

(1998) 05 DEL CK 0016

In the Delhi High Court

Case No : IA No's. 10166/97 and 11537/97 In S. No. 2329/97

Uni Steel Corporation

APPELLANT

Vs

M/s. Skoda Export Co. Ltd., and Another

RESPONDENT

Date of Decision : 29-05-1998

Acts Referred:

Citation : (1998) 5 AD 543 : (1998) 74 DLT 469 : (1998) 46 DRJ 528

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. V.P. Singh and Mr. Punit D. Tyagi, for the Appellant; Mr. Vikramjit Sen, for the Respondent

Judgement

J.B. Goel, J.—By this order two applications is No. 10166/97 of the plaintiff (Under Order 39 Rules 1 & 2) and is No. 11537/97 of the defendant No.1 (Under Order 39 Rule 4) of the CPC (for short the "Code") are being disposed of.

2. The plaintiff has filed the suit for declaration and injunction against invocation of performance bank guarantee given by the defendant No. 2 on behalf of the plaintiff in favor of defendant No. 1 in the sum of Rs. 7.60 lakhs (being Bank Guarantee No.43/95).

3. Briefly the facts are that the work of laying of pipelines known as Kandla-Bhatinda Pipelines Project had been awarded by Indian Oil Corporation Ltd., (for short IOCL) to the Consortium of defendant No. 1. The latter in turn had awarded a sub-contract for supply of various steel pipes of different dimensions, length, materials, standards and class to the plaintiff, perhaps after inviting quotations and the terms and conditions for the supplies, delivery period and manner of payments were stipulated in the contract in writing as per Purchase Order No. KB-D-00-09-PUR-066 dated 15.7.1995, total value being Rs. 62,05,852.60. The plaintiff was required to give a warranty-cum-performance guarantee in the form of a Bank Guarantee in the prescribed form with twelve months validity from the date of delivery of the material. Time was of the essence of supplies. plaintiff

furnished Bank Guarantee No. 43/95 (copy Annexure 2) in the sum of Rs. 7.60 lakhs issued by Canara Bank, Hauz Qazi (defendant No. 2). It appears that the supplies were not made within the agreed schedule and defendant No. 1 invoked the Bank Guarantee on 27.10.97. The plaintiff has challenged it. It is alleged that the defendant had made changes in the purchase order several times about the specifications and quantities to be supplied by amendments made on 12.8.95, 31.8.95, 11.9.95, 8.11.95 and 20.3.95 (Copies Annexures 3-7), that the validity of Bank Guarantee was got extended till 30.10.97 by the defendant unreasonably though the plaintiff had completed the delivery in accordance with the purchase orders as modified, by 12.4.96 without any delay, the Bank Guarantee was valid for a period of 12 months from this date till 12.4.97 but it was not released in spite of demands made on 12.4.97 (copy Annexure 8). The supplies were made without any default or delay on the part of the plaintiff and the delay, if any, was caused due to acts or omissions on the part of the defendant; first because purchase orders were amended, secondly they did not inspect the goods in time and thirdly dispatch instructions were not given in time. Time for supply of the goods because of amendments made ceased to be of the essence of the contract and was waived. In any case, there was delay only in respect of very small quantities and the defendant is not entitled to claim whole of the amount of penalty stipulated for the total supplies to be made. And the invocation of the Bank Guarantee is illegal, fraudulent and not warranted in the circumstances.

4. In is No. 10166/97 vide order dated November 5, 1997 an ex parte ad interim injunction was passed restraining the defendant from invoking the Bank Guarantee which has been extended. The defendant filed written statement, reply to plaintiff's application and is No. 11537/97 for vacating the ex parte injunction, contesting the suit as well as the grant of interim order on various legal pleas, alleging that the suit is not maintainable, the plaintiff is guilty of deliberate suppression of arbitration clause, seeking restraining from invocation of the Bank Guarantee is not proper, it is against the settled principles of law; the suit is not properly valued for purposes of court fees and the process of the court has been misused. On merit it is alleged that no substantial changes were made in the purchase order except some insignificant changes in specifications and some quantity of material to be omitted or reduced and some additional items added for supply of which time was given. These changes were effected with mutual consent and other terms and conditions remained unchanged, time always remained of essence. The contract provided for levy of penalty on prescribed scale. As the plaintiff did not make supply of the material during agreed period, and as there is breach of the contract, the defendant is entitled to impose penalty and to invoke bank guarantee. The plaintiff has no say in the matter of invocation of the bank guarantee, which is an independent contract between the defendant and the bank. The invocation has been made in accordance with the terms of the Bank Guarantee. Interim order has been passed because of misrepresentation made and the plaintiff is not entitled to the same.

