Veer Probhu Marketing Limited and etc. Vs National Supply Corporation and Others

Court: Calcutta High Court

Date of Decision: Nov. 11, 2005

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 39 Rule 4, Order 6 Rule 18, Order 9 Rule 13, 104 Contract Act, 1872 â€" Section 230

Citation: AIR 2006 Cal 301

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Judgement

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Kalyan Jyoti Sengupta, J.
The aforesaid three applications are heard together as there is identity in issue, as regard fact and law though

separate suits are filed. The aforesaid three applications have been taken out by Arab Bank for Investment and Foreign Trade who is the second

defendant in all these three suits, for vacating and/or discharge of interim orders granted by this Court on interlocutory applications made in the

three suits separately. The short fact of the case for which the aforesaid three suits were filed and consequently the application for vacating interim

order of injunction was made, are stated hereunder.

2. The plaintiffs in all the three suits being the suppliers and exporters of diverse kinds of agro-commodities, in course of their business sold and

supplied to defendant No. 1 under several agreements certain quantities of chickpeas, coffee, natural Indian white rice and rice. In terms of the said

agreement the first defendant in all these three suits for due payment of price of the above goods furnished irrevocable letter of credit in favour of

all the plaintiffs. The plaintiffs in all these suits also furnished bank guarantee in the amount of 10 per cent of the amounts of the letter of credits.

Each of the bank guarantees was furnished as above through their banker, namely M/s. Bank of Baroda the defendant No. 3, who in its turn

requested the defendant No. 2 to furnish bank guarantee in favour of National Commercial Bank, Tripoli (defendant No. 5) which in its turn

promised to honour the bank guarantee furnished it to the defendant No. 1. There has been no dispute as regard realization of the sale price upon

invocation of the letter of credit. The disputes relate to and/or concern with the invocation of the performance bank guarantee furnished by the

plaintiffs above named. The suits were filed originally against National Supply Corporation being the ultimate beneficiary of the guarantee and buyer

of the goods, Arab Bank for investment and foreign trade being intermediary bank (defendant No. 2) being the applicants, Bank of Baroda being

the Banker of the plaintiff who furnished the guarantee on behalf of all the plaintiffs, for declaratory reliefs that the plaintiffs and each of them stood

discharged from the obligation arising out of the aforesaid three bank guarantees upon performance of the contract, decree for perpetual injunction

restraining the defendant No. 3 from making payment in terms of the bank guarantee in connection with the original contract. It is true in all these

three suits transactions are different and separate, naturally contracts and bank guarantees are also different and separate but as I already observed

the nature of the transactions are identical and similar.

3. In all the plaints of the suits, so also in the interlocutory applications it is said identically that the plaintiffs in each case have duly discharged their

contractual obligations and delivered the goods to the buyer and accordingly received payment under the said letters of credit. There was no

complaint, lodged by defendant No. 1. Thus plaintiffs and each of them discharged their obligations to the satisfaction of the party. The defendant

No. 1 had consumed the said goods and till date no complaint has been received by the plaintiffs regarding the quality thereof. Thereafter despite

repeated request the defendant No. 1 failed to cancel the respective guarantees given by the respective plaintiffs. The plaintiffs and each of them

have been apprehending invocation of the said guarantees. In connection with the aforesaid three suits three separate interlocutory applications of

the plaintiffs were moved upon notice to the defendant No. 3. On August 14, 2000 an order was passed by Hon''ble Justice Ronojit Kumar Mitra

(as his Lordship then was) restraining Bank of Baroda from making any payment on the basis of the said bank guarantee until further order of this

Hon''ble Court. The said interim order was ultimately affirmed on 15th May 2001 when none was present on behalf of the Arab Bank despite

service. Thus the earlier interim order of August 14, 2000 had merged with the final order passed on 15th May 2001 when the aforesaid three

applications were disposed of finally. This final order confirming earlier interim order was also communicated by the learned Advocates of the

respective plaintiffs to the defendants. On or about January 2003 instant three applications have been made by the defendant No. 2 asking for

vacating interim order of injunction passed on 14th August 2000 and consequently direction upon the Bank of Baroda to immediately make

payment to the defendant No. 2 against the said bank guarantees. Subsequently all these applications for vacating interim order were amended by

an order so far their prayer portion is concerned and to the extent that date of the orders sought to be vacated should be read as 15th May, 2001

in place of August, 2000. It is stated that in spite of the aforesaid order of amendment changing the date of the order in the prayer portion no step

has been taken for carrying out the same.

4. In all these matters affidavits in opposition have been filed by the plaintiffs and both the parties on subsequent development filed their respective

supplementary affidavit.

