
(2014) 01 MP CK 0040

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 1724 of 2012

Singh Cold Storage Pvt. Ltd.

APPELLANT

Vs

Parle Biscuits Pvt. Ltd.

RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 151

Citation : (2014) 3 MPLJ 120

Hon'ble Judges : S.C. Sharma, J

Bench : Single Bench

Advocate : A.K. Sethi, Senior Counsel and Manoj Manav, Advocate for the Appellant; A.K. Chitale, Senior Counsel, B.A. Chitale and Nitin Bhati, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.C. Sharma, J.—The present appeal has been filed under Order 43, Rule 1 of the Code of Civil Procedure, 1908 by the appellant being aggrieved by the order dated 11-9-2012 passed by the learned District Judge, Ujjain M.P. in Civil Suit No. 04-A/2012, by which the trial Court has dismissed the application under Order 39, Rules 1 and 2 read with section 151 of the Code of Civil Procedure, 1908 for grant of temporary injunction. Appellant's contention is that the appellant has entered into an agreement with the respondent No. 1 Parle Biscuits Private Ltd., on 11-2-2011 and thereafter pursuant to the aforesaid agreement they have also executed two bank guarantees of Rs. 50 lakhs and 42.44 lakhs, respectively. It has been further stated that after completion of the agreement as there was some outstanding amount against the appellant, the appellant has offered a payment schedule to respondent No. 1 and even one instalment has been paid to the defendant No. 1/respondent No. 1. It has been further stated that after receiving the first instalment the respondent No. 1 submitted the bank guarantee for encashment and the present appellant being aggrieved by the action of the respondent No. 1, in encashing the bank guarantees preferred a

writ petition before this Court and the same was registered as W.P. No. 4361/2012.

2. This Court on 1-5-2012 has granted an interim order. However, the writ petition was withdrawn on 20-7-2012 with a liberty to take appropriate steps, in accordance with law. The petitioner Company has further stated that after the withdrawal of the writ petition, a suit for declaration and permanent injunction was filed before the learned District Judge, Ujjain on 23-7-2012, along with an application under Order 39, Rules 1 and 2 read with section 151 of CPC claiming injunction and also an application was preferred for grant of ex parte injunction. Interim injunction was granted on 24-7-2012. However, after hearing both the parties, the injunction application has been turned down by an order dated 11-9-2012. The order dated 11-9-2012 is impugned in the present Miscellaneous Appeal.

3. The contention of the learned senior counsel appearing for the appellant Company is that the trial Court has erred in law in fact in rejecting the injunction application. It has been further stated that balance of convenience has not been seen by the trial Court while rejecting the application for grant of injunction. It is also been stated that the defendant No. 1/respondent No. 1 has raised a demand of Rs. 184 lakhs approximately and the same has never been disputed till date though the demand was illegal and against the contract. It has been further contended that against the demand of Rs. 184 lakhs, repayment schedule was also submitted by the present petitioner and all the aforesaid explanations have not been considered by the trial Court and, therefore, the impugned order deserves to be set-aside. It has been further contended that the bank guarantee has to be read along with clause 10.4 of the agreement, which is a very relevant clause and by reading the clause 10.4 of the agreement, the bank guarantee becomes a conditional bank guarantee and, therefore, the respondent No. 1 cannot be permitted to revoke the bank guarantee till the matter is finally decided by the trial Court.

4. Learned counsel has placed reliance upon a judgment delivered by this Court in the case of *Devi Shakuntala Thakral Vs. Wig Brothers (India) Pvt. Ltd. and Another*, and the contention of the learned senior counsel is that once a bank guarantee is conditional, it cannot be revoked as held by this Court in the aforesaid case. He has placed reliance on another judgment delivered by the Apex Court in the case of *Hindustan Construction Co. Ltd. Vs. State of Bihar and Others*, and he has placed heavy reliance upon paragraph-8 of the aforesaid judgment. His contention is that a Bank guarantee which is not un-conditional and unequivocal in terms, cannot be revoked. He has prayed for quashment of the order dated 11-9-2012.

