

(2008) 07 MAD CK 0037
In the Madras High Court
Case No : O.S.A. No's. 3 and 4 of 2005

State Bank of India

APPELLANT

Vs

Nihar Fathima Proprietrix Professional Couriers, Professional
Couriers (P) Ltd. and Tamilnadu Mercantile Bank Ltd.

RESPONDENT

Date of Decision : 17-07-2008

Acts Referred:

Citation : (2008) 7 MLJ 411

Hon'ble Judges : R. Subbiah, J;M. Chockalingam, J

Bench : Division Bench

Advocate : S. Sethuraman, for the Appellant; C. Chinnasami, for S.
Hajamohideen Gisthi, for RR1 and 2, for the Respondent

Final Decision : Allowed

Judgement

M. Chockalingam, J.—Both the appeals challenge a common order of the learned Single Judge of this Court allowing O.A. No. 634 of

2003 whereby the plaintiffs/respondents 1 and 2 herein sought interim injunction against the second defendant/third respondent herein from

honoring the bank guarantee No. BG 25/98-99 dated 14.5.1998 for Rs. 1 lakh and BG No. 123/BG 108/02 dated 13.12.2002 for Rs. 10 lakhs

in favour of the appellant herein and dismissing Application No. 4301 of 2003 filed by the first defendant Bank to vacate the interim injunction

originally granted in favour of the plaintiffs.

2.The short facts which necessitated the plaintiffs to file the application for interim injunction could be stated thus:

An agreement was entered into between the plaintiffs and the first defendant, State Bank of India, on 29.1.2001 to carry and deliver documents of

the Bank in and to various places in India. The agreement which was originally

entered, was extended till 28.1.2003. Originally, there was a bank guarantee for Rs. 1 lakh and subsequently, additional bank guarantee for Rs. 10 lakhs was given by the plaintiffs. While the matter stood thus, a communication was addressed by the first defendant that the agreement has come to a termination and not to be extended thereafter, on 27.1.2003. It was further added that if the first defendant found any deficiency in service offered by the plaintiffs, the plaintiffs would be liable to make good the loss to the first defendant bank.

3.While the matter stood thus, a communication was addressed by the first defendant on 16.7.2003, to the second defendant bank invoking the bank guarantee stating that the plaintiffs have not fulfilled their obligations under the contract and thus made a demand of Rs. 11 lakhs. The invocation of the bank guarantee was the cause of action for the suit. In the suit, the plaintiffs have asked for a declaration that the bank guarantees No. BG 25/98-99 dated 14.5.1998 for Rs. 1 lakh and BG No. 123/BG 108/02 dated 13.12.2002 for Rs. 10 lakhs given by the 2nd respondent on behalf of the first plaintiff are inoperative and unenforceable and for a permanent injunction restraining the second defendant from honoring the said bank guarantees.

4.At the time of the initiation of the proceedings, the instant application in O.A. No. 634 of 2003 was brought forth seeking interim injunction.

5.The said application was countered by the first defendant/appellant stating that it is true that there were bank guarantees for Rs. 11 lakhs as put forth in the application; that the bank guarantee was actually an independent agreement to the agreement originally entered into between the parties; that despite the termination of the original agreement, the bank guarantees were to be honored as it was thoroughly unconditional; that it was found that the staff of the plaintiffs with the connivance of the staff of the defendants were involved in the commission of fraud in Pudukottai and Vadiveeswaram Branches of the bank which has resulted in huge loss to the bank to the tune of nearly Rs. 3.8 crores to the bank; that the investigation was in progress; that there was a prima facie case against the employees of the second plaintiff; that though the agreement entered into between the parties in respect of taking the packets of the first defendant is over, the agreement in respect of the bank guarantee was

unconditional; that as per the agreement entered into in the bank guarantee, it would be quite clear that whenever any breach or any damage or injury or loss is found in future, that has got to be made good; that once a communication was addressed by the first defendant to the second defendant, the bank guarantees should have been honored; that in this case, the plaintiffs have not done so, or no notice was necessary, and hence, the balance of convenience was also in favour of the first defendant not to grant injunction, and hence, it was to be dismissed.

