

(1994) 03 KL CK 0031
In the High Court Of Kerala
Case No : C.M.A. No. 28 of 1992

Unique Alliance Industries, Goa

APPELLANT

Vs

Anupama Agencies, Trichur and Another

RESPONDENT

Date of Decision : 11-03-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Contract Act, 1872 — Section 126

Citation : AIR 1995 Ker 52 : (1998) 91 CompCas 254 : (1994) 3 ILR (Ker) 274

Hon'ble Judges : Varghese Kalliath, J;P.A. Mohammed, J

Bench : Division Bench

Advocate : K.P. Sreekumar and M. Pathros Matthai, for the Appellant; A.P. Chandrasekharan and B.S. Krishnan, for the Respondent

Final Decision : Allowed

Judgement

Mohammed, J.—The first defendant in O.S. No. 333 of 1991 on the file of the Subordinate Judge's Court, Trichur is the appellant in this Civil Miscellaneous Appeal. This appeal is against an order allowing the petition filed under Order XXXIX, Rule 1 of the CPC for a temporary injunction by the first respondent -- plaintiff. By the said order the second respondent (second defendant) has been injunctioned from paying and the appellant from receiving Rs. 1,67,427.16 demanded by the appellant out of the guranteed amount as per the letter of guarantee dated 20-4-1990 executed by the second respondent till the disposal of the suit.

2. The facts necessary for the disposal of this appeal are these: The appellant is a firm known as "Unique Alliance Industries, Goa" engaged in the manufacture of confectionary items. The first respondent M/s. Anupama Agencies, Trichur was appointed as the wholesale distributor for the supply of confectionary items in the districts of Trichur, Malappura, Palghat, Calicut and Kannur. As per the terms of the agreement dated 22-3-1990 (Ext. A1) the appellant had agreed to give credit facilities of 33 days and the first respondent had to furnish Bank gurantee

in favour of the appellant to cover up the supplies. The first respondent thereafter requested the second respondent, Bank of Baroda, to furnish necessary Bank guarantee on the production of sufficient security. Accordingly second respondent, after satisfying the security furnished by the first respondent, issued Bank guarantee to the appellant for an amount of Rs. 2 lakhs. The validity of the Bank guarantee was for a period of one year from 20-4-1990 to 19-4-1991. The first respondent thus became the wholesale distributor and orders for supply of confectionary items were taken. In the meanwhile M/s. Sreevilas Agencies, Trichur made a complaint to All Kerala Distributors Association, where the first respondent is also a member, that they are the dealers appointed by the appellant and already functioning for Trichur District. According to the first respondent, appellant had suppressed the facts that it had earlier appointed M/s. Sreevilas Agencies as their dealer for Trichur district and that therefore appellant had actually played fraud. In the meantime one lorry load of confectionary items was despatched to the first respondent by the appellant in January, 1991. When the goods reached Trichur the first respondent refused to unload and take delivery of the goods. However, pursuant to a specific request made by the appellant, the first respondent had kept the consignment temporarily in its godown. The case of the first respondent is that the appellant requested the first respondent to effect supply as and when the orders were received from the representative of the appellant and the first respondent would be paid commission at the rate of 10%. Thereafter the first respondent supplied the goods as per four orders. The cheques for the value of the goods so supplied were presented to the Bank for payment, but three cheques were returned unpaid for want of sufficient money. According to the first respondent, consignment received on 5-1-1991 was for Rs. 1,25,384.86 and the lorry load was not against any specific order of the first respondent and hence no responsibility could be attributed to it in any manner. The second respondent has informed the first respondent that the appellant had demanded Rs. 1,47,423.16 out of the amount covered by Bank guarantee. According to the first respondent, the appellant is making all attempts to misuse the Bank guarantee given as security. It was under that situation the present suit was filed for a decree of permanent injunction restraining the Bank of Baroda (second respondent) from effecting payment of an amount of Rs. 1,67,427.16 out of the guaranteed amount. The suit was filed on 15-3-1991. The suit claim was opposed by the appellant. After filing the suit first respondent applied for temporary injunction against the appellant. That application was opposed by the appellant and a detailed counter affidavit was also filed. After finally hearing the application for temporary injunction, the court below came to the conclusion that prima facie the first respondent had a "debatable and arguable" case. In that view of the matter the court below made ex parte injunction already issued, absolute till the disposal of the suit. The said order of the court below is under challenge in this Civil Miscellaneous Appeal.

3. Sri K.P. Sreekumar learned counsel for the appellant submitted before us that

the court below grossly erred in exercising the jurisdiction under Order XXXIX, Rule 1, C.P.C. in favour of the first respondent. His argument is, the first respondent has no prima facie case or balance of convenience justifying the grant of temporary injunction in his favour. His further point is that the court below has committed a grievous error of law in issuing injunction against the second respondent Bank from encashing the Bank guarantee. The question of law erred by the trial court to observe, according to counsel, is that the Bank guarantee is an autonomous and independent contract and so it cannot be interfered with except in cases of fraud or in case of genuine apprehension of irretrievable injustice.