5. Mr. Sirdharta Mitra, learned Counsel appearing on behalf of the defendant No. 2 in all these applications submits that both the interlocutory

orders passed at the ad interim stage on 14th August, 2000 and also at the final stage on 15th May, 2001 were passed ex parte and without

serving any notice whatsoever upon his client. His client came to know of the said order through the defendant No. 3 who intimated that no

payment could be made in view of the restrained order passed by this Court. Even after passing of the aforesaid order of injunction the petitioner

was not served with copy of the plaint. No writ of summons has been taken out nor copy thereof has been served.

6. He submits that his client requested unsuccessfully time and again to the defendant No. 3 for supply of the copies of the aforesaid pleadings and

documents. The service of inter alia judicial process between the Republic of India and the Government of the United Arab Emirates is governed

by an agreement between the two countries.

7. By and under Articles I, II, III, IV, in particular Article III(1) the summons and other judicial documents are to be served upon United Arab

Emirate through the Ministry of Justice. In this case it has not been done through the above procedure. Finding no way out of problem arisen from

aforesaid situation his client in December 2002 engaged M/s. Orr, Dignam and Company, Advocates to represent them in this matter and power

of attorney was also given in favour of one of the Senior Partners Mr. M. Dutt of M/s. Orr, Dignam and Company. Thereafter this matter was

mentioned before His Lordship, the Hon"ble Mr. Justice P.C. Ghose (then taking interlocutory determination). It was only after a direction given

by His Lordship a copy of the plaint and petition along with copy of the Notice of Motion were served on M/s. Orr Dignam and Company by

M/s. Sanderson & Morgan acting on behalf of the plaintiff. Thereafter the present applications were made.

8. He contends that originally National Commercial Bank, Tripoli being the defendant No. 5 being the banker of the buyer was not party in the

suits. Subsequently on amendment of the plaint being made by an order dated 20th November 2003 this bank was made a party defendant.

9. He contends that this initial ex parte orders of injunction were obtained in collusion between the plaintiff and the defendant No. 3 and keeping

the defendant No. 2 in dark and so also not making the defendant No. 5 as a party initially. Actually the buyer has already invoked the guarantee

given by the defendant No. 5 who in its turn has demanded payment from the defendant No. 2 who in terms of the guarantee has already made

payment giving credit to the account maintained by it.

10. He submits that whether the interim orders are confirmed or not is immaterial so far defendant No. 2 is concerned as it was not served with

any notice under the established procedure of law (bilateral agreement) his client instead of preferring appeal as law permits, has moved this

application for discharge and vacating of the interim order passed ex parte as against his client in this Court.

11. If the application for interlocutory relief and the plaints were examined minutely it would appear that the plaintiffs in each case have not been

able to make out a case warranting interim order of injunction restraining the defendant No. 3, Bank of Borada from honouring its obligation arising

out of absolute counter-guarantee given to the petitioner (herein).

12. He contends that if no case has been made out in the petition for issuing an order of injunction then interim order of injunction should be

discharged. He submits that in absence of fraud and special equity bank cannot be prevented from honouring its unconditional commitment under

credit guarantee, the principle for granting order of injunction both against invocation of bank guarantee and letter of credit stands on same footing.

In this connection he has relied on a large number of decisions both of English Court and our Court, which are as follows:

U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.,

1977 (2) All ER 862;

1978 (1) All ER 976;

United Commercial Bank Vs. Bank of India and Others, ;

Texmaco Ltd. Vs. State Bank of India and Others, ;

National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, ;

Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, ;

Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, ;

State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, ;

Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another,

Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, ;

Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, ;

54 Comp Ca 147 : AIR 1982 Delhi 78;

51 Comp Cas 316;

Damodar Paints Pvt. Ltd. Vs. Indian Oil Corporation Ltd. and another, .

13. He contends that there is no convincing and cogent case before this Court to suggest that the commercial contract was vitiated by fraud or that

any special equity exists in favour of the plaintiff in the absence of which order of injunction cannot be issued. The obligation of a banker under a

performance guarantee lies altogether on different level and bank is not remotely concerned with the dispute between the buyer and the seller

relating to the commercial contract. The particulars of alleged fraud pleaded in the plaint are merely allegations of dispute between the buyer and

seller relating to their respective obligation under the commercial contract.

14. However, the remedy of the plaintiff in the event it is held that it had performed its contractual obligations and performance guarantee was

wrongfully invoked, would be to initiate appropriate action for damages against the defendant No. 1 in the appropriate forum for such wrongful

invocation and counter-claim of refund of the amount paid by the bank.

15. He urges with regard to the jurisdiction of this Court that the defendant No. 2 has no place of business in India and guarantee furnished by the

defendant No. 2 in favour of the National Commercial Bank, Tripoli being the Banker of the ultimate beneficiary was executed in United Arab

Emirates outside the jurisdiction of this Hon''ble Court. No part of cause of action so far the defendant No. 2 and/or National Commercial Bank is

concerned has arisen within the jurisdiction of the Indian Courts.

