
**Road Infrastructure Development Company of Rajasthan Ltd. Vs I.V.R.C.L.
Ltd.**

Civil Misc. Appeal No. 552 of 2014

Court: Rajasthan High Court (Jaipur Bench)

Date of Decision: March 3, 2014

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 16, 17, 34, 36, 37#Civil Procedure Code, 1908 (CPC) " Order 39 Rule 1, Order 39 Rule 2

Citation: (2014) 4 RLW 3660

Hon'ble Judges: R.S. Chauhan, J

Bench: Single Bench

Advocate: Rajendra Prasad and Sheetal Mirdha, Advocate for the Appellant; Harsh Vardhan Nandwana, Advocate for the Respondent

Judgement

R.S. Chauhan, J.

The appellant-non-claimant, the Road Infrastructure Development Rajasthan Ltd. ("the appellant" for short) is aggrieved

by the order dated 24.1.2014 passed by the Additional District and Sessions Judge No. 17, Jaipur Metropolitan, Jaipur, whereby the learned

Judge has allowed an interim application filed by the respondent-claimant, M/s I.V.R.C.L. Ltd., and has directed the appellant to deposit the bank

guarantee amount to the tune of Rs. 7,07,35,474/- in a fixed deposit with a Nationalised Bank within a period of one month from the date of

passing of the order. The brief facts of the case are that the appellant is a company registered under the Companies Act, 1954. It is a venture of

the Govt. of Rajasthan and Infrastructure Leasing and Financial Services Ltd. The Company was incorporated for the purpose of developing

infrastructure facilities including construction of Mega Highway Project roads in the State of Rajasthan. While the Chief Secretary, Govt. of

Rajasthan, is the Chairman of the Board of Directors, the Additional Chief Secretary (Infrastructure) and Principal Secretary (Finance) are the

Directors on the Board of Directors of the Company. Further, on 17.1.2006, the appellant entered into an agreement with the respondent-claimant

for construction and maintenance of a road from Village Pachpadra to Village Ramji Ki Gol (PR-2) 138 kms. The total cost of construction was

Rs. 141.47 crore, and for its maintenance Rs. 8.61 crore. Thus, the total contract cost was of Rs. 150/- crore. According to the contract entered

between the parties, the respondent-claimant was responsible for the improvement/construction work, and for maintenance work for a period of

five years. The construction was to be completed within eighteen months from the date of commencement; the road had to be maintained for five

years, i.e. from 1.1.2009 to 31.12.2013, from the date of completion of the construction. But according to the appellant, the construction work

was delayed by seventeen months beyond the stipulated period of construction. Moreover, the respondent-claimant failed to carry out the

maintenance of the said road after the initial period of two years from the date of the completion of the road. Thereafter, the respondent-claimant

did not continue the maintenance work. Therefore, according to the appellant, it was constraint to hire the services of other contractors to carry out

the maintenance of the said road from January 2011 till 2013. In order to give the contract to a third party, on 13.1.2012 the appellant issued a

short term NIT (Tender). The respondent-claimant challenged the said NIT before this Court by filing a writ petition, namely, S.B. Civil Writ

Petition No. 1622/2012. Initially this Court granted a stay on 13.2.2012. However, on 28.3.2012 the stay was vacated by this court.

Subsequently, certain disputes have arisen between the appellant and the respondent-claimant. Since the agreement contained an arbitration clause,

the disputes have been referred to an arbitrator. Presently, the case is sub judice before the arbitrator.

2. During the pendency of the arbitration proceedings, the respondent-claimant filed an application under Section 9 of the Arbitration and

Conciliation Act, 1996 ("the Act" for short) for preventing the appellant from encashing the bank guarantee. The said application was filed on

22.1.2014. The learned Judge issued notice on the same day. On 23.1.2014, the appellant appeared before the learned Judge. The appellant

submitted an affidavit wherein it clearly informed the Court that the bank guarantee has already been encashed on 22.1.2014. However, by order

dated 24.1.2014 the learned Judge directed the appellant to deposit the bank guarantee amount in a fixed deposit with a Nationalised Bank.

Hence this appeal before this Court.

3. Mr. Harsh Vardhan Nandwana, the learned counsel for the respondent-claimant, has raised a preliminary objection with regard to the

maintainability of the present appeal. According to him, the final adjudication of the application under Section 9 of the Act is still pending before the

learned Judge. The impugned order is merely an interim order passed by the learned Judge. Hence, the present appeal is not maintainable under

Section 37 of the Act.

