

(2000) 03 MAD CK 0040

In the Madras High Court

Case No : Original Application No. 185 of 2000 and Application No. 1083 of 2000

Rajathi Agencies

APPELLANT

Vs

Agrocorp International P. Ltd. and Another
Punjab
National Bank Vs Rajathi Agencies

RESPONDENT

Date of Decision : 16-03-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 9

Citation : (2000) 03 MAD CK 0040

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Judgement

A. Ramamurthi, J.—O. A. No. 185 of 2000 has been filed by the applicant under Order XIV, Rule 8 of the Original Side Rules read with

Section 9 of the Arbitration and Conciliation Act, 1996, to grant an interim injunction restraining the second respondent from paying a sum of Rs.

43,18,080 to the first respondent from out of the amount of Rs. 2,76,24,170 based on the letter of credit dated September 23, 1999, pending

disposal of the arbitration proceedings between the parties before the Refined Sugar Association, London, relating to the dispute in the supply of

3,000 MTs refined white sugar as per the contract dated September 17, 1999.

2. Application No. 1083 of 2000 has been filed by the second respondent under Order 39, Rule 4 of the Civil Procedure Code, 1908, to vacate

the interim order dated March 8, 2000 passed in O. A. 185 of 2000.

3. The case in brief for disposal of both the applications is as follows :

4. The applicant, Rajathi Agencies, are big exporters of onions, chillies and other commodities to Srilanka, Singapore and other countries and they

are a recognised trading house of the Ministry of Commerce and Government of Tamilnadu. They are also regularly importing pulses, sunflower oil, etc. and marketing the same on wholesale basis. They entered into a contract dated September 17, 1999, with the first respondent for import of 3,000 MTs of white refined sugar with specifications. The consignment arrived at Mumbai on October 22, 1999, by M. V. Turnstone and it was found that the sugar was entirely different from the sample given. Immediately they sent a message to the seller that the cargo is different from the sample. There was no reply and again on November 1, 1999, it was complained that the colour of the sugar does not coincide with the sample sent by the shipper. As there was no response, on November 29, 1999, they sent another message to the first respondent for appointment of a joint survey for the sugar arrived. There was no reply and, as such, the applicant engaged the Government-recognised international surveyors and they conducted the survey on December 1, 1999. According to the survey report, the colour of the sugar for each lot varied. The first respondent is solely responsible for contacting the shipper. Since this matter relates to the quality of the sugar, the applicant cannot have a claim for insurance also. When the first respondent was contacted, they stated that Pepsi India has accepted similar cargo. Now, the first respondent wants to take shelter as per a clause in the contract.

5. In view of the poor quality of the sugar supplied by the first respondent, they could not sell the same in the market. The total approximate cost of the sugar imported arrived at is Rs. 4,41,81,082 and the sugar was sold for Rs. 4,06,58,872 and incurred a loss of Rs. 35 lakhs odd. They have lost the profit of sale of the sugar. The total loss amounts to more than Rs. 75 lakhs. However they have restricted the claim only to US dollars of 30 per M. T. They issued a notice dated February 12, 2000 through counsel by fax and registered post to agree for reduction of payment. They also requested to appoint an arbitrator if they were not agreeable for reduction in the price. The seller has not agreed for the same. There was no alternative to refer the matter for arbitration and appointment of an arbitrator by the letter dated February 21, 2000 to the Refined Sugar Association of London. The firm had to make payment within 90 days from October 22, 1999 as per the conditions of the letter of credit, which

was extended by the first respondent by another 60 days since the consignment could not be sold. Because of the delay in marketing the sugar and the extension of time of 60 days for payment, they have to pay an additional amount of 8,132 U. S. dollars to the seller which works out to Rs. 3,55,370.

6. The petitioner has to make the payment of Rs. 2,76,24,170 on or before March 17, 2000. They have already provided necessary funds with

the second respondent who are their bankers for several years. This amount under the letter of credit will have to be sent by the second

respondent to the first respondent on or before March 17, 2000. They have also paid customs duty at 25 per cent. ad valorem and with surcharge

of 10 per cent. duty. They were also directed to remit 1000 sterling pounds towards membership and 6000 sterling pounds towards costs, and it

works out to Rs. 4,18,080. If they get an award in their favour this amount also has to be paid to them by the first respondent. If the second

respondent remits the entire amount of 6,24,000 US dollars towards price of sugar, they will have no hold over the first respondent to recover the

losses, damages and the expenses towards arbitration caused to them because of the supply of bad quality sugar by the first respondent. As the

arbitration proceedings have been referred to at London, it will take quite sometime for initiating them. The second respondent has to be restrained

from paying the claim amount of Rs. 39 lakhs and also Rs. 4,18,080 to be deposited in the Refined Sugar Association of London pending disposal

of the arbitration proceedings. The balance of convenience is also in favour of the applicant. The first respondent have committed the act of breach

of trust and cheated by supplying poor quality sugar contrary to the specifications in the contract. In any event, if the compensation awarded to

them is less than the amount of Rs. 43,18,080 in the arbitration proceedings, they undertake to remit such amount of the first respondent in US

dollars at the then prevailing rate, when such payment has to be made. Hence the petition.