5. On the other hand learned senior counsel arguing the matter on behalf of the respondent No. 1 has vehemently argued before this Court that the bank guarantee in question is an unconditional bank guarantee and in light of clause 2 of the bank guarantee as and when the Bank is called upon to encash the bank

guarantee, which is unequivocal and unconditional, the bank is left with no other choice except to encash the bank guarantee. His contention is that merely because in first bank guarantee it has been mentioned that the parties have entered into an agreement dated 2-2-2010, it does not mean it is a conditional bank guarantee. His further contention is that the clause 10.4 of the agreement empowers respondent No. 1 Company to recover damages and it does not mean that other dues cannot be recovered by the Company by encashing the bank guarantee. He has further stated that besides recovery of the dues by encashing the bank guarantee, the respondent No. 1 is also claiming damages by virtue of clause 10.4 from the petitioner Company. Learned counsel has placed reliance upon various judgments delivered by the Apex Court from time to time and his contention is that the judgment relied upon by learned counsel for the appellant in the case of Hindustan Construction Company Ltd. (supra) has already been distinguished by the Apex Court in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, He has also argued before this Court that the outstanding liability excluding the damages has been admitted by the appellant Company and, therefore, the trial Court keeping in view the various factors, which are necessary for grant of an injunction has rightly turned down the prayer for grant of an injunction. He prays for dismissal of the Miscellaneous Appeal.

6. Heard learned counsel for the parties and perused the record. The matter is being disposed of finally with the consent of all parties.

7. In the present case, it is an undisputed fact that the present appellant has initially filed a writ petition before this Court restraining the respondent No. 1 from encashing the bank guarantee in question. This Court has initially granted interim order on 1-5-2012 passed in Writ Petition No. 42361/2012. However on 20-7-2012, the writ petition was withdrawn with a liberty to take appropriate steps, in accordance with law.

8. The present appellant after withdrawal of the writ petition filed a civil suit for declaration and for grant of permanent injunction before the District Judge, Ujjain on 23-7-2012 and initially ex parte injunction was granted on 24-7-2012.

9. A detailed and exhaustive reply has been filed on behalf of the respondent No. 1/defendant No. 1 and the trial Court has finally dismissed the application for grant of temporary injunction, by an order dated 11-9-2012. The Bank guarantee in question is on record. Clauses 1, 2, 3, 4, 5 and 6-A and 6-B of the Bank guarantee reads as under:--

1. "PARLE" has agreed to pay Rs. 1.25 crore (Rupees One Crore Twenty five lakhs only) to M/s. Singh Cold Storage Pvt. Ltd., Ujjain (M.P.) towards purchase of potatoes, as per the potato purchase agreement.

2. We Bank of India, Branch Feeganj, Ujjain (hereinafter referred to as the Bank) at the request of M/s. Singh Cold Storage Pvt. Ltd., Ujjain (M.P.), hereby irrevocably and unconditionally guarantee to "PARLE" that the Bank shall pay

without demur all the amount of the dues under the raw sugar processing arrangement whenever called upon to pay by "PARLE".

3. We, the BANK, hereby further undertake to pay as primary obligor and not merely a surety but to pay such sums not exceeding Rs. 50.00 lakhs (Rupees Fifty Lakhs Only) to Parle immediately without demur and objections and without reference to and without questioning the right of PARLE to make such demand or the propriety or legality of the demand merely on demand of Parle upon its first demand in the format as per Appendix-1 hereto.

4. We, BANK, hereby undertake to pay the PARLE an amount not exceeding Rs. 50.00 lakhs (Rupees Fifty lakhs only) to the PARLE immediately on demand in writing and without demur.

