

(1991) 06 BOM CK 0048

In the Bombay High Court

Case No : Notice of Motion No. 67 of 1990 in Suit No. 43 of 1990

S.C.I.L. (India) Ltd.

APPELLANT

Vs

Indian Bank and another

RESPONDENT

Date of Decision : 18-06-1991

Acts Referred:

Citation : (1994) 79 CompCas 693

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : S.C. Gupte, for the Appellant; Miss. M.C. Shah and Dr. D.Y. Chandrachud, for the Respondent

Judgement

D.R. Dhanuka J.

1. By this notice of motion, the plaintiff seeks to restrain defendant No. 1 bank from paying the amount covered under the bank guarantee dated May 23, 1987, to defendant No. 2 and defendant No. 2 from encashing the said bank guarantee.

2. I must state at the outset that no case is made out by the plaintiff for grant of interim injunction and the notice of motion is liable to fail for the reasons indicated below.

3. The plaintiff-company has its registered office at Calcutta in the State of West Bengal. The plaintiff-company also has its office at Nirlon House, Bombay. By a contract bearing No. NPIL/ECP/85/9/782, dated March 31, 1987, defendant No. 2 engaged the plaintiff as sub-contractor for carrying out erection, testing and commissioning of L.P. pipe work and tube oil unloading system at Rihand Super Thermal Power Station Stage I, at a total value of Rs. 1,07,28,060. At the instance of the plaintiff, defendant No. 1-bank furnished a bank guarantee in the sum of Rs. 10,72,806 in favour of defendant No. 2 Defendant No. 1 obtained a counter-guarantee from the plaintiff in its turn. A copy of the said bank guarantee dated May 23, 1987 (performance guarantee), is annexed as exhibit "A" to the plaint. After reciting the above referred contract, it was provided in the

operative part of the guarantee that defendant No. 1 bank guarantees and undertakes to pay to defendant No. 2 on demand "any and all monies payable by the contractor to the extent of Rs. 10,72,806 as aforesaid at any time up to June 30, 1989, without any demur, reservation, contest, recourse of protest and/or without any reference to the contractor". The plaintiff is described as contractor in the said bank guarantee. The said bank guarantee in terms provided as under :

"Any such demand made by NPIL (defendant No. 2) on the bank shall be conclusive and binding notwithstanding any difference between NPIL and contractor or any dispute pending before any court, Tribunal, arbitrator."

4. The terms of the said bank guarantee clearly show that the first defendant-bank had accepted an independent obligation to pay the amount to the extent of Rs. 10,72,806 to defendant No. 2 irrevocably on demand without any demur and without any reference to the plaintiff. The said bank guarantee has been extended till June 30, 1991.

5. Ordinarily, no injunction can ever be granted in cases where such bank guarantees are furnished by the bank. The categories or recognised exceptions are limited by judicial decisions to cases like that of fraud or special equities.

6. Defendant No. 2 has filed an affidavit of one Mr. B. M. Baliga, being affidavit dated June 26, 1990, setting out details of huge losses suffered by defendant No. 2 by reason of the default committed by the plaintiff. I need not summarise the contents of this affidavit for the sake of brevity. It is not the case of the plaintiff that defendant No. 2 has invoked the said bank guarantee fraudulently or mala fide. It is obvious that the said bank guarantee is invoked bona fide.

7. The Government of West Bengal has declared the plaintiff as an unemployment relief undertaking under the West Bengal Act, XIII of 1972, with effect from May 11, 1990. In paragraph 3 of the affidavit in rejoinder the plaintiff has set out details of the notifications issued by the Government of West Bengal from time to time in this behalf, the last of such notifications being notification dated March 18, 1991, to be operative till September 9, 1991. Under the said notification, all contracts between the plaintiff and third parties and all rights, obligations and liabilities arising therefrom appear to have been suspended, excluding the following contracts :

- (1) contracts, assurances of property and agreements in force immediately before the relevant date between the relief undertaking and the Government;
- (2) contracts between the relief undertaking and the Industrial Reconstruction Bank of India;
- (3) contracts between the relief undertaking and any bank;
- (4) contracts between the relief undertaking and financing institutions; and
- (5) contracts between the relief undertaking and any workman or any group of workmen.

9. Relying upon the provisions of the above referred West Bengal Act No. XIII of 1972, and the notifications, learned counsel for the plaintiff has submitted that the sub-contract dated March 31, 1987, whereby defendant No. 2 engaged the plaintiff to carry out certain work, itself has stood suspended. Learned counsel has submitted that the contract of performance guarantee executed by defendant No. 1 bank in favour of defendant No. 2 cannot be viewed as an independent contract and the said contract being ancillary to the contract dated March 31, 1987, is liable to be treated as suspended. Defendant No. 1 has submitted to the orders of the Court.