7. The second respondent contended that a sum of Rs. 2,76,24,170 which is equivalent to US dollars 6,24,000 is covered by the irrevocable

letter of credit dated September 23, 1999, which the bank issued in favour of the first respondent with Hongkong and Shanghai Banking

Corporation Ltd., Singapore, as the advising and confirming bank. In terms of the letter of credit, the bank irrevocably undertook to pay on the due dates subject to certain terms and conditions as stipulated in the letter of credit. The beneficiary in accordance with the terms of the purchase order placed, got the goods shipped and in terms of the letter of credit had the documents relating thereto along with usance bills of exchange for acceptance and payment on the due date viz., January 17, 2000. The bank in turn, presented the documents and the bills of exchange which on being fully satisfied that the said documents and the bills of exchange were strictly in conformity with the terms and conditions of the said letter of credit accepted to pay the value of US dollars 6,24,000 on the date of maturity. The bank also delivered the document relating to the shipment of the goods. The bank as the opener of the said letter of credit was and continues to be bound under an irrevocable obligation to HSBC, the negotiating bank and to the beneficiary to pay the said amount with interest. The bank as an authorised dealer in foreign exchange, maintains a foreign currency account with HSBC Bank in New York, USA and that regardless of whether or not the applicant pays to the bank, the amounts on the due dates, HSBC, the negotiating bank, would draw the amount by debit of the bank's foreign currency account.

8. The respondent by letter dated January 15, 2000 informed that the purchasers would effect payment only by March 15, 2000 and requested extension of 60 days time from January 17, 2000 to make payment of the bill amount. The beneficiary had advised HSBC to agree to the extension and the bank also extended the time for payment up to March 17, 2000 subject to the condition that the bank paid interest on the bill amount of US dollars 6,24,000 for the extending period and the applicant in turn, paid interest on the sum of Rs. 2,76,24,170 to the bank. The applicant is now attempting to raise some disputes with the beneficiary as to the quality of the goods supplied and to have the dispute made the subject-matter of arbitration proceedings. The endeavour of the applicant is nothing but an afterthought and it is neither bona fide nor genuine. The liability of the applicant to pay to the bank on or before March 17, 2000 is absolute. If the buyer has an enforceable claim that adjustment must be made by way of refund by the seller and not by way of retention by the buyer. The letter of credit is independent and unqualified. The bank is,

therefore, bound by the terms of letter of credit to pay the amount of the bills and interest in the foreign currency on or before March 17, 2000 and

the applicant does not remit the amount in full and without any deductions plus interest on or before March 17, 2000, the bank a public institution

carrying on banking business with the public money will suffer very serious and irreparable injury. The applicant is estopped from raising any claim

that the bank should withhold payment of Rs. 43 lakhs odd out of the total amount. The applicant has not established a prima facie case for grant

of any interim order and the balance of convenience is not in their favour. The continuance of injunction would affect the image of the country and

the international trade and, as such, the interim order already granted on March 8, 2000, is liable to be vacated.

9. The applicant obtained an order of interim injunction in O. A. No. 185 of 2000 and the second respondent in O. A. No. 185 of 2000 filed

Application No. 1083 of 2000 as an applicant to vacate the interim order dated March 8, 2000. The respondent in Application No. 1083 of 2000

has filed a separate counter, reiterating the averments made by them in O. A. No. 185 of 2000 and, as such, it is unnecessary to reproduce the

same. The parties will be hereinafter referred to as they are described in O. A. No. 185 of 2000 to avoid confusion.

9. Heard learned counsel of both the sides.

10. The points that arise for consideration are (1) whether the applicant has got prima facie case and the balance of convenience is in their favour ?

and (2) whether the interim order dated March 8, 2000 is liable to be vacated ?

11. Points : The applicant is engaged in export of onions, chillies and other commodities to foreign countries and is recognised as a trading house.

