
(2005) 02 DEL CK 0147

In the Delhi High Court

Case No : IAs. 4738, 5248, 8187/04 and 303/05 in CS (OS) No. 807 of 2004

Punj LLOYD Ltd.

APPELLANT

Vs

The India Cements Ltd. and Others

RESPONDENT

Date of Decision : 09-02-2005

Acts Referred:

Citation : AIR 2005 Delhi 389 : (2005) 3 BC 491 : (2005) 1 CTLJ 189 : (2005) 117 DLT 496 : (2005) 80 DRJ 215

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : J.P. Singh and Ravinder Dalal, for the Appellant; G.L. Sanghi Sr. Advocate, P.B. Agarwala and Hari Shankar, for the Respondent

Judgement

Pradeep Nandrajog, J.—Present order disposes of the above captioned interim applications. IA. No. 4738/2004 is the plaintiff's application under Order 39 Rules 1 and 2 CPC praying that defendants 1 and 2 be restrained from encashing the bank guarantees No. 031-BG-353 and 031-BG-223 issued by Canara Bank, bank guarantee No. BG.064/03 issued by Jammu and Kashmir Bank Ltd. and bank guarantee No. 0853403 BG-000085 issued by State Bank of India and further to restrain said banks from making any payment under the said bank guarantees to the beneficiaries, being defendants 1 and 2.

2. IA. 5248/2004 is an application under order 39 Rule 4 CPC filed by defendants 1 and 2 praying for vacation of the ex-parte ad interim order dated 30.7.2004. IA. No. 8187/2004 is the defendants' application u/s 151 CPC seeking preponement of hearing of is No. 5248/2004 and is No. 4739/2004. is No. 303/2005 is the plaintiff's application u/s 151 CPC praying that directions be issued to defendants 3 to 5 i.e. the issuing bank to extend the validity of the bank guarantees issued by them.

3. Case of the plaintiff stands reflected in the averments made in paras 2 to 11 of the plaint. Said averments read as under:-

"2. That defendant No.2 is a subsidiary of defendant No.1. The defendants No.1 & 2 approached the plaintiff for supply of cement OPC Grade 43 conforming to IS:8112 in acceptable condition to the plaintiff's road projects being executed by the plaintiff being Dharmavaram Tuni Road Project and Belgaum Maharashtra Border Road Project respectively.

3. That accordingly, separate memorandum of understanding was executed between the plaintiff and defendants No.1 & 2 setting out the price of the cement to be supplied inclusive of all insurance, taxes, duties, loading and unloading and freight up to PLL Camp location, delivered at site and the prices were to remain fix during the execution of the contract subject to any escalation of excise duty or other taxes and levies etc. in terms as set out therein.

4. That for ensuring timely payments the plaintiff furnish bank guarantees valued at 30 days of supply. In all the plaintiff furnished the following bank guarantees in favor of defendant No.1 issued by defendants No.3 to 5:-

-----					BANK	NO.
AMOUNT		VALIDITY		PERIOD		
-----					a) Canara Bank	
BG.031BG353	1,50,00,000/-	30/9/2004	b) Canara Bank	BG.031BG223		
75,00,000/-	31/7/2004	c) J & K Bank Ltd.	BG.064/03	50,00,000/-	25/9/2004	d)
SBI	0853403BG	000085	1,80,00,000/-		31/7/2004	

5. That a bare perusal of the agreement between the parties as well as the bank guarantees in question would reveal that the bank guarantees have been issued by the plaintiff for purposes of "money that may become payable by our said client to you in relation to the said goods whether on account of security or of the price of the said goods as dispatched or delivered by you."

6. That it is clear from the agreement between the parties as well as the bank guarantees that the same can be invoked only for purposes of price of the goods i.e. cement supplied by the defendants No.1 & 2. Under no other circumstance any amount under the bank guarantee becomes payable by the defendants No.3 to 5 or encashable by defendant No.1.

7. That certain disputes have arisen between the parties on account of entry tax and Form-C to be furnished by the plaintiff. As per the plaintiff the Karnataka Government had already exempted the levy of any entry tax on construction materials equipment and machinery purchased or proposed to be purchase within and outside Karnataka State for use in the said project. In any event the liability, if any, on account of the entry tax has nothing to do with defendants No.1 & 2 as set out in their letter dated 4/6/2003. So far as Form-C is concerned it was stated that as soon as there was confirmation that consolidated commercial invoices had been issued the same would be furnished without any delay.

