
(2001) 09 DEL CK 0050

In the Delhi High Court

Case No : IA 12922/96 and 1026/97 Suit No. 3154/96

Munters India Ltd.

APPELLANT

Vs

National Thermal Power Corporation Ltd. and Others

RESPONDENT

Date of Decision : 19-09-2001

Acts Referred:

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

Citation : (2001) 09 DEL CK 0050

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : Ravi Gupta, for the Appellant; S.K. Taneja and Rajesh Gupta, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Aggarwal, J.—plaintiff, M/s. Munters India Ltd., has filed the suit seeking permanent injunction against defendant No. 1 (National Thermal Power Corporation) restraining defendant No. 1, servants, agents or representatives in any manner encashing the bank guarantee bearing No. 39/94 to a sum of Rs. 11,87,000/- drawn on defendant No. 3 (Punjab National Bank).

2. The facts alleged are that defendant No. 1 was awarded a contract by defendant No. 1 for erection and installation of a tower at NTPC Vidyut Nagar, Dadri District, Ghaziabad. For the said erection and installation of the cooling tower defendant No. 2 had required the PVC Nested sheets type JC.10.19. Defendant No. 1 had placed an order upon the plaintiff for supply of the said sheets. An agreement of 17th January, 1994 modified on 22nd March, 1994 was entered between the plaintiff and defendant No. 2 for sale and supply of such goods. A joint meeting was held between plaintiff and defendants 1 and 2 and the payments terms were settled. It was agreed that initial advance of 10% on acceptance of the order secured by bank guarantee would be given and was to be extended and was to be kept alive for a period of 30 days beyond the date of receipt of the material.

3. In accordance with it the plaintiff was required to furnish a bank guarantee to the tune of 10% of the total value of the contract. The bank guarantee was initially valid till 31st October, 1994 and the same was to be extended and to be kept alive for a period of three months beyond the date of the receipt of the last consignment. The plaintiff furnished the bank guarantee to the tune of Rs. 18,19,884/- in favor of defendant No. 1. It was valid upto 30th October, 1994. The plaintiff sold and delivered the goods to the defendant No. 1 at the site. The plaintiff was raising invoices against defendant No. 2 for each of the supply made. The plaintiff had kept the bank guarantee alive as per terms of the agreement vide letter of 29th June, 1995 written by defendant to the plaintiff the amount of bank guarantee was reduced to Rs. 11,87,000/-. Accordingly a fresh bank guarantee bearing NO. 39/94 dated 12.4.1994 was given.

4. It is asserted that goods under the agreement has already been sold and supplied and the delivery stood completed on 17th June, 1995. The contract in this process was completed. The plaintiff was required to keep the bank guarantee alive only thus up to 16th July, 1995. It received a letter dated 23rd November, 1995 from defendant No. 1 Corporation required the plaintiff to further extend the period of bank guarantee failing which the plaintiff was threatened for invocation of the bank guarantee. In this process the plaintiff was coerced and forced to extend the bank guarantee. Though it was extended but a letter of protest was written. It is alleged that the same could not be kept alive for any further period. Defendant No. 1 again wanted the plaintiff to extend the bank guarantee asserting that the contract has been completely satisfied, the money paid by defendant No. 1 has already been paid and delivery of the goods received and accepted. Therefore, the bank guarantee cannot be kept alive. On these broad facts the present suit seeking the above said injunction has been filed.

5. In the written statement filed defendant No. 1 has contested the suit. It is admitted that defendant No. 2 had placed an order on the plaintiff for supply of nested sheets and that the bank guarantee in accordance with the minutes as were drawn had been recorded. But as per defendant No. 1 the plaintiff has tried to conceal the facts. The fact has not been mentioned that there were minutes of the meeting on 29th July, 1993, 30th July, 1993 and 3rd August, 1993 which have been concealed. The contract was awarded to M/s. Wig Brothers. It is apparent that contract was having two types of rates and rates of Alternative II is higher than Alternative I.

6. It is admitted that in unconditional bank guarantee had been furnished and as per the minutes of the meetings of 29th July, 1993, 30th July, 1993 and 3rd August, 1993 plaintiff had agreed for the lowest possible price. It is admitted that delivery of the goods was made by the plaintiff. Defendant No. 1 received goods from defendant No. 2 since the contract was awarded to defendant No. 2. However, it is alleged that from time to time defendant No. 1 made a request to the plaintiff to obtain the deemed export benefits and make sincere efforts in this

regard as per terms and conditions of the contract. The plaintiff failed to give any satisfactory Explanations. The plaintiff himself accepted these material facts that they were not able to take the deemed control benefits from the concerned office. Vide the letter of 30th September, 1996 the plaintiff himself came out with the difficulty and reasons due to which they were not in a position to get deemed export benefits. They communicated that defendant No. 2 had to applied for invalidation of their license so that the supply could be taken from the plaintiff. On 26th December, 1996 that plaintiff had categorically written that they have not been able to obtain full deemed export benefits and Therefore alternative price is applicable. It is asserted that the rates were paid provisionally and bank guarantee in this process could be kept alive. The assertions of the plaintiff to the contrary had been controverted alleging that contract has not been fully satisfied and completed. The access money of Rs. 17.03 lakhs paid by defendant No. 1 to the plaintiff is still outstanding.

