(2015) 01 OHC CK 0052

In the Orissa High Court

Case No : C.M.P. Nos. 153 and 858 of 2014

Paradip Port Trust and Others APPELLANT

Vs

Paradip Multi Cargo Berth Pvt. Ltd. and Others RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 151
Major Port Trusts Act, 1963 — Section 120

Citation : (2015) 4 BC 167 : (2015) 1 OLR 1122

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : Gautam Mishra, D.K. Patra and A. Dash, for the Appellant; S.P. Sarangi, B.C. Mohanty, P.P. Mohanty and A. Patnaik, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Sanju Panda, J—C.M.P. No. 153 of 2014 has been filed by the petitioners challenging the order dated 12.02.2014 passed by the learned Civil Judge (Senior Division), Kujang in C.M.A. No. 249 of 2013 arising out of C.S. No. 20 of 2013 rejecting the application filed by the petitioners to defer hearing of C.M.A. No. 249 of 2013 till disposal of F.A.O. No. 46 of 2013 pending before the learned District Judge, Jagatsinghpur.

Similarly C.M.P. No. 858 of 2014 has been filed by the petitioners challenging the judgment dated 23.06.2014 passed by the learned District Judge, Jagatsinghpur in F.A.O. No. 46 of 2013 confirming the order dated 22.08.2013 passed by the learned Civil Judge (Senior Division), Kujang in I.A. No. 17 of 2013 under Order 39, Rules 1 and 2 and read with Section 151 of C.P.C. arising out of C.S. No. 20 of 2013 restraining petitioner No. 1 from en-cashing the Bank Guarantee of Rs. 3,30,00,000/- deposited by opp. party No. 1 till disposal of the suit.

2. As both the Civil Miscellaneous Petitions involve common questions, parties are same and the dispute arises out of a suit, the matters are taken up for hearing together and are disposed of by this common judgment.

3. The brief facts of the case are that opposite party No. 1. Paradip Multi Cargo Berth Private Ltd. As plaintiff filed C.S. No. 20 of 2013 before the learned Civil Judge (Senior Division), Kujang to declare the project i.e. Development of Multipurpose Berth to Handle Clean Cargo including Containers on Build, Operate and Transfer (BOT) basis of Paradip Port Trust to be unworkable and unviable, for permanent injunction restraining the defendants from en-cashing the Bank Guarantee submitted by the plaintiff as bid security and to direct the defendant Nos. 1 and 2 to return back the bid security along with other reliefs. Along with the plaint the plaintiff also filed an application under Order 39, Rules 1 and 2 read with Section 151 of C.P.C. restraining petitioner No. 1 Paradip Port Trust from en-cashing the Bank Guarantee and an application under Order 39, Rule 3 of C.P.C. The said application was registered as I.A. No. 17 of 2013. The Court below by order dated 25.01.2013 rejected the application filed under Order 39, Rule 3 of C.P.C. and issued notice on the petition under order 39, Rules 1 and 2 of C.P.C. Challenging the said order the Opp. Party No. 1 approached this Court in W.P.C. No. 2112 of 2013, which was disposed of on 09.04.2013 restraining encashment of the Bank Guarantee in question till disposal of the application under Order 39, Rules 1 and 2 of C.P.C. Thereafter petitioner No. 1 preferred W.A. No. 82 of 2013, which was disposed of on 21.06.2013 with a direction to the Court below to pass a final order in the interim application without being influenced by any of the observations made by the Hon''ble Single Judge of this Court. The petitioners-defendants appeared before the Court below and contested the interim application. The Court below after hearing the parties by order dated 22.08.2013 restrained petitioner No. 1 from en-cashing the Bank Guarantee of Rs. 3,30,00,000/- deposited by Opp. Party No. 1 till disposal of the suit with a finding that if the Bank Guarantee will be en-cashed by petitioner No. 1 without fault of Opp. Party No. 1 definitely opposite party No. 1 will sustain irreparable loss and no irreparable loss will be sustained by petitioner No. 1 if it is restrained form en-cashing the Bank Guarantee.

3.1 Being aggrieved the petitioners preferred F.A.O. No. 46 of 2013 before the learned District Judge, Jagatsinghpur. In the appeal the petitioners have taken a stand that when the suit is not maintainable, the Court below should not have passed any interim order. The mandatory provisions have not been complied with at the time of filling of the suit, so the suit is not maintainable. The Court below should not have gone to the underlying dispute at the time of any passing interim order. The said appeal was posted to 11.02.2014 for condonation of delay.

3.2 While matter stood thus Opp. Party Nos. 1 and 2 filed and application under Section 151 of C.P.C. before the learned Civil Judge (Senior Division), Kujanga to return the Bank Guarantee, which was registered as C.M.A. No. 249 of 2013. The petitioners filed their objection to the said application. Thereafter the petitioners filed an application before the Court below to defer hearing of C.M.A. No. 249 of 2013 till disposal of F.A.O. No. 46 of 2013 pending before the learned District Judge, Jagatsinghpur. The Court below by order dated 12.02.2014 rejected the said application with a finding that the present petitioner has different cause of action and it is no way connected with the pending F.A.O. No. 46 of 2013. The said order is challenged by the petitioners in C.M.P. No. 153 of 2014.