5. We, the BANK, do hereby declare and agree that the decision of Parle as whether any amount or any part thereof is payable under the said arrangement and as to the amount payable by Bank to the PARLE hereunder shall be final and binding on us.

6. We, the BANK, do hereby declare and agree that:--

a) That the a bank guarantee shall not exceed Rs. 50.00 lakhs (Rupees Fifty lakhs only).

b) That PARLE shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said arrangement or to extend or to allow time for payment related performance of any obligation of the said arrangement from time to time or to postpone for any time or from time to time any of the powers exercisable by Parle against the said arrangement and to forbear or to enforce any of the terms and conditions relating to the said arrangement and we shall not be relieved from our liability by reason of any variation or extension being granted to the said M/s. Singh Cold Storage Pvt. Ltd., Ujjain (M.P.) or forbearance act or omission on part of Parle or any indulgence by Parle to M/s. Singh Cold Storage Pvt. Ltd., Ujjain or to give such matter of thing whatsoever which under the law relating to sureties would be for this provision, have effect of so relieving us.

10. The aforesaid bank guarantee is for a sum of Rs. 50.00 lakhs. There is another bank guarantee of the year 2010 with similar clauses and it is for a sum of Rs. 42,44,000.00, they are dated 12-4-2010 and 15-4-2010, respectively. It is certainly true that the parties have entered into a processing agreement on 2-2-2010, but the terms and conditions of the agreement, are certainly not a part of the bank guarantee.

11. This Court has also carefully gone through the agreement executed between the parties and clause 10.4 of the agreement (page-48) provides that in case the supplier fails to procure/to supply goods and the Company is required to purchase the goods from open market, the Company shall have a right to terminate the agreement for non-supply and in addition shall be entitled of

refund all the amount paid by way of advance and shall also be entitled to recover damages from the supplier. The aforesaid clause nowhere mentions that the Company will not be able to encash the bank guarantee and will not be able to recover other dues. The aforesaid clause makes it very clear that the respondent No. 1 Company can recover damages also in addition to other recoveries.

12. This Court is of the considered opinion that the bank guarantee in the present case taking into account the specific clause i.e. Clauses 2 and 3 is irrecoverable and unconditional bank guarantee. Not only this, paragraph-2 of the memo of appeal, paragraph- 7 and 9, (grounds) of the appeal reads as under:--

"Paragraph-2 (Memo of Appeal):-- That, after the completion of agreement, some outstanding has been shown on the name of appellant and same was accepted by the appellant/plaintiff and sent a schedule of payment and same was accepted by the respondent No. 1/defendant and according first instalment was paid and received by the defendant No. 1.

Paragraphs 7 and 9 (Grounds of Appeal):--

7. That, the learned trial Court has considered this aspect that, in case of damage the defendant No. 1 having liberty to encash the bank guarantee, but such damage has never been raised by the defendant No. 1 and the appellant has never denied their any damage, contrary to this, the amount demanded by the defendant No. 1 has been accepted by the appellant and the payment of the demand is under process.

9. That, the conducts of the defendant No. 1 has never been considered by which, initially they have accepted the reschedule of payment and accepted the first part of the payment and after the accepting of the first instalment, without any knowledge of the appellant, the bank guarantee has been produced in the Bank with a mala fide intention, which shows that, the defendant No. 1 is not willing to follow the repayment schedule and he is in hurry to grab the amount from both the side.

13. The aforesaid paragraphs makes it very clear that the plaintiff/the present appellant has accepted the outstanding liability. Plaintiff has also mentioned in ground No. 4 that the defendant No. 1 has raised demand of Rs. 184 lakhs, approximately and the same has not been disputed by the plaintiff till date and keeping in view the demand of Rs. 184 lakhs, a repayment schedule was also submitted to the respondent No. 1 Company by the plaintiff. As per repayment schedule the last date to clear the entire outstanding dues was 30th of September, 2013. However, it has not been done by the plaintiff.

