(1985) 10 DEL CK 0018

In the Delhi High Court

Case No : First Appeal No. 20 of 1983

S.S. International APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 04-10-1985

Acts Referred:

Citation : (1986) 29 DLT 307

Hon'ble Judges : N.N. Goswamy, J;D.K. Kapur, J

Bench : Division Bench

Advocate : S.B. Ghosh, Pradeep Aggarwal, Sanjeev Khanna and D.K. Kapur, for the Appellant;

Judgement

D.K. Kapur, J.

(1) This appeal u/s 10 of the Delhi High Court Act is directed against a judgment dated 24th February, i983, whereby an application claiming an interim injunction to restrain the encashment of a bank guarantee dated 11th December, 1980 was rejected. The entire dispute harassment of a contract for the supply of 96 M.Ts. of Kishmish. In connection with that contract, a bank guarantee No. 138 of 1980 dated 11-12-1980 issued by the Canara Bank, Chandni Chowk, Delhi was furnished by the contractor (Appellant) to the Union of India. This bank guarantee was for Rs. 3.66.260.00 but it appears that out of this Rs. 24.400.00 covered a different contract and for the purpose of the Kishmish contract, the bank guarantee was for a sum of Rs. 3,41,840.00 .

(2) The Kishmish was delivered but according to the Union of India, part of the quantity was found to be unfit for human consumption within the warranty period. According to the plaintiff in the suit, there was no warranty executed. The total supply made against the contract of 96 M.Ts. was 85 M.Ts. out of which the Union of India had declared 48 77 M.Ts. approximately to be unfit for human consumption within the warranty period. Later, this amount was reduced to a lesser amount which is 43.663 MTs. approximately.

(3) The main question urged on behalf of the appellant was that the bank guarantee had been invoked in circumstances in which it coved not be invoked. To understand this submission, an extract from the bank guarantee is necessary. It states in para 2 as follows : "We, Canara Bank, Chandni Chowk. Delhi- 110006 do hereby undertake and promise to pay the amounts due and payable under this Guarantee without any demur, merely on a demand from the Government staling that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor''s)of any of the terms or conditions contained in the said agreement or by reason of the contractor''s failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 3,66.260.00 ,

(4) On 17th April, 1982, the Government of India invoked the bank guarantee by addressing a letter to Manager, Canara Bank, Chandni Chowk, Delhi. In para 2 of this letter it was stated that 33.618 948 Tonnes Kishmish was declared gone bad and the firm had, Therefore, been called upon to replace the condemned stores or to refund the cost thereof but the firm bad not done so So, the amount of Rs. 12,70,340.30 was recoverable by the Government. In para 3, it was stated that the terms and conditions of the bank guarantee entitled the government to demand against any loss cr damage caused to or suffered and hence the bank guarantee to the extent of Rs. 3,41,840.00 was sought to be encashed.

(5) The interim injunction was sought against the encashment and was granted initially but later withdrawn. It is submitted that the bank guarantee is not excusable as no loss was claimed. We have examined this contention but do not see how the bank guarantee is not applicable to the loss in question. The substance of the matter is that according to the government, they bad paid for the Kishmish which was later rejected and hence were entitled to a refund of the price on the ground that it was unfit for human consumption. In short, the government''s case is that either the Kishmish has to be replaced or its price has to be refunded. On the other hand, the case of the contractor is that there was no warranty covering the subsequent deterioration of the Kishmish and in any case, the breach of warranty would give rise to a claim for damages and not for refund of the price.

(6) We refuse to decide the real effect of the contract at this stage. The suit is pending and the rights of the parties will have to bs determined in accordance with the true meaning of the contract between the parties. The bank guarantee had been invoked for refund of the price of the Kishmish which has not been found to be of the proper quality inasmuch as it has become unfit for human consumption. As the government claims that it is entitled to the refund of the price, the claim is governed by the bank guarantee.

(7) The real fact of the matter is that the bank guarantee is a kind of security

given for the fulfillment of the contract. Instead of being in cash, the security has been furnished by means of a bank guarantee. The encashment of the bank guarantee only ensures that the money is returned to the government in case the goods are not up to the requisite quality. The subsequent rights of the parties will have to be determined in the suit.

(8) Learned counsel for the appellant has referred to J.H. Rayner & Co. Ltd. v. Hambro''s Bank Ltd. (1943)1 Kb 37which is concerned with a confirmed credit covering a cargo of Coromandel groundnuts. The bills of lading presented were in respect of machine shelled groundnut kernels. The single Judge Atkinson J. granted the order enforcing payment on the ground that Coromandel groundnut was the same as machine-shelled kernels, but the Division Bench on appeal reversed this judgment on the footing that the bank was entitled to act in the precise terms of the letter of credit. Learned counsel submits that the bank guarantee could be invoked only if there is an immediate cause for the government to claim a loss and not in a case where the claim is yet to be established in Court. It is submitted that in spite of. the breach of the warranty, the amount would only be due if the Court gives judgment in favor of the government. Though this is an attractive argument, it does not impress us at this stage. We have to view this case from the government''s angle and not from the contractor''s angle. According to the government''s case, the amount is immediately payable because the terms of the agreement were that either the rejected goods have to be replaced or their price has to be refunded. If this is a true construction of the contract, then the government is entitled to get an immediate refund of the price.

(9) We agree with the learned single Judge when he observed at the end of the judgment under appeal that the expression of opinion is tentative and will not prejudice either of the parties.

(10) We accordingly dismiss the appeal but in the circumstances, leave the parties to bear their own costs.