3.3 Thereafter Opp. Party No. 1 appeared before the learned District Judge, Jagatsinghpur in F.A.O. No. 46 of 2013 and filed written objection stating that the petitioners have not performed their part of contract. Though three years has already been lapsed, the petitioners could not obtain the statutory environmental and forest clearance. The signing of concession agreement was delayed only due to aforesaid inaction of the petitioners to obtain the statutory environmental and forest clearance. Therefore, the trial Court has not committed any error in entertaining the order of injunction restraining the petitioners from en-cashing the Bank Guarantee. The learned lower Appellate Court after hearing the parties by judgment dated 23.06.2014 confirmed the order of injunction passed by the trial Court on 22.08.2013, which is under challenge in C.M.P. No. 858 of 2014.

4. Learned counsel appearing for the petitioners submitted that since opposite party No. 1 has filed to sign the concession agreement, the Bank Guarantee is en-cashed by the petitioners. He further submitted that the Bank Guarantee in question is an independent contract and disputes of the underlying contract should not come in the way of encashment of the Bank Guarantee. The suit is not maintainable as statutory notice under Section 120 of Major Port Trust Act had not been issued, therefore, the Court below should not have granted interim order. The lower appellate Court failed to appreciate the conduct of Opp. Party No. 1 in filing the suit which would itself entitle the petitioners to invoke the Bank Guarantee in terms of Clauses 2.20.7 of the Request for Proposal (RFP) and the proposition that unless the Court prima-facie satisfied that fraud has been practised, it should not restrain the petitioners from en-cashing the Bank Guarantee. In support of his contention he has relied on the decision reported in Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, AIR 2007 SC 2798 : (2007) 3 ARBLR 139 : (2007) 139 CompCas 706 : (2007) 9 JT 631 : (2007) 9 SCALE 631 : (2007) 8 SCC 110 : (2007) 8 SCR 869 : (2007) AIRSCW 5080 , Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, AIR 2000 SC 2548 : (2000) 102 CompCas 13 : (2000) 8 JT 141 : (2000) 5 SCALE 250 : (2000) 6 SCC 385 : (2000) 2 UJ 1390 : (2000) AIRSCW 2762 : (2000) 5 Supreme 369 , Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, (1996) 6 AD 290 : (1997) 88 CompCas 149 : (1996) 7 JT 336 : (1996) 5 SCALE 769 : (1996) 5 SCC 450 : (1996) 4 SCR 226 Supp : (1996) 2 UJ 581 Svenska Handelsbanken Vs. M/ s. Indian Charge Chrome and others, AIR 1994 SC 626 : (1994) 1 BC 215 : (1994) 78 CLT 1 : (1994) 79 CompCas 589 : (1994) 1 CompLJ 145 : (1993) 6 JT 189 : (1993) 4 SCALE 124 : (1994) 1 SCC 502 : (1993) 3 SCR 323 Supp and V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and Another,

AIR 2005 SC 4138 : (2005) 3 JT 607 : (2005) 140 PLR 743 : (2005) 4 SCC 613 : (2005) 3 SCR 27 : (2005) AIRSCW 3285 : (2005) 4 Supreme 181 .

5. Learned counsel appearing for Opp. party No. 1 and 2 in support of the impugned orders submitted that the Bank Guarantee being a conditional one could only be en-cashed on the ground of failure of the bidder to fulfill and comply with the terms and conditions of the bid document and the aforesaid breach ought to have occurred during the validity of the bid. The validity of the bid lapsed on 26.09.2012 and it cannot be unilaterally extended thereafter by Paradip Port Trust. He further submitted that retention of Bank Guarantee in the absence of bid document illegal/unauthorized, therefore, the Opp. Party No. 1 is entitled to return of the same. He also submitted that the petitioners have already floated another tender on 26.06.2013 seeking for bidders to bid at a higher price for the self same work, therefore the prayer made in the suit has been accepted and the Bank Guarantee should be returned. It is stated that both the Courts below directed Paradip Port Trust not to encash the Bank Guarantee till disposal of the suit, therefore in the interest of justice Paradip Port Trust may be directed to deposit the en-cashed Bank Guarantee amount before the Court below which shall be kept in an interest bearing account till disposal of the suit. In support of his contention he has relied on the decisions reported in (1999) 8 SCC 4369 and Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, AIR 1992 SC 1439 : (1992) 75 CompCas 440 : (1992) 2 CompLJ 121 : (1992) 3 JT 98 : (1992) 1 SCALE 947 : (1992) 3 SCC 1 : (1992) 2 SCR 999 : (1992) 2 UJ 257 .

