
(1995) 09 MAD CK 0057
In the Madras High Court
Case No : O.S.A. No. 191 of 1995

T.N.S.S. Steels Pvt. Ltd.,

APPELLANT

Vs

Cochin Port Trust and another

RESPONDENT

Date of Decision : 14-09-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : AIR 1996 Mad 293 : (1996) 1 MLJ 445

Hon'ble Judges : Srinivasan, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : K.T. Palpandan, for M/s. S.F. Mohammed Yousuf and N. Sahul Hammed, for the Appellant; T. Thiageswaran, for M/s. Waraon and Sai Rams, for the Respondent

Judgement

AR. Lakshmanan, J.—This appeal is directed against the order of the learned single Judge of this Court in O. A. No. 214 of 1994 and

Application No. 4346 of 1994 in C.S. No. 271 of 1994 dated 31-7-1995 vacating the interim injunction granted earlier.

2. The appellant is the plaintiff in the suit. The suit was filed for a perpetual injunction restraining the 1st respondent/Cochin Port Trust from

invoking and encashing the letter of bank guarantee and the 2nd respondent/bank from making any payment under the bank guarantee dated 11-

5-1993 executed by the 2nd respondent on behalf of the appellant in favour of the 1st respondent, and for costs.

3. The following are the plaint averments in short. The appellant, who is carrying on the business of acquiring and dismantling vessels on the high

seas, purchased a vessel under the name of ""H.S.D. Mattancherry"" from M/s. Orient Underwater Engineers Private Limited for dismantling the

vessel. An agreement was entered into between the appellant and the 1st respondent on 12-5-1993. The suit relates to the guarantee executed by the 2nd respondent/bank in favour of the 1st respondent for Rs. 5 lakhs. The guarantee was executed as per the terms of the agreement dated 12-5-1993 that the appellant should furnish a security deposit in the sum of Rs. 5 lakhs for adhering to and discharging the obligations under the Berth Hire Contract. It was also agreed and so incorporated in the agreement -- vide Clause 11 -- that instead of furnishing cash security, the appellant could furnish a bank guarantee for a sum of Rs. 5 lakhs and pursuant thereto, the 2nd respondent/bank furnished a bank guarantee for Rs. 5 lakhs on 11-5-1993.

4. According to the appellant, the dismantling operation, which was commenced on or about 24-5-1993, was completed on 16-10-1993 and the

Deputy Conservator of Port Trust, Cochin, has certified to the said effect on 20-10-1993. The storage space was also Vacated and handed over

on 18-11-1993 as per the letter of surrender dated 19-11-1993 signed by the appellant and the 1st respondent. According to the appellant, the

payments made by them towards berth hire charges are vouched by receipts. After surrendering the land, the appellant has closed down their

temporary office at Cochin on the very same day on due notification to the 1st respondent. The berth hire contract stood terminated by payment of

the charges from 24-5-1993 to 16-10-1993 on 22-11-1993. As the berth hire contract has been terminated by the fulfilment of the contract, the

bank guarantee dated 11-5-1993 will also come to an end with the fulfilment of the contract. In short, the appellant has no liability under the

contract as the contract has been completed and terminated and that the 1st respondent also has not made any claim under the contract or in

respect of or on matters relating to any of the terms of the contract dated 12-5-1993. However, the 2nd respondent wrote a letter on 21-2-1994

to the appellant stating that they received a notice invoking the bank guarantee and demanding that the amount of Rs. 5 lakhs be paid to the 1st

respondent and in default thereof, the bank is liable to pay interest at the rate of 20% from the date of issue of notice. A letter dated 16-2-1994

issued by the 1st respondent invoking the bank guarantee was also sent along with the notice by the 2nd respondent.