14. Order 39, Rules 1 and 2 of the Code of Civil Procedure, 1908 reads as under:--

1. Cases in which temporary injunction may be granted.--Where in any suit it is

proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

(2) In case of disobedience of any order passed under sub-rule (1) the Court granting injunction may proceed against the person guilty of such disobedience under sub-rules (3) and (4) of Rule 2 of this Order.

Orissa.--Same as in Patna.

Patna.--In Order XXXIX, in Rule 1, at the end, insert the following provisos, namely:--"Provided that no such temporary injunction shall be granted if it would contravene the provisions of section 56 of the Specific Relief Act (Act 1 of 1877):

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property or objection to the sale, or to the attachment preceding it, before the Court executing the decree.

15. Learned District Judge after taking into account the aforesaid statutory provision of law and the law laid down by the Apex Court in various cases has rejected the application for grant of injunction preferred by the plaintiff. It has been observed that the plaintiff has not been able to establish the irreparable loss nor has established the balance of conveniences enabling the Court to grant an injunction. The matter relating to grant of injunction has been considered by the Apex Court in various cases and the Apex Court in the case of Dwarikesh Sugar vs. Prem Heavy Engg. (supra) in paragraphs-29, 30, 31, 32 and 33 held as under:--

29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted

by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious for which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had trail the trouble of examining the documents on record, which had been referred to by the trial Court, in its order refusing to grant injunction, the Court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of adjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

30. We are constrained to make these observations with regard to the manner in which the High Court had dealt with this case because this is not an isolated case where the Courts, while disobeying or not complying with the law laid down by this Court, have at time been liberal in granting injunction restraining encashment of bank guarantees.

31. It is unfortunate, that notwithstanding the authoritative the pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.

32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.

33. Before concluding we think it appropriate to mention about the conduct of the respondent - bank which has chosen not to be in this case. From the facts stated hereinabove it appears to us that the respondent bank has not shown professional efficiency, to say the least, and has acted in a partisan manner with a view to help and assist respondent No. 1. At the time when there was no restraint order from any Court, the bank was under a legal and moral obligation to honour its commitments. It, however, failed to do so. It appears that the bank deliberately dragged its feet so as to enable respondent No. 1 to secure favourable order of injunction from the Court. Such conduct of a bank is difficult to appreciate. We do not wish to say anything more but it may feel that it will be prejudicial in the event of the appellant taking action against it.

16. Keeping in view the aforesaid judgment delivered by the Apex Court and also keeping in view the fact that the bank guarantee it is unconditional and

irrecoverable, this Court is of the considered opinion that the learned District Judge has rightly rejected the injunction application, keeping in view the judgment delivered in the case of Dwarikesh Sugar vs. Prem Heavy Engg. (supra), it is not a case where a fraud has taken place or a bank guarantee was obtained by coercion and, therefore, in absence of established fraud and keeping in view the bank guarantee, the trial Court has rightly declined prayer for grant of injunction and from restraining the respondents from encashment of the bank guarantee.

17. This Court in the case of Gopal Narayan Vs. State of Madhya Pradesh, while again dealing with the factors for grant of interim injunction in paragraph-7 has held as under:--

7. Even on merits, there is no prima facie case in favour of the plaintiff-appellant. Mere institution of a suit challenging vires of provisions of law and an assessment order passed by a competent authority cannot entitle a plaintiff to claim as of right issuance of interim injunction to restrain recovery of tax-imposed and assessed on him. Three factors have to be shown to co-exist by a plaintiff to claim and/or sustain a grant of interim injunction viz., (a) prima facie case, (b) balance of convenience and (c) irreparable injury, if any of the aforesaid factors is not shown to exist then interim injunction cannot be issued.

18. Keeping in view the aforesaid, as no prima facie case was established before the trial Court nor balance of convenience was established before the trial Court and no irreparable damages was established before the trial Court, the trial Court has rightly declined to grant injunction in the matter.

