
(1998) 11 CAL CK 0030

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction A.P.O.T. No. 808 of 1998, G.A. No. 2940 of 1998 and A.P. No. 395 of 1998

The State Trading Corpn. of India Ltd.

APPELLANT

Vs

K.K. Designs (P) Limited

RESPONDENT

Date of Decision : 05-11-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4
Negotiable Instruments Act, 1881 (NI) — Section 32

Citation : (1999) 1 CALLT 413

Hon'ble Judges : Ruma Pal, J; Basudeva Panigrahi, J

Bench : Division Bench

Judgement

R. Pal, J.—The facts of the case have been narrated fully in the Judgment of my learned Brother. While concurring with the findings of my learned Brother I wish to add a few words.

2. The original ex parte order obtained by the respondent is dated 28th August, 1998. It directed maintenance of status quo and made the application returnable on 1st September, 1998. The appellant was given an opportunity to apply for vacating or modifying the order upon notice to the respondent. On 1st September, 1998 the appellant appeared. The order of status quo was directed to continue and directions were given for filing of affidavits.

3. The grievance of the respondent before us is that the appellant did not prefer any appeal from the order dated 1st September, 1998 and instead of filing an affidavit in opposition and having the matter heard and disposed of, filed an application for vacating the interim order.

4. The application of the appellant was for vacating the ad interim order. By refusing to vacate the ad interim order on the appellant's application, the learned Judge, in fact, confirmed the ad interim order until disposal of the

respondent's application and to that extent rendered the application of the appellant infructuous.

5. The refusal to vacate, modify or clarify the ad interim order pending the final disposal of the respondent's application, in fact, granted a fresh order of confirmation of the earlier order dated 1st September, 1998. By obtaining directions for filing of affidavits the appellant cannot be said to have consented to the continuance of the order dated 1st September, 1998, nor can the appellant be debarred from questioning the same by way of an independent application.

6. The submission of the respondent that the provisions of Order 39 Rule 4 debar the appellant from filing the application because there was no fresh ground for the learned Judge to change the order which had been passed on contest, does not, strictly speaking, apply. Order 39 Rule 4 envisages a situation where an interim order of injunction is confirmed after the parties have filed their affidavits. Assuming that Order 39 Rule 4 applies to such a situation where the contesting parties are heard only on the basis of the application filed by one nevertheless, I would say that in this case the application would lie because by refusing to vacate the ad interim order undue hardship has been caused to the appellant.

7. Normally, this court does not interfere with an ad interim order in appeal unless there appears to be a gross irregularity. In this case the irregularity is patent. Apart from the fact that no reasons have been given justifying the continuation of the interim order dated 1st September, 1998, the learned Judge erred in restraining the enforcement of a Bank Guarantee, if, indeed, this was the intention, without any reason whatsoever.

8. The Bank Guarantee is unconditional as noted by my learned Brother. Therefore, strictly speaking, the facts on the basis of which the Bank Guarantees were to have been invoked by the appellants are not relevant. All that the Bank Guarantee required for its due invocation was a statement of the appellant that a breach had occurred.

9. The orders as passed by the learned Single Judge on 28th August, 1998 and 1st September, 1998 do not specifically restrain the enforcement of the Bank Guarantee. The orders required clarification. The least that the learned single Judge could have done was to have expressed his intention clearly as to whether the orders were meant to restrain the appellant from enforcing the Bank Guarantee Issued by the respondent in its favour.

10. For the reasons stated by my learned Brother in his judgment, the appeal must be allowed. The only caveat that is put in is that the prima facie findings arrived at by this court should not be taken as final and have been arrived at solely for the purposes of the ad interim stage of the matter.

B. Panigrahi, J.--This appeal as well as the application have been filed against the order dated 25th September, 1998 passed by the learned single Judge refusing

to pass any interim order or vacate the order passed earlier on the application filed by the appellant/petitioner. The respondent in this appeal filed an application u/s 9 of the Arbitration and Conciliation Act, 1996 against the appellant/petitioner for the following reliefs :-

"(a) Status quo as to the contract dated December. 17, 1996 be maintained.