5. According to the appellant, the 1st respondent has not made any demand under the contract dated 12-5-1993 and that the berth hire contract charges and other dues connected therewith have been paid up-to-date and, therefore, the invocation of bank guarantee by the 1st respondent is totally illegal. It is also stated that there is no dispute between the appellant and the 1st respondent at any point of time in the execution of the contract dated 12-5-1993. However, it is now stated by the Deputy Conservator, in particular the Chief Mechanical Engineer, that in respect of the two cranes, one designated as No. 1 and the other as No. 3, Crane No. 1 has sustained a bent and that, therefore, the appellant is liable for the repair charges. In regard to Crane No. 3, the claim was, that while lifting a load having no stenciling or information regarding the weight of the load, it has got seriously damaged. It is the case of the appellant, that no assessment of damage has been made and the engagement of the crane was not covered by the agreement dated 12-5-1993 nor by the bank guarantee dated 11-5-1993, and that the terms of the agreement dated 12-5-1993 will make it clear that hiring of equipment was not subject-matter of the agreement. Even otherwise, the alleged damage can be rectified as these were minor damages and no demand was made on the appellant. It is also contended that the bank guarantee is unrelated to the hiring of the two cranes and even in respect of the hiring of the two cranes, no hiring charge is due and no other dues had accrued and in fact, no demand has been made. However, the 1st respondent has chosen to invoke the bank guarantee with fraudulent intention to make illegal enrichment by taking illegal resort by way of invoking the bank guarantee. Lastly it is contended that if there is any amount due either under the agreement dated 12-5-1993 or even otherwise, the 1st respondent could have made a demand on the appellant. There is absolutely no demand. Therefore, the appellant was compelled to file the suit to save their reputation and credibility in the market from being assailed.

6. Along with the suit, the appellant filed O.A. No. 214 of 1994 for an injunction restraining the 1st respondent from invoking and enforcing the bank guarantee, and the 2nd respondent from making any payment under the bank guarantee dated 11-5-1993 issued by the 2nd respondent on behalf of the appellant in favour of the 1st respondent pending disposal of the suit. The affidavit filed in support of the above application contains

the very same averments as in the plaint. On 3-3-1994 a learned single Judge of this Court granted interim injunction as prayed for and ordered

notice to the respondents returnable by 17-3-1994. On receipt of the order, the 2nd respondent has informed the 1st respondent expressing its

inability to pay under the bank guarantee in view of the order of injunction passed by this Court. The 1st respondent/ Cochin Port Trust

represented by its Chairman filed Application No. 4346 of 1994 to vacate the interim injunction granted on 3-3-1994 in O.A. No. 214 of 1994.

7. According to the 1st respondent, the agreement entered into between the parties contemplates dismantling and removal of the vessel in

accordance with the terms and conditions stipulated therein and that Clause 8 of the agreement stipulates that the appellant shall pay the berth hire,

cost of fresh water and other charges at the prevailing rates as stipulated by the 1st respondent, and that the bank guarantee executed by the 2nd

respondent clearly covers all the exigencies and is not limited to certain specific exigencies and conditions. The agreement dated 12-5-1993 does

not limit the said bank guarantee in any manner whatsoever. A spot enquiry was also conducted in the presence of the representatives of the 1st

respondent and the damages to the cranes were notified. The representatives of the appellant, however, denied their liability by their letters dated

9-11-1993 and 18-11-1993 for the damage caused to the cranes. According to the 1st respondent, the denial is only an afterthought, and the 1st

respondent proceeded with the enquiry on 30-1-1993.

8. The 1st respondent would submit that Chapter II of the Port Scale of Rates clearly stipulates that the hirer of Port equipments is responsible for

the damages to the Port properties while under use and the terms and conditions in the bank, guarantee dated 11-5-1993 also covers the same.

Hence, the appellant is liable to pay the 1st respondent the damages caused by them to the cranes hired. The appellant is also bound by the

stipulations in the bank guarantee and is liable to pay all other dues that may arise as the work progresses. It is also pointed out that the bank

guarantee clearly states that in consideration of the covenants therein, the 2nd respondent/bank shall pay to the 1st respondent without any demur a

sum of Rs. 5 lakhs and the bank is liable to pay the same sum as and when a demand is made. The appellant has not made out any prima facie

case for the grant of injunction.

9. The learned single Judge by his order dated 31-7-1995 considered the entire matter and the materials placed before him and dismissed O.A.

No. 214 of 1994 and vacated the interim injunction granted earlier. In consequence, the learned Judge allowed Application No. 4346 of 1994

filed by the 1st respondent/ Cochin Port Trust. Aggrieved by the said common order, the unsuccessful plaintiff has filed the present appeal.

10. We have heard the arguments of Mr. K. T. Palpandian for the appellant and Mr. T. Thiageswaran for the 1st respondent. We have also

perused the pleadings and the documents filed and also the impugned order.