4. It would be worthwhile to examine the terms of Ext. A2 Bank guarantee before analysing the aforesaid questions. This Bank guarantee will come within the terms of the "contract of guarantee" as defined in Section 126 of the Indian Contract Act. It is a contract to perform the promise or discharge the liability of third person in case of his default. The Bank guarantee is an absolute guarantee in the sense that the guarantor Bank unconditionally promises payment in default of the principal debtor. Ext. A2 deed of guarantee is executed on 20th April, 1990 by Bank of Baroda, Trichur in favour of M/s. Unique Alliance Industries, Goa (appellant) in consideration of agreeing to appoint M/s. Anupama Agencies (first respondent) as a wholesale distributor for Unique confectionary and supply the same on credit basis, as per the terms in the letter dated 22nd March, 1990. Clauses (a) and (b) of Ext. A2 Bank guarantee are most relevant for the present purpose. They are as follows :

(a) We shall act as guarantor and be answerable and responsible to you for any breach committed by constituent aforesaid in the due performance of all terms of contract and due payment of all sums of money that may become payable to you in this respect and We, Bank of Baroda, do hereby undertake to pay the amounts due and payable under this guarantee without any demur merely on a demand from you stating that the amount claimed is due from the aforesaid constituent, But our total liability to you in this respect at any part of time shall be limited to the extent of Rs. 2 lakhs (Rupees two lakhs only) for the period of this guarantee.

(b) We undertake to pay you any money so demanded notwithstanding any dispute or disputes raised by our constituent firm in any suit or proceeding pending before any court or tribunal or arbitrator relating thereto, our liability under this present being absolute and unequivocal.

5. Now it is necessary to examine the impact of the above clauses while considering the interlocutory application for temporary injunction under Order XXXIX, Rule 1. The main prayer in the suit is to :

"grant a decree of permanent prohibitory injunction, restraining the second defendant from effecting payment of an amount of Rs. 1,67,427.16 out of the guaranteed amount as per the letter of guarantee dated 20-4-1990 as requested by the first defendant in their lawyer notice dated 11-3-1991 issued on behalf of

the first defendant and the first defendant from receiving the said amount from the second defendant".

The suit filed on 15-3-1991 is now pending disposal before the Subordinate Judge's Court, Thrissur. The question is whether the trial court can injunct the Bank by an order of temporary injunction from enforcing the amount guaranteed in view of the provisions contained in Clause (b) of Ext. A2. Clause (b) makes the liability of the Bank absolute and unequivocal. The Bank guarantee, therefore, in this case is in the nature of a special contract. The Supreme Court in *Syndicate Bank Vs. Vijay Kumar and others*, observed that the Bank guarantee is a well known business transaction in the world of commerce and it has become the backbone of the banking system. As far as its enforceability, the Supreme Court further said that it depends upon the terms under which the guarantor has bound himself. It is also said that the obligations arising under the Bank guarantee are independent of the obligations arising out of a specific contract between the parties. Therefore the terms contained in the Bank guarantee alone need be considered for its enforceability. Clause (b) contains an absolute undertaking to pay the money notwithstanding the dispute raised by the principal debtor in any suit or proceeding pending before the court. This special nature of contract of guarantee should significantly determine the question of granting or refusing an order of injunction. In *U. P. Co-op. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* AIR 1988 SC 174 the Supreme Court laid down :

"Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the SCE (P) Ltd. 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 guarantees in question."

6. A Division Bench of this Court in *Regional Science Centre v. Varghese K. Pulayath and Anr.* (C.M.A. No. 86 of 1993) has firmly settled the law relating to the extent of the power of court to interfere with the operation of the Bank guarantee or irrevocable documentary credit. After exhaustively analysing the decisions of India as well as English courts, His Lordship Varghese Kalliyath, speaking for the Division Bench, held :

".....a Bank issuing or confirming a letter of credit or a Bank guarantee is not concerned with the underlying contract between the beneficiary under the guarantee and the person on whose instance the Bank guarantee has been given. Duties of a Bank under a Bank guarantee are created by the guarantee document itself."

The learned Judge further observed :

"Courts should not lightly interfere with the operation of Bank guarantees or irrevocable documentary credit. We hold that in order to restrain the operation of an irrevocable letter of credit, performance bond or guarantees by the order of a court there should be good prima facie acts of fraud or irretrievable injustice."

In view of the above exposition of the law by the Division Bench, what is required to be established in this case is whether there is a good prima facie act of fraud or irretrievable injustice in this case so as to constitute a valid ground for ordering temporary injunction.

7. As far as fraud is concerned, of course, there are certain allegations in the petition which are controverted by the appellant. The impugned order also points certain allegations of fraud in making certain dealings between the appellant and first respondent. The order further states that those allegations were denied by the appellant. However, the court below did not come to a finding as to whether a prima facie case of fraud is made out. The following passage from the impugned order is very much relevant.