16. As far as the verification of the application by the partner of the Advocate-on-Record is concerned the same is not strictly forbidden under the

law, it is the ethics and conduct of the learned Advocate while discharging their professional obligation. In the rule of pleading there is no such

restriction, in absence thereof this verification of the petition is acceptable consequently the same cannot be termed to be an illegal one. In any view

of the matter at the highest if the Court finds there is illegality then leave may be granted to re-verify the same by the competent person.

17. The question of merger of the ad interim order with the final one does not and cannot arise. By an order of amendment the application for

action of the defendant No. 2 is treated to be challenge against the final order. In view of such order of amendment, which has reached its finality,

no other point can be allowed to be raised as the same is hit by the principle of res judicata.

18. He contends further that his client in terms of the guarantee has already made payment, therefore, defendant No. 3 being the banker of the

plaintiff is bound to honour guarantee given above by it, in favour of his client. The order of injunction should now be vacated immediately and/or

discharged.

19. In all those matters Mr. Banerjee, learned Senior Advocate appearing on behalf of the plaintiffs, while opposing all these applications made by

the defendant No. 2 submits as follows:

He has taken a preliminary point to the effect that all these applications are not verified lawfully. The verification has been made in all these

applications by affirming an affidavit by one Mohan Murati Dutta who is acting as a Constituted Attorney of the defendant No. 2. The said Mohan

Murati Dutta is one of the partners of M/s. Orrdignum & Company, the Advocate"s firm acting on behalf of the defendant No. 2 in this matter.

Despite repeated demands two copies of the purported Power of Attorney said to have been issued by the defendant No. 2 in favour of said Dutt,

have, however, not been produced for inspection. It has been settled by judicial pronouncement that Advocate acting as a Constituted Attorney of

a party cannot act as an Advocate in the said case or matter nor can he be combined for two roles. It has been further settled that an Advocate is

not entitled to act in a professional capacity or be a Constituted Attorney of the party in the said matter simultaneously. In support of his submission

he has relied on the decision of a Bombay High Court judgment, reported in Oil and Natural Gas Commission Vs. Offshore Enterprises Inc., ,

Colombia Pictures Association v. CITI Cable Network, an unreported judgment of the Learned Single Judge dated 20th December, 1999, Safary

Ventures v. Canara Bank and Ors. G.A. No. 5070 of 1999, C.S. No. 613 of 1999.

20. His next contention is that all these applications have been made after the final disposal of earlier interlocutory applications by passing order

dated 15th May, 2001. It is noteworthy that all these applications are made basically for vacating the earlier interim orders passed by this Court on

14th August, 2000 and 28th August, 2000 which have stood now merged with the final order dated 15th May, 2001. There has been no challenge

for vacating order dated 15th May, 2001. Of course subsequently the applicant had detected its mistake and application for amendment of the

prayer was made for inserting the date of the order dated 15th May, 2001 in place of the dates 14th August, 2000 and 28th August, 2000. This

application for amendment was allowed by this Court. But such amendment has not been carried out till today. Therefore, under the provision of

Order 6, Rule 18 of the CPC the aforesaid order of amendment has now become nugatory and as a result whereof till today there has been no

challenge against the final order dated 15th May, 2001 and earlier non-existent orders still remain in the application for vacating interim orders.

21. He further contends that even assuming these applications are maintainable for vacating the final order dated 15th May, 2001 still no sufficient

cause has been made out for which the petitioners were prevented from appearing at the time of final hearing of the application dated 15th May,

2001 despite service of notice. While considering these applications this Court cannot examine at this stage as to whether interim order of

injunction was rightly passed on merit both on fact or in law. At this stage Court will rather examine whether the sufficient cause has been made out

or not. From the applicant''s own showing its knowledge of passing of the order of injunction dated 14th August, 2000 is in August, 2000 itself and

it is apparent as Bank of Boroda sometimes in the month of August, 2000 duly communicated the order of injunction. It is further stated in the

affidavit-in-opposition, by the plaintiff that orders of the Court were duly communicated to the defendant No. 2 applicant. Such settlement of fact

in the affidavit-in-opposition has not been denied and disputed by the applicant. The reference to the relevant terms of the agreement between

Government of United Arab Emirates and Government of India regarding service of judicial process is of no consequence nor relevance. Besides

the orders of the Court have been served upon the concerned Ministry of Justice. Upon proper interpretation of the above agreement Article (v)

and Article (iii) of the Convention relied on by the defendant it will appear that voluntary acceptance of the process, orders and notices are

permissible. Here the orders were received voluntarily. Therefore, no explanation has been given despite having knowledge of the passing of the

aforesaid orders way back in August 2000 till January 2003 when the present application was made. He strenuously criticizes inaction of the

defendant No. 2 who according to him, stood by and waited. After a long time it has chosen deliberately to appear before this Court after the

interim order of injunction is confirmed. This Court cannot examine the earlier orders of injunction acting as appellate Court.