8. That the entire payment for the supplies made by defendants No.1 & 2 stood paid by May, 2004 and the said defendants were requested to return the original bank guarantees. On 1/7/2004 the defendant No.1 raised a claim towards entry tax, sales tax and Form-C in the sum of Rs.70,98,672/-. As on 2/7/2004 it was duly recorded in the Minutes of Meeting held between the parties that the defendants No.1 & 2 had in fact received an extra amount of Rs.1,49,707.79 on account of price of the supply of cement and the issues relateable to entry tax, Form-C, differential tax etc. remained unresolved between the parties.

9. That the plaintiff was shocked to learn from defendant No.5 that defendant No.1 had made a claim for a sum of Rs.73,55,438/- allegedly on account of non payment of the value of cement purchased by the plaintiff from the said defendant. The plaintiff says and submits that as is evident from the correspondence between the parties the claim, if any, raised by the defendants No.1 & 2 till July, 2004 is only relateable to so called debit note raised on account of entry tax, sales tax, Form-C failing which it had been threatened that the bank guarantees would be invoked.

10. That the plaintiff says and submits that the letter of invocation of the bank guarantee sent by defendant No.1 is malafide, fraudulent and the same has been sent illegally to coerce the plaintiff to submit to its illegal demands. It is an attempt on part of defendant No.1 to unjustly enrich itself. The plaintiff says and submits that in the facts and circumstances of the case the invocation of the bank guarantee by defendant No.1 is a threat on the interest and property of the plaintiff. No right has accrued in favor of defendant No.1 to encash the said bank guarantee. On the other hand special equities exist in favor of the plaintiff justifying the non-encashment thereof.

11. That the payment under the Bank Guarantees is not an unqualified obligation. The condition in which the bank guarantees are encashable has not happened. There is no failure on part of the plaintiff to pay the defendant No.1 for the price of goods supplied by defendant No.1. Defendant No.1 cannot invoke the bank guarantees for disputes for which the bank guarantee was not furnished."

4. Response of defendants 1 and 2 as per written statement is as under:-

"2. With reference to para 2 of the plaint, it is submitted that the relevant documents in the said behalf be seen to ascertain the true meaning and scope of the same. However, the Memorandum of Understanding referred to in the plaint do not indicate that the Defendant had approached the plaintiff for supply as pleaded. Since the need was mutual, the parties had approached each other for the supply of cement.

3. With reference to para 3 of the plaint, it is submitted that Memorandum of Understanding executed between the parties be seen to ascertain true and correct meaning thereof. However, the price agreed to in the said Memorandums of Understanding were valid up to December, 2002 only. The reference to the

said Memorandum of Understanding is, Therefore, out of context.

4. Contents of para 4 of the plaint are matter of record and hence need not reply.

5-6. With reference to paras 5 and 6 of the plaint, it is submitted that the Bank Guarantees may kindly be seen to ascertain true meaning and scope thereof. The allegations to the contrary in the paras under reply are denied.

7. With reference to para 7 of the plaint, it is submitted that entry tax was the liability of the plaintiff (Purchaser). The plaintiff was to bear the same. However, since the plaintiff represented that they have been granted exemption from payment of entry tax, invoices were raised accordingly. However, later on it turned out that the exemption is not valid and, entry tax will have to be paid for the supplies made by the Defendant to the plaintiff. The matter was taken up with the plaintiff. The plaintiff throughout did not deny their liability to pay entry tax. The Defendant has filed necessary documents in the said behalf Along with their application under Order 39 Rule 4. The Defendant craves leave of this Hon"ble Court to refer to the documents to appreciate the true meaning and scope thereof. The allegations to the contrary in the para under reply are denied. It is, however, reiterated that entry tax had to be paid by the Defendant Nos. 1 and 2 for the sales made to the plaintiff. Since the said entry tax was not recovered from the plaintiff because of the plaintiff's representation as to exemption, the Defendants were entitled to claim the same once it became clear that exemption from payment of entry tax is not available to the plaintiff for the supplies made by the Defendant. The said entry tax formed part of the price, as, price includes not only the price of the goods but all taxes which legally can be claimed from the purchaser. The allegation that in so far as "C" form is concerned, it was stated that as soon as there was confirmation that consolidated commercial invoices have been issued, the same would be furnished is incorrect even to the knowledge of the plaintiff. The plaintiffs were aware that individual invoices had been issued for the supplies made. The invoices are to be submitted to various departments of the Government for tax purposes. Consequently, no consolidated invoices could be issued for the supplies in respect of which individual invoices had already been issued.

