

(2009) 09 DEL CK 0108
In the Delhi High Court
Case No : CS (OS) 2477 of 1991

National Hydro Electric Power Corpn. Ltd. APPELLANT
Vs
Punjab and Sind Bank and Another RESPONDENT

Date of Decision : 03-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3

Citation : (2010) 2 BC 473

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : V.P. Dewan, for the Appellant; Pallav Saxena, for D-1, for the Respondent

Judgement

S. Muralidhar, J.—This suit by the National Hydro Electric Power Corporation Ltd. ("NHPCL") has been filed against the Punjab & Sind Bank ("Bank") and M/s. Bhasin Associates Limited ("BAL") for recovery of a sum of Rs. 29,18,850/- with pendent lite interest and future interest at the rate of 18% per annum till the recovery of the decretal amount, together with costs.

2. NHPCL awarded a contract dated 30th March 1988 in favour of Defendant No. 2 BAL for the construction of silt ejector and power channel including escape channel at Tanakpur Hydro Electric Power Project, Nainital. According to the plaintiff for the smooth performance of the contract, Defendant No. 2 BAL requested its banker Defendant No. 1 Bank to furnish to the NHPCL five bank guarantees the details of which are as under:

Bank Guarantee No. Dated Amount

(1) 24/90170/89 12.08.89 6,00,000 (2) 24/90177/89 21.10.89 3,00,000 (3) 24/90008/90 24.01.90 4,00,000 (4) 24/90082/90 06.07.90 11,00,000 (5) 24/90179/90 15.11.90 5,00,000

3. It is stated that when BAL committed defaults in the performance of the contract and stopped work unilaterally on 6th July 1991, a letter dated 10th July

1991 was written by the plaintiff to the Bank calling upon it to encash the bank guarantees. The Bank, however, did not immediately encash the bank guarantees within 48 hours as stipulated in Clause 2 of each of the bank guarantees. Instead the bank wrote to the plaintiff on 24th July 1991 stating that they had referred the matter to their advocate for opinion. After awaiting for 15 days, NHPCL filed the present suit under Order XXXVII CPC on 26th July 1991 seeking the above reliefs.

4. The Defendant No. 1 Bank entered appearance on 22nd October 1991 and filed IA No. 11031 of 1991 under Order XXXVII Rule 3 for condonation of delay in entering appearance. By this time, Defendant No. 2 BAL had filed Suit No. 146 of 1991 in the Court of the learned Civil Judge, Nainital praying inter alia for an injunction restraining the Bank from encashing the bank guarantees in question. On 1st August 1991 the following order was passed by the learned Civil Judge, Nainital:

1.8.91 Case called out.

Present: Shri Bupinder Singh, Advocate.

Shri R.K. Mehrotra, Advocate For the plaintiff.

Shri L.M. Bhatt

Shri K.C. Upraiti For defendants. Objection 27/C alongwith affidavit 28/C filed at 3.30 p.m.

Learned Counsel for the plaintiff requested that status quo in respect of encashment of bank guarantee be maintained. Learned Counsel for defendant stated that bank guarantees have been encashed to the best of his knowledge.

Fix 6.8.91 for disposal. Meanwhile parties shall maintain status quo in respect of bank guarantees.

5. It is not in dispute that the above suit was filed by BAL against the plaintiff herein as well as the Bank. Defendant No. 2 BAL filed another suit being Suit No. 158 of 1991 in the court of learned Civil Judge, Nainital in which an order dated 20th August 1991 was passed restraining NHPCL from using the machinery and equipment belonging to BAL. Aggrieved by the said interim order dated 20th August 1991 NHPCL filed a revision petition in the High Court of Judicature at Allahabad which came to be dismissed on 30th August 1991. Aggrieved by the dismissal of its revision petition by the High Court, NHPCL filed SLP (Civil) 24807 of 1991 in the Supreme Court. In the said case the following order was passed by the Supreme Court on 18th September 1991:

Special leave granted.

Heard Counsel for the parties.