22. His next contention on merit is as follows:

On interpretation of counter-guarantee given by the Bank of Boroda in favour of the defendant No. 2 it is evident that it is a conditional one, and

payable on the first demand in favour of National Supply Corporation (NASCO), the defendant No. 1, which is the beneficiary under the said

guarantee. The document in question is not simply a document in between the defendant No. 2 and the Bank of Boroda in which case it could have

been an unconditional bank guarantee. It is in essence a document, which involves ARBIFT Bank, defendant No. 2, the Bank of Boroda,

defendant No. 3, NASCO and the plaintiff. It is made clear that counter-guarantee to be issued to NASCO is to be backed by a guarantee to be

given by Bank of Boroda to ARBIFT. One is the consideration for the other Clause 1 clearly refers to guarantee being payable on first demand to

beneficiaries. The word ''beneficiaries'' refers to NASCO. The document, therefore, contemplates that demand being made by NASCO to the

ARBIFT Bank then the defendant No. 2 can pay against its guarantee and thereafter seeks its remedy by invoking its guarantee against Bank of

Boroda. It is connected and chain transaction. Significantly, the guarantee of National Commercial Bank of Tripoli is not the subject-matter of this

document. That is because of the liabilities of ARBIFT to NASCO. It is only for the sake of convenience that ARBIFT Bank gave a guarantee to

NASCO through National Commercial Bank of Tripoli since it was a Libian Bank and NASCO''s banker. Without any demand by NASCO the

countervailing guarantee of Bank of Boroda is not invocable.

23. He says that it is settled law if the document of guarantee has onerous consequences is to be construed strictly against the party invoking the

guarantee. There must be a strict compliance of the terms of the guarantee. Any possible ambiguity must be read in favour of the plaintiff more

particularly at the interlocutory stage. On a true and correct construction of the document, it contemplates invocation of NASCO and then

subsequent invocations, be it by NCB or ARBIFT. The document does not contemplate a situation where NCB is permitted to invoke guarantee

given by ARBIFT, without any corresponding invocation by NASCO. The document in question is the payment of the first demand to the

beneficiary, i.e. NASCO.

24. All such transactions are contrary to the guarantee. It will appear from the series of documents annexed to various affidavits affirmed by the

plaintiff that NASCO has never invoked its guarantee. The purported and fabricated letter of invocation of guarantee by NASCO is of dated 19th

June, 2001. According to this document put forward by the defendant No. 2 in its supplementary affidavit affirmed on 10th August, 2004

NASCO has invoked this guarantee on the National Commercial Bank on 19th June, 2001. Surprisingly, on its own showing and admission the

defendant No. 2 had invoked its guarantee on Bank of Boroda on August, 2000 i.e. 10 months before. This clearly shows the fraudulent conduct.

It is only after NASCO invoked guarantee the question of ARBIFT invoking guarantee on Bank of Boroda could arise. There was never any

question of invoking for bank guarantee before NASCO''s demand. It is, therefore, clear that the purported document of invocation is a bogus

one.

25. It is settled law by the Apex Court in case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , that the invocation will have to

be in accordance with terms of the letter of credit or else the invocation itself could be bad. The learned Single Judge of the Calcutta High Court

following the above Supreme Court decision has also held in similar line in the case of Stone India Limited v. Union of India reported in 2001 (3)

CHN 483. In this case he points out that the Arab Bank without the instructions of the beneficiary had improperly sought invocation of bank

guarantee, which is conditional one.

26. In any view of the matter the factum of invocation of the bank guarantee by the cumulative action of the parties are themselves triable issue and

has to be decided in the suit. It is quite apparent that the defendant No. 2 and defendant No. 4, National Commercial Bank being the bankers of

the NASCO is acting in fraud and collusion with each other. After discovery of such facts the plaintiff had amended the plaint impleading National

Commercial Bank of the party defendant in the said suit. The defendant No. 2 has come with false story of demand made by National Commercial

Bank upon Arab Bank and has shown debit, which is absolutely a fraudulent act, which is submitted to this Hon''ble Court. The said Arab Bank

and National Commercial Bank being the defendants Nos. 2 and 4 are hands in glove to deprive the plaintiffs in order to unjustly enrich

themselves. Therefore, the applications for vacating the final order dated 15th May, 2001 should be dismissed with the exemplary costs.

