

(2004) 08 DEL CK 0051

In the Delhi High Court

Case No : IA 4687 and 4778/04 in CS (OS) 800 of 2004

P.T. Sumber Mitra Jaya

APPELLANT

Vs

National Highways Authority of India

RESPONDENT

Date of Decision : 06-08-2004

Acts Referred:

Citation : (2004) 08 DEL CK 0051

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : S.C. Maheshwari, S. Nanda Kumar, Vipul Mahehwari and Yogesh Kanna, Jagdish Lall Jain, Adv R.S. Sharma, for the Appellant;

Judgement

Vikramajit Sen, J.—By these Orders I shall decide whether it is proper and just to interdict the encashment of the subject Bank Guarantee. On 29.7.2004 an ex parte ad interim injunction had been granted. On the subsequent hearing the plaintiff was directed to ensure that the said Guarantee was kept alive, and the Indian Bank, Defendant No. 2 was alternatively ordered to encash the Guarantee and retain its proceeds in an escrow account.

2. The facts, in brief, are that the plaintiff had submitted its Tender/Bid for the widening of 4-lane and strengthening of existing 2 lane carriageway of NH 17 from Suratkal to Nantoor and NH 48 from Pandil to B.C. Road and bypass from Nantoor to Pandil all in Karnataka. The Bid Guarantee for a sum of Rs. 1.73 crores had been furnished in favor of Defendant No. 1 (NHAI) at the time of the submission of the bid by the plaintiff. Its offer was accepted by Shri B.N. Singh, acting as General Manager (PC) and Director, New Mangalore Port Road Co. Ltd. (NMPRCL); the letter-head of the National Highways Authority of India (NHAI) had been used. The plaintiff was required to furnish the Performance Guarantee equal to fifteen per cent of the contract price within twenty eight days in accordance with Clause 34.1 of the Instructions to Bidders and sign the contract failing which action as stated in Clause 34.3 thereof would be taken. The Performance Guarantee was to be furnished within twenty-eight days of the

Letter of Acceptance. It appears that the Performance Bank Guarantee dated 21.6.2004, purportedly issued by the State Bank of Mysore, was submitted by the plaintiff. NHAI, in its Letter dated 6.7.2004, informed the plaintiff that the Bank Guarantee should be in favor of Chairman, NMPRCL who had issued the Letter of Acceptance. The plaintiff was also called upon to ensure that the Bank Guarantee was valid up to a specific date, preferably 31.5.2008. The plaintiff's submission is that while complying with these demands it came to learn that the Bank Guarantee dated 21.6.2004 was a forgery, committed at the instance of a Chartered Accountant engaged by it, namely, Defendant No. 4. NHAI, however, submits that this forgery/fraud was discovered by it when this Bank Guarantee was referred to the State Bank of Mysore for confirmation, as is the extant banking practice. The plaintiff has averred that it lodged a First Information Report (FIR) on 15.7.2004. Whereas NHAI has stated that it had already lodged an FIR on 14.7.2004; it is strongly contended that there is connivance with criminal intent between the plaintiff and its Chartered Accountant, Defendant No. 4. The Complaint/FIR lodged by the NHAI states inter alias as follows:-

""3. Subsequently vide letter dated 30th June, 2004 M/s. P.T. Sumber Mitra Jaya through its Sr. Admn. Manager, submitted the Performance Guarantee No. 9/2004-05 for Rs. 21 Crores purportedly issued by State Bank of Mysore, Sudhamanagara Branch, Lal Bagh Road, Bangalore-27 dated 21st of June, 2004.

4. As a standard practice NHAI vide its letter No. 11011/16/2000-CF dated 7th July, 2004 requested the issuing branch of the said bank to confirm the issuance of the said Bank Guarantee and further again vide letter of 8th July, 2004 the NHAI requested the Head office also for a confirmation of the said Bank Guarantee. On 10th of July, 2004, vide letter No. BR/AGM-1/03148, the Assistant General Manager of Regional Office, State Bank of Mysore, BKG Complex, Avenue Road, Bangalore-560 009 informed the NHAI that the said Bank Guarantee submitted to NHAI was not issued by the said Bank. Upon receipt of this letter it was further confirmed telephonically from Branch Manager, Shri Chandra Shekhar, State Bank of Mysore that the said Bank Guarantee was forged and in fact has not been issued by the said bank"".

It is difficult to appreciate why the plaintiff chose to charter a course contrary to the previous one, namely, to call upon the Indian Bank to provide the Performance Guarantee. It makes its conduct suspicious, to say the least. It is also not the plaintiff's case that it has no assets or collateral to offer in Indonesia or Singapore. A chain of corresponding Banks now exist worldwide, and as in the case of the Bid Guarantee the Performance Guarantee could also have been obtained without the medium of the Chartered Accountant.