We are of the view that the order made by the Allahabad High Court which is impugned has to be vacated. We accordingly allow this appeal and vacate the

order of the High Court.

The dispute which the respondent now raises on account of the termination of the contract has to be referred to Arbitration but we are inclined to agree with Mr. Salve that the Arbitrator should not be one contemplated in this agreement but should be a retired Judge.

We accordingly appoint Mr. Justice H.N. Seth, a retired Chief Justice of Punjab & Haryana High Court as an Arbitrator.

The Arbitrator will hear parties and make orders as to measurement of the work done by the contractor, if possible, with the assistance of a capable engineer. The work at the site shall continue without any interference and the arbitration proceedings will also continue simultaneously .

Injunction granted against the use of the Contractor's machinery shall be sustained as Mr. Dutta for the appellant does not want to use the same. The dispute which shall be referred would be the entire one relating to the contract and not to termination only.

No costs.

6. It appears that after the aforementioned order was passed by the Supreme Court, BAL filed an application (No. 42-C) in Suit No. 146 of 1991 in the court of the Civil Judge, Nainital seeking stay of further proceedings in the suit on the ground that all disputes between BAL and NHPCL, including the issue relating to encashment of bank guarantees, had been referred to the Arbitrator. It was prayed that the civil court should stay its proceedings till such time the Award was not passed by the learned Arbitrator. NHPCL opposed this application by filing an objection (numbered as 46-C). An order dated 15th February 1992 was passed by the learned Civil Judge in the said application in which it was noticed that the Supreme Court had referred all the disputes between the parties to arbitration and that the arbitration proceedings were not confined to the disputes arising in Suit No. 158 of 1991. Before the learned Civil Judge it was urged by the plaintiff herein that in view of the settled law explained by the Supreme Court the withholding of the bank guarantees was not justified. However, this plea was not accepted. The learned Civil Judge noted that the order dated 1st August 1991 passed by the Civil Court staying the encashment of bank guarantees had not been challenged by the NHPCL in the High Court and, therefore, remained in force. Further, in view of the fact all the disputes between NHPCL and BAL had been referred to arbitration, the civil court had to await the award of the Sole Arbitrator and till such time the proceedings in Suit No. 146 of 1991 was stayed. The objection petition filed by the plaintiff herein i.e. NHPCL was dismissed. This order dated 15th February 1992 passed by the learned Civil Judge was not challenged by the NHPCL thereafter.

7. It appears that the proceedings before the Sole Arbitrator, Justice H.N. Seth, the retired Chief Justice of the High Court of Punjab & Haryana, did not conclude

within the stipulated time. This led to the Supreme Court being again approached by way of IA No. 4-6 in Civil Appeal No. 6372 of 1991 seeking extension of time for the conclusion of the arbitration proceedings and passing an Award. These applications were dismissed by the Supreme Court on 27th August 2004. As a result, the arbitration proceedings came to an end.

8. As far as the present suit is concerned, IA No. 2721 of 1994 being the application for leave to defend filed by the Bank was allowed unconditionally by this Court by an order dated 4th May 2000. The grounds on which leave to defend was sought by the Bank were that the Civil Judge, Nainital had by an order dated 1st August 1991 in Suit No. 146 of 1991 stayed the encashment of the bank guarantees; that all the disputes between the NHPCL and BAL including the dispute concerning the encashment of the bank guarantees had been referred to a Sole Arbitrator, Justice H.N. Seth; the arbitration proceedings had not concluded and lastly, by the order dated 15th February 1992 the learned Civil Judge had stayed the further proceedings in Suit No. 146 of 1991 till such time the Award was not made. This Court in the order dated 4th May 2000 noted that: "there was a stay of encashment of bank guarantees even on the date of filing of the suit and till such time the stay is vacated the plaintiff, in my view, is not entitled to receive any money from Defendant No. 1. This itself is sufficient to entitle Defendant No. 1 to the grant of leave to defend the suit." The order dated 4th May 2000 was not challenged by the Defendant.

9. As far as Defendant No. 2 BAL is concerned, by an order dated 26th February 2001 its right to file a written statement was closed. It has not been appearing in the suit since.