27. I have considered the respective submissions of the learned Counsel with great care and have gone through the petition, affidavit-in-opposition

and a good number of supplementary affidavits and counter-supplementary affidavits together with annexures thereto. The first point agitated by

Mr. Banerjee appearing for the plaintiff, is that all these petitions are not verified by the competent persons, as such it should be held that there has

been no lawful application before this Court. I have checked up the verifications, which have been done by way of affidavit affirmed by one Mohan

Murati Dutt who happens to be one of the partners of M/s. Orrdignum & Company who is an Advocate on record of the applicant, defendant No.

2. He has stated that he is acting as the Constituted Attorney of defendant No. 2 on the one hand and also conducting these proceedings acting as

lawyer. Therefore, defendant No. 2 is the principal, a foreign principal, consequently this gentleman is an agent of foreign principal. u/s 230 of the

Contract Act the agent of the foreign principal is always treated for all practical purposes as sui juris. This agent is answerable in relation to the

transaction to all concerned. Mr. Banerjee has rightly pointed out that an Advocate while acting as an agent of a client should not prosecute nor

conduct any litigation. The learned Advocate is bound to maintain separate and independent identity from that of his client. Under no circumstances

he can associate himself with the litigant. An agent is obliged to look after interest of the principal and in fact principal is bound by the act and

conduct of the agent under the law except in case of criminal offences while lawyer is an officer of the Court also. The High Court of Bombay in

case of Oil and Natural Gas Commission Vs. Offshore Enterprises Inc., has held that an Advocate while acting as agent will not conduct litigation

and also it is held in Paragraph 15 as follows:

(a) An Advocate is not entitled to act in a professional capacity as well as Constituted Attorney of a party in the same matter or cause. An

Advocate cannot combine the two roles. If a firm of Advocates is appointed as Advocate by suitor none of the partners of the Advocates'' firm

can act as a recognized agent in pursuance of power of Attorney concerning the same cause.

(b) The existing practice followed by firm of Advocates/Solicitors/Attorneys particularly in case of non-resident clients combining the roles is

opposed to law and it is required to be discontinued forthwith. The Prothonotary and Senior Master of High Court shall not accept a Vakalatnama

in favour of the firm of Advocates where one or the other partners of the same firm also holds the power of Attorney from the plaintiff or the

defendant or any other suitor before the Court in the same cause.

28. Subsequently, Delhi High Court in case of Colombia Pictures Association v. CITI Cable Network 2001 PTC 319 (Delhi) while accepting the

views of the Bombay High Court as quoted above held that an Advocate is not entitled to act in a professional capacity as well as Constituted

Attorney of a party in the same matter or cause. The aforesaid judgment of the learned Single Judge was appealed against and the Division Bench

of the same High Court has affirmed the judgment of the learned Single Judge so far as the aforesaid legal proposition is concerned.

29. In an unreported decision of the learned Single Judge of this Court in the case of Safari Venture Limited v. Canada Bank and Ors. in C.S. No.

613 of 1999 the same view was taken and this Court directed to re-verify the petition, as it was not done by the competent person.

30. Accordingly I hold, accepting the argument of Mr. Banerjee, that petition has not been verified by the competent person. However, on that

score the application cannot be non-suited. What order would be passed on this point would be considered later.

31. Mr. Banerjee''s next point of opposition is that under the law there is no challenge against the order dated 15th May, 2001 which is a final one

in which earlier orders dated 14th August, 2000 and 28th August, 2000 have been merged. The petitioners'' challenge is against the two orders

dated 14th August, 2000 and 28th August, 2000 although an application for amendment was made to seek to substitute order dated 15th May,

2001 in place of the aforesaid two orders of August, 2000. This Court allowed such amendment and despite that incorporation has not been made

even till today. Mr. Banerjee is right in his legal point about the effect of not carrying out the amendment order. Under Order 6, Rule 18 which is

set out hereunder:

Failure to amend after order - If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for the

purpose by the order, or if no time is thereby limited then within 14 days from the date of the order, he shall not be permitted to amend after the

expiry of such limited time as aforesaid or of such 14 days as the case may be, unless the time is extended by the Court.

32. Undisputedly order of amendment was passed allowing the applicant to incorporate amendment within a certain time and this has not been

done nor there has been extension by this Court. Under such circumstances, having regard to the mandatory nature of the language incorporated in

the said Rule, the petitioner cannot get advantage of the order of amendment.

33. Accordingly, challenge is against ad interim orders not against the final order.

34. In my view this point would have been very relevant had there been a different and inconsistent order passed by the Court subsequently. The

effect of merger of the judicial order of a same nature is of no consequence. Actually the Court at a subsequent date has accepted the first order. If

the challenge against the first order succeeds either on fact or in law it will have an implication in the subsequent orders because there has been no

difference and distinction. Therefore, in this particular case this point, in essence, is of a hypertechnical nature. Accordingly, I decide to examine the

other aspects of the matter, which has been stated in the petition.