10. Dr. Chandrachud, learned counsel for defendant No. 2, has submitted at the outset that according to the various decisions of the apex court and of this court, the contract of bank guarantee is liable to be treated as an independent contract between the bank and the beneficiary under the bank guarantee to which the plaintiff cannot be treated as a party. Pursuing this argument, Dr. Chandrachud has submitted that the contract of bank guarantee sought to be enforced by defendant No. 2 against defendant No. 1 is not at all affected or suspended by the operation of the above referred Act or the notifications. In the alternative, learned counsel for defendant No. 2 submitted that the sub-contract dated March 31, 1987, itself cannot be treated as subsisting on the relevant date and it cannot therefore, be treated as suspended. It is not necessary to make a detailed scrutiny in respect of the limb of the argument of Dr. Chandrachud. It is sufficient to state that according to the decisions of this Court and according to the decisions of the Supreme Court, the contract of bank guarantee in question is a contract between the first defendant bank and the second defendant beneficiary and the said contract is independent of the sub-contract dated March 31, 1987. It was held by this Court in the case of Suresh Arjundas Bakhtiani v. Union of India , following a series of decisions cited therein, as under (at page 197) :

"It is well-settled by the decisions of the apex court and the High Courts that a bank guarantee is a separate and independent contract between the bank and the beneficiary enforceable on its own terms independently of disputes between the parties to the main contract in pursuance whereof the bank guarantee is furnished. The only parties to the contract of bank guarantee are the bank and the beneficiary. The party at whose instance the bank guarantee is furnished is not a party to the contract of bank guarantee. Similarly, the bank is not a party to the main contract and is unconcerned with it. The arbitration clause contained in the main contract cannot bind the bank as the bank is not a party to the main contract."

11. The same view was expressed by the High Court of Calcutta in the case of Hindustan Paper Corporation Ltd. v. Keneilhouse Angami [1990] 68 Comp Cas 361.

12. There is another angle to examine the problem. In quite a few matters decided by the Supreme Court the question has arisen as to whether the liability

of a guarantor is automatically suspended when the liability of the principal debtor is suspended under some statutory provision. In all these cases the Supreme Court has held that the liability of a guarantor to pay the amount under the guarantee is not at all affected merely because the liability of the principal debtor is suspended. On this aspect, it would be useful to refer to some of the judgments cited by Dr. Chandrachud, learned counsel for the second defendant. In *Maharashtra State Electricity Board v. Official Liquidator*, High Court, Ernakulam [1983] 53 Comp Cas 248, the principal debtor company was in liquidation and the electricity board was seeking to enforce the liability of the bank under a contract of guarantee. It was held in paragraphs 5 and 6 of the said judgment by Venkataramiah J., speaking for the Bench that the contract of guarantee in favour of the electricity board by the bank was an independent contract and the said contract was not affected by liquidation proceedings against the principal debtor. In *State Bank of India v. Saksaria Sugar Mills Ltd.* [1986] 59 Comp Cas 861, the question arose as to whether the liability of the surety was also suspended when the liability of the principal debtor was suspended under a certain statute. It was observed by Venkataramiah J., speaking for the Bench, in paragraphs 6 and 7 of the judgment, that the remedy against the guarantor was not suspended merely because the operation of the contracts, assurances of property, etc., in respect of the sugar undertaking were suspended.

13. Learned counsel for the plaintiff has submitted that the result of denial of injunction in this case would be very inequitable as the first defendant bank would be able to enforce the counter-guarantee when the contract between the plaintiff and the second defendant remains suspended. On facts also I am not satisfied that the plaintiff has any bona fide claim against the second defendant under the said contract although having regard to the ratio of the various judgments regarding bank guarantee being an independent contract, it is not necessary to pursue this line.

14. Learned counsel for the second defendant submitted that the provisions of the above referred Act and the said notification should not be relied upon in the proceedings before the High Court at Bombay as the said Act and the said notification did not have extra-territorial operation. On this aspect, Dr. Chandrachud relied upon the judgment of the High Court of Delhi in the case of *State Bank of India Vs. Jaipur Udyog and Others*, . In this case, the defendant undertaking was declared a relief undertaking and the defendant undertaking was situated in Rajasthan. It was held by the High Court of Delhi that the Rajasthan Relief Undertaking Act did not have extra-territorial jurisdiction and accordingly the relief undertaking could not claim protection of the said Act before the High Court of Delhi. I do not wish to express any opinion on the question as to whether the ratio of the said judgment is correct or not. As a matter of fact the Delhi High Court appears to have differed on the above aspect from the High Court of Punjab and Haryana in the case of *Jaipur Udyog Ltd. v. Punjab University* [1980] 82 P LR 597. The above-referred Punjab decision is not

made available to me. According I am not expressing any opinion on this aspect. This aspect can be considered in some other case if an occasion so arises.

15. Having regard to the ratio of the above referred Bombay judgment and of the supreme Court decisions and the nature of the bank guarantee and there being no special equity whatsoever in the case of the plaintiff, the notice of motion is dismissed with no order as to costs.

16. Ad interim order shall stand vacated with immediate effect.