8. With reference to para 8 of the plaint it is submitted that the liability towards entry tax and differential tax because of non-furnishing of "C" forms was on the plaintiff. In so far as the amount of Rs.1,49,707.79 is concerned, the same did not take into consideration the amount of entry tax and amount of differential sales tax. It is submitted that the liability to pay both the said taxes was on the plaintiff. It is a matter of record that the plaintiff has not paid the same. It is submitted that in the facts of the case it would be highly unjust that the plaintiff holds the money towards the entry tax and differential sales tax to its benefit and, at the same time the Defendant is obliged to pay the same to statutory authorities. The allegations in para under reply Therefore are untenable.

9. Contents of para 9 of the plaint are wrong and are denied. There was nothing

for the plaintiff to be shocked to learn that the Defendant No.1 has made a claim for Rs.73,55,438/- under the Bank Guarantees issued on behalf of the plaintiff. It is submitted that the plaintiffs were aware that if the said amounts are not paid, Bank Guarantees would be invoked. The plaintiffs were further made aware of the intention of the Defendant No.1 to invoke the Bank Guarantees vide communication dated 22nd July, 2002 wherein it was made clear to the plaintiff that the Defendant No.1 is constrained to encash the Bank Guarantees to the extent of Rs.73,55,438/-. The Defendant crave leave of this Hon"ble Court to refer to the correspondence referred to in para under reply for their true and correct meaning when produced. The allegations to the contrary are wrong and are denied.

10. Contents of para 10 of the plaint are wrong and are denied. It is denied that letter of invocation of the Bank Guarantees sent by the Defendant is malafide, fraudulent and, the same has been sent illegally to coerce the plaintiff to submit to the Defendants illegal demand as alleged or otherwise. It is also denied that invocation of the Bank Guarantees is an attempt on the part of the Defendant No.1 to unjustly enriched itself. It is also denied that invocation of the Bank Guarantees by the Defendant No.1 is a threat on the interest and property of the plaintiff. It is also denied that no right has been accrued in favor of the Defendant No.1 to encash Bank Guarantee. It is also denied that special equities exists in favor of the plaintiff justifying the non-encashment of the Bank Guarantees. It is submitted that the allegations are bald and devoid of any material particulars. It is also submitted that the Bank Guarantee are not invoked by the Defendant No.1 to unjustly enrich itself but has been invoked to pay the statutory dues which it is liable to pay for the supplies of cement made by it to the plaintiff. The invocation amount includes the amount payable to the statutory authorities towards entry tax and the differential amount of sales tax because of non-furnishing of "C" forms by the plaintiff. The liability Therefore is of the plaintiff. By moving the suit and, by avoiding to pay the same, it is the plaintiff who is unjustly trying to enrich itself. The special equities are in fact in favor of the Defendant No.1 as, the Defendant No.1 cannot be expected to pay its money to the statutory authorities and at the same time the plaintiff continue to enjoy the money which it had to pay to the Defendant No.1 to enable the Defendant No.1 to pay the same to the statutory authorities.

11. Contents of para 11 of the plaint are wrong and are denied. It is denied that the condition on which the Bank Guarantees are encashable has not happened. It is also denied that there is no failure on the part of the plaintiff to pay to the Defendant No.1 for the prices of the goods supplied by the Defendant No.1 to the plaintiff. It is also denied that the Defendant could not invoke the Bank Guarantees for disputes for which the Bank Guarantee was not furnished. It is submitted that the Bank Guarantee has been invoked validly, in terms of Bank Guarantee and, for payment of tax liabilities which form part of the sale price and other charges which are payable by the plaintiff. It is denied that the Bank Guarantee has been invoked for disputes for which Bank Guarantee was not

furnished as alleged or otherwise."

5. While praying for preponement of the date vide is NO. 8187/2004, defendants has placed on record assessment orders passed by the Sales Tax authorities, Government of Karnataka determining sales tax payable on the supplies effected by the defendants 1 and 2 to the plaintiff.

6. Learned counsel for the plaintiff, Mr.J.P.Singh, predicated a stand that the bank guarantees in question secured payment of the price of the goods supplied by the plaintiff to defendants 1 and 2 and, Therefore, defendants 1 and 2 could not invoke the bank guarantees for realization of entry tax and sales tax levied by the State of Karnataka on the goods supplied by the defendants to the plaintiff.

7. Per contra, Mr.G.L.Sanghi, learned senior counsel for defendants 1 and 2 urged that the bank guarantees secured payments for all money due for or in relation to the goods supplied by the defendants to the plaintiff and alternatively contended that the bank guarantees were unconditional and payable on demand.

8. The 4 bank guarantees issued by defendants 3 to 5 are identically worded, save and except the amount payable under the guarantees. Operative part of the guarantees reads as under:-

"We guarantee the due payment by our said client to you of all money that may become payable by our said client to you for or in relation to the said goods whether on account of security or of the price of the said goods as dispatched or delivered by you. We undertake to pay to your goodself, on demand and, without demur or protest and without reference to the client."

