

(2000) 08 GAU CK 0007
In the Gauhati High Court
Case No : M.A. (F) No. 146 of 1998

State of Assam and Others

APPELLANT

Vs

N.V. International and Another

RESPONDENT

Date of Decision : 07-08-2000

Acts Referred:

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

Citation : (2000) 3 GLT 261

Hon'ble Judges : P.G. Agarwal, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : B.M. Sarma, for the Appellant; A.K. Phukan, S. Sarma and J. Deka, for the Respondent

Judgement

P.G. Agarwal, J.—This appeal under Order 43, Rule 1(r) of the CPC is directed against the order dated 27.5.98 passed by the learned Civil Judge (Sr. division) No. 1, Kamrup, Guwahati in Misc. (J) case No. 55/98 arising out of T.S. No. 98/98.

2. The Respondent Plaintiff M/s. N.V. International instituted Title Suit No. 98/98 stating, inter alia, that the Respondent State of Assam had appointed the Plaintiff as Distributor of the State Lotteries for a period of 3 (three) years and an agreement to that effect was executed in between the parties on 12.6.95. In terms of the said agreement the Plaintiff provided the State Government with a bank guarantee of Rs. 25,00,000/-. The bank guarantee for Rs. 25,00,000/- was re-validated till 30.6.98. On 30.12.95, the Plaintiff was informed that the State of Assam has decided to discontinue the Assam State Lotteries Draw whereupon certain litigation ensued in between the parties.

3. On 26.5.90 the Plaintiff was informed by his banker that the State Govt, has invoked the bank guarantee for Rs. 25,00,000/- and the bank is going to release the amount. The Plaintiff thereupon filed a suit praying for declaration that the proposed invocation of the bank guarantee is illegal and also prayed for permanent injunction restraining the Defendants from invoking/encashing the

bank guarantee. The Plaintiff also filed in Misc. Case No. 55/98 praying for temporary injunction. The learned Civil Judge (Sr. Division), J Camrup, Guwahati after hearing the learned Counsel for the Petitioner and learned Govt. Advocate passed the impugned order. On perusal of the said order it is seen that the learned Govt, pleader has sought time to file objections against the prayer for injunction and Court also held that for filing written objection after obtaining necessary instruction, time is required to be given but the Court was of the view that if no interim order is passed restraining the Defendants from encashing the bank guarantee, then the very purpose of issuing injunction will be frustrated. Therefore, the Court directed the parties to maintain the present status quo in respect of the said Bank guarantee as on the date of the order dated 27.5.98 until further orders and directed the Defendants to file their objections. Hence the present appeal.

4. We have heard Mr. H. Rahman, learned Counsel for the State of Assam and Mr. A.K. Phookan, learned senior advocate for the Respondents.

5. Before proceeding further with the matter it will be pertinent to mention at this stage that except the plaint and pleadings of the Respondent-Plaintiff, we have no other documents, pleadings before us. Learned Counsel for the Appellant has submitted that the Appellant Respondent have not filed their written statement or written objections. The copy of certain documents filed with the Memo of Appeal cannot be considered as these are not part of the pleadings or part of the records. In view of the above, it was observed during the course of the argument that the Appellant may file their written objections/written statement and the question of injunction may be considered by the trial Court after hearing both the sides as a period of more than 2 years have already elapsed. The question of expiry of the validity period of the Bank guarantee is not involved in the matter as apparently the bank guarantee was invoked by the Sate of Assam before its expiry.

6. Learned Counsel for the Appellant has however submitted that the impugned order passed by the trial Court was apparently bad in law and in complete violation of the law of injunction in respect of a bank guarantee as laid down by the Apex Court. Learned Counsel for the Appellant has placed reliance on a decision of the Apex Court in the case of Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, wherein it was held that in case of confirm bank guarantee it cannot be interfered with unless there is fraud and irretrievable injustice nvolved in the case and fraud has to be a established fraud.

7. The decision in Svenska (supra) was explained by the Apex Court in the case of Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, The Apex Court held:

We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the Courts and it is only in exceptional cases, that it is to say, in case of fraud or in a case

where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the Court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent No. 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach on the contract, that the contractor has a counter-claim against the Appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the Appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining to the Appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the Appellant from enforcing the bank guarantees.

The above position was reiterated by the Apex Court in the case of AIR 1997 1644 (SC) and in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, In the present case the bank guarantee in favour of the State of Assam was not before the Court when the impugned order was passed. The bank guarantee was with the State of Assam and it was in their favour. The Plaintiff has filed a copy of the letter of extension only. Hence, at this stage, it cannot be said whether the bank guarantee was conditional one or unconditional. Learned Counsel has submitted that fraud was alleged in the plaint and the Plaintiff has also made out a case of irretrievable injury if the bank guarantee is enquired. The Appellant Defendant instead of filing their pleadings or objections before the learned Court, have chosen to approach this Court in appeal without bringing on record the terms of bank guarantee. In the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, the Apex Court held that the terms of Bank guarantee are extremely material since the Bank guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of Bank guarantee, or else, the invocation itself would be bad.

8. As the terms of bank guarantee are not known and it is also not clear as to whether bank guarantee was conditional one or unconditional one, no interference by this Court at this stage is called for. The learned trial Judge has passed an order of maintaining status quo in respect of the Bank guarantee. The present Appellants Defendants may file their show cause/written statement and produced necessary documents before the trial Court whereupon the trial Judge, upon hearing the both sides, shall pass necessary orders in accordance with the settled provisions of law as laid down by the Apex Court and taking into consideration, the terms of Bank guarantee and other relevant factors.

9. In the result, the present appeal stands disposed of. Both the parties are directed to appear before the learned trial Judge on 28th August, 2000, Send

down the records.