10. The stand taken in the written statement filed by the Defendant No. 1 Bank is a reiteration of the grounds urged by it in its application for leave to defend. In addition, it is contended that the bank guarantees in question were not issued by the bank in consideration of any contract between NHPCL and BAL. It is contended that they were not performance guarantees. It was urged that even when the first bank guarantee was issued by the bank, BAL had carried out work to the tune of Rs. 9,18,87,179/- as against the total value of Rs. 8,58,99,500. Since the value of the contract executed had exceeded the value of the contract there was no occasion for the Bank to issue and the NHPCL to expect any bank guarantee for "the smooth performance of the contract." Further it is contended that the bank guarantees had not been invoked in terms thereof. Reliance is placed on Clause 1 of the bank guarantees where it is stated that the bank guarantee had been issued to indemnify the NHPCL on behalf of BAL "in view of equal cash amount of security deposited by the said contractor and/or deducted by the said Corporation from the bills of the said contractor and which the said Corporation had agreed to convert against the bank guarantees as therein." According to the bank it was the duty and obligation of the plaintiff to disclose the reasons for invoking the bank guarantee and unless the plaintiff was able to show any actual loss or damage sustained by it due to the return of the deposit

to BAL, the bank guarantees could not be invoked.

11. A replication was filed by the plaintiff reiterating its claims in the plaint. It was contended that inasmuch as there was no mention of the extension of the interim stay granted on 1st August 1991 by the learned Civil Judge in the order dated 15th February 1992 it could not be said that the stay was still operative. It was further urged that the contract between the plaintiff and the Bank as evidenced in the bank guarantees was independent of the contract between BAL and NHPCL and that there was no justifiable ground for the Bank not to honour the bank guarantees and pay the money on demand by the plaintiff.

12. On the basis of the pleadings and the documents on record the following issues were framed by this Court by the order dated 8th August 2005:

1. Whether the suit of the plaintiff is signed, verified and instituted by a duly authorised person? OPP
2. Whether the defendant No. 1 is not bound to encash the Bank Guarantee received from the plaintiff for a total amount of Rs. 29 lakhs as alleged in the written statement? OPD
3. To what amount, interest, plaintiff is entitled? If so, at what rate and for what period? OPP
4. Relief.

13. On behalf of the plaintiff Shri P.B. Jain (PW-1), Chief Engineer, Civil Contract filed his affidavit by way of evidence. Another affidavit was filed by Shri Vijay Gupta (PW-2). On behalf of the Defendants, the affidavit by way of evidence was filed by Shri Rajesh Malhotra working in the Defendant No. 1 Bank.

14. Issue No. 1: Whether the suit of the plaintiff is signed, verified and instituted by a duly authorised person?

In order to prove that the plaint has been signed, verified and instituted by a duly authorised person, Shri P.B. Jain has placed on record the general power of attorney (Ex. PW1/1) dated 26th July 1991 executed by the Chairman-cum-Managing Director of NHPCL nominating and appointing Shri S.K. Sharma, Manager (CC) as attorney for and on behalf of the NHPCL to do all acts necessary for filing a suit for recovery against the Bank and BAL. Also placed on record is the general power of attorney dated 13th February 2006 executed by the then Chairman-cum-Managing Director of NHPCL authorising P.B. Jain to file documents in the present suit and to appear on behalf of the plaintiff verifying the applications, plaints, pleadings and affidavits.

15. The Defendant No. 1 Bank has contended that the power of attorney dated 26th July 1991 is beyond the powers of sub-delegation conferred upon the Chairman and Managing Director and that PW-2 in his cross-examination did not recognise the signatories of the plaint.

16. Having examined the documents on record and having considered the submissions of Counsel, this Court finds no merit in the objections raised by the Defendant Bank. The clauses of the power of attorney dated 26th July 1991 give sufficient authority to the concerned official of the plaintiff to sign the plaint and institute the suit on behalf of NHPCL. Accordingly, Issue No. 1 is answered in favour of the plaintiff and against the Defendants.

