank guarantee that before invoking the bank guarantee, the appellant company will also have to satisfy one more condition and the said condition which is found at page No. 71 of the paper book reads thus:

In case The WEGs fail to achieve the guaranteed performance during the period of one year, the company will get the WEGs tested for the power curve performance as mentioned in supply order by a certified agency like C-WET, NAL, TERI or any other competent, agency. Once it is certified that the WEGs have not generated power as per the authenticated power curve of the each machine, the company will lodge the claim against this Guarantee.

13. Therefore, it is clear from the above Clause 3 of the performance bank guarantee that the right of the company to lodge the claim to invoke the bank guarantee will arise only when the certified agency like C-WET, NAL, TERI certify that, the WEGs have not generated power as per the authenticated power-curve of each machine. Therefore, if a certificate as contemplated in the above Clause No. 3 is obtained by the appellant company, then the bank concerned will have to honour the claim of the appellant. However, if we take a look at the order passed by the trial court, it becomes clear that the appellant herein had not obtained the report from the C-WET and therefore, the trial court has observed that it's claim for invoking conditional performance bank guarantee arises only after a report as contemplated in clause No. 3 of the bank guarantee is obtained. It is also admitted by the appellant before the trial court that no such report from the C-WET has been obtained about, the performance of the power-curve. The trial court having taken note of these facts, has therefore, came to the conclusion

that the bank guarantee in question is not an unconditional bank guarantee, but it is a conditional bank guarantee subject to the fulfillment of Clause No. 3 of the said performance bank guarantee.

14. In fact, if the bank guarantee is an unconditional one and if the appellant company is having the right to take a final decision as regards the non-fulfillment of the guarantee and the decision taken by the appellant-company is a final one and binding on all the parties, the bank concerned certainly would have honoured the request of the appellant who invoked the bank guarantee. But in the case on hand it is seen from the order of the trial court that the bank concerned did not allow the appellant company to invoke the bank guarantee, unless the appellant also submits report of the C-WET about the performance of the power-curve. Hence, all these facts clearly go to indicate that the bank guarantee in question is a conditional performance bank guarantee and not an unconditional one.

15. As far as the argument of the learned Counsel Sri. S.S. Naganand for the appellant that the condition in Clause No. 3 only relates to the power-curve performance and not to be linked to the availability of the machines is concerned, a reading of the performance bank guarantee does not anywhere give the impression that even in the case of non-availability of the machine, the appellant can invoke the bank guarantee. Therefore, in the absence of such a specific term being found in the performance bank guarantee, it is not possible to read the two conditions in opposition so as to warrant the view that notwithstanding the power-curve performance clause, the appellant is still entitled to invoke the bank guarantee on the non-availability of machinery.

16. Coming to the decisions referred to by the learned Counsel for the parties in so far as the ruling reported in AIR 2006 SC 728 is concerned, I have carefully gone through the said decision and the various clauses of the agreement referred to in the said decision are not the ones similar to the one we have on hand. In other words, the conditions that are obtaining in the performance bank guarantee in the instant case are quite different from the one with which the Apex Court was dealing in the said case and in the said case the Apex Court found that there was no satisfactory performance of the contract and therefore, encashing the bank guarantee was held to be justified. Furthermore, in the said decision at para 26, it has been observed that the appellant is the best judge to decide as to when and for what reason the bank guarantee should be encashed. In the instant case, no such provision is there in the performance bank guarantee and further more as already stated, the bank in question has called upon the appellant to produce the report of the C-WET, whereas in the decision of the Apex Court it has been also observed at para 26 that the second respondent-bank has obliged to make payment when the bank guarantee was called in, irrespective of any contractual dispute between the appellant and the first respondent. No such conditions are forthcoming in the case on hand and therefore, what we are dealing here is an altogether a different cup of tea. The

ruling referred to, therefore, does not apply to the case, as the facts and circumstances are entirely different.

17. In the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , the Apex Court has observed that:

What is important, in matter of grant of injunction restraining invocation of Bank guarantee is that the Bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the Bank guarantee was furnished. The terms of the Bank guarantee are, therefore, extremely material. Since the Bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank guarantee; or else, the invocation itself would be bad.

In the light of the aforesaid proposition of law laid down by the Apex Court in the case on hand at this stage not permissible to take the view that the bank guarantee in question is an unconditional one. As regards the submission made by the learned Counsel for the appellant, the trial judge did not consider many of the documents produced in proof of loss of power generation as well as loss of availability of the machines is concerned, it has to be mentioned that so far as these aspects of the matter is concerned, the same requires detailed investigation, as the respondents have strongly disputed the said stand taken by the appellant, it is a matter of evidence which will have to be gone into by the trial court in detail. But however, it is relevant to observe at this juncture that the trial court has not only referred to various clauses of the bank guarantee in question, but has also observed thus at page 24 of its order:

If temporary injunction is not granted, the purpose of filing this suit will be frustrated. The learned Counsel for the defendant has also submitted that if court holds that bank guarantee ought not to be invoked or encashed during the pendency of the suit, then he has requested that the plaintiff may be directed to keep the bank guarantees current and valid till disposal of the suit or any orders from the higher courts.

18. "On the other hand, learned Counsel for the defendant also submitted that if the court holds that the bank guarantee ought not to be invoked or encashed during the pendency of the suit, then he has requested that the plaintiff may be directed to keep the bank guarantee current and valid till the disposal of the suit in orders from the higher courts."

19. Therefore, the trial judge after considering all the aspects of the matter and the submission made to the above effect by the counsel for the appellant in the trial court has ultimately passed the impugned order restraining the appellant from invoking the bank guarantees and at the same time has directed, the

respondent to keep the bank guarantees alive and valid till the disposal of the suit or any order from the higher side. The above said decision of the trial judge, therefore, cannot be termed as capricious or unreasonable and in this regard, the observations of the Hon''ble Supreme Court in the Wanders Ltd. case (supra) is worth repeating here. At para 14 of the said judgment, it has been laid down thus:

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court, will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court''s exercise of discretion.

20. Having regard to the above position in law, in the instant case, I am of the considered opinion that the order passed by the trial court on I.A.III granting temporary injunction in favour of the respondent and dismissing the I.A.VI filed by the appellant therefore, does not call for interference. Hence, this appeal has to fail and accordingly, it stands dismissed.

21. Since the question involved in all the other appeals also relate to invoking the conditional bank guarantee, the observations made above, will also apply to the grounds urged in the said appeals and as the consequence of the finding arrived at in this appeal, the other appeals also stand dismissed.

22. Before parting, it is necessary to make an observation to the effect that as this Court has examined the matter at the interlocutory stage, it is made clear that none of the observations made above shall have any effect on the final decision to be arrived at on merits after adducing evidence.

23. Since there is huge claim made by the respondent on the appellant and vice-versa, having regard to the nature of the controversy involved and the magnitude of the loss each party claims to have sustained, it is further necessary to direct the trial court to dispose of the main matter within six months from the date of communication of this order. In the circumstances, no order as to costs.