

(1998) 11 GUJ CK 0024
In the Gujarat High Court

Prem Conductors Pvt. Ltd.

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

Date of Decision : 06-11-1998

Acts Referred:

Citation : (1999) 1 GLR 118

Hon'ble Judges : Y.B. Bhatt, J

Bench : Single Bench

Judgement

Y.B. Bhatt, J.—Heard the learned Counsel for the applicant (original plaintiff) and learned Counsel for the second opponent (original defendant No. 2). Hearing defendant No. 1 at this stage is not necessary since it has not taken any stand, either way, during the hearing of the injunction application.

2. As a result of the hearing and discussion, I am of the opinion that the ad interim relief granted by me by order dated 5th November, 1998 requires to be confirmed. It is accordingly confirmed, subject to the further conditions that the appellant-plaintiff shall file an undertaking in the trial Court within two weeks from today to the effect that (i) in case the appellant-plaintiff loses in the suit, it shall immediately deposit in the trial Court a sum equivalent to 17% interest on Rs. 15.00 lacs from the date of invocation of the bank guarantees by the second defendant upto the date of the decree, (ii) that it shall not oppose any application made by the second defendant for withdrawal of the same, and that (iii) such deposit shall be made before the exercise of the right of appeal from the decree in question. There shall be no extension of the said period.

3. The trial Court is also directed to expedite the hearing of the suit, and dispose of the same as expeditiously as possible and in any case not later than 28th February, 1999. In case the trial Court is unable to dispose of the suit by the said date, the second defendant shall be at liberty to apply to the Court for vacating the present ad interim relief, and in case the trial Court comes to a conclusion (after hearing the parties) and records a finding that the non-disposal of the suit is on account of the plaintiff, the trial Court may permit the realisation of the

bank guarantees which are the subject-matter of the suit. In such case, the plaintiff shall stand absolved from the undertaking.

4. Although it is not necessary, I may state that before passing the present order I have heard the learned Counsel for hours, both on facts and on law. Learned Counsel for respondent No. 2 original defendant No. 2 has in particular referred to the following decisions of the Supreme Court:

(i) AIR 1997 1644 (SC) .

(ii) Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

(iii) U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., .

I have perused the said decisions carefully and in that context, I am of the opinion that there cannot be any controversy as to the principles laid down by the Supreme Court in the aforesaid decisions.

5. However, the said decisions have to be noted and applied looking to the facts and circumstances of the instant case.

6. First of all, it must be noted that the bank guarantees in question are not performance guarantees.

6.1. Another aspect to be noted is that the bank guarantees in question, although styled as unconditional guarantees, are in fact and in substance not really unconditional. As noted in the internal page 2 of the said guarantees, the bank has guaranteed payment of the designated amount in favour of the beneficiary, namely, the second defendant, if the said supplier (meaning thereby the plaintiff) fails to comply with any of the three stipulated conditions. As part of the very same para, these conditions are set out. The first condition stipulates that the bank will make payment in case the supplier (the plaintiff) fails to make proper utilisation of raw material provided/imported under the contract. In this context, it must be noted that it is an admitted position that the second defendant, who seeks to invoke the bank guarantees, was under an obligation under the contract between the parties to import the necessary raw material under a Special Imprest Licence, and to supply such imported material to the plaintiff. Admittedly, the second defendant could neither obtain the licence, nor could it import the necessary raw material and consequently, did not supply any material whatsoever to the plaintiff. It is not the case of the second defendant that imported raw material, or a suitable alternative was not available/purchaseable in India.

