(2018) 07 MP CK 0212

In the Madhya Pradesh High Court

Case No : Writ Petition No. 16302 OF 2018

Reliance Communications Ltd And Another — APPELLANT

Vs

Union Of India And Others — RESPONDENT

Date of Decision : 24-07-2018

Acts Referred:
Indian Telegraph Act, 1885 — Section 20A

Citation : (2018) 07 MP CK 0212

Hon'ble Judges : Hemant Gupta, Cj;Rajendra Kumar Srivastava, J

Bench : Division Bench

Advocate : Siddarth Gupta, Sandeep Shukla

Judgement

The challenge in the present petition is to communications dated 13.7.2018 â?" Annexures P/4 and P/5, whereby the Bank Guarantee furnished by the

petitioners for not complying with their contractual obligation/duty in accordance with the License Agreement was intended to be encashed.

The first communication Annexure P/4 is in respect of Bank Guarantee for the sum of Rs.3,55,00,000/-, valid upto 11.6.2019; whereas, communication

Annexure P/5 is in respect of Bank Guarantee for Rs.27,76,77,000/-, valid upto 18.4.2019.

Learned counsel for the petitioners relies upon interim orders passed by different High Courts to contend that invocation of Bank Guarantees in similar

circumstances has been stayed.

The petitioner challenges Clause 5.1 and Clause 10.2(ii) of the License Agreement said to be inconsistent with the Indian Telegraph Act, 1885 (for

short the â??Actâ??). It is also alleged that the penalty cannot be levied as it is contrary to Section 20A of the Act.

We find that challenge to the conditions of the license and to said Section 20A of the Act to avoid encashment of Bank Guarantee is not tenable, as it

is well settled that Bank Guarantee is a stand-alone agreement independent of the agreement in terms of which any Bank Guarantee was furnished.

The Supreme Court in a Judgment reported as General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd., (1991) 4 SCC 230, held that the

Bank must honour the Bank Guarantee free from interference by the courts. Since the Bank pledges its own credit involving its reputation, it has no

defence except in the case of fraud. The extract from the Three Bench Judgment reads as under:-Â

â??9. The question is whether the court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of

respondent 1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases

have been considered in a recent judgment of this Court in U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1

SCC 174, wherein Sabyasachi Mukharji, J., as he then was, observed (SCC p. 189, para 28) that â??[I]n order to restrain the operation either of

irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie

case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees

would be negatived and the fabric of trading operations will get jeopardisedâ?. It was further observed that the Bank must honour the bank guarantee

free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional

cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. In the concurring opinion one of us (K. Jagannatha

Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the

documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its

reputation, it has no defence except in the case of fraud. The Bankâ??s obligations of course should not be extended to protect the unscrupulous

party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an â??egregious nature as to vitiate the entire underlying transactionâ?. It is fraud of the beneficiary, not the

fraud of somebody else.â??

The issue has been examined recently by the Honâ??ble Supreme Court in a judgment reported as Gujarat Maritime Board Vs. Larsen and Toubro

Infrastructure Development Projects Limited and another, (2016) 10 SCC 46, wherein it has been held as under:

â??12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious

fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Limited v. Coal

Tar Refining Company, (2007) 8 SCC 110, at paragraph -14: (SCC pp.117-18)

â??14.Â From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank

guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank

guarantee or a letter of credit:Â

(i) 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 realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes

relating to the terms of the contract.Â

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.Â

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.Â

(iv) 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. Â

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take

advantage of the situation.Â

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.â??Â

13. Guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz. the first respondent of the

conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it â?¦ â??without any demur, merely on a demand

from GMB (appellant) stating that the said lead promoter failed to perform the covenantsâ?¦â?. It has also been undertaken by the bank that such

written demand from the appellant on the bank shall be â?¦ â??conclusive, absolute and unequivocal as regards the amount due and payable by the

bank under this guaranteeâ?. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated

06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to

perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal

and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying

its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India.

Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants

between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee.â??

In view of the aforesaid judgments, we find that no case is made out for stay of invocation of Bank Guarantee.

Let notice be issued of the writ petition to decide the issues raised.Â

Respondent Nos. 1 and 2 may file their return within six weeks.Â Â