5. Learned counsel for the plaintiff relying on *Charles Rickards Ltd. Vs. Oppenheim* (1950) 1 All E.R. 420 and *M/s. Mohinder Singh & Co. Vs. Executive Engineer Jammu & Central Construction Division CPWD & Others* AIR 1971 J&K 130 has contended that as the contract of supply as contained in purchase order dated 15.7.1995 was amended five times as per Annexures 3 to 7 and with the extension of time for supply, the condition of time being of essence of the contract became unenforceable or was waived and in the absence of fresh agreement making it again of the essence of the contract, this condition is not available to entitle the defendant to claim damages for delay, if any, in the supplies and the bank guarantee stood discharged and is not enforceable and it was fraudulent on the part of the defendant to have invoked the same. Also that the whole of the amount of bank guarantee cannot be claimed as the delay, if any, was in respect of only some items and of small quantities. For this reason also, invocation of bank guarantee is fraudulent and irreparable loss will be caused to the petitioner. Further that the supplies were made by 12.4.1996; the bank guarantee was for 12 months and it was got extended unreasonably and could be enforced by 12.4.1997 only and it has been wrongfully invoked on 27.10.1997.

6. To this, learned counsel for the defendant has contended that this is not correct, first the contract was not materially changed except minor changes whereby some additional items were added and some were reduced or cancelled and whenever the purchase order was amended, time for delivery whenever necessitated was specified and time remained of the essence of the contract, that the bank having made unconditional and absolute promise to honour the bank guarantee could not refuse to honour their commitment and what could not be done directly by the bank, the same cannot be done indirectly by the plaintiff. plaintiff has got no right to interfere in the invocation as this is an independent contract between the bank and the defendant, the beneficiary. The principles for issuing injunction order restraining the enforcement of bank guarantee are well established and no case is made out for the grant of injunction in this case.

7. The principles governing the grant of injunction against invocation of the bank guarantee are well established. It was held in *Tarapore and Co. Vs. V/O Tractoroexport and Another*, that the opening of a confirmed letter of credit constitutes a bargain between the banker and the seller of the goods which imposes on the banker an absolute obligation to pay. It is independent and unqualified by the contract of sale or other underlying transaction between the buyer and the seller. The autonomy of an irrevocable letter of credit is entitled to protection and except in very exceptional circumstances courts should not interfere with that autonomy. These observations a fortiori apply to a bank guarantee. *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, .

8. A letter of credit constitutes the sole contract with the banker, and the bank issuing the letter of credit has no concern with any question that may arise between the seller and the purchaser of the goods. The rule is well established

that a bank issuing a confirmed letter of credit is not concerned with the underlying contract between the buyer and the seller. Duties of a bank under a letter of credit are created by the document itself but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit. In view of the banker's obligation under an irrevocable letter of credit to pay his buyer - customer cannot instruct him not to pay. The bank which gives a performance guarantee must honour that guarantee according to its terms. The courts would do their utmost to enforce it according to its terms. *United Commercial Bank Vs. Bank of India and Others*, . The scope of this has also been considered by the Supreme Court in the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, where his Lordship Mukharji, J. after referring to the case law both Indian and English observed that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be a serious dispute and a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Commitments of banks must be honoured free from interference by the courts otherwise trust in commerce - internal and international would be irreparably damaged. It is only in exceptional cases, that is to say, in case of fraud or in cases of irretrievable injustice that the Court should interfere otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

9. And in the same judgment his Lordship Shetty, J. also reiterated the principles as under :-

"Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of bank appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defense except in a case of fraud. But, the banker must be sure of his ground before declining to pay. The fraud should be of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. And in such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. In order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be a serious dispute to be tried and there should be a good prima facie act of fraud."