11. The only ground that was urged before the learned single Judge was, that on the date when the bank guarantee was about to be invoked the

damage was not assessed, and being unquantified, the enforcement of the bank guarantee by the 1st respondent was unjustified. The learned

Judge, after referring to various judgments cited, came to the conclusion that the argument of the plaintiff has no force in view of the clauses in the

bank guarantee. The learned Judge has also held that no fraud has been proved in this case and that the bank guarantee has been enforced rightly,

and if ultimately it is found that the bank guarantee has been enforced unauthorisedly or illegally, the plaintiff can file a suit and recover the amount

due to it. In the concluding paragraph of his order, the learned Judge has also observed that the bank has to stand on its obligations and what the

bank cannot achieve directly by filing a suit cannot be allowed to be secured by it indirectly through the plaintiff/ appellant herein. On the above

findings, the learned Judge vacated the interim injunction granted earlier by holding that this is a fit case where the interim injunction has to be

vacated.

12. Mr. K. T. Palpandian reiterated the contentions raised by the appellant in the pleadings. According to him, there had been no assessment of

damages and that the contention of the 1st respondent that the bank guarantee covers the alleged dues on account of damages caused to the

cranes is incorrect. According to the learned counsel for the appellant, a bare reading of the several clauses of the agreement would make it clear

that there is no reference to the engagement of cranes or any equipment of the Port Trust, and therefore, the attempt to invoke Clause 9 of the

agreement is illegal.

13. The following facts are not in dispute :

(a) The execution of bank guarantee dated 11-5-1993 by the 2nd respondent in favour of the 1st respondent.

(b) The bank guarantee has been executed in order to satisfy the liability of the appellant to pay berth hire and hire charges of port equipment that may be used to meet any exigency and all other dues that may arise as the work progresses.

(c) The appellant has agreed to furnish bank guarantee for Rs. 5 lakhs instead of furnishing cash security.

(d) In consideration thereof, the 2nd respondent/bank undertook to pay the 1st respondent on demand and without any demur the amount of Rs. 5 lakhs.

(e) The execution of the agreement dated 12-5-1993 between the 1st respondent and the appellant agreeing to dismantle and remove the vessel from the Port area within a period of one year.

(f) Clause 10 of the agreement fixes the responsibility on the appellant for all loss and/ or damages that emanate from the dismantling of the vessel or removal of the dismantled material, to the Port Trust.

(g) Clause 11 of the agreement speaks of the second party therein viz., the appellant, in furnishing a bank guarantee for Rs. 5 lakhs instead of furnishing cash security for adhering to and discharging the terms of the contract.

(h) The allotment of 1,000 sq. Metres open space purely on a temporary basis for a period up to 17-11-1993 for the storage of the cut materials on a monthly rental of Rs. 453/-per 100 Sq. Metres.

(i) It is not in dispute that the following clause is incorporated at the bottom of the Form of Application for use of Heavy Lift and Shore Cranes, which was signed by the appellant at the bottom :

If the weight of any package of article actually exceeds the weight above stated, we will be entirely responsible for all damages which may be in any wise sustained during the hoisting or lowering of such package of article however caused and will meet the cost of repairing for such damage on demand.

(j) Spot enquiry was conducted at 4-00 p.m., on 16-11-1993. Though the

representative of the appellant was present, he refused to sign the spot enquiry report.

(k) The damage caused to the Port mobile crane was brought to the notice of the appellant by the 1st respondent by their letter dated 24-1-1994

informing them that they are liable to pay the Port Trust the actual hire charges for the whole period and also to remit the rectification charges of both the cranes.

14. With the above background, we have to consider the case of the appellant whether they are entitled to an order of injunction restraining the 1st

respondent from enforcing the bank guarantee for Rs. 5 lakhs, which was admittedly executed by them instead of furnishing cash security. The

bank guarantee executed by the 2nd respondent/bank refers to two important contingencies. The first is, the bank guarantee has been executed to

meet the liabilities of the appellant to pay berth hire and hire charges of Port equipments that may be used by the appellant to meet any exigency,

and all other dues that may arise as the work progresses and also to clear the dismantled pieces without causing obstruction to navigation or

shipping. It is also seen from the terms of the bank guarantee that the appellant alone had agreed to furnish bank guarantee for Rs. 5 lakhs instead

of furnishing cash security. In consideration thereof the 2nd respondent/ bank undertook to pay the 1st respondent on demand and without any

demur the amount of Rs. 5 lakhs.