They are also regularly importing pulses, sunflower oil, etc. from foreign countries. They have entered into a contract with the first respondent, a

Singapore-based company for importing 5,000 M.Ts. of white refined sugar with specifications. The necessary irrevocable letter of credit dated

September 23, 1999 for 100 per cent. of the value was also opened with the second respondent bank at Chennai. The letter of credit was for

payment of US dollars 6,24,000 in 90 days from the bill of lading date. The consignment arrived at Mumbai on October 22, 1999, by M. V.

Turnstone and according to learned counsel for the applicant, the sugar was

entirely different from the sample given. The applicant complained to the first respondent on several occasions and later engaged the Government-recognised international surveyors and obtained a survey report also.

However, since the first respondent has not sent any reply, the applicant was constrained to invoke the clause of arbitration. Because of the poor

quality of the sugar, they could not sell the entire quantity in the open market within the period and they have also sustained loss of more than Rs.

75 lakhs. The matter was referred to arbitration by letter dated February 21, 2000 to Refined Sugar Association, London.

12. Learned counsel for the applicant contended that if the second respondent remits the whole amount of Rs. 2,76,24,170 equivalent to 6,24,000

US dollars towards the price of sugar and also 81,324 US dollars towards interest to the first respondent as per the letter of credit, they will have

no hold over the first respondent to recover the losses, expenses, etc., towards the arbitration and, as such, filed the application to grant an interim

injunction restraining the second respondent/garnishee bank from paying the sum of Rs. 43 lakhs odd from the first respondent from out of the total

amount of Rs. 2 crores odd, based on the letter of credit dated September 23, 1999.

13. This application is resisted by the second respondent/garnishee bank that after entering into an irrevocable letter of credit, it is no longer open

to the applicant to get an order of interim injunction restraining the bank from paying the amount to the beneficiary. Whatever the dispute between

the applicant and the first respondent, they have to work out the same and unless there is any fraud, the second respondent cannot be prevented

from paying the amount to the beneficiary. According to the letter of credit, the period came to an end by January 17, 2000. Later, at the request

of the applicant only, the period of letter of credit was extended up to March 17, 2000. It is always open to the applicant to sort out the dispute

with the first respondent. In fact, learned counsel for the second respondent pointed out number of correspondence between the parties in order to

show that in none of the communications the applicant has informed the second respondent that the quality of the sugar sent was either bad or

substandard. In short, according to learned counsel, the endeavour of the applicant is only to delay the payment and it is neither bona fide nor

genuine. When once the goods have been sent to the destination the applicant, having received the same, is not now entitled to prevent the bank

viz., the second respondent from paying the amount as per the letter of credit. A vendor of goods selling against a confirmed letter of credit is

selling under the assurance that nothing will prevent him from receiving the price. If the buyer has an enforceable claim that adjustment must be

made by way of refund by the seller and not by way of retention by the buyer. The autonomy of an irrevocable letter of credit is entitled to

protection and irrevocable letter of credit is a mechanism of great importance in international trade and any interference is bound to have serious

repercussions on the international trade. He further pointed out that the applicant has no prima facie case and the balance of convenience is not in

their favour and even if the applicant succeeds in the arbitration, he can be compensated in money by the first respondent and, as such, the interim

order already passed on March 8, 2000 is liable to be vacated.

14. Per contra, learned counsel for the applicant contended that a letter of credit has been opened for a sum of Rs. 2 crores odd and now, the

interim injunction has been granted restraining the second respondent from paying only a sum of Rs. 43 lakhs odd and by this, there would not be

any loss or damage or hardship to the second respondent. In view of the arbitration proceedings before the authorities at London, it may take

considerable time and in fact, the applicant himself in the affidavit has given an undertaking that even if the compensation awarded is less than the

amount of Rs. 43 lakhs odd, he is prepared to remit such amount to the first respondent in US dollars at the then prevailing rate when such

payment has to be made. No doubt, this undertaking appears to be a sound one but it has to be found out whether the applicant has got a prima

facie case and the balance of convenience is in his favour to prevent the second respondent from paying a portion of the amount covered under the

letter of credit leaving a sum of Rs. 43 lakhs odd. It is necessary to state that admittedly the applicant has not informed the second respondent at

any point of time about the quality of sugar imported by them. When once the irrevocable letter of credit has been entered into between the parties,

normally the bank is entitled to honour the same and only in exceptional cases, the order of interim injunction can be issued restraining the issuing

bank from paying the amount to the beneficiary through the negotiating bank. The burden is only upon the applicant to show that unless and until an order of interim injunction is granted, they would be put to much loss and hardship or they cannot be compensated in terms of money. It is not the case of learned counsel for the applicant that they may not be able to recover any money from the first respondent if ultimately they succeed in the arbitration claim. It is only when the applicant is able to establish that the first respondent is a man of no means or the amount cannot be got back, then alone it can be construed that the balance of convenience is in his favour. When the irrevocable letter of credit is there, I am of the view that the second respondent bank alone has got a prima facie case. Similarly, the loss if any created to the applicant, even if it is true can be compensated in terms of money and it is always open to the applicant to claim the same from the first respondent.