6. In the case Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, AIR 2007 SC 2798 : (2007) 3 ARBLR 139 : (2007) 139 CompCas 706 : (2007) 9 JT 631 : (2007) 9 SCALE 631 : (2007) 8 SCC 110 : (2007) 8 SCR 869 : (2007) AIRSCW 5080 the Apex Court held that 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 realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. 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. The Courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit. There are two exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit; (i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the

situation; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned. Except under these circumstances, the Courts should not readily issue injunction to restrain the realization of a bank guarantee or a letter of credit.

So far as the first exception is concerned i.e. of fraud, one has to satisfy the Court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. But the evidence must be clear, both as to the fact of fraud and as to the bank''s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank''s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged. To avail the second exception, it has to be decisively established that there exist exceptional circumstances which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds. Clearly, a mere apprehension that the other party will not be able to pay, is not enough.

6.1 The Apex Court reiterated the above proposition in the case of Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, AIR 2000 SC 2548 : (2000) 102 CompCas 13 : (2000) 8 JT 141 : (2000) 5 SCALE 250 : (2000) 6 SCC 385 : (2000) 2 UJ 1390 : (2000) AIRSCW 2762 : (2000) 5 Supreme 369 .

6.2 In the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, (1996) 6 AD 290 : (1997) 88 CompCas 149 : (1996) 7 JT 336 : (1996) 5 SCALE 769 : (1996) 5 SCC 450 : (1996) 4 SCR 226 Supp : (1996) 2 UJ 581 the Apex Court held 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. 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. 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 prime facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. Otherwise 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.

6.3 The Apex Court in the case of Svenska Handelsbanken Vs. M/s. Indian

Charge Chrome and others, AIR 1994 SC 626 : (1994) 1 BC 215 : (1994) 78 CLT 1 : (1994) 79 CompCas 589 : (1994) 1 CompLJ 145 : (1993) 6 JT 189 : (1993) 4 SCALE 124 : (1994) 1 SCC 502 : (1993) 3 SCR 323 Supp held that the law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima-facie case of established fraud and an irretrievable injury. Mere irretrievable injustice without prima-facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.

6.4 In the case of V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and Another, AIR 2005 SC 4138 : (2005) 3 JT 607 : (2005) 140 PLR 743 : (2005) 4 SCC 613 : (2005) 3 SCR 27 : (2005) AIRSCW 3285 : (2005) 4 Supreme 181 the Apex Court held that requirement of giving of notice under Section 120 of Major Port Trusts Act, 1963 is mandatory and a precondition to the filing of the suit and since the suit was filed without giving the notice the same was not maintainable.

6.5 In the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, AIR 1999 SC 3710 : (2000) 99 CompCas 297 : (1999) 3 CTC 618 : (1999) 8 JT 142 : (1999) 6 SCALE 486 : (1999) 8 SCC 436 : (1999) 3 SCR 554 Supp : (2000) 1 UJ 336 : (1999) AIRSCW 3747 : (1999) 9 Supreme 1 the Apex Court held that if bank guarantee in unequivocal and unconditional terms undertakes to pay the amount without any demur or objection and irrespective of any dispute, Court would refrain from issuing the injunction. But if bank guarantee is conditional, the beneficiary cannot have unfettered right to invoke the guarantee and Court can issue injunction against invocation of the guarantee in view of the facts of the case.

6.6 In the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, AIR 1992 SC 1439 : (1992) 75 CompCas 440 : (1992) 2 CompLJ 121 : (1992) 3 JT 98 : (1992) 1 SCALE 947 : (1992) 3 SCC 1 : (1992) 2 SCR 999 : (1992) 2 UJ 257 the Apex Court held that while considering the effect of an interim order staying the operation of the order under challenge a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate

Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and it still pending.

7. Considering the rival submission of the parties and after going through the materials available on record, it appears that the Bank Guarantee being a conditional one could only be en-cashed on the ground of failure of the bidder to fulfill and comply with the terms and conditions of the bid document. The aforesaid breach ought to have occurred during the validity of the bid. However, the Bank Guarantee has already been invoked by the petitioners Paradip Port Trust. From the status report of Major-ongoing Projects of Paradip Port Trust downloaded from the website, it appears that Forest clearance is under process and is likely to be received by December, 2012 and Concession Agreement will be signed on receipt of Forest clearance. It is not the case of Opp. party No. 1 that fraud has been committed in the notice of the Bank or invocation of the Bank Guarantee is impossible on the part of the petitioner-Paradip Port Trust to reimburse or would result in irretrievable harm. Hence the interim injunction should not have been granted by the Court below for invocation of the Bank Guarantee.

8. In view of the discussions made hereinabove, this Court in exercise of the jurisdiction under Article 227 of the Constitution of the India while setting aside the impugned judgment dated 23.06.2014 passed by the learned District Judge, Jagatsinghpur in F.A.O. No. 46 of 2013 as well as the order dated 22.08.2013 passed by the learned Civil Judge (Senior Division), Kujang in I.A. No. 17 of 2013 arising out of C.S. No. 20 of 2013 directs the Court below to dispose of the suit in accordance with law, as expeditiously as possible.

Both the Civil Miscellaneous Petitions along with Misc. Cases are accordingly disposed of.