35. Next contention of Mr. Banerjee is that no sufficient cause has been made out for recalling of any of the orders of injunction as the applicant

failed to appear at the time of passing of the final order of subsequent orders. Indisputably under the law the nature of the order is an appealable

one within the provision of Order 43 read with Section 104 of the Code of Civil Procedure. So, a party has two options to challenge such orders,

which have been passed behind his back. Either he may prefer an appeal or make an application for discharging and setting aside the orders

passed by the Court. In my view the provisions of Order 9, Rule 13 of the CPC has no manner of application if notice of hearing is given and this

will appear from the language of Order 39, Rule 4 of the Code of Civil Procedure. So, I think that the provision of Order 39, Rule 4 has to be

reproduced:

4. Order for injunction may be discharged, varied or set aside. - Any order for an injunction may be discharged, or varied, or set aside by the

Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or

misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall

vacate the injunction unless for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice.

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be

discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a

change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

36. From careful reading of the aforesaid Rule it is evident that once an order of injunction is passed after giving a party an opportunity of being

heard the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside

has been necessitated by the change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

So, in my view a party has only limited right for discharge, variation and vacating the interim order passed under the aforesaid Rules in case where

notice meaning thereby opportunity of being heard has been given. But in case where no notice has been served at any point of time the party to a

suit can always come for vacating, variation and setting aside the order irrespective of any situation.

37. Now it has to be examined in this case whether the defendant No. 2. viz. applicant herein was served with any notice. From the annexures to

the petition I find that petitioner was having knowledge of passing of the earlier order of injunction or even subsequent thereto as on receipt of the

notice the applicant-Bank reacted, however, no action by filing affidavit or making application of this nature was taken immediately thereafter. Mr.

Mitra, however, explained as to why a client could not appear at the earliest possible opportunity in spite of having knowledge of passing of the

interim order through the correspondences. He says in this regard that the notice is required to be served upon his client under the bipartite

agreement between these two countries and unless such procedure is followed his client could not come to this country to contest any proceeding.

I am unable to accept this excuse, as the relevant articles of the said agreement nowhere prohibits appearing in the matter voluntarily. This

agreement containing the relevant articles for service of judicial notices and process through diplomatic channel will have a mandatory effect only

when a party concerned is not voluntarily accepting such services. In our country under the CPC when a particular party to a proceeding does not

accept service of judicial process and notice voluntarily the same is left at the residence of the party or in case of refusal the process server''s

intimation of refusal is good enough to accept it as proof of service.

38. So I think despite having knowledge without plausible reason Mr. Mitra''s client sat tight over the matter and why it did so will be revealed

from further enquiry as being done by this Court, little later.

39. Thus, in my view his client is not entitled to ask for variation or vacating the interim order already passed within the four corners of the proviso

of Rule 4 as from the pleading I do not find that there has been any subsequent change of circumstances. Interim order of injunction was passed on

the fact that there has been threat of illegal invocation of bank guarantee furnished by the defendant No. 3 on behalf of the plaintiff, in favour of

defendant No. 2. From that position there was no change going by the petition of the defendant No. 2. Nowhere I find that the petitioner is

subjected to undue hardship by the order of this Court. If the petitioner could withstand the hardship, if at all, from August, 2000 till January, 2003

then I do not find any reason not to allow the interim order to continue for further time.

40. On that score I think this application ought not to be entertained.

41. However, the aforesaid proposition of law cannot be an absolute one, for order of rehearing power of the Court is always available for doing

justice to the parties at any stage if the same is found to have been obtained by practising fraud or gross suppression of material fact.

42. Mr. Mitra''s contention while supporting his client''s application is that there had been no pleading of the prima facie case having been made out

to obtain an order of injunction restraining invocation of the bank guarantee. Granting of injunction be it a case of letter of credit or of performance

guarantee, is guided by the same legal principle. Mr. Mitra has very appropriately brought various decisions on this subject. Regarding the principle

laid down in the various decisions of Supreme Court and this Court as well as English Courts is in the same line. The decisions cited by him already

quoted by me earlier uniformly settled the position of law and there cannot be any dispute. The sum and substance of the legal principle in my

estimation is as follows:

A bank guarantee is an independent and distinct transaction between the bank and the person in whose favour a guarantee is given and ordinarily it

cannot have any reference to the underlying transaction unless it is expressly made, and primarily it is contract between the persons at whose

instance the bank guarantee is given and the beneficiary.

