
(2018) 11 BOM CK 0089

In the Bombay High Court

Case No : Commercial Appeal No.514 Of 2018 With Commercial Notice Of Motion No.1226 Of 2018 In Commercial Arbitration Petition (L) No.1465 Of 2018

Tata Projects Ltd.

APPELLANT

Vs

Hazel International Fze And 2 Ors.

RESPONDENT

Date of Decision : 24-11-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2018) 11 BOM CK 0089

Hon'ble Judges : B. R. Gavai, J;A. S Chandurkar, J

Bench : Division Bench

Advocate : Gaurav Joshi, Rohan Cama, Kaustav Talukdar, Kazan Shroff, Vikash Kumar, Bipin Mehta, Venkatesh Dhond, Amey Patil, Hetal Jobanputra, Vivek Sharma, Bhairavi Waravdekar, Vivek Kantawala

Final Decision : Disposed Off

Judgement

B. R. Gavai, J

1. This appeal challenges an order passed by the learned Single Judge in Commercial Arbitration Petition (Lodging) No.1465 of 2018 thereby rejecting

the petition filed by the present appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).

2. Undisputedly the present appellant was awarded a contract for constructing Chemical Storage Terminal at Hamriyah Free Zone, Sharjah U.A.E. by

the respondent No.1 on 20/02/2014. The contract was awarded on turn key basis. The contract document was executed on 02/06/2014. As per the

contract and particularly Clause 11.1, the appellant was required to furnish a Performance Bank Guarantee equivalent to 10% of the contract price

within 28 days from signing of the contract. Accordingly the appellant had

submitted a Performance Bank Guarantee issued by the respondent Nos.2 and 3 dated 11/08/2014.

3. As per the contract the appellant was required to complete the work within a period of two years from the execution of the said contract.

Admittedly the said work has not been completed within the aforesaid period of two years and further extension of two years was granted to the

appellant. It is different matter that according to the appellant the work could not be completed within the stipulated period, for the reasons beyond the

control of the appellant and due to the reasons attributable to the respondent's employer. There is an exchange of certain correspondence between the

parties. Ultimately vide communication dated 17/11/2018 addressed by the respondent No.1 to the respondent Nos.2 and 3, respondent No.1 invoked

the Bank Guarantee. The appellant therefore filed Commercial Arbitration Petition No.1465 of 2018 before the learned Single Judge of this Court.

Vide the impugned order the petition has been rejected. Being aggrieved thereby the appellant has filed the present appeal.

4. Shri Gourav Joshi, learned Senior Counsel appearing for the appellant submitted that in view of specific clause in the contract between the parties

and particularly Clause No.4.2, unless there was an amount due and only in the eventuality of making the demand by the employer not being fulfilled

by the contractor within period of 45 days after making of the demand and unless a notice was issued as required under Clause 15, the Bank

Guarantee could not have been invoked. The learned counsel submitted that in the present case neither there is a notice as required under Clause 15.3,

which is required to be issued by registered mail (acknowledgment due) or by hand or by facimile or by reputed courier and thereafter 42 days period

is given to comply with the demand, the Performance Bank Guarantee could not have been invoked. The learned counsel further submits that the

communications with the petitioner were not by an authorised employer as defined under the contract between the parties. He therefore submits that

the learned Single Judge erred in refusing to grant injunction against invoking the Bank Guarantee. The learned Senior Counsel relied on the judgment

of the Honourable Apex Court in case of Hindustan Construction Co. Ltd. Vs. State of Bihar and ors. (1999) 8 SCC 436.

5. Shri V. Dhond, learned Senior Counsel for respondent No.1 on the contrary submitted that the learned Single Judge has rightly considered the legal position. He submitted that the contract between the employer and the guarantor is an independent contract and as per the contract between the Bank and the employer, on a demand simplicitor made by the employer the Bank is bound to perform its obligation within a period of three days. He submitted that, the contract between the Bank and the employer is independent of the agreement between the appellant and respondent No.1. The learned Senior Counsel submitted that though on merits the respondent No.1 can very well justify the invocation of the Bank Guarantee, on account of various defaults of the contractor, in view of the clear legal position it would not be necessary to go into that aspect. The learned Senior Counsel relied on the judgment of the Honourable Apex Court in the case of U.P.State Sugar Corproation vs. SUMAC International Ltd. (1997) 1 SCC 568.