15. The appellant and the 1st respondent have also entered into an agreement on 12-5-1993. Clause 10 of the agreement fixes the responsibility

on the appellant for all losses and/ or damages that emanate from dismantling of the vessel or removal of the dismantled materials and caused to the

1st respondent/ Cochin Port Trust. Clause 11 of the agreement re-affirms the acceptance on the part of the appellant in furnishing a bank guarantee

for Rs. 5 lakhs instead of furnishing cash security for adhering to and discharging the contract. In our opinion, the terms of the bank guarantee and

the agreement are very clear and there is no ambiguity at all in the agreement. Had the 1st respondent insisted upon the appellant to furnish cash

security there would not have been any necessity at all for them to invoke the bank guarantee and be at the mercy of the 2nd respondent/bank.

When the appellant had unequivocally agreed to pay the Port Trust on demand

and without any demur the amount of Rs. 5 lakhs, it is not now open to the appellant to raise all contentions and say that it will not pay and honour its commitment to the 1st respondent. In our opinion, the amount covered by the bank guarantee is payable on demand and without any demur. Therefore, we are of the view, that there is no point in now saying that the damage is not quantified or assessed by the 1st respondent, which was the only contention raised before the learned single Judge.

16. It is also seen from the letter of the 1st respondent in A3/4693/T dated 24-1-1994 addressed to the appellant, that the 1st respondent

requested the appellant to bear the rectification charges of both the cranes within ten days of receipt of that letter failing which they may be

compelled to initiate further action to recover the charges. It is not in dispute that no reply was sent by the appellant to this letter. The letter dated

18-11-1993 sent by the appellant to the 1st respondent can also be noticed in this context wherein the appellant has categorically guaranteed the

1st respondent that if any legal claim is made out against them in regard to the cranes given to them on hire, they will indemnify the 1st respondent.

There is also a reference to the allotment of mobile cranes and the remittance of some hire charges and their entitlement for refund of the deposit in

view of the failure of the machinery.

17. Mr. K. T. Palpandian contended that the 1st respondent has committed fraud in invoking the bank guarantee. We have care- fully gone

through the plaint and the affidavit filed in support of the injunction application. Fraud has not been alleged anywhere in the pleadings. The learned

Judge has also observed in his order that fraud has not been proved in this case.

18. Mr. K. T. Palpandian then contended that bank guarantee does not cover the alleged due on account of the damages caused to the cranes and

that Clause 9 of the agreement dated 12-5-1993 will only relate to the subject-matter covered by the agreement and, therefore, any attempt to

invoke Clause 9 is futile. As already seen, there is no limitation in the bank guarantee for enforcement of the same. The appellant, in our view, has

proceeded on the basis that the agreement limits the bank guarantee. We are unable to countenance the said contention of the learned counsel for

the appellant. Clause 8 of the agreement clearly stipulates that the appellant shall pay the berth hire, cost of fresh water and other charges at the

prevalent rates stipulated from time to time by the 1st respondent. Similarly, Clause 9 also stipulates that in the event of any dispute between the parties, the decision of the Deputy Conservator of the Port Trust shall be final. The said terms and conditions of the agreement have been duly agreed to by the appellant and in acceptance thereof, the appellant has signed the same. It is also not in dispute that in addition to the payment of rent for the leasing space, the appellant is also liable to pay electricity charges, etc., hire charges for Port equipments, etc., and all other due's that may arise when the work progresses. It is hence clear that for the purpose of dismantling and removing the said vessel from the Port Trust area, the appellant has to necessarily make use of certain equipments and the same has to be acquired from the 1st respondent. The charges for all the services have to be paid by the appellant without fail. Therefore, in order to secure their interest, as per the practice, a security deposit was sought for by the 1st respondent for providing these services and in pursuance of mutual discussions between the parties, the appellant has agreed to take a bank guarantee for Rs. 5 lakhs as sufficient security in lieu of cash deposit. In pursuance of this mutual agreement, the 2nd respondent had executed a bank guarantee on 11-5-1993 on behalf of the appellant in favour of the 1st respondent. Therefore, in our view, the bank guarantee clearly covers all the exigencies referred to above and is not limited to certain specific exigencies or conditions.