43. In case of an unconditional bank guarantee the nature of the obligation of the bank is absolute and is not dependent on any dispute or

proceeding between the parties including one at whose instance the bank guarantee is given. It is well settled that commitment of banks must be

free from interference of the Courts. It is only in exceptional cases that is to say in case of an established fraud or in case where irretrievable loss

would be caused if the bank guarantee is allowed to be encashed, the Court should interfere.

44. This Court cannot dispute the aforesaid proposition nor it is disputed even by the Learned Counsel, Mr. Banerjee. At the same time there is

another proposition of the law relating to passing of order of injunction in case of bank guarantee and letter of credit. In the decision of the

Supreme Court rendered in case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, , in Paragraph 8 it has been held by the Apex

Court while reiterating the principle of law of all the decisions rendered earlier by the Supreme Court as well as English Court held as follows:

What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid

without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under

the bank guarantee and the person on whose behalf the bank guarantee was furnished. The terms of the bank guarantee are, therefore, extremely

material. Since the bank guarantee represents an independent contract between the bank and beneficiary both the parties would be bound by the

terms thereof. The invocation, therefore, will have to be in accordance with the terms of bank guarantee or else the invocation itself would be bad.

45. A learned Single Judge of this Court in case of Stone India Limited and Anr. v. Union of India reported in 2001 (3) CHN 483, while following

the Apex Court decision as above has held that it is settled law that the bank guarantee is between the beneficiary and the banker. Therefore, the

bank is not supposed to perform unless the conditions stipulated therein are fulfilled.

46. So, the principle has to be applied taking into consideration of both the situations. I am of the view that even if the bank guarantees are

unconditional and if the same mention certain situation and condition under which the bank guarantee can be invoked the same can only be done

when such conditions are fulfilled. Then in that case right of invocation is not unfettered, and obligation of the Bank to pay is absolute the moment

condition is fulfilled.

47. Significantly all the decisions of the Supreme Court and this Court relate to bank guarantee between the non-bank beneficiary and the bank.

There is no authoritative pronouncement as to what would be situation if the bank guarantee sought to be invoked by a banker as against another

banker and acting as a special agent of the beneficiary. It has further to be examined as to what is the position if the bank guarantee furnished in

favour of the ultimate beneficiary having different language from that of the intermediary bank guarantee. In this case, actually there has been a

chain of transactions relating to furnishing of guarantee. Firstly, Bank of Boroda, defendant No. 3 furnished bank guarantee at the instance of the

defendant No. 4, in favour of defendant No. 2, applicant who in his turn furnished guarantee in favour of the defendant No. 5 who furnishes

counter-guarantee in favour of the defendant No. 1, being ultimate beneficiary. If there is any demand from the ultimate beneficiary and payment

being received by it, National Commercial Bank, Main Branch, Tripoli, Libia, the defendant No. 5 will be entitled to invoke guarantee furnished by

the defendant No. 2.

48. Mr. Mitra, however, submits that invocation of bank guarantee by his client vis- a-vis defendant No. 3 cannot be connected and/or related to

any other transaction and it is an independent agreement between the Bank of Boroda and his client. He further contends that terms of the bank

guarantee is absolutely unconditional and has no relation or reference to any other things. So, I have looked into the terms of guarantee given by

defendant No. 3 in favour of his client. In my view the bank guarantee has to be read as a whole. While reading I find the guarantee is

unconditional no doubt for invocation. But it is clear from the bank guarantee furnishing of the same and invocation thereof are related to and/or

connected with the invocation of bank guarantee by National Supply Corporation (defendant No. 1) furnished by National Commercial Bank,

Main Branch. Therefore, it is clear that this bank guarantee was furnished by Bank of Boroda in order to secure payment which might be made in

the event bank guarantee is invoked by ultimate beneficiary as has been rightly contended by Mr. Banerjee. The object of furnishing of the bank

guarantee has been made clear by the bank guarantee itself. This bank guarantee is not a subjective one, and until and unless, in my view, the

object is fulfilled invocation of the same cannot be allowed to be done.

49. I am of the prima facie view that in order to complete the chain of invocation of guarantees, step by step action is required to be made. To

clarify there must be lawful invocation by the ultimate beneficiary, viz. defendant No. 1 and the payment must have been made or secured by its

banker, National Commercial Bank, defendant No. 5 and then it can invoke guarantee furnished by the defendant No. 2. Then and only then the

defendant No. 2 is entitled to invoke the bank guarantee asking for making payment. All these occurrence of events either must be simultaneous or

in quick succession.