3. Shri B.N. Singh, now acting on behalf of the Chairman, NHAI informed the Indian Bank, Defendant No. 2 by Letter dated 16.7.2004 that it had decided to invoke the Bid Bank Guarantee with reference to its paragraphs 2 and 4 and requested it to remit the said sum of Rs. 1.73 crores to the credit of NHAI,

having discovered by them that the Performance Guarantee was not genuine.

4. Learned counsel for the plaintiff submits that the plaintiff is still ready and willing and interested in performing all the terms of the contract, and is also desirous of furnishing another Performance Bank Guarantee in the sum of Rs. 21 crores.

5. The salient features of the understanding between the parties around which will revolve the determination of the question before the Court are the following:-

""16.5 The Bid Security of the successful bidder will be discharged when the bidder has signed the Agreement and furnished the required Performance Security.

16.6 The Bid Security shall be forfeited.

(a) if the bidder withdraws the Bid after Bid after bid opening during the period of Bid validity;

(b) if the Bidder does not accept the correction of the Bid Price, pursuant to Clause 27; or

(c) in the case of a successful Bidder, if the Bidder fails within the specified time limit to

(i) sign the Agreement; or

(ii) furnish the required Performance Security.

34.1 Within 28 days of receipt of the Letter of Acceptance, the successful bidder shall deliver to the Employer a Performance Security in the form of a Bank Guarantee in the form given in Section 8 for an amount equivalent to 10% of the contract price pls additional security for unbalanced bids in accordance with Clause 29.5 of ITB and Clause 52 of Conditions of Contract.

34.3 Failure of the successful bidder to comply with the requirements of Sub-clause 34.1 shall constitute sufficient grounds for cancellation of award and forfeiture of the bid Security"".

6. The law as it has been enunciated by the Apex Court, in AIR 1997 1644 (SC) , is to be found in these words of the Court:

""12 The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, Therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank

guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two rounds are not necessarily connected, though both may coexist in some cases.

.....

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the *Itek Corpn.* case, 566 Fed Supp 1210. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favor of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, Therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek* case (*supra*) there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be *prima facie* satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

15. Our attention was invited to a number of decisions on this issue -- among them, to *Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others*, and *Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.*, as also to *National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another*, . The latest decision is in the case of *State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another*, where this Court has summed up the position by stating:

""The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.""

The other recent decision is in Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, .

16. Clearly, Therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee"".

7. In U.P. State Sugar Corporation case (supra), the arguments raised to support the continuance of the injunction were that the beneficiary had terminated the contract on the incorrect ground that time was of the essence of the contract, and that the chances of making any recovery if it succeeded in the Arbitration was illusory since the fortunes of the rival company now lay in the hands of BIFR. These arguments did not find favor with the Court which comprised their Lordships M.M. Punchi and Sujata Manohar JJ. These passages were relied upon by a Bench of the Supreme Court comprising K.S. Paripoornan, K. Venkataswami and B.N. Kirpal, JJ. in the case Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Anr. 1997 (5) SC 416. It is clear that the Apex Court has spoken in one voice and with unanimity on this aspect of the law.

8. S.C. Aggarwal and G.T. Nanavati, JJ, who decided the disputes raised in the Hindustan Steelworks Case (supra), after considering several previous decisions of the Apex Court including U.P. Cooperative Federation Ltd. V. Singh Consultants and Engineers (P) Ltd. (1988) SCC 174, General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, , Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, and Hindustan Steel Works Construction Ltd. Vs. G.S. Atwal and Co. (1995) SCC 76 held as follows:

""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 has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special

circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, Therefore, not right in restraining the appellant from enforcing the bank guarantees"".

In *Hindustan Construction Company Limited v. State of Bihar* (1999) 8 SC 436, the Hon"ble Supreme Court enunciated the principle that if a Bank Guarantee in unequivocal and unconditional terms undertakes to pay the amount without demur the Court should refrain from issuing an injunction. In *Makharia Brothers Vs. State of Nagaland and Others*, , the Apex Court has opined that a Bank Guarantee has to be read in conjunction with the terms of the contract in respect of which it is issued.

In *Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others*, , similar views have been reiterated, while observing that the Bank Guarantee should be read along with the terms of the contract between the parties.

9. Shri Kini, Advocate states that he has also received instructions from Shri B.N. Singh to represent Defendant No. 5. Mr. Sethi, learned Senior Counsel for the NHAI , relies on the Terms of the Bid Guarantee to submit that this Court ought not to inter direct its encashment. He relies inter alias on the terms of the Bank Guarantee whereby Defendant No. 2 had undertaken to pay the said sum of Rs. 1,73,00,000/- to the employer upon receipt of its first written demand without the employer having to substantiate is demand. At the stage of furnishing this Guarantee there was no controversy that the NHAI was the ""employer"". This issue has cropped up, so far as the Bank Guarantee is concerned, only when the next stage had arrived viz. the furnishing of the Performance Guarantee and the signing of the contract. Reliance is placed on the decision of the Hon"ble Supreme Court in *National Highway Authority of India Vs. Ganga Enterprises and Another*, to put forward this submission that events connected with ""on - demand Bank Guarantee"" are entirely inconsequential. In particular, reliance has been placed on the following passage:-

""10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an ""on -demand bank guarantee"" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an ""on- demand guarantee"" in accordance with its terms by looking at terms of the underlying contract. The

existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 day. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court"".

