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Calcutta High Court

Case No: Suit No. 48 of 1992

Unit Construction Company Pvt. Ltd.		APPELLANT
	Vs	
Officer-On-Spl. Duty, Cal. Metropolitan Devel. Authority and Others		RESPONDENT

Date of Decision: March 5, 1992

Citation: 99 CWN 974

Hon'ble Judges: Tarun Chatterjee, J; N.P. Singh, J

Bench: Division Bench

Advocate: S.K. Kapoor and I.P. Singh, for the Appellant;P.N. Chatterjee, Rina Basu and P.S. Biswas, for the Respondent

Final Decision: Dismissed

Judgement

N.P. Singh, C.J.
This appeal has been filed on behalf of Unit Construction Co. Pvt. Ltd. (hereinafter referred to as the appellant) for setting aside an order dated 14th February, 1992 passed by a learned Judge of this Court refusing to grant temporary injunction restraining the Calcutta Metropolitan Development Authority (hereinafter referred to as the respondent) from enforcing the bank guarantee in question. It is an admitted position that the appellant entered into a contract with the respondent for construction of high rise building, 4th floor to 12th floor at Civil Centre at Manicktola in Calcutta. One of the terms of the contract was that mobilisation advance equivalent to 10 per cent of the gross value of the contract will be paid to the appellant against suitable bank guarantee and the recovery will be made from each running account bill at the rate of 10 per cent of the gross value of the bill or any part thereof. The entire outstanding amount was to be recovered from the pre-final bill.

2. Pursuant to the said term of the contract the appellant furnished a bank guarantee being No. CS/52/01 dated 30th June, 1990 for Rs. 31,50,000/- through the Bank of India, Chowringhee Square Branch.

3. According to the appellant, the respondent failed and neglected to pay the running bills submitted to them in time although the appellant had diligently discharged its obligation in accordance with the terms of the contract, because of which the work could not be completed within time. The appellant received a letter dated 16th January, 1992 enclosing a copy of a letter dated 14th January. 1992 purporting to invoke the bank guarantee a fore said.

4. Thereafter the appellant has filed a suit making a prayer for a decree that the letter of demand dated 14th January, 1992 written by the respondent to the bank for enforcement of the bank guarantee in question was void. A prayer for perpetual injunction restraining the respondent, their agents and assigns from demanding or receiving payment under the bank guarantee was also made apart from other incidental reliefs.

5. On 17th January. 1992 the appellant had filed an application for temporary injunction in the suit praying for an Order of injunction restraining payment under the bank guarantee. On that application the learned Judge passed an order on. 20th January. 1992 directing maintenance of status quo which was vacated by an order dated 14th February, 1992 which is being challenged in the present appeal.

6. By consent of both the parties the appeal along with the application for interim relief were taken up for hearing treating the appeal as on the day"s list dispensing with the filing of the paper book and discharging the undertaking given in that behalf.

7. In support of the contention that in the facts and circumstances of the present case the appellant was entitled to an order for temporary injunction restraining the respondent from enforcing the bank guarantee, our attention was drawn to the relevant paragraphs of the Bank Guarantee which are as follows :

2. The sum of Rs. 31,50,000/- (Rupees thirtyone lacs fifty thousand only) to be advanced by the O.S.D. (Officer on Special Duty) as aforesaid to the contractor(s) shall be recovered from the contractor(s) progressive bills @ 10% of the progressive bill value

3. We. Bank of India do hereby undertake to pay forthwith the amounts due and payable under the guarantee without any demur merely on a demand in writing from the O.S.D. stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the O.S.D. by reason of the contractor"s failure to perform the said agreement. Any such demand on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However our liability under the guarantee shall be restricted to an amount not exceeding Rs. 31,50,000/- (Rupees Thirtyone lacs fifty thousand only).

4. We. Bank of India undertake to pay to the O.S.D. any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any Court or Tribunal/Arbitration relating thereto our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and the contractor(s) shall have no claim against us for making such payment.

8. Mr. Kapoor learned counsel appearing for the appellant urged that paragraph 3 of the Bank Guarantee contemplates a demand in writing from O.S.D. stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the O.S.D. By reason of the Contractor''s failure to perform the said Agreement." But on behalf of the respondent while enforcing the Bank Guarantee the following Communication was made to the Bank:

Sub Bank Guarantee No. C.S./52/01 dated 20.6.90 in lieu of mobilisation advance made to M/s. Unit Construction Co. Private Ltd. for construction of High Rise Office Building at Civil Centre. Manicktala in CIT Scheme No. VII-M.

Dear Sir.

In reference to above I do hereby demand you to please remit a sum of Rs. "22,45.166/- (Rupees twentytwo Lakhs fortyfive thousand one hundred sixtysix only) being balance amount of mobilisation advance still recoverable from your client M/s. Unit Construction Co. Private Limited, P. 40, Block B, New Alipore. Calcutta - 700 063 forthwith.