19. The Apex Court in the case of State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd., in paragraphs 24 to 28 has held as under:--

24. The said document, in our opinion, constitutes a document of indemnity and not a document of guarantee as is clear from the fact that by reason thereof the Appellant was to indemnify the co-operative society against all losses, claims, damages, actions and costs which may be suffered by it. The document does not contain the usual words found in a bank guarantee furnished by a Bank as, for example, "unequivocal condition", "the co-operative society would be entitled to claim the damages without any delay or demur" or the guarantee was "unconditional and absolute" as was held by the High Court.

25. The High Court, thus, misread and misinterpreted the document as on scrutiny thereof, it had opined that it was a contract of guarantee and not a contract of indemnity.

26. The document was executed by the Bank in favour of the cooperative society. The said document indisputably was executed at the instance of Pentagon.

27. We have hereinbefore noticed the surrounding circumstances as pointed out by Mr. Naphade as contained in Clauses 15.2.4 and 15.2.5 of the contract vis-?-vis the letters exchanged between the parties dated 6-4-1985, 11-4-1985,

16-4-1985 leading to execution of the document dated 7-9-1985 by the First Appellant in favour of the co-operative society.

28. We are, however, unable to accept the submissions of the learned Senior Counsel that the bank guarantee must be construed in the light of other purported contemporaneous documents. A contract indisputably may be contained in more than one document. Such a document, however, must be a subject-matter of contract by and between the parties. The correspondences referred to hereinbefore were between the co-operative society and Pentagon. The said correspondences were not exchanged between the parties hereto as a part of the same transaction. The Appellant understood that it would stand as a surety and not as a guarantor.

20. Keeping in view the aforesaid this Court is of the considered opinion that merely because parties have entered into an agreement and later on Bank guarantees have been furnished, it does not mean that it's a conditional bank guarantee. The bank guarantee, whether it is conditional bank guarantee or unconditional bank guarantee? whether it is a revocable or irrevocable? has to be seen by going through the relevant clause mentioned in the bank guarantee itself and, therefore, in the present case as the bank guarantees are not conditional nor revocable, the question of restraining the respondents from encashing the bank guarantees does not arise. Not only this, it is a well settled proposition of law that a bank guarantee is a contract between the bank and beneficiaries as held by the Apex Court in the case of Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, The Apex Court in the aforesaid case has held as under:--

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour it guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another,

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. vs. Sumac International Ltd. (hereinafter U.P. State Sugar Corpn.) this Court, correctly declared that the law was "settled".

21. This Court is of the considered opinion that in the present case also the bank guarantee is an independent contract between the Bank and the respondent No. 1. It is unconditional irrevocable one and therefore the learned District Judge was

justified in dismissing the injunction application. Not only this, this is a case wherein the present appellant has categorically stated in the memo of appeal as well as at various other places that the outstanding amount of Rs. 182 crores has to be paid to the respondent No. 1. It has also been stated that they have not disputed the amount, though it is an illegal demand. The bank guarantees are amounting to only about 96 lakhs only, which is certainly less than the admitted amount. The balance of convenience is infact in encashment of the bank guarantees. The learned District Judge has not committed any jurisdictional error nor the order suffers from any patent illegality and therefore this Court does not find any reason to interfere with the order passed by the learned District Judge.

22. Before closing the matter, this Court would like to observe that in the present case a caveat has been filed by the respondent No. 1. The noting made by the Registry reflects that the caveat was on record. However, the respondent No. 1 against whom injunction has been sought has not been heard while passing an interim order. However, as matter has now been finally decided by dismissing the present appeal, the respondent Bank is directed to encash the bank guarantees forthwith. Learned counsel appearing for the respondent No. 2 Bank, Mr. Nitin Bhati, who is present in Court and as order has been dictated in open Court undertakes to inform the Bank about the order passed today.

The appeal stands dismissed.

No order as to costs.

C.c. as per rules.