"From the above reported decision it is seen that court have power to grant injunction when there is an allegation of fraud against counter petitioners. In such cricumstances the inherent jurisdiction of the court is very wide.

The main averment in the petition is that the defendant played fraud against the defendant in making him as dealer for Thrissur, Quilon and Trivandrum on the direction of their representatives. They also received amounts direct from the purchasers as DD. and the cheques issued to the plaintiff returned unpaid. Even though the counter petitioners totally denied all the allegations in the petition, prima facie it appears that the plaintiff had a prima facie case debatable and arguable case. If the injunction is not granted, irreperable injury will be caused to the plaintiff. The balance of convenience is also stands in allowing the petition."

From the above what we could see is that the court below has misdirected itself in applying the law and deciding the question. However there is no finding as to whether the allegations of fraud are established prima facie. It appears, the court below is under an erroneous impression that such prima facie finding on the allegations of fraud is unnecessary. The court below appears to have taken a view that in all cases temporary injunction can be ordered if it appears that the plaintiff had a prima facie debatable and arguable case. This cannot be said to be correct approach. Order XXXIX, Rule 1 authorises the issue of a temporary injunction in a suit only when it is proved by affidavit or otherwise the actions alleged against the defendant or any party to the suit. The court cannot order temporary injunction as a matter of course when there is a debatable and arguable case prima facie. Only when a case is proved by affidavit or otherwise the court gets the power to order temporary injunction in exercise of its discretion. It can be granted "for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit." But, at the same time, it may be recalled that the granting of temporary injunction is not a panacea for all disputes coming before courts. When the purpose of obtaining injunction is pleaded, unless it is proved by affidavit or otherwise, the court can refuse to order temporary injunction, even if the court feels that there is a debatable or

arguable case. The pleadings make only allegations or averments of facts. Merely pleading does not make a strong prima facie case. The case must be established with sufficient material or proved by affidavit. What is required is a finding that a prima facie case for temporary injunction is proved or made out.

8. Section 17 of the Indian Contract Act defines "fraud". It is a comprehensive term and embraces large number of delinquencies. A person who alleges fraud must give particulars thereof in his pleadings. It must be established beyond any reasonable doubt. Lord Atkin in AIR 1941 93 (Privy Council)) observed :

"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."

The allegations of fraud pointed out in the impugned order are concerned with the contract between the appellant and the first respondent at whose instance the Bank guarantee has been given. It is to be remembered here that there is no case of fraud in the execution of Ext. A2 guarantee by the Bank in favour of the appellant. The rule is well established that a Bank issuing a letter of credit is not concerned with the underlying contract between the buyer and seller. (See : United Commercial Bank Vs. Bank of India and Others,) This position will equally apply to a bank guarantee, so held by this court in Kunjannamma v. Kerala Fisheries Corporation 1986 KLT 37.

9. The next point required to be considered is whether there is pleading in this case so as to constitute "irretrievable injustice" justifying the grant of temporary injunction. The Supreme Court in General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, observed :

"The Bank cannot be interdicted by the Court at the instance of respondent 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the Bank guarantee."

Prevention of "irretrievable injustice" between the parties is considered to be a special equity. The plea of irretrievable injustice cannot be allowed if it is not proved by affidavit or otherwise. Such a contention postulates the existence of facts as to how the damage or loss to be sustained by the plaintiff is irretrievable. As far as the present case is concerned, there is a total dearth of pleadings in that regard. On going through the pleadings and impugned order we fail to see, the first respondent had any case of "irretrievable injustice" so as to constitute a ground for ordering temporary injunction in the present case.

10. The grant of temporary injunction, as noticed above, is purely a discretionary exercise of power by the court. This power has to be exercised by the court fairly and equitably. It can refuse temporary injunction against a Bank if the court feels that granting of such injunction will result in gross injustice to the Bank or the

public at large. In certain cases public interest assumes much importance at the realms of granting or refusing the temporary injunction in the case of banking institutions. The Supreme Court in a recent decision in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, observed :

"It has to maintain its credibility and not merely be guided by the loss to our citizen. It has also to maintain its international credibility. Credibility is the most important thing for any banking institution. If the credibility goes the Bank cannot survive. The Bank in its working has to be most upright and honest in dealing with its customers."

This observation really indicates the serious consequences of granting temporary injunction against banking institutions by the courts. It is for the courts to decide in the fact and circumstances of each case whether the grant of temporary injunction will result in eroding the credibility of Bank. At any rate in the present case we have other sufficient materials which we have discussed herein before, to set aside the order of temporary injunction granted by the court below

11. In view of what we have discussed above, we have no hesitation to hold that the court below has acted illegally in ordering temporary injunction against the second respondent. Accordingly the impugned order is set aside. No order as to costs.