10. It was also explained in that case that one cannot do indirectly what one is not free to do directly. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to the appellant. If under the law, the bank could not be prevented by the respondent from honouring the credit guarantees, the appellant also cannot seek restraint from invoking the guarantee. What applies to the bank must equally apply to the appellant. It was

further held that the question of examining the prima facie case or balance of convenience does not arise if the Court cannot interfere with the unconditional commitment made by the bank in the guarantee.

11. The same principles have been emphasised in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, where also it has been laid down that in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable - injustice involved in the case. Fraud has to be an established fraud. Not only the ground of fraud be pleaded but material and evidence should also show it. As held in ALN Narayanan Chettyar Vs. Official Assignee, High Court of Rangoon, AIR 1941 SC 93 [which has been referred to with approval in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, :-

"Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture."

12. Irretrievable injury is of the nature as noticed in the case of Itek Corpn Bank 566 Fed Supp. 1210.

13. These principles have been repeatedly reiterated and more recently in AIR 1997 1644 (SC) and Dwariakesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

14. Broadly, the facts are, Annexure 1 to the plaint is the Purchase Order dated 15.7.1995 signed by both the parties. Details of materials to be supplied is given in it. Total price of the material is Rs. 62,05,852.60; terms for payment and supply are agreed, the plaintiff was to furnish warranty for quality and a performance guarantee. Time schedule for supply of the material item wise was specified. Under Clause VI, time is made of the essence. Clause XII provided for consequences of delay in making the delivery on time of any item for which penalty @ 1% of the price of the purchase order for each week or part thereof subject to a maximum of 10% of the price of the purchase order was specified. Performance Bank Guarantee No. 43/95 dated 4.12.1995 (Annexure 2 to the plaint) given by defendant No. 2 inter alias stipulated that :-

"We Canara Bank, Hauz Qazi, Delhi do hereby unconditionally and irrevocably undertake to pay to the CONTRACTOR on first demand in writing without protest or demur or proof of condition any and all amounts from time to time stated as due to the CONTRACTOR from the SUBCONTRACTOR with reference to the SUBCONTRACT up to an aggregate limit of INR Rs. 7,60,000/- (Indian rupees Seven lac sixty thousand only exactly)."

15. And the bank further agreeing that:-

"(iv) The amount stated by the CONTRACTOR in any demand claim or notice as due to the CONTRACTOR from the SUBCONTRACTOR shall as between the BANK and the CONTRACTOR for the purpose of these presents be conclusive of the said

amount and of the BANK's liability to the CONTRACTOR hereunder.

(v) The liability of the BANK to the CONTRACTOR under this guarantee and or undertaking shall remain in full force and effect notwithstanding the existence of any difference or dispute between the SUBCONTRACTOR and the CONTRACTOR the SUBCONTRACTOR and the BANK and or the BANK and the CONTRACTOR or otherwise howsoever touching or affecting these presents or the liability of the SUBCONTRACTOR to the CONTRACTOR and notwithstanding the existence of any instructions or purported instructions by the SUBCONTRACTOR or any other person to the BANK not to pay or for any cause to withhold or defer payment to the CONTRACTOR under these presents with the intent that notwithstanding the existence of such difference dispute or instruction the BANK shall be and remain liable make payment to the CONTRACTOR in terms hereof.

The purchase order was amended vide letter dated 12.8.1995 (Annexure 3 to the plaint) duly signed by both the parties thereby replacing Schedule A-1 by Schedule A-1/a. By this only one item was added and some changes were made in the items earlier agreed. It was specifically mentioned in this amendment that "all other articles according to the basis purchase order No. KB-D-00-09-PUR-066 dated 15.7.1995 are valid without any changes." The purchase order was again amended vide letter dated 31.8.1995 (Annexure 4 to the plaint) whereby Enclosure No. A-1/a was replaced by Annexure A-1/b and thereby some more items were added, some quantities were reduced or increased, the total price agreed for the amended schedule if items amended to Rs.70,99,438.60. This also specifically provided that the terms mentioned in the purchase order dated 15.7.1995 are valid without any changes. The purchase order was again amended vide letter dated 11.9.1995 (Annexure 5 to the plaint) thereby replacing Schedule A-1/b by Schedule C-1/c making similar additions/deletions in the items to be supplied and the total price of the purchase order was amended to Rs. 71,91,048.07. This also specifically provided that the basic terms and conditions agreed in purchase order dated 15.7.1995 were valid and without any changes. Vide another letter dated 8.11.1995 (Annexure 6 to the plaint), the purchase order was further amended thereby replacing Schedule C-1/c by Schedule D- 1/d and making following changes :-