9. It is not in dispute that in view of the adjustments made the total amount of Bank Guarantee for Rs. 31,50,000/- had been reduced to Rs. 22,45,166/- only for which the aforesaid communication was issued on behalf of the respondent to the Bank. But according to the appellant in the said communication, there is no statement that the aforesaid amount of Rs. 22,45,166/- was being claimed by way of loss or damage caused to or likely to be caused to or suffered by the respondent by reason of the contractor''s failure to perform the Agreement in question, which was one of the conditions for enforecement of the Bank Guarantee.

10. The question whether the Court should issue temporary injunction restraining the party concerned from enforcing or invoking the Bank Guarantee has been examined from time to time by Supreme Court as well as this Court. Reference in this connection may be made to the judgment of the Supreme Court in the case of United Commercial Bank Vs. Bank of India and Others, In that case it was observed:

In the light of these principles, the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitation which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.

It is somewhat unfortunate that the High "Court should granted a temporary injunction, as it has done in this case, to restrain the appellant, from making a recall of the amount of Rs. 85,84.456/- from the Bank of India in terms of the letter of guarantee of indemnity executed by it. The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit or a Bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the Letters of Guarantees of credit executed by it the whole banking system in the country would fail.

11. Again in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., it was pointed Out by the Supreme Court:

In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do of the principle well settled that there should not be interference in trade. This is not a case where irretrievable injustice would be done by enforcement of bank guarantee. This is also not a case where a strong prima facie case of fraud in entering into a transaction was made out. If that is the position then the High Court should not have interfered with the bank guarantee.

12. Recently the Supreme Court in the case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, in which facts, according to us, were similar to the facts of the instant case, held as follows:

The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would be tantamount to suppression of material facts, in the sense that the mobilisation advance was under the contract to be recovered from the running bills. It was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills and what was the corresponding amount of the mobilisation advance and to what extent the amount covered by the bank guarantee remained payable. In any event, the "High Court said that GETSCO could not demand full amount of the bank guarantee" on 17th April, 1989. It seems to us that the High Court has indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled

principle of the law in England. This is also a well settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court." apprehension of irretrievable injustice has been mark out. This is the well-settled principle of the law in England. This is also a well settled principle of law in India, as 1 shall presently notice from some of the decisions of the High Court and decisions of this Court.

13. It was then said Mr. Tarkunde submitted before us that in this case the grievance of the appellant was that there was delay in performance and defective machinery had been supplied. He submitted that if at this stag appellant was allowed to enforce the bank guarantee, damage would be done. He submitted before us that appellant could not in permitted to take advantage of illegality by invoking the bank guarantee. But in my opinion these contentions cannot deter us in view misconstrued the terms of the bank guarantee and the nature of the inter se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETSCO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent. Secondly, the Bank is not concerned with the outstanding amount payable by GETSCO under the running bills. The right to recover the amount under the running bills'' has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment, under the running bills. The failure on the part of GETSCO to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee. The demand by GETSCO is under the Bank guarantee and as per the terms thereof. The Bank has to pay and the Bank was willing to pay as per the undertaking. The Bank cannot be interdicted by the Court at the instance of respondent 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."

14. The Supreme Court said in clear and unambiguous terms that right to recover the amount under the running bill has no relevance to the liability of the bank under the guarantee because the liability of the bank remained intact irrespective of the recovery of the mobilisation advance or non-payment under the running bills. In the present case also the dispute has arisen in connection with mobilisation advance and the appellant is seeking a temporary injunction from this Court against the respondent from enforcing the bank guarantee in question on a ground which has no relevance to the dispute in respect of the payment of mobilisation advance. It is true that the bank guarantee had been furnished in connection with the mobilisation advance which fact has been mentioned in the Bank Guarantee itself. But according to us in view of paragraph 4 of the Bank Guarantee, quoted above, the liability of the bank to pay the amount in question to the respondent is absolute and unequivocal in view of the undertaking given in that paragraph by the Bank saying that the Bank undertakes to pay to the O.S.D. "any

moneys so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any Court or Tribunal/Arbitration relating thereto."

15. On the materials on record in connection with grant of temporary injunction it is not possible to hold that the said absolute and unequivocal liability undertaken by the Bank was subject to "any restriction like a demand being made in writing from the O.S.D. stating that the amount claimed was due by way of loss or damage caused or likely to be caused by reason of the Contractor''s failure to perform the said Agreement. It may be mentioned that during the hearing pi the appeal nothing was pointed out in respect of any fraud, special equity or appellants suffering any irretrievable injustice in absence of grant of temporary injunction. Accordingly the appeal along with the application for interim relief is dismissed. There shall be no order for costs. However, we make it clear that any observation made in this order, for the purpose of rejecting the prayer for temporary injunction made on behalf of the appellant, should not be treated as finding on the merit of the connected suit and shall not prejudice in any manner the appellant who is the plaintiff in the said suit.