(b) injunction restraining the respondent, whether by itself or its servants, agents, assigns or otherwise however, from giving any effect or further effect to or acting in terms of or pursuant to or in furtherance of the Impugned threat of risk purchase including the letter dated August 4, 1998 or enforcing the contract dated December 17, 1996 or any terms and condition thereof, or taking any action pursuant thereto. in any manner whatsoever;

(c) Ad interim order in terms of prayers above;

(d) Costs of and incidental to this application be borne by the respondent;

(e) Such further order or orders be passed and/or direction or directions be given as to this Hon''ble Court may deem fit and proper."

11. The respondent also moved for an ex parte order on the said application and the court presided over by the learned single Judge passed the following order :--

"This is an application u/s 9 of the Arbitration & Conciliation Act, 1996.

There will be an order for maintaining Status Quo as of date until further orders.

The application is made returnable on 1.9.1998 when the petitioner will be entitled to ask for further orders.

Leave is given to the respondent to apply for vacating and/or modification of the order upon notice to the petitioner.

All parties to act on a signed copy of the minutes of this order on the usual undertaking."

12. On 1st September, 1998 the court again passed an order continuing the order of status quo until further orders. Being aggrieved by and dissatisfied with the said order, the appellant moved an application for modification, vacating or setting aside and also to clarify the aforesaid order. But the learned trial Judge without passing any order on such application has merely directed the parties to file their affidavits against the said application. Therefore, being aggrieved by and dissatisfied with such an order, the appellant/petitioner has filed the present appeal and also prayed for clarification of the order of status quo.

13. The facts leading to the present appeal as well as the application are as follows :--

An agreement was entered into by and between the appellant/ petitioner and the respondent on 27th December, 1996 for supply of 1,700 M.T. of tea by the

respondent to the appellant/petitioner by June, 1997 and the appellant/petitioner, in turn, was to supply the same quantity of tea to the Defence Authorities. in terms of the said Agreement the respondent supplied a total quantity of 1338 M.T. of tea to the appellant/ petitioner leaving a balance quantity of 362 M.T. of tea which is still to be supplied by the respondent to the appellant/petitioner.

14. Since March. 1998 onwards the respondent had, however, on several occasions defaulted in supplying the tea as aforesaid. The respondent was, however, able to supply only 1,050 M.Ts. of tea by the end of June. 1997. The respondent from time to time requested the appellant/petitioner to seek extension of time for delivery of the said tea as per the previous contract. The appellant/petitioner had to request the Defence Authorities on several occasions for extension of the period to supply the tea as per the previous contract. On or about 30th July, 1998 the Defence Authorities had, however, granted extension of time for supply of tea. But, even then the respondent could not supply the said tea as a result of which the Defence Authorities had revoked the previous Agreement.

15. The respondent in due performance of the contract and in terms of the said Agreement furnished a Bank Guarantee dated 26th May, 1997 through the State Bank of Saurashtra, 9 Brabourne Road, Calcutta in favour of the appellant/petitioner for a sum of Rs. 80,00,000/- which was valid upto 15th March, 1998 but it was subsequently extended upto 31st March, 1999. The respondent having committed a breach of the contract by its failure to supply the balance quantity of 326 M.T. of tea to the appellant/petitioner, the appellant/petitioner tn turn could not supply the said tea to the Defence Authorities. The appellant/petitioner also entered into an Agreement with the Ministry of Defence, Army Purchase Organisation for supply of 1,700 M.T. of tea whereunder the appellant/petitioner had furnished a Bank Guarantee of a sum of Rs. 84,00,000/- in favour of the Government of india, Ministry of Defence, Army Purchase Organisation. On 12th October, 1998 the Defence Authorities Issued a letter purporting to cancel the contract which had been entered into by and between the appellant/petitioner and the Defence Authorities. The Defence Authorities threatened to take risk purchase and claimed the difference in value. The Defence Authorities simultaneously also wrote a letter to the State Bank of india, Overseas Branch, Calcutta for invocation of the Bank Guarantee of Rs. 84,00,000/-, furnished by the appellant/petitioner. After receiving the said letter the appellant/petitioner referred the disputes and claims to arbitration and requested the Defence Authorities to appoint an Arbitrator. Subsequently, on 22nd October, 1998 the appellant/petitioner received a letter dated 14th October, 1998 from the Defence Authorities indicating their inability to act in terms of the letter sent by the appellant/petitioner as the latter did not set in terms of the contract