6.The learned Single Judge after hearing the submissions made and looking into the materials available, was of the opinion that it was a fit case where interim injunction was to be granted, and hence made the ad interim injunction originally granted, absolute by allowing the injunction application and dismissing the application to vacate the interim injunction originally granted. Under the circumstances, these appeals have arisen before this Court.

7.Advancing the arguments on behalf of the appellant, the learned Counsel inter alia would submit that while it is an admitted fact that the bank guarantees were given for the due performance of the service by the plaintiffs, a fraud has been found by which there was a loss to the bank to the tune of crores of rupees, and suits in C.S. No. 82 and 83 of 2006 have been filed; that in the instant case, the bank guarantees were given; that there is a clear clause to the effect that it should be honored on intimation; that the bank guarantees will make it clear that they are unequivocal and unconditional; that the learned Single Judge has found as if the bank guarantee was a conditional one; that the very reading of the bank guarantee would make it clear that it was unconditional, and hence, no notice to the plaintiffs guarantors was necessary; that once an intimation was given, the first defendant was entitled to invoke the same since no conditions could be attached to; that the contention put forth by the plaintiffs" side and accepted by the learned Single Judge that the bank guarantees could continue till the time of the agreement between the parties cannot be correct; and that in the instant case, even after the termination of the contract, if anything which would cause any damage or loss to the first defendant bank, then it has got to be made good by the plaintiffs.

8.Added further the learned Counsel that in the instant case, what is sought for

by the plaintiffs is the declaration that the bank guarantees are unenforceable; and that in short, it was nothing but seeking the rejection of the bank guarantees which should not be allowed.

9.The learned Counsel relying on a decision of the Apex Court reported in AIR 1997 1644 (SC) , would submit that in order to revoke a bank

guarantee which is unconditional, the party who seeks to revoke the same, should show the fraud in connection with such bank guarantee either, or

if the encashment of the unconditional bank guarantee is allowed, it would result in an irretrievable harm and injustice to one of the parties

concerned; that if either of the grounds is not available, then an unconditional bank guarantee what is one in question cannot be allowed to be

revoked; that under the circumstances, the first defendant/appellant should be allowed to invoke the same; that the contentions put forth by the

plaintiffs/respondents 1 and 2 should have been rejected by the learned Single Judge, and therefore, the appeals have got to be ordered.

10.In answer to the above, it is contended by the learned Counsel for the respondents 1 and 2/plaintiffs that in the instant case, the agreement

entered into between the parties, was admittedly over; that in order to ensure the fair and prompt service, the bank guarantees were given; and that

once the main agreement entered into between the parties, came to an end, no question of keeping the bank guarantees alive would arise.

11.The learned Counsel would further add that even as per the terms, if there is any fault found by the first defendant in the service rendered by the

plaintiffs, a notice should be given within 45 days and for other cases, within 90 days; but, in the instant case, no notice was given; that on the

contrary, a notice was given after six months" period alleging that there was a fraud that has been committed; and that even then, no specific

allegations of fraud were pointed out; but, it was so vague.

12.Further, the learned Counsel relying on the very same decision relied on by the appellant's side and referred to above, would submit that in the

instant case, it is a fit case where bank guarantees have got to be revoked; that if the encashment of the bank guarantee even assuming to be an

unconditional one, is allowed, it would result in irretrievable harm and also would be causing injustice to the plaintiffs; that under the circumstances,

even applying the principles laid down by the Supreme Court in the above case,

it is a fit case where the bank guarantees should not be allowed to be invoked, and hence, the appeals have got to be dismissed.

13.The Court paid its anxious consideration on the submissions made.