4. On the other hand, Mr. Rajendra Prasad, the learned counsel for the appellant, has contended that Section 37 of the Act clearly states that an

appeal shall lie from the following orders amongst others, namely, ""granting or refusing to grant any measure under Section 9"". Therefore even if an

interim order were to be passed while exercising the power under Section 9 of the Act, the same would be appealable before this Court. In order

to buttress his contention, he has relied on the case of A. Venkatasubbiah Naidu Vs. S. Challappan and Others, . According to the learned

counsel, although the said case has been passed in relation to Order 39 Rules 1 and 2 CPC, but like Order 39 Rules 1 and 2 CPC Section 9 of

the Act is a repository power to grant orders of temporary injunction. Therefore, Section 9 of the Act is mutatis mutandis to Order 39 Rules 1 and

2 CPC. Thus, even under Section 9 of the Act, the Court would have the power to pass an interim order; under Section 37 of the Act, the said

order would be an appealable one. Hence, according to him, the present appeal is maintainable.

5. Heard the learned counsel on the preliminary objection.

6. Section 37 of the Act is as under:-

Appealable orders. - (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from

original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(Emphasis added)

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.-

(a) accepting the plea referred in sub-section (2) or sub- section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to

appeal to the Supreme Court.

7. A bare perusal of Section 37 of the Act clearly reveals that it deals with Section 9. It further stipulates that any order granting or refusing to grant

any measure"" under Section 9 would be appealable. The words ""any measure"" are words of widest amplitude. The use of the term ""any measure

would obviously include an interim order. Therefore, the words ""any measure."" would include an interim order passed by the Court while

exercising its power under Section 9. Needless to say, the power to grant a temporary injunction would also include the power to pass an interim

order. (Ref. to A. Venkatasubbiah (supra)). Therefore, an order granting an interim injunction would fall within the ambit and scope of Section 37

of the Act. Hence, the present appeal is certainly maintainable. The preliminary objection is, thus, unacceptable.

8. The learned counsel for the appellant has raised the following contentions before this Court: firstly, that a contract regarding a bank guarantee is

an independent tripartite contract between the surety (the bank), the creditor (the party issuing the work contract), and the principal debtor (the

contractor who has to carry out the work). It is an independent and a separate contract from the work contract entered between the party giving

out the work, and the contractor who needs to carry out the work. A bank guarantee is, therefore, asked for in order to ensure that the work order

is carried out to the satisfaction of the party granting the work. Moreover, in case the party granting the work incurs any expenses due to the

default of the contractor, the former party would be in a position to recover the amount of expenses so incurred, from the bank guarantee given by

the latter party. Since the bank guarantee contract is an independent one, it is not covered by the bank contract entered between the appellant and

the respondent-claimant. Furthermore, according to Section 9 sub-clause (ii)(b), a party may apply to a Court for an interim measure for

protection and securing of "the amount in dispute in the arbitration". However, the bank guarantee does not form part of "the amount in dispute in

an arbitration". Therefore, according to the learned counsel, the application filed under Section 9, for securing of the bank guarantee, was

misplaced.

9. Secondly, there are well settled principles of law for passing an injunction order against the encashment of the bank guarantee. Relying on the

case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , the learned counsel has contended that the general rule is that

encashment of the bank guarantee should not be prohibited by an injunction order. However, the general rule can be relaxed only under two

circumstances: firstly, fraud of an egregious nature committed in the notice of bank which would vitiate the very foundation of the guarantee;

secondly, injustice of the kind which would make it impossible for the guarantor to reimburse himself, or would result in irretrievable harm or

injustice to one of the parties concerned. However, according to the learned counsel, in the present case, neither of these two conditions has been

made out, even prima facie, by the respondent-claimant. Hence, the injunction passed by the learned Judge is contrary to the well settled principles

established by the Hon"ble Supreme Court.

10. Thirdly, relying on the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, , the learned

counsel has pleaded that an injunction of the Court ought not to be an instrument which is used in nullifying the terms of a contract, agreement or

undertaking which would be lawfully enforceable. According to him, since the respondent-claimant had failed to fulfill its part of the contract in

maintaining the roads/or five long years, since the appellant was forced to engage the services of other contractors for maintaining the said road,

naturally according to the contract of bank guarantee entered between the parties, the appellant was entitled to encash the bank guarantee. Yet the

injunction passed by the Court has nullified the terms of the contract which were lawfully enforceable.