16. The appellant/petitioner states that since the respondent has defaulted in supplying the balance quantity of 362 M.T. of tea to the appellant/petitioner in

terms of the Agreement dated 27th December, 1996, the appellant/petitioner Is, therefore, entitled to cancel the contract, make risk purchase and enforce the Bank Guarantee furnished by the respondent. The said Bank Guarantee, furnished by the respondent, was unconditional and Irrevocable.

17. It has further been claimed by the appellant/petitioner herein that the respondent has filed an application u/s 9 of the Arbitration & Conciliation Act, 1996 suppressing some material facts and obtained an ex parte order against the appellant/petitioner. As soon as the appellant/ petitioner came to know of the said order, it has filed an application to revoke, cancel, modify and/or clarify the order passed by the learned trial court But the learned trial court without passing any order on the said application, rather passed an order of status quo. Therefore, being aggrieved by and dissatisfied with the said order, the appellant/petitioner was constrained to file this appeal and prayed for an interim order.

18. By consent of the parties the appeal as well as the application are taken up together and disposed of as follows :--

19. The undisputed facts are that the appellant/petitioner has entered into a contract with the Defence Authorities, Army Purchase Organisation for supply of 1,700 M.T. of tea by the end of June, 1997. it has supplied only 1368 M.T. of tea till date and within June, 1997 only 1050 M.T. of tea was supplied. The appellant/petitioner had further furnished an unconditional Bank Guarantee in favour of the Defence Authorities for Rs. 84,40,900/-. There has been a threat by the Defence Authorities for invocation of the said Bank Guarantee.

20. It is further not disputed that the respondent furnished a Bank Guarantee in favour of the appellant/petitioner for Rs. 80.00.000/- through the State Bank of Saurashtra and the said Bank Guarantee has been renewed and is in force till the end of March, 1999. Further, the respondent had only supplied 1338 M.T. of tea and was unable to supply 362 M.T. of tea although it promised to supply 1.700 M.T. of tea on or before June, 1997.

21. The learned Advocate appearing on behalf of the appellant/petitioner has submitted that the Bank Guarantee being an independent contract, notwithstanding the other clauses of the contract, shall be enforceable as soon as there has been a breach of contract. Therefore, in this case since the Defence Authorities have already taken steps to enforce the Bank Guarantee furnished by the appellant/petitioner, there was no other alternative left to the appellant/petitioner but to enforce the Bank Guarantee which has been furnished by the respondent in favour of the appellant/petitioner. The fact remains that the respondent did not supply the entire 1,700 M.T. of tea as agreed before to the appellant/petitioner. in this context this Bench has already taken a view in the case of Star Wire (India) Ltd. v. ITC Global Holdings Put. Ltd. which is as follows :--

"A Bill of Exchange like other negotiable instruments, furnishes a right to payment u/s 32 of the Negotiable instruments Act 1881 independent of the

original contract pursuant to which the bill may have been executed. Where it not so it would also its character of negotiability. The Bills of Exchange in this case contain no arbitration clause. Any dispute regarding the enforceability of the Bills of Exchange cannot, therefore, be referred to arbitration."