10. The proposition that whenever the Court is confronted with an "on-demand bank guarantee" its powers of interdicting the encashment or embarking on any jural interference is obliterated, is so wide that it must be summarily rejected. Certainly, the extract from the NHAI's case (supra) does not support it. Their Lordships would have found it unnecessary and otiose to discuss the facts of the case, in particular the plaintiffs resiling from the contract, if it intended to lay down an absolute principle that there is no scope for the Court to look into the circumstances of the case. A pedantic exercise or enquiry is always an anathema for the Judge. He would abjure it just as much as he would be loath to inspect only the semantics of a Bank Guarantee Letter of Credit and dispense justice in the manner demanded by Shylock. Similarly, a misplaced comma or a typographical error would not defeat the implementation of an otherwise "on-demand Bank guarantee", or render its invocation ineffective on a films and formal ground. A holistic perusal of every document is essential. The salient terms of engagement in NHAI's case (supra) are in pari materia with the instant petition and, Therefore, commend that a similar consideration and treatment of the facts should be undertaken.

11. The admitted position is that the Performance Bank Guarantee has not been furnished by the plaintiff. Although this is strongly contested by the Defendants, I shall assume for the present that the plaintiff was duped by Defendant No. 4 into forwarding a fictitious, forged and fabricated Bank Guarantee. Defendant No. 1 or Defendant No. 5, however, certainly have no role to play in the fraud; nor have they acted in any unfair manner. Which of the commercial entities should, Therefore, be made to suffer the financial consequences of such circumstances, is the issue which I have to grapple with. In commercial transactions equitable considerations cannot outweigh or cast any shadow on the plain terms of the contract. Clause 16.6 states that the Bid Guarantee shall be forfeited if the successful Bidder (that is, the plaintiff herein) fails to furnish the required Performance Security. It had been contended by Mr. Sethi, and with substance, that the Defendants would not like to deal with a party which has committed a fraud. The Court would also not thrust a commercial relationship on an unwilling party, and especially so when one of them has manifested such commercial immaturity and negligence as has allegedly rendered it a victim of a fraud. Defendant No. 1 had reverted to Defendant No. 3, State Bank of Mysore, for

confirmation of the execution of the Bank Guarantee as per prevalent practice. Considering that a large sum of money had been paid by the plaintiff for arranging the Performance Guarantee for the sum of Rs. 21 crores a similar enquiry must be expected of any business concern such as the plaintiff. If the plaintiff has been remiss in taking steps which would be expected of any prudent businessman, it must suffer the consequences of its negligence. Looking at the wordings in Clause 16.5 there is no room or scope for this Court to infuse and thrust equitable considerations on the parties and re-write the contract.

12. It has been strenuously submitted by Mr. Maheshwari, learned Senior Counsel for the plaintiff that it cannot be controverted by Defendant No. 1 that the contract had been accepted by Defendant No. 5 and not by Defendant No. 1 and that till date the former had not taken any decision to cancel the contract. There is, however, a prima facie case that Defendant No. 1 and Defendant No. 5 are alter egos of each other and if their respective corporate veils are pierced to determine their economic personalities and realities, they would no doubt be seen as one and the same entities, and that Defendant No. 5 had been begotten by Defendant No. 1 for commercial expediency. In the face of an "on-demand bank guarantee" it would be improper and impermissible for the Court to take such questions into active considerations when incontrovertibly the Bank Guarantee is in the name of Defendant No. 1 and not Defendant No. 5. It is also prima facie evident that Mr. B.N. Singh, the signatory of the Letter of Acceptance dated 26. (sic).2004, is a senior functionary of both these Defendants.

13. It is for these reasons that I am of the view that the plaintiff has failed altogether to disclose the existence of a prima facie case in its favor. There is no error that is at once apparent and manifest on the question of any error in the invocation of the Bank Guarantee. No fraud of a egregious nature has been disclosed. No irretrievable injury is evident since we are dealing only with money changing hands, and it is always open to the plaintiff to file a Suit for recovery or for damages or or any other relief that it may be advised to initiate. The interim Orders passed on 29.7.2004 are recalled. The Defendant's application under Order XXXIX Rule 4 is allowed and the plaintiff's application under Order XXXIX Rules 1 and 2 is dismissed.