"Item No. 45 quantity is increased by 20m to 20m.

Item No.81 is increased by 14m to 94m.

Items No. 88,89,90 are amended The total price of amended pipes is Rs. 4,38,125/-.

Further, total purchase order price is also adjusted to Rs.76,29,173.07.

Delivery Time

Items No.81 and 88 shall be delivered by 25.12.1995.

All the other materials are ex-stock and shall be offered for inspection

immediately after the date of signature of this varia- corporation purchase order and will be dispatched by 25.12.1995 at the latest."

16. This amendment also provided that other terms and conditions of basis purchase order dated 15.7.1995 are valid without any changes. The purchase order was further amended on 20.3.1996 (Annexure 7 to the plaint) which was signed by both the parties and the changes were as under :-

"Item No. 90 - Pipe 20" : Quantity to be delivered is as per the dispatch clearance yet to be obtained from IOCL but not more than 34m.

Whichever further balance item/quantity resulting from the purchase order and undelivered till this day is hereby cancelled without any liability on either side."

17. In the circumstances, prima facie, it cannot be said that the contract between the parties which originally contained the condition of time being of the essence of the contract was waived or was not specified after the amendments were made. All the amendments specifically provided that other terms and conditions remain unchanged which necessarily will include that the time remained of the essence of the contract. This is not the final opinion of this Court as the disputes that have arisen between the parties have to be gone into in accordance with the agreement between the parties whereby they have agreed in clause XVI that in the event of disputes or differences between the parties, the same shall be resolved through arbitral tribunal as agreed. The terms of the bank guarantee are absolute and the dispute, if any, between the buyer and seller is not a ground not to honour the commitment by the Bank.

18. The function of the Court is simply to see whether the bank guarantee was invoked in accordance with the terms and conditions as agreed in the bank guarantee. The relevant terms of the bank guarantee have already been reproduced. These terms are absolute and constitute an absolute obligation on the part of the bank to honour the same. There is no fraud proved, involved, nor from this material, it can be said that there was any fraud on the part of the defendant No.1 when the bank guarantee was given nor it can be said that any irretrievable loss is being caused by enforcing the bank guarantee. It is not disputed that the validity of the bank guarantee had been extended up to 30.10.1997 and the invocation has been made on 27.10.1997, i.e., within the extended period when the bank guarantee was still valid. The bank was bound to honour it, the plaintiff has no better right. As noticed above, what cannot be done directly cannot be done indirectly. plaintiff also is bound and cannot interfere in the invocation of the bank guarantee. The question/dispute raised by the plaintiff cannot be gone into by this Court and would be decided in the forum and by the Tribunal as agreed by the parties.

19. In the circumstances, it cannot be said that there is any illegality or infirmity in the defendant No.1 invoking the bank guarantee No. 43/95 furnished by defendant No. 2. The plaintiff is not thus entitled to any interim injunction. Their application I.A. 10166/97 is accordingly dismissed and I.A. 11537/97 of the

defendant under Order 39 Rule 4 is allowed with costs. The interim ex parte injunction dated November 5, 1997 which has been extended from time to time is hereby vacated. As the defendant No. 2 failed to fulfill its obligation on demand unreasonably, it shall also pay interest along with the amount of bank guarantee @ 18% per annum from 27.10.1997 till payment to the defendant No.1.

20. Costs for these proceedings assessed at Rs. 5,000/- to be paid by the plaintiff to defendant No.1.

21. I.As. 10166/97 and 11537/97 are disposed of accordingly.