50. Now question is whether there has been any invocation by the ultimate beneficiary on the date the defendant No. 2 sought to invoke the

guarantee against the defendant No. 3. From the sequence of events and affidavits of the document I find (even assuming the same are genuine for

the time being) that when the invocation was sought to be made by the defendant No. 2 or immediately before filing of the suit there has been no

invocation by the ultimate beneficiary or even by the intermediary bank or National Commercial Bank. Actually, invocation was sought to be made

by the applicant on 28th August, 2000 and after the interim order of injunction was passed by this Court but before the expiry of the period of

bank guarantees. It appears that after the interim order was passed on 14th August, 2000 and was confirmed on 15th May, 2001 and the same

was communicated on 19th June, 2001 ultimate beneficiary viz. defendant No. 1 asked defendant No. 5 to make payment in terms of the bank

guarantee. On receipt of this request on 24th June, 2001 the defendant No. 5, National Commercial Bank asked the applicant therein for making

payment and subsequently within 2nd July, 2001 the payment is purported to have been made by crediting in the accounts of the defendant No. 5

by the defendant No. 2.

51. Of course these documents have been given in the affidavit-in-reply and supplementary affidavit.

52. Therefore, it is clear at the time of making demand immediately before filing of the suit or even subsequently thereafter the invocation of

defendant No. 2 was not in accordance with the terms of the bank guarantee. At that point of time order of injunction passed by this Court was

perfectly justified and I do not find any reason to recall the same.

53. But then question is whether taking note of the subsequent event, which is permissible to be done under Order 39, Rule 4 of the Code whether

the aforesaid order of injunction can be discharged and/or vacated. Law relating to passing, maintaining order of injunction does not require to be

reiterated as the bank concerned cannot be injuncted from being honoured with the terms of the bank guarantee and letter of credit, but there are

exceptions, which are fraud or special equity or irretrievable injury. According to me, if the bank guarantee or letter of credit is allowed to be

invoked in case of this nature wherein prima facie it appears that performance for which Bank guarantee is furnished is certified to be completed,

by the beneficiary, being a foreign trader who does not have any property and assets within the territory of this country, and its asset and property

of the party locating in its own country cannot be got hold of without any enormous delay and expenses, this would be one of instances of

irretrievable loss.

54. In the supplementary affidavit of the plaintiff the documents have been annexed. These documents prima facie suggest that the petitioners have

been discharged from all obligations in connection with the performance consequently in connection with the bank guarantee. Further documents

have been annexed by the plaintiff in the supplementary affidavit which show that earlier letter of invocation purported to have been issued by the

defendant No. 1 was not genuine and fabricated one. Under these circumstances, I find there is a strong triable issue relating to factum of

invocation of the bank guarantee by the defendant No. 1 or discharge of the bank guarantee. I think by subsequent event the plaintiffs have been

able to make out a very strong prima facie case that there must be some element of fraud in connection with the invocation. It is not understood

why even after order of injunction passed by this Court restraining the defendant No. 3 from making payment which has got the cumulative effect

of restraint the (sic) order against other defendants from receiving any payment indirectly the invocation was made. Prima facie I find there has

been no lawful invocation at any stage by any of the parties.

55. As a result whereof I find reason, for which the petitioner despite the knowledge of passing of the interim order sat tight over the matter, is that

at no point of time there has been any factual invocation by any of the beneficiaries before making this application and after invocation was made

by the ultimate beneficiary followed by intermediary bank and so-called payment having been made by crediting to the accounts the defendant No.

2 has come up with the present application to get the order vacated so that the Bank of Boroda could make payment. As far as jurisdiction of this

Court is concerned, it is alleged in the plaint that the defendant No. 3 asked payment for invocation of guarantee within the jurisdiction of this

Court.

56. Under such circumstances, I am unable to vacate the interim order. The suit is of 1999 and the hearing of the suit can be expedited.

57. Since there is a triable issue the defendant No. 2 must be secured in the event the plaintiff fails in the suit. I accordingly direct the plaintiff to

revive the bank guarantee by renewing it till the disposal of the suit. Subject to this direction the interim order of injunction will continue till the

disposal of the suit. I make it clear that if the suit is dismissed the plaintiff must pay interest at the rate of 9% per annum on the amount of bank

guarantee and the defendant No. 3, Bank of Boroda shall make payment along with interest.

58. There will be no order as to costs.

59. Mr. Sanjib Banerjee appearing for the plaintiff/petitioner submits that there has been a subsequent development that Mr. Mitra''s client has

already been paid the amount of the bank guarantee by the banking transaction. Mr. Mitra, however, is enable to make any comment on this unless

he receives specific instruction. Mr. Sanjib Banerjee wanted that this Court should record the submission even before delivery of the judgment. I

am unable to do so since it is a mere statement moreover, the hearing was concluded long time back on the basis of the materials placed before the

Court. Therefore, liberty is given to both the parties to apply appropriately, if so advised.

60. This judgment and order is without prejudice to the rights and contentions of the parties.

61. All parties concerned are to act on a signed copy of the operative portion of this judgment and order.