It does not matter that the Bills of Exchange were executed in terms of the contract. Once the Bill of Exchange is accepted it remains separate from the original contract much like a situation where in terms of the condition of the contract a Bank Guarantee may be provided by a Bank in favour of one of the parties to the original contract. The Bank Guarantee itself is a contract separate from the original contract pursuant to which the Bank Guarantee is furnished [See Hindusthan Paper Corporation Ltd. v. Kenellhouse Angaml : CAL. LT. 1990 (1) HC 2001.

We find support for this view from the observations of Ramlal Onkarmal Firm Vs. Mohanlal Jogani Rice and Atta Mills, . The document in question in that case was a demand draft. It was said :

"the respondents by accepting the demand draft must be deemed to have accepted that draft as a legal tender or as absolute payment of the amount payable under the cheque endorsed in their favour by the appellant. Their rights thereafter would rest only upon the demand draft and not upon the original debt which the appellant owed to them."

22. In the above Division Bench case this Bench has also relied upon a judgment of an earlier Division Bench case reported in Hindusthan Paper Corporation Limited Vs. Keneilhouse Angami, in the case of Hindusthan Paper Corporation Ltd. v. Kenethhouse Angami. From the aforesaid case it is gathered that the Bank Guarantee is independent of the original contract. If pursuant to this contract a party to the said document has claimed for invocation of the Bank Guarantee, it shall not be postponed until it is found that there has been a breach to the other clauses of the contract.

23. It has further been contended from the Bar that even in certain extreme and exceptional circumstances the court can pass an order of injunction on the ground of fraud and special equity. But in this case no such ground has been made out by the respondent. From the Impugned judgment we also do not come across that the learned trial court has been addressed on those grounds, nor any finding thereon has been arrived at.

24. From the order which has been assailed before us we do not find that the learned trial court has narrated good and sufficient reasons for granting injunction.

25. It has been submitted from the Bar on behalf of the respondent that the appellant/petitioner having not preferred any appeal from the ex parte order of injunction, it Is not open to the appellant to challenge the said order. We find little substance in this submission, inasmuch as the learned trial court had

granted only an ex parte injunction and the appellant/ petitioner Immediately after having come to know about the said order has filed an application for modification of the said order under Order 39 Rule 4 of the CPC and the said application is still pending without it being disposed of. The learned trial court only passed an order of status quo without disposing of the application which was filed under Order 39 Rule 4 of the Code of Civil Procedure. As soon as the order of status quo has been passed until further orders which amounted to an order of injunction, any party aggrieved by such order has a right to prefer an appeal before the competent court. Therefore, in that view of the matter, it cannot be argued that the appellant/petitioner could not have preferred an appeal challenging the order of status quo.

26. Since no ground of satisfaction for passing an interim order has been stated in the trial court's order, we are unable to agree with the order of interim injunction as well as the order of status quo passed by the learned trial court. In this connection our view is buttressed by a decision of the Supreme Court of India in Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, in the said decision the Supreme Court has, inter alia, held as follows :

... .. Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. Such ex parte orders have far reaching effect and as such a condition has been imposed under proviso to Rule 3 of Order 39 CPC that court must record reasons before passing such order. This is imperative in nature and not optional. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant. Proviso to Rule 3 attracts the principle that if a statute requires a thing to be done in a particular manner it should be done in that manner or not at all. The requirement for recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. This requirement is consistent with the principle that a party to a suit who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party who invokes the Jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order."

27. Therefore, in view of the above observation of the Supreme Court, we have no other option but to vacate the order of status quo passed by the learned trial court.

The Court: Accordingly, the appeal as well as the application are allowed and the

interim order dated 1st September, 1998 whereunder the learned trial court has passed the order of status quo is hereby vacated.

Costs of this appeal will be cost in the suit.

Stay of operation of this Judgment and Order, prayed for on behalf of the respondent, is refused.

All parties concerned are to act on a Xeroxed signed copy of the operative part of this Judgment and Order on the usual undertaking.

28. Appeal allowed