6. The present appeal is basically an appeal against an order of refusing injunction. The scope of interference with same would be as laid by the Honourable Apex Court in case of Wander Ltd and anr. vs. Antox India P. Ltd. 1990 (Supp) SCC 727.Â Paragraph 14 of its judgment reads thus :

14. â?? The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph :

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Johnston* the law as to the

reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due

only to the application of well settled principles in an individual case. The appellate judgment does not seem to defer to this principle. ^??

It can thus be seen that unless it is found that the view taken by the learned Single Judge is either perverse or impossible, it would not be permissible to

this Court to interfere with the same.

7. After considering the rival submissions it would be relevant to refer to the following clauses of the Performance Bank Guarantee :

^?? In considering thereof, We Bank of Baroda, Sharjah, Crystal Plaza Building, PO Box 1671, Sharjah UAE hereinafter referred to as the Guarantor

Bank hereby irrevocable and unconditionally guarantee to pay to you on your written demand and without demur such amount or amounts not

exceeding the sum of USD 6,500,000 (US Dollars Six Million Five Hundred Thousand Only) 10 percent of Contract Price of USD 65,000,000 on

receipt of your written demand within 3 working days, stating that the Contractor defaulted the conditions of the Contract.^??

^?? Our liability under this Granratee is restricted to USD 6,500,000/Â (US Dollars Six Million Five Hundred Thousand Only). The Guarantor Bank

hereby expressly agrees that it shall not require any proof in addition to the written demand from the Employer made in any format, raised at the

above mentioned address of the Guarantor Bank, in order to make the said payment to the Employer.^??

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^?? The Guarantor Bank shall make payment hereunder on first demand without restriction or conditions and notwithstanding any objection by the

Contractor and or any other person. The Guarantor Bank shall not require the Employer to justify the invocation of this Guarantee, nor shall the

Guarantor Bank have any recourse against the Employer in respect of any payment made hereunder.

8. It can thus be seen that perusal of the aforesaid clauses would reveal that the GuarantorÂBank has irrevocably and unconditionally agreed to pay

on a written demand and the amount specified in the Guarantee within three

working days on the employer invoking the Bank Guarantee and informing that the contractor has defaulted the conditions of the terms of contract. It would further reveal that the Guarantor Bank has specifically agreed that it shall not require proof from the employer in any format, in order to make the said payment to the employer. It would further reveal the Guarantor Bank has further agreed to make payment on first demand without restriction or conditions and notwithstanding any objection by the Contractor and or any other person. It would further reveal that, the Bank has further agreed that it shall not require the employer to justify the invocation of this Guarantee nor the Guarantor Bank shall have any recourse against the Employer in respect of any payment made thereunder.

9. The law with regard to invocation of Bank Guarantee is very well crystalized by the Honourable Apex Court in case of UP State Sugar Corporation

(Supra) in paragraphs 12, 13 and 14 of its judgment which read thus :

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 co-exist in some cases. In the case

of U.P.Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of 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 NA* (1984 [1] AER 351 at 352): "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.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken v. M/s Indian Charge Chrome & Ors.* (1994 [1] SCC 502). The Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corporation v. The First National Bank of Boston etc.* (566 Fed Supp. 1210). On the question of fraud this Court confirmed the observations made in the case of U.P.

Cooperative Federation Ltd. (supra) and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees

are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision

in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and

sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract.

The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in

relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets

under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for

damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the

bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore,

exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively

established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on

this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer

would be found entitled to receive the amount paid under the guarantee.