17. Issue No. 2: Whether the defendant No. 1 is not bound to encash the Bank Guarantee received from the plaintiff for a total amount of Rs. 29 lakhs as alleged in the written statement?

The onus to prove the above issue was on the Defendant Bank. The stand taken by the Defendant Bank in the affidavit by way of evidence of its witness is a reiteration of the stand taken in the application for leave to defend and the written statement the contents of which have already been noticed hereinbefore. Learned Counsel for the Defendant reiterated that Clause 1 of the bank guarantee had to be read along with Clauses 2 and 3 and if so read, it would indicate that unless the plaintiff satisfied the Bank that it had actually suffered some loss on account of the refund by it to BAL of the security deposit or any portion thereof, the Bank was not obliged to honour the bank guarantees. According to him the letter invoking the bank guarantees was silent on the reasons for invocation and therefore the Bank was justified in not honouring the bank guarantees within a period of 48 hours.

18. The stand taken in the written statement which is repeated in para 11 of the affidavit by way of evidence of the Defendant Bank is that the contractor BAL had already performed work to the extent of Rs. 9.18 crores which was in excess of total contract value of Rs. 8.58 crores and therefore no bank guarantee should have been issued for any performance of the contract as contended by the plaintiff. Learned Counsel for the Defendant Bank was however unable to point out any document placed on record by the Defendant Bank which would go to show that within 48 hours from the invocation of the bank guarantees by the plaintiff, the opinion not to honour the bank guarantees on the basis of the grounds now urged, was formed by the advocate or the Bank. Even DW-1 makes no mention as to the time and date on which such opinion was formed by the Bank. Even as of 24th July 1991 the Bank had only informed the plaintiff that it had referred the matter to its advocate for an opinion. Clearly, therefore, despite Clause 2 of the bank guarantees requiring the bank to "pay unequivocally and unconditionally within 48 hours of demand in writing from the said Corporation of any amount up to and not exceeding Rs. 6 lakhs" no such opinion had been formed by the Bank within 48 hours not to honour the bank guarantees for any reason.

19. In order to appreciate the contention of learned Counsel for the Defendant that the Bank was not obliged to honour the bank guarantees unless the letter invoking the bank guarantees gave the reason why the bank guarantees was not to be invoked a reference was made to clauses 1, 2 and 3 of the bank

guarantees which read as under:

1. We, the Punjab & Sind Bank, IBD, 6 Scindia House, New Delhi (hereinafter referred to as "the said Bank") and having our registered office at Rajindra Place, New Delhi do hereby undertake and agree to indemnify and keep indemnified the National Hydroelectric Power Corporation Limited; represented by Chief Engineer (hereinafter referred to as "the said Corporation" which expression shall, unless repugnant to the subject or context, include its administrators, successors and assigns) to the extent of Rs. 6,00,000/- (Rupees Six Lakhs only) on behalf of Bhasin Associates Limited in lieu of an equal cash amount of security deposit deposited by the said contractor and/or deducted by the said Corporation from the bills of the said contractor and which the said Corporation has agreed to convert against a bank guarantee as hereunder, under the provisions of Contract No. NH/Contracts/CCII/TP 07 dated...which the said contractor has entered into with the said Corporation in connection with the construction of Power Channel & Silt Ejector from RD 250 M to 1437.5 M including Escape Channel for Tanakpur Hydroelectric Project at a total cost of Rs. 8,58,99,500/- (Rupees Eight Crores Fifty Eight Lakhs Ninety Nine Thousand Five Hundred only) (hereinafter called the "said contract").

2. We, the said Bank also do hereby agree to pay unequivocally and unconditionally within 48 hours on demand, in writing, from the said Corporation, of any amount upto and not exceeding Rs. 6,00,000/- (Rupees Six Lakhs Only) to the said Corporation for any purpose or cause or on any account whatsoever under the provisions of the said contract in which respect the decision of the said Corporation shall be final and binding on us.