19. It is pointed out that Chapter II of the Port Scale of Rates stipulates that the hirer of Port equipments is responsible for the Port properties while under use and the terms and conditions in the bank guarantee dated 11-5-1993 also cover the same. The said contention of the learned counsel for the 1st respondent merits acceptance. Hence, we hold that the appellant is liable to pay the 1st respondent the damages caused by them to the cranes hired. The appellant was also informed by the 1st respondent by its letter dated 24-1-1994 that on the basis of the joint enquiry conducted on 30-11-1993, the appellant is liable to pay damages to the 1st respondent. Prior to this letter, the Traffic Manager of the 1st respondent had informed the Deputy Conservator of the 1st respondent by his letter dated 7-12-1993 regarding the damage caused to the cranes hired to the appellant. Similarly, the Chief Mechanical Engineer of the 1st respondent was also requested to estimate the cost of the damages

caused by the appellant to the two cranes. The Deputy Conservator came to the conclusion that the damages to the two cranes have been caused

due to the negligence of the appellant while handling the same and hence decided to invoke the bank guarantee executed by the 2nd respondent.

We are also of the view that the appellant is bound by the stipulations in the bank guarantee and is liable to pay the hire charges to the Port

equipments and all other dues that may arise as the work progresses. The damage caused to the crane is to be compensated by the appellant and

the same, in our opinion, amounts to a due that arose as the work progressed. Therefore, we hold that the bank guarantee clearly covers the said

due and that the 1st respondent is entitled to encash the said bank guarantee. The appellant having accepted the various clauses in the agreement is

now estopped from going back upon its written commitments.

20. It is not necessary for us to deal with each and every contention urged by the parties as most of them relate to the merits of the suit, Both sides

cited a number of decisions in support of their respective contentions. We do not think it necessary to refer to all of them as we have decided this

appeal on the facts and circumstances of the case. Therefore, we confine ourselves only to a very few decisions of the Supreme Court.

21. In the decision reported in *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*, the Supreme Court

has observed as follows at page 2783 of AIR :--

It is settled law that the Court, before issuing the injunction under Order 39, Rules 1 and 2, C.P.C., should prima facie be satisfied that there is

triable issue, strong prima facie case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent

irremedial injury. The Court should normally insist upon enforcement of the bank guarantee and the Court should not interfere with the

enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily

plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the

original contract or any of the subsequent events that may happen as a ground for fraud.

22. In the above decision, the Supreme Court has also pointed out that the grant

of injunction is a discretionary power in equity jurisdiction and that the contract or guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract and, therefore, it creates an irrevocable obligation to perform the contract in terms thereof on the occurrence of the events mentioned in the bank guarantee.

23. In the decision reported in *United Commercial Bank Vs. Bank of India and Others*, , the Supreme Court has observed that no injunction could be granted under Order 39, Rules 1 and 2, C.P.C., unless the plaintiff establishes that he had a prima facie case, manning thereby that there was a bona fide contention between the parties or a serious question to be tried, and even if there was a serious question to be tried, the High Court has to consider the balance of convenience. In the instant case, the appellant has not made out a prima facie case for the grant of injunction in their favour. There is no reason to prevent the 1st respondent from invoking the bank guarantee for Rs. 5 lakhs. Balance of convenience clearly lies in allowing normal banking transaction to move forward. The appellant has also failed to establish that they would be put to an irreparable loss unless an interim injunction is granted.

24. In the decision reported in *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, , the Supreme Court has observed that a party having made a demand for encashment under the bank guarantee and in terms thereof, the bank has to pay and that the bank cannot be interdicted by the Court at the instance of a party, like the appellant herein, in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The Supreme Court has also observed that where under the bank guarantee the bank undertook to pay the amount without any demur on mere demand of the principal on ground of non-performance or breach of contract treating the demand to be conclusive as to the amount due, held, that the Court was not justified in issuing injunction in that case, interdicting the bank from encashing the bank guarantee on demand of the principal.

25. In the decision reported in *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, 1978 (I) All ER 976, the Court of Appeal has observed that a bank which had given a performance guarantee was required to

honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default and that the only exception to the rule was, where fraud by one of the parties to the contract in question had been established and the bank had notice of the fraud. We have already seen in this case that the appellant has not established fraud on the part of the 1st respondent. Therefore, the 1st respondent would be entitled to invoke the bank guarantee as per its terms.

26. In the result, the appeal fails and is dismissed without costs. The order passed by the learned single Judge, which is impugned in this appeal, vacating the injunction is confirmed and the application filed by the appellant herein for grant of temporary injunction is rejected, with a direction that the Original Side of this Court shall try to dispose of the suit as expeditiously as possible

27. Appeal dismissed.