6.2 The second condition pertains to the non-acceptance of the product by the clients. As aforesaid, since the second defendant failed to supply either the imported raw material and/or any other raw material to the plaintiff, the plaintiff did not manufacture the necessary goods (under the contract) and therefore,

there was no question of non-acceptance of the product manufactured by the plaintiff by the client (M.P. State Electricity Board). The third condition pertains to the non-fulfilment of any provisions of the contract (including the terms and conditions agreed upon between the parties). In this context, non-fulfilment of any provision or condition of the contract refers to non-compliance by the supplier (the plaintiff) inasmuch as the three conditions set out in the bank guarantees pertained to the action taken or not taken by the said supplier (the plaintiff). On the facts of the instant case, it is an admitted position that the second defendant failed to import and consequently failed to supply the plaintiff with the necessary raw material, in order that the plaintiff could manufacture the same under the terms of the contract. Under the circumstances, therefore, it could not legitimately be said that it was the supplier (the plaintiff) who has not fulfilled the provisions of the contract, since in the absence of the raw material it could not possibly have manufactured any goods.

7. Another aspect which is required to be considered in the context of the aforesaid decisions is that the Supreme Court itself, in the aforesaid decisions as also in various other decisions, laid down a justifiable exception to the principle of non-interference by the Courts in realisation of bank guarantees. One such just exception is on the ground of "fraud". However, the concept of "fraud" has many connotations and obviously there cannot be any omnibus definition of the said word. Furthermore, the concept of fraud is not limited to fraud committed by the beneficiary upon the bank in obtaining a bank guarantee in its favour, but would include the act of invoking or realising the bank guarantee. In a given case, fraud could also provide justifiable exception to the principles laid down by the Supreme Court whereby the bank guarantee itself had been obtained by fraud or on a gross misrepresentation of the facts. This is not to say that, on the facts of the case, it is so. In the instant case, I am merely considering the implications of the word "fraud". What is more relevant on the facts and circumstances of the case is that since admittedly it was the second defendant who had failed to obtain the necessary Special Imprest Licence, it failed to procure the necessary raw material, it failed to supply such imported and/or any other material to the plaintiff, it would appear at least on a prima facie basis, that it was the second defendant who was responsible for non-compliance of the terms of the contract between the parties. The conduct of the second defendant made it impossible for the plaintiff to comply with its obligation under the contract. Under such circumstances, the act of invocation of the bank guarantee on the part of the second defendant, would in my opinion, amount to fraud not only upon the bank, but also upon the plaintiff.

8. I must also take note of another just exception laid down by the Supreme Court against the realisation of bank guarantees. This justification is expressed in the phrase "special equities" used by the Supreme Court in the decision of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . As discussed hereinabove, I am of the opinion that this is a case, on the particular facts whereof, "special equities" constitute a relevant consideration. Since the

second defendant as aforesaid has failed to import and/or supply the necessary raw material to the plaintiff, the plaintiff was in no position to manufacture the necessary goods for the performance of the contract in question. Under the circumstances, it appears to me that even if the plaintiff were found not to have performed its part of the contract (in failing to manufacture the goods in question), this failure was a direct consequence of the failure on the part of the second defendant to supply the raw material. On these facts and under these circumstances, I am of the opinion, that "special equities" cannot be ignored. To permit the invocation and realisation of the bank guarantees on the part of the second defendant would tantamount to permitting the second defendant to take advantage of its own wrong, even if such wrong or lapse was inadvertent or beyond the control of the second defendant (as alleged). Indeed, it would not be farfetched to state that there is an intimate connection between the mutual rights and obligations created by the contract between the plaintiff and the second defendant on the one hand and the bank guarantee on the other. It would be stretching the principles laid down by the Supreme Court too far and beyond the realm of legitimacy, to suggest that the second defendant should be permitted to invoke and realise the bank guarantees, although it had by its own conduct placed the plaintiff in a position where it could not perform its part of the contract. In this context, therefore, when the Supreme Court, in the case of U.P. Co-operative Federation Limited (*supra*) observed in para 45 and used the phrase "fraud in the transaction", the phrase must be read and applied in the light of and in the context of the specific facts and circumstances of the present case.

9. Hence, the above order.

This application is accordingly disposed of with no order as to costs.

10. The Registry is directed to send a yadi to the trial Court forthwith i.e., not later than 12th November, 1998. Direct service is also permitted.