9. Client referred to is the plaintiff. Beneficiary is defendant No.1.

10. Admitted case of the parties is that defendants 1 and 2 were to effect supply of cement to plaintiff for its project in the State of Karnataka and plaintiff was to pay the price for the goods supplied. It is also not in dispute that the plaintiff claimed that it had been granted exemption from payment of entry tax and sales tax concession and accordingly defendants had raised price payable, excluding the entry tax and sales tax.

11. Assessment orders by the sales tax authorities show that the Government of Maharashtra is demanding entry tax and sales tax in respect of the goods in question.

12. A perusal of the term of the bank guarantees noted above shows that the issuing banks, guaranteed payment to defendants 1 and 2 of all money "for or in relation to the goods".

13. The term of the guarantee is widely worded. It secures all money for or in relation to the goods supplied by the defendants to the plaintiff. It is settled law that where a buyer agrees to pay the taxes on the goods sold, the tax component relates to the price of the goods. I need not elaborate on this issue for the reason that the bank guarantee secures all money payable in relation to

the goods. The clause is widely worded.

14. Mr.J.P.Singh, learned counsel for the plaintiff urged that the words "for or in relation to the said goods" are succeeded by the sentence "whether on account of security or of the price of the said goods". Counsel urged that the said words restricted the ambit of the preceding words to secure payment on account of price of the goods.

15. A reading of the clause as a whole would reveal that the latter part is explanatory of the first part and not restrictive thereof. The clause is to be found in a commercial document and has to be read as ordinary men of prudence dealing in commercial matters would understand it to be. The bank guarantee secures all money payable to the defendants in relation to the goods delivered.

16. If sales tax and entry tax relate to the sale of goods, the sum thereof would obviously be in relation to the goods delivered.

17. Be that as it may, if the term of sale, in relation to the price, requires the buyer to pay to the seller taxes livable on the sale of the goods, the tax component would be inclusive of the price. It has to be noted in this case that the plaintiff had informed the defendant that it had obtained exemption from the State of Karnataka, but the State of Karnataka was demanding sales and entry tax from the defendants No. 1 & 2.

18. A perusal of the bank guarantee would further reveal that the issuing bank has undertaken to pay the amount secured on demand and without demur or protest and without referring to the plaintiff.

19. The principles regarding the payment of amounts covered by bank guarantees are fairly well settled. A bank has to honour the bank guarantee subject of course to 3 limitations, being that (i) the invocation has to be in terms of the guarantee, (ii) there is no fraud or (iii) there is no irretrievable injury. Fraud if pleaded has to be of such nature that the underlying contract between the parties is vitiated.

20. A bank would not be concerned with the private dispute between the buyer and seller which must be settled between the two. In the judgment Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, it was held that when in a course of commercial dealings a bank guarantee is given or accepted, the beneficiary is entitled to realize the guaranteed sum in terms of the guarantee 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 the customer.

21. On the terms of the bank guarantee noted above and the admitted position that the State of Karnataka has raised a demand of sales tax and entry tax in respect of the supplies effected by the defendants to the plaintiff, it cannot be said that the invocation of the bank guarantee by the defendants for realization of the said money which is in relation to the supply of goods is outside the terms

of the bank guarantee.

22. is No. 4738/2004 filed by the plaintiff is accordingly dismissed and is NO. 5248/2004 filed by defendants 1 and 2 are allowed. Since IAs. 4738/2004 and 5248/2004 have been decided, is NO. 8187/2004 has become infructuous and stands disposed of.

23. As regards is No. 303/2004, it is for the plaintiff to work out with its banker (s) on the issue of renewal of the bank guarantees. This court cannot direct the bankers of the plaintiff to extend the bank guarantees. However, plaintiff can be directed by this court to either get extended the bank guarantees or replace the same. It has, however, be noted that at the time when the suit was filed it was only the bank guarantee issued by defendant No.5 which was invoked. Notwithstanding the same, order dated 30.7.2004 injuncted all the issuing banks from paying under the bank guarantees and defendants 1 and 2 were restrained from encashing under the guarantees. Unfortunately, it was not noticed that the bank guarantees were expiring. is NO. 303/2005 is accordingly disposed of with a direction to defendants 3 to 5 to pay to defendants 1 and 2 under the guarantees, subject of course to defendants 1 and 2 invoking the guarantees. It may be taken on record that as per the documents filed, defendants 1 and 2 had invoked the bank guarantee issued by defendant No.1 well before the suit was filed.

24. No costs.