11. Lastly, relying on the case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., the learned counsel has pleaded that while

passing an interim injunction under Section 9 of the Act, all the principles governing the grant of an interim injunction as are applicable in the cases

under Order 39 Rule 1 or under the Specific Relief Act, would ipso facto apply to a grant of interim injunction under Section 9. Thus, the learned

Judge was required to see whether there was a prima facie case, whether there was a balance of convenience, and whether there was an

irreparable loss that would be caused to the respondent-claimant in case the interim injunction were not granted in its favour. However, according

to the learned counsel, the learned Judge has failed to apply these three criteria to the present case. For, as the case does not fall within the

parameters established by the Hon'ble Supreme Court for granting an injunction against the encashment of a bank guarantee, the respondent-

claimant does not even have a prima facie case. Moreover, the balance of convenience is not on the side of the respondent-claimant. In case the

respondent-claimant were to succeed in its arbitration claim, obviously the amount which has been encashed by the appellant would be refundable

to the respondent-claimant. Therefore, no irreparable loss would have been caused to the respondent-claimant. Yet, the learned Judge has issued

a direction to the appellant to deposit the bank guarantee amount. Hence, the impugned order deserves to be interfered with.

12. On the other hand, Mr. Harsh Vardhan Nandwana, the learned counsel for the respondent-claimant, has raised the following contentions:

firstly, according to Clause 45.2 of the agreement entered between the parties, in case the maintenance work was not carried out by the claimant-

respondent, the appellant would be free to have the work done through a third party, and ""debit the cost and expenses incurred to the

Contractor's account/recover the same from the Performance Security"". Moreover, according to Clause 7.1(a) of the Special Conditions of

Contract, in case of dispute or differences arising between the employer and the contractor relating to any matter arising out of, or connected with

the agreement, shall be settled in accordance with the provisions of the Act. Thus, according to the learned counsel, in case disputes arise with

regard to the debiting of the cost and expenses incurred to the Contractor's account, or the recovery of the same from the Performance Security,

such disputes would be referable to an Arbitrator.

13. Secondly, Section 9(ii)(b) and (e) of the Act bestow a vast power upon the Courts for protecting and ""securing the amount in dispute in the

arbitration"", or ""to pass such other interim measure or protection, as may appear to the Court to be just and convenient"". Since a dispute has arisen

with regard to the amount that the appellant could have claimed or recovered from the respondent-claimant, since the said dispute was referred to

the Arbitrator, naturally the dispute also relates to ""the encashment of the bank guarantee"". Therefore, in order ""to secure the amount in dispute in

the arbitration"", according to the learned counsel, the learned Judge was justified in invoking his powers under Section 9(ii)(b) and (e) of the Act.

14. Thirdly, a distinction has to be made between an injunction with regard to bank guarantee, and protection of the amount of the bank guarantee.

According to the learned counsel, while the principles stated by the Hon"ble Supreme Court in the case of Himadri Chemicals Industries Ltd.

(supra), are applicable to encashment of a bank guarantee, the same principles are inapplicable ""to protection of the amount of bank guarantee"".

Therefore, according to the learned counsel, the learned Judge has not passed the impugned order contrary to the principles established by the

Apex Court. For, the present case is a case of ""protection of the bank guarantee"" and does not deal ""with encashment of the bank guarantee"".

15. Fourthly, according to the learned counsel, by encashing the bank guarantee the appellant, in fact, has robbed the Arbitrator of the amount

which he could have granted, by way of compensation, to the respondent-claimant. Therefore, the appellant has cleverly circumvented the powers

bestowed upon the Arbitrator.

16. Lastly, relying on the case of IVRCL Ltd. vs. IOT Utkal Energy Services Ltd. (Appeal (L) No. 28/2013 in Arbitration Petition (L) No.

1514/2012, decided on 16.1.2013 by the Hon"ble Bombay High Court) the learned counsel has contended that even in that case the Hon"ble

High Court had restrained the respondents from encashing the bank guarantee. The said judgment was subsequently upheld by the Apex Court in

the case of IVRCL Ltd. vs. IOT Utkal Energy Services Ltd. (Special Leave to Appeal (Civil) No. 7619/2013, decided on 6.2.2013). Therefore,

according to the learned counsel, the learned Judge was certainly justified in protecting the bank guarantee amount and in issuing the necessary

direction for the appellant to comply with. Hence, the learned counsel has supported the impugned order.

17. Heard the learned counsel for the parties, perused the impugned order, and considered the case law cited at the Bar.

18. Section 9 of the Act reads as under:-

Interim measures, etc. by Court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but

before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any

question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any

party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for

the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

19. A bare perusal of the provision clearly reveals that a vast power has been bestowed upon the Court not only for securing the amount in the

arbitration, but also in passing such other interim measure of protection as may appear to the Court to be just and convenient. However, it is a

settled principle of law that the more vast the power, the more carefully it has to be exercised by the Courts. Therefore, before invoking and

exercising its power, the Court has to be well aware of the parameters under which the power is to be exercised. After all, the Court can neither

act like an unruly horse, nor act like a bull in a china town. The discretion of a Court is not an unbridled power, but has to be exercised within the

limits either placed by the law itself or within the four corners of the law as interpreted by the Apex Court. Thus, even the power granted under

Section 9 of the Act has to be exercised with due care and caution.