15. Learned counsel for the applicant relied on M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , wherein it was observed that a party to

an arbitration agreement can approach the court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings.

There is no dispute about this proposition taking into consideration the language employed u/s 9 of the Arbitration and Conciliation Act. Learned

counsel also relied on Harendra H. Mehta and Others Vs. Mukesh H. Mehta and Others, wherein it was observed that Foreign Awards Act is a

complete code in itself providing for all the possible contingencies in relation to the foreign awards. Once it is held that an award is a foreign award,

the provisions of the Foreign Awards Act would apply and where the conditions for enforcement of such an award exist as mentioned in Section 7

of the Act, the court shall order the award to be filed and shall proceed to pronounce judgment granting award and upon the judgment so

pronounced, decree shall follow. There is also no dispute about this proposition but it has no application to the case on hand.

16. Learned counsel for the second respondent relied on Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, wherein it was

observed that in the law relating to bank guarantee, a party seeking injunction from encashing of bank guarantee by the suppliers has to show a

prima facie case of established fraud and irretrievable injury. Once the borrower was able to establish fraud against the suppliers or suppliers-cum-

lenders and obtained any decree for damages or diminution in price, there was no problem for effecting recoveries in a friendly country where the

bankers and the suppliers are located. The principles enunciated in the above decision is applicable to the case on hand.

17. Reliance was also placed upon National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, , wherein it was

observed that the court should not lightly interfere with a performance bond or guarantee unless there is fraud of the beneficiary. Learned counsel

also drew my attention to the decision in I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, , wherein it was observed that the

question whether goods were supplied by the appellant or not was not for the bank to go into. The bank could not, by merely stating that there

was non-supply of goods by the appellant, use the word ""fraud"" or ""misrepresentation"" for purposes of coming under the exception. The dispute as

to non-supply of goods was a matter between the seller and the buyer and did not provide any cause of action for the bank against the seller. An

allegation of non-supply of goods by the sellers to the buyers did not by itself amount, in law, to a plea of ""fraud"" as understood in this branch of

the law and hence by merely characterising the alleged non-movement of goods as ""fraud"", the bank could not claim that there was a cause of

action based on fraud or misrepresentation. Nor was there an allegation of presentation of forged or fraudulent documents. This decision is

applicable to the case on hand.

18. It has been held in Tarapore and Co. Vs. V/O Tractoroexport and Another, that opening of a confirmed letter of credit constitutes a bargain

between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there

may be between the parties as to whether the goods are up to contract or not. A vendor of goods selling against a confirmed letter of credit is

selling under the assurance that nothing will prevent him from receiving the price. If the buyer has an enforceable claim that adjustment must be

made by way of refund by the seller and not by the way of retention of the buyer. The letter of credit is independent of and unqualified by the

contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule courts refrain from

interfering with that autonomy, This decision is also applicable to the case on hand.

19. Learned counsel also relied on United Commercial Bank Vs. Bank of India and Others, , wherein it was observed that it is only in exceptional

cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood 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. This principle is also applicable to the case on hand.

20. Reliance was also placed upon another decision in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and

another, , wherein it was held that the law relating to invocation of such bank guarantee 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. 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.

21. Lastly, learned counsel relied on AIR 1997 1644 (SC) reiterating the very same proposition. It is, therefore, clear from the aforesaid decisions

that the courts should be slow in granting an injunction to restrain the realization of an unconditional bank guarantee. Only two exceptions have

been provided and the first exception relates to a fraud in connection with the bank guarantee and 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. In the present case, the quality of the sugar has been questioned by the applicant and as adverted to, in none of the communications it has been referred to the second respondent bank. Even assuming that there is a genuine dispute between the applicant as well as the first respondent relating to the quality of the goods supplied is a matter of dispute between the buyer and seller and for which, the second respondent bank cannot be restrained from enforcing the irrevocable letter of credit already entered into. The applicant is not in a position to establish prima facie material that any fraud was committed or the non-grant of any injunction would cause any irretrievable injury. I am of the view that the applicant has no prima facie case and the balance of convenience is not in their favour. Hence, these points are answered accordingly.

22. For the reasons stated above, O. A. No. 185 of 2000 is dismissed and Application No. 1083 of 2000 is allowed. The interim order granted in

O. A. No. 185 of 2000, dated March 8, 2000 is vacated.