

(1989) 12 P&H CK 0021

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 1463 of 1989 and Civil Miscellaneous No's. 3288 CII and 3289 CII of 1989

National Project Construction Corporation Ltd.

APPELLANT

Vs

M/s. Sadhu and Company a unit of Kular Constructions Ltd.
and others

RESPONDENT

Date of Decision : 20-12-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 126, 128

Citation : AIR 1990 P&H 300

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : H.L. Sibal and S.C. Sibal, for the Appellant; Hemant Kumar and D.P.S. Uppal, (on behalf of Bank), for the Respondent

Judgement

1. This petition is directed against the order of the appellate Judge who on appeal affirmed that of the trial Judge whereby respondent No. 3 has (been?) restrained from releasing the amount of the Bank guarantee to the petitioner during the pendency of the suit.

2. The National Hydro Electric Power Corporation Limited (for short "N.H.P.C." invited tenders in respect of the construction of Chamoia Tunnel, which is a part of Chamera Project. N.H.P.C. allotted the work to National project Construction Corporation Limited, Chamera (for short "the Corporation"). It was authorised to invite tenders for completion of the project through private agencies. The Corporation invited tenders for the construction of diversion tunnel, i.e. for construction of (i) Tunnel boring allied works and (ii) Down Stream Portal. The tenders submitted by the plaintiff (hereinafter referred to as "the Contractor") was accepted. The agreement entered into between the Corporation and the Contractor provided for a Bank guarantee to be furnished by the Contractor for due performance of the work allotted. The Contractor furnished a Bank guarantee in the sum of Rs. 5 lacs for the Corporation. The Bank guarantee dt.

12-1-1987 was furnished by the Punjab and Sind Bank. The Corporation invoked the Bank guarantee vide letter dt. 18-6-1988. This led to the filing of a suit for permanent injunction for restraining the Corporation from enforcing the Bank guarantee. Along with the suit, an application under O. 39, Rr. 1 and 2 of the Civil P. C. (was?) filed by the Contractor for an interim injunction restraining the Bank from releasing the amount of the Bank guarantee to the Corporation during the pendency of the suit. The trial Judge allowed the application and granted the injunction. The order was affirmed on appeal. The Corporation has come up on revision petition.

3. Both the Courts below did not understand the controversy between the parties and on erroneous premises proceeded to invoke the provisions of the agreement arrived at between the Corporation and the Contractor to come to the conclusion that the Bank should be restrained from releasing the amount covered under the Bank guarantee to the Corporation. The Bank guarantee constitutes an agreement between the Bank and the Contractor under which there is an absolute obligation of the Bank to make the payment of the Contractor merely on demand from the latter. The Bank is prohibited under the guarantee from raising any objection. Demand made on the Bank in accordance with the eventualities mentioned in the deed of the guarantee is conclusive as regards the amount due and payable by the Bank. There may be disputes between the Contractor and the Corporation about the amount claimed by way of loss or damages caused to or would be caused to or suffered by the Contractor by reason of any breach of the terms of the contract agreement by the Corporation. The Bank guarantee is a definite undertaking on the part of the Bank and constitutes an engagement of the Bank to pay the amount covered under the guarantee to the Corporation, merely on demand. The guarantee executed by the Bank reads thus :--

"I. We, the Punjab and Sind Bank (hereinafter referred to as "the said Bank") and having our registered office at 21, Rajendra Place, New Delhi do hereby undertake and agree to indemnify and keep indemnified the NPCC Ltd., represented by N.P.C.C. (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. 5,00,000/- (Rupees Five Lacs only) on behalf of M/s. Sadhu Singh and Co. 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. 700563 / Project dt. 22-12-S4 which the said contractor has entered into which the said Corporation in connection with the construction of Diversion Tunnel at a total cost of Rs. 2.684 crores (Rupees Two Crores Sixty eight lakhs and forty thousand only) (hereinafter called the said contractor).

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 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.

4. We, the said Bank further agree that this guarantee shall be valid and binding on us up to and including 31-12-1987 and shall not be terminable by notice or any change in the constitution of the said Bank or the said Contractor or by any other reasons whatsoever and our liability hereunder shall not be impaired or discharged by any extension of time or variations made, given conceded, or agreed with or without our knowledge or consent by or between the parties to the said contract.

5. We also undertake not to revoke this guarantee during its currency except with the previous consent, in writing, of the said Corporation.

6. Our liability under this guarantee is restricted to Rs.500000/- (Rupees five lacs only) our guarantee shall remain in force until and unless a suit or action to enforce a claim under the guarantee is filed against us within six months from that date, all your rights under this guarantee shall be forfeited and we shall be relieved and discharged from all liabilities thereunder:--

Witness: Signed: For and on behalf of the Bank Bank Common Seal. For Punjab and Sind Bank Sd/- xxx Manager ROPAR (Pb) Dated this 12th day of Jan., 1987

The above guarantee is accepted by the Corporation.

For and on behalf of the Corporation."

... ..