20. The learned counsel for the appellant is unjustified in claiming that the issue with regard to encashment of bank guarantee is not within the

confines of Section 9(ii)(b) of the Act. If the encashment of bank guarantee is co-related to the performance of the contractor, or lack of

performance of the contractor, and in case the dispute relates thereto, obviously the two issues would be interrelated. Therefore, the encashment of

bank guarantee would relate to the amount in dispute in arbitration. Hence, the Court would be justified in exercising its power with regard to the

encashment of the bank guarantee.

21. But, while exercising its power vis-a-vis the encashment of bank guarantee, the Court would have to be alive to the principles prescribed by

the Apex Court. In the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , for the first time the Apex Court

dealt with the issue whether the Court could grant an injunction against the encashment of a bank guarantee against the contractor or not? After

noticing a large number of English cases. Their Lordship noted that ""on the basis of these principles I reiterate that 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 case of irretrievable injustice be done, the court should interfere"".

22. The said principle has been followed consistently by the Hon"ble Supreme Court. In the case of Himadri Chemicals Industries Ltd. (supra), the

Court has opined as under:-

The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit. There are two

exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit:

(i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and

the beneficiary seeks to take advantage of the situation; and

(ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to

one of the parties concerned. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank

guarantee or a letter of credit.

So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of

credit would vitiate the very foundation of such a bank guarantee or letter of credit. 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 discharged.

To avail of the second exception, it has to be decisively established that there exist exceptional circumstances which would make it impossible for

the guarantor to reimburse himself if he ultimately succeeds. Clearly, a mere apprehension that the other party will not be able to pay, is not

enough.

(Emphasis added)

23. Moreover, in the case of Dwarikesh Sugar Industries Ltd. (supra), the Hon"ble Supreme Court had also observed that ""an injunction of a

Court ought not to be an instrument which is used in nullifying a contract, agreement or undertaking which is lawfully enforceable"".

24. While dealing with the issue whether to prohibit the appellant from encashing the bank guarantee, the learned Judge was required to keep these

three fundamental principles of law in mind.

25. A bare perusal of the application filed under Section 9 of the Act, does not reveal that there is any allegation of fraud made by the claimant-

respondent against the appellant. Moreover, it does not reveal any special equities, or special circumstances for which the appellant should be

restrained from encashing the bank guarantee, or should be directed to deposit the amount of the bank guarantee in a Nationalised Bank. While

considering the pleadings of the application, the learned Judge was required to see whether the respondent-claimant had a prima facie case in its

favour. The prima facie case could be seen only in the context of the principles mentioned above. Since there was nothing in the application that

would bring the case within the two exceptions laid down by the Hon"ble Supreme Court, the respondent-claimant did not have a prima facie case

in its favour.

26. Though the learned counsel for the respondent-claimant has relied on the case of IVRCL Ltd. (supra) decided by the Hon"ble Bombay High

Court, and as upheld by the Apex Court, but the said case does not support the case of the respondent. For, in the case decided by the Hon"ble

Bombay High Court, Their Lordships have clearly opined that the judgment is being passed ""in the peculiar facts and circumstances of the case"".

However, as those facts and circumstances are not similar to the facts and circumstances of the present case, the ratio of the said case is

inapplicable to the present one.

27. Since the case of the appellant is that the respondent-claimant had failed to carry out the maintenance, since according to condition No. 45.2 it

is entitled to debit the expenses incurred by it while granting the work to a third party, since there is an independent contract between the bank, the

appellant and the respondent-claimant with regard to the bank guarantee, obviously the appellant was entitled to enforce the said contract.

Moreover, the learned Judge could not have prevented the appellant from lawfully enforcing an independent contract. Thus, the balance of

convenience was more on the side of the appellant, than on the side of the respondent-claimant.

28. The entire case of the respondent-claimant is with regard to damages that it is entitled to from the appellant. Even if a bank guarantee had been

encashed in accordance with the contract entered between the three parties, even if the respondent-claimant were to win the arbitration claim, it

certainly could have been compensated by directing the appellant to refund the bank guarantee to the respondent-claimant. Thus, the respondent-

claimant would not have suffered any irreparable loss in case the injunction were not granted in its favour.

29. The learned counsel for the respondent-claimant is not justified in claiming that the appellant has ""robbed the arbitrator by encashing the bank

guarantee"". After all the appellant is a government undertaking which has sufficient capital for discharging its financial liability, if any. Thus, the said

contention is highly misplaced. For the reasons stated above, the impugned order is legally unsustainable. The order dated 24.1.2014 is quashed

and set aside. Consequently, the appeal is allowed. However, as the case deals with an application under Section 9 of the Act, the learned Judge is

directed to decide the same as early as possible.