10. It could thus be seen that their Lordships of the Honourable Apex Court have in clear terms held that an unconditional Bank Guarantee cannot be

interfered with unless there is an established fraud or irreparable injustice involved in the case. Undisputedly it is not even the case of the appellant

that in the present case any element of fraud is involved. The only reason furnished for seeking an injunction is on the ground of irreparable injury. The

law as to the question as to what sort of injury can be an exception for grant of injunction against invoking Bank Guarantee, has also been laid down

by the Honourable Apex Court. It has been held that only in the case of irreparable injury like the one which has been found in the case of Itek

Corporation vs. First National Bank of Boston 566 Fed Supp 1210 can be a ground for granting injunction against invoking the Bank Guarantee.

Undisputedly the appellant has not been in a position to make out a case of any such irreparable injury of a nature, which is like the one found in the case of Itek Corporation (supra).

11. In so far as the reliance placed by the appellant on the judgment in case of Hindustan Construction Ltd. (supra) is concerned, on perusal of the

said judgment it would reveal, that the said judgment has been delivered by the Honourable Apex Court in different set of facts. It would be relevant

to refer to paragraph 16 of the said judgment in which the Lordships have reproduced the Clause in the Bank Guarantee which persuaded their

Lordships to take different view from the legal position as discussed hereinabove which reads thus :

16. The "Performance Guarantee" was furnished in terms of Clause 5 of the agreement which provides as under :

(a) For the due performance of the contract, the Tender shall contain an undertaking by the Contractor to obtain when required a bond or guarantee

of an insurance company or bank, or other approved sureties to be jointly and severally bound with the Contractor to the Employer, in a sum not

exceeding that stated in the Letter of Acceptance for such bond or guarantee, the said insurance company or bank sureties and the terms of the said

bond or guarantee shall be such as shall be approved by the Employer. The obtaining of such bond or guarantee or the provisions of such sureties and

the cost of the bond or guarantee to be so entered into shall be at the expense in all respects of the Contractors unless the contract otherwise

provides.

(b) The performance security shall be submitted by the Contractor within 30 days of issue of the Letter of Acceptance and shall be in the form of a

bank guarantee or a bond (at the Contractor's option). The amount of the bank guarantee shall be 10 (ten) per cent of the Contract Price, or the

amount of the bond provided by insurance or bonding company shall be 30 (thirty) per cent of the Contract Price. If the Performance Security is in the

form of a Bank Guarantee, it shall be issued either (i) by a local bank or a foreign

bank through a correspondent local bank, or (ii) directly by a foreign

bank acceptable to the Employer. The performance security shall be denominated in the types and proportions of currencies in which the Contract

Price is payable. The performance security will be released by the Employer not later than 30 days following the date of delivery of the Certificate of

Completion of works by the Engineer.

The perusal of aforesaid clause would reveal that there was a specific clause in the Bank Guarantee wherein it was required that the Bank Guarantee

shall be invoked in the event when the obligations in the contract specified in the Bank Guarantee have not been fulfilled by the contractor giving a

right of claim to the employer for recovery of the whole or part of advance/loan. It would thus be seen that non-performance of a condition in the

contract was directly linked with invocation of Bank Guarantee in the said case. However, in the present case, the Bank Guarantee issued by the

respondent Nos.2 and 3 in favour of respondent No.1 which has been discussed hereinabove clearly shows that the Bank has no other option but to

make the payment within three days from the date of invocation of Bank Guarantee by the respondent No.1. The Bank has clearly undertaken not to

ask for any other details except written demand by the employer. We find that in view of a specific agreement between the Bank and the respondent

No.1 wherein there is no clause of like nature as was in case of Hindustan Construction Co. Ltd. (supra), the injunction has rightly been refused by

the learned Single Judge.

12. We are of the considered view that the learned Single Judge has decided the matter in accordance with the well laid principles laid down by the

Honourable Apex Court. No case is made out for interference. The appeal is dismissed.

At this stage Shri Gaurav Joshi, learned Senior Counsel for the appellant prays for grant of status quo for further period of one week. A similar

request was made before the learned Single Judge which request has been rejected by the learned Single Judge. In view of the legal position

discussed hereinabove we do not find that we should depart from the view as taken by the learned Single Judge.

The prayer is rejected. Needless to state that none of the observations made either by the Single Judge or by this Court would come in the way of the

parties in the arbitration proceedings. No costs.

Commercial Notice of Motion No.1226 of 2018 also stands disposed of.