4. The Bank extended the guarantee on Jan., 12, 1988. The Corporation invoked the guarantee vide letter No. M/s. SS& Co/1510-11 dt. 18-6-1988, which reads as under:--

"Dear Sir,

It is intimated that huge amount is outstanding against M/s Sadhu Singh & Co. It is requested that the amount of Rs. 5,00,000.00 (Rupees Five lakhs) only on a/c of above said bank guarantee, may please be remitted forthwith in favour of M/s National Projects Construction Corporation Ltd. in the shape of bank. Draft drawn on SBI, Bathri (H.P.) in order to cover the losses suffered by the Corporation.

Thanking you,

.....

5. Perusal of these two documents clearly established that an independent contract had been created between the Bank and the Corporation on the latter entering into contract No. 700563/Project dt. 22-12-84 with the Contractor. Any breach of the terms of the contract entered into between the Corporation and the Contractor, may give rise to reciprocal rights and obligations flowing from it to the parties. The parties to the contract will be entitled to enforce their respective rights and remedies, as provided under the contract. The Contractor cannot move the Court for restraining the Bank from releasing the amount covered under the deed of guarantee to the party in whose favour it was executed. The law relating to the enforcement of the Bank guarantee is well settled. A learned Judge of the Delhi High Court in *Banwari Lal Radhe Mohan Vs. Punjab State Co-operative Supply and Marketing Federation Ltd. and Another*, had succinctly stated thus:--

"The performance guarantees or performance bonds, a comparatively recent specie of Banker's commercial credit has many similarities to a letter of credit and stand on a similar footing to a letter of credit. Such guarantees, even though having their genesis in the primary contract between the parties are nevertheless "autonomous" and independent contracts and bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier had performed his contracted obligations or not, nor with the question whether the supplier is in default or not and the only exception is when there is a clear fraud, of which the bank has notice. In short these guarantees impose an absolute obligation on the banks to pay on demand in their terms and the courts usually refrain from interfering with the obligation except in rare cases of fraud.

The performance guarantee is an "autonomous" contract and imposes an "absolute obligation" on the bank in its terms. As such the existence of disputes between the parties under the primary contract or the possibility of a reference of these disputes to arbitration or of the pendency of proceedings on such a reference, have absolutely no relevance to the obligation of the bank under the guarantee. The banks are bound to pay without demur irrespective of the pendency of any arbitration proceedings or the imminence of any reference to arbitration of the disputes between the parties, arising out of the primary contract between the parties.

However, such an obligation arises only if the conditions of the bond are satisfied and if the demand made on the bank is in strict accord with its terms. Any demand which is outside the terms of the guarantee bond and any payment by the bank without strict compliance with the terms of the bond would not be beyond the scope of the bond and would not give discharge to the paying

bankers."

It will equally be useful to reproduce the following observations of Lord Denning, M.R. in *Elia v. Matsas* (1966) 2 LR 495. While refusing to grant an injunction:--

".....a bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation. Thus they refused in *Malas v. British Imex Industries Ltd.* 1958 2 WLR 100. But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction. A bank which gives a performance guarantee must honour that guarantee according to its terms. In *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* (1977) 3 WLR 752, Kerr. J. considered the position in principle. We would like to adopt a passage from his judgment at p. 761 : It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs look the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged. "

This principle was followed by their Lordships of the Supreme Court in *United Commercial Bank Vs. Bank of India and Others*, , where it was stated thus :--

"In the light of these principles, the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of Credit are created by the document self, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit."

In the same authority in respect of grant of temporary injunction, the following observations are very relevant:--

"The Courts" usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. It is only in exceptional cases that the courts

will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

No injunction could be granted under O. 39 Rr. 1 and 2 of the Code unless the plaintiffs establish that they had a prima facie case, meaning thereby that there was bona fide contention between the parties or a serious question to be tried. A payment "under reserve" is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Further more, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

Somewhat identical matter came up for consideration in *Vinay Engineering v. Neyveli Lignite Corporation Limited* AIR 1985 Mad 213, before a Division Bench presided over by my lord V. Ramaswami, J. (as his lordship then was) and it was held as under (at p. 219 of AIR):--

"If the bank guarantees are unconditional, the bank has no defence when its guarantee is sought to be enforced. It is the document of guarantee that has to be scanned to ascertain whether the guarantee is conditional or otherwise and whether it is an autonomous contract by itself. Ordinarily, the Court shall not grant an injunction restraining enforcement of such bank guarantees save where there is clear case of fraud of which the bank had notice and where the special equity was in favour of the beneficiary under the bank guarantee in the instant case, the appellant."

Following the rule of law laid down in *Vinay Engineering's* case (supra). I hold that the Courts below were not justified in restraining the Corporation from enforcing the Bank guarantee save there is clear case of fraud of which the Bank had notice and where the special equity was in favour of the beneficiary.

6. For the reasons aforesaid, this revision petition is allowed. The orders of the Courts below are set aside. The Corporation is entitled to enforce the Bank guarantee referred to above.

7. Petition allowed.