3. Provided that it shall not be necessary for the said Corporation to proceed against the said contractor before proceeding against us and the guarantee herein contained shall be enforceable against us, notwithstanding any security which the Corporation may have obtained or obtain from the said contractor shall, at the time when proceedings are taken against us as hereunder, be outstanding or unrealised.

20. It is not possible to accept the submissions of learned Counsel for the Defendant Bank that a collective reading of the above clauses obligates the plaintiff to explain to the Bank the reasons why it was invoking the bank guarantees. In the view of this Court, Clause 2 is unambiguous when it states that the demand made by the Corporation would have to be met unconditionally by the Bank within 48 hours and that such invocation "for any purpose or cause or on any account whatsoever under the provisions of the said contract" would be not questioned as is evident from the words "in which respect the decision of the said Corporation shall be final and binding on us." In other words, the language of the bank guarantees does not admit of the construction that is sought to be placed on it by the Defendant Bank.

21. The law in respect of honouring of bank guarantees is well settled. A

reference may be made to the decision in National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, and Hindustan Steelworks Construction Ltd. v. Tarapore & Co. 1996 III AD SC (C) 153. Therefore this Court rejects the plea of the Defendant Bank that it was justified in not honouring the bank guarantee since the letter sent to it by the plaintiff invoking the bank guarantee did not give the reasons why the bank guarantees were being invoked.

22. The other reasons given by the Bank for not honouring the bank guarantees is the pendency of the Suit No. 146 of 1991 in the court of the learned Civil Judge, Nainital and the continuation of the order dated 1st August 1991 staying the encashment of the bank guarantees. As far as this ground is concerned, it is seen that the order dated 15th February 1992 passed by the learned Civil Judge confirming the stay of further proceedings in Suit No. 146 of 1991 awaiting the Award of the learned Arbitrator continues to remain in force. Where the arbitration proceedings are closed without any Award being pronounced, the suit would naturally revive. However no attempt appears to have been made either by the plaintiff NHPCL or the other parties to Suit No. 146 of 1991 to approach the learned Civil Judge, Nainital with an application to have the proceedings revived. As of today therefore the position is that Suit No. 146 of 1991 is pending and so is the order dated 1st August 1991 passed by that court staying encashment of the bank guarantees is operative. The said stay order has not been modified or varied till date. Therefore the Defendant Bank as of today is justified in not honouring the bank guarantees on the ground that there is a stay operating against such encashment.

23. The only ground on which the Bank can seek to justify not honouring the bank guarantees as of date is the stay order passed by the learned Civil Judge, Nainital. Once the said stay order is vacated or comes to an end by any subsequent order or with the disposal of the suit, then the Bank would have no justification to not honour the bank guarantees.

24. Accordingly, issue is answered by holding that the Defendant Bank would be bound to honour the bank guarantees for a total amount of Rs. 29 lakhs as and when the learned Civil Judge, Nainital either vacates the stay order dated 1st August 1991 or the said stay order comes to an end by any further orders passed by that court.

25. Issue No. 3: To what amount, interest, plaintiff is entitled? If so, at what rate and for what period?

The case of the plaintiff is that it is entitled to recover the amount due to it together with the interest at the bank rate prevalent at the time the bank guarantees were given by Defendant No. 1 Bank in its favour. However in view of the facts narrated hereinbefore, the Bank was justified in not honouring the bank guarantees during the period of the pendency of the Suit No. 146 of 1991 and till such time the stay order dated 1st August 1991 passed by the learned Civil Judge, Nainital remains in force. That position remains unchanged till date. It

would therefore appear that if the Defendant Bank fails to honour the bank guarantees even after the vacation of the stay order by the learned Civil Judge in the manner indicated hereinbefore then from such date till the date of payment of the amount due under the bank guarantees to the plaintiff the Defendant Bank would be liable to pay interest. This will be at the bank rate prevalent on the date of such vacation of stay. The issue is answered accordingly.

26. In view of the above determination of the issues, no relief can be granted to the plaintiff at the present stage except by clarifying the position as has been done hereinbefore.

27. The suit is disposed of.