7. During the pendency of the suit the plaintiff prayed for an ad interim injunction to restrain defendant No. 1 or its employees from encashing bank guarantee. Defendant No. 1 on the contrary filed an application for vacation of the ex parte order passed by this court. By this order both IAs 12922/96 and 1026/97 is to be disposed.

8. Learned counsel for the plaintiff highlighted the fact that the contract had been satisfied, delivery of the goods had been effected. the money paid by defendant No. 1 as advance also stood repaid and there is no dispute between the parties with respect to computation and adjustments. Therefore, there was no ground to keep the bank guarantee alive. But on behalf of the defendants it has been denied that defendant No. 1 has paid more amount. It is the plaintiff who himself wanted more time for the bank guarantee to be furnished and adjustment necessarily has to be done and consequently it was asserted that the bank guarantee claimed could not be stopped to be encashed.

9. On behalf of the plaintiff strong reliance was placed on the decision of this court in the case of Radhey Shyam Bansal v. Indian Farmers Fertilisers Cooperative Ltd. 35 (2000) DLT 484. It was held that the bank guarantee has to be invoked strictly in accordance with terms and tenor of bank guarantee. The bank would not be liable to honour its invocation if it is not in the terms of the guarantee. The bank guarantee would be discharged on satisfactory completion of work. In the cited case the Indian Farmers Fertilisers Cooperative Ltd. had awarded a work of construction to the plaintiff. The work had to be completed within 15 months. The plaintiff's assertions was that they had completed the work to the satisfaction of the respondent and a completion certificate had been issued. IN the facts of that case it was found that the work as such had been completed and the bank guarantee was being extended unreasonably in violation of the terms and conditions of the guarantee by exercising undue influence. Therefore, a restraint order was passed restraining the respondents from invoking the bank guarantee. These facts clearly show that the present case is on

a different premises. As would be noticed hereinafter it cannot be termed that bank guarantee was being extended unreasonably in violation of the terms or that there was nothing that was due to respondent No. 1. Once it is so it must be held that ratio decidendi of the cited case will have no application to the facts of the present case in hand.

10. The law as to under what circumstances ad interim injunction can be passed or not has been subject matter of consideration before the Supreme Court in number of matters. In the case of National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, The contractor had agreed to supply pumps. the matter in dispute was referred for arbitration. The supplier was keeping the bank guarantee alive by renewal. It was held that injunction against invocation of bank guarantee should not be granted. One factor which weighed with the Supreme Court was that there was no circumstance pointed which would result in any irretrievable injustice to the first respondent if the bank guarantee is released.

11. Similarly in the case of Hindustan Steel Works Construction Ltd. v. Tarapore Company AIR 1996 SC 2263 the Supreme Court held that when unconditional bank guarantee is furnished there would be two exceptions which may call for interference, namely fraud or where irreparable injustice would be caused, a bank guarantee is allowed to be encashed. In paragraph 23 the findings in this regard recorded were:-

"We are, Therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the Courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the Court should interfere. IN this case fraud had not been pleaded and the relief for injunction was sought by the Contractor/respondent No. 1 on the ground that special equities or the special circumstances of the case required it....."

12. Same view had been expressed by the Supreme Court in the case of AIR 1997 1644 (SC) he earlier view that the bank guarantee should be honoured and that there are two exceptions, namely fraud committed or encashment of the bank guarantee would result in irretrievable harm had been reiterated. Same was the view in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

13. Reverting back to the present case in hand obviously question that comes up for consideration is as to whether there is any fraud that has been practiced or not. The plaintiff/petitioner does not allege any fraud. On the contrary, it is being asserted that they were being coerced to do so. But for purpose of the present order undue influence and coercion cannot be taken to be so established. This is apparent from the letter of 8th December, 1995 written by the plaintiff to the National Thermal Power Corporation. Of course there is a whispering protest that

they don't want to precipitate the matter but still it was pointed that they are taking steps to extend the validity of the bank guarantee without prejudice to their rights. By no stretch of imagination it can be taken that any fraud as such had been practiced. This letter has been written after the alleged supply of the goods and Therefore the question of fraud or any other extraneous influence to be exercised on the plaintiff cannot be believed to have been exercised.

14. Otherwise also there is little assertion on the record to conclude that if the bank guarantee is alleged to be invoked an irreparable injury would be caused and Therefore the ad interim injunction cannot be granted to the plaintiff. Merely asserting that he would be put to grave loss or irreparable harm will not necessarily satisfy the ingredients of Order 39 Rule 1 Code of Civil Procedure.

15. As a consequence thereto the application filed by the application seeking ad interim injunction must fail and is dismissed. The ad interim injunction already granted is accordingly vacated and is of the defendant No. 1 under Order 39 Rule 4 CPC is allowed.

16. List it on 21st February, 2002 for framing of issues.