14.It is not in controversy that an agreement was entered into between the plaintiffs a courier service and the first defendant/appellant bank on

29.1.2001, as per which the first respondent/plaintiff through its accredit agents must carry the packets of the first respondent bank. It is also an

admitted position that the original agreement in the same terms and conditions was continued till 28.1.2003. Originally, there was a bank guarantee

for Rs. 1 lakh, and subsequently, additional bank guarantee of Rs. 10 lakhs was provided from the second defendant bank. The agreement which

was entered into between the parties, was, admittedly, not extended beyond 28.1.2003. While the matter stood thus, on 16.7.2003, the appellant

invoked the bank guarantees alleging that the plaintiffs did not fulfill their obligations under the contract and made a demand for Rs. 11 lakhs which

was the cause of action for the instant suit. The plaintiffs' case as could be seen from the materials available and also the submissions made by the

Counsel before this Court, is that even as per the agreement entered into between the parties, if there was any deficiency found in delivery which

related to shortage, damage or delay, a notice should be given within 45 days and in the case which related to non delivery, etc., it should be within

90 days. As could be seen above, such a notice as contemplated in Clause 8 of the agreement was not given within the stipulated period. But, a

notice has emanated only on 16.7.2003 wherein it was stated that the obligations on the part of the plaintiffs were not fulfilled. The parties are in

controversy as to whether the bank guarantees what were provided through the second defendant bank were conditional or unconditional. A

reading of the bank guarantee a copy of which is furnished to the Court, would clearly indicate that it was an unconditional one. If a bank guarantee

what was given was an unconditional one, when it could be revoked is well settled. It would be more apt and appropriate to reproduce what is

held by the Supreme Court in the above referred case as follows:

12.The law relating to invocation of such bank guarantees 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. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. 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. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. In *Bolivinter Oil SA v. Chase Manhattan Bank* All ER at p.

352:at SCC p. 197

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already

made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's

knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can

be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank

to have it charged.

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

15. The very reading of the above judgment would indicate that if a bank guarantee which is an unconditional one, has got to be revoked, it could

be done only under two circumstances namely (i) allegation of fraud in connection with such a bank guarantee, and (ii) in a case where allowing the

encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. In the absence of any

of the exceptions, in the opinion of the Apex Court, in no one case, it could be revoked. In the instant case, as rightly pointed out by the learned

single Judge, the bank guarantees were given in order to ensure the proper and prompt service as found in the original agreement between the

parties. Admittedly, the period under the agreement was also over. Now, at this juncture, it is highly doubtful in a given case like this, where the

contract which was entered into between the parties, became terminated or came to an end, whether the original bank guarantees which were

given would inure or would be continued. The contention put forth by the learned Counsel for the appellant is that there were specific allegations of

fraud on the strength of which, a case has been filed, and there was loss to the tune of Rs. 3.8 crores, and the case is also pending in the hands of

this Court. He would further add that if the appellant is not allowed to invoke the same, it would jeopardize his right, and therefore, injunction what

has been granted has got to be vacated. As pointed out by the learned Counsel for the appellant, this Court is unable to notice either of those two

grounds. The contention put forth by the learned Counsel for the respondents 1

and 2 is that by allowing the bank guarantees to be encashed, it will cause irretrievable harm or injustice to the plaintiffs cannot be accepted. In a given case like this where there is a loss of Rs. 3.8 crores as alleged by the Bank, and a case has been instituted, the interest of the first defendant bank has got to be secured, and even if applying the principles laid down by the Supreme Court in the above mentioned case, so long as either of the grounds is not found in an unconditional bank guarantee, there cannot be any legal impediment for allowing the bank to invoke the same and get the fruit of it. Even assuming that the suit itself is decreed in favour of the first respondent bank on the allegations of fraud or damages, it could be adjusted, and if not, the first defendant/appellant bank could be ordered to make refund of the same. Under the circumstances, granting an injunction has no legal sanction as per the settled principles of law as enunciated by the Supreme Court in the case stated supra. This Court is unable to see anything to sustain the order of the learned Single Judge. Accordingly, both these original side appeals are allowed setting aside the order of the learned Single Judge. No costs.