
(2010) 02 DEL CK 0358

Delhi High Court

Case No: CS (OS) 43 of 2009 and I.A. No. 331 of 2009

BJCL-BRITE (JV)

APPELLANT

Vs

National Highways
Authority of India and
Another

RESPONDENT

Date of Decision: Feb. 15, 2010

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Contract Act, 1872 - Section 17
- Specific Relief Act, 1963 - Section 14, 34, 41, 42

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Ashish Bhagat, Abdhesh Chaudhary and Manisha Suri, for the Appellant; Ranjit Sharma and Ashim Bhatt, for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

The plaintiff in the suit seeks a decree of declaration that the first defendant (hereafter called the "NHAI") cannot invoke a bank guarantee dated 13.10.2007 $\text{₹} \frac{1}{2}$ which has been kept alive and is hereafter referred to as "the guarantee", for the sum of Rs. 3 crores. Permanent injunction is sought against the NHAI from invoking the bank guarantee and a mandatory injunction is sought against the NHAI to release or return the bank guarantee issued by the second defendant, (hereafter called "the bank").

2. The facts necessary for deciding the case are that the plaintiff successfully bid for construction work tendered by the NHAI. The plaintiff and the NHAI entered into a contract on 25.11.2005; in terms of the contract, the work commenced on 29.12.2005 and had to be completed within 18 months, i.e. 28.06.2007. The plaintiff contends that right

from inception, the National Highways Authority of India, (hereafter referred to as "NHAI") was guilty of a series of omissions, which hindered the smooth progress of the work. These included delay in handing-over the site. The plaintiff alleges that despite the obligation to hand-over the site within 18 months, the NHAI dithered and despite reminders and meetings, no action was forthcoming and that instead a series of letters were issued by the NHAI, on 27.05.2006, 30.03.2007 and 11.06.2007, leveling baseless allegations.

3. The plaintiff next submits that other important obstructions and hindrances were not attended to by the NHAI, which included existence of electric poles, that were removed as late as October-November 2008, non-adherence to the traffic diversion plan agreed upon to ease and facilitate smooth work, delayed submission of drawings and hindrance on account of unfulfilled statutory obligations such as clearance from the Pollution Control Board, Irrigation Department, that were not forthcoming from the NHAI. It is submitted that these omissions went into the root of the performance of the contract itself and amounted to fundamental breaches of the agreement which altered, if not altogether, relieved the time schedule. The plaintiff argues that in terms of the contract (Clause 60.6, pertaining to advance payments), the NHAI was asked to release Mobilization Advance to the tune of Rs. 7.5 crores, in September 2007, although it (the plaintiff) was entitled to an amount equivalent to 10% of the contract value. The contract value was Rs. 93 crores. The NHAI, however, unjustifiably, truncated the amount and directed the plaintiff to furnish bank guarantee for Rs. 3 crores, which was apparently secured from the bank on 13.10.2007. The plaintiff contends that despite furnishing the guarantee, the NHAI released the amount after a lapse of more than five-and-half months, on 10.03.2008, which also displays delaying tactics on part of the latter. It is claimed that the tenure of the bank guarantee was initially upto 12.04.2008, but was later extended to 11.01.2009. The plaintiff refers to extension of time for performance of the contract and states that the NHAI's engineers, despite request, extended it only upto 25.11.2008. It is contended that the NHAI's engineers, by letter dated 09.02.2008 informed that the period of extension upto 31.12.2008 was recommended provided liquidated damages were paid with effect from 24.07.2008.

4. The plaintiff claims that the entire amount of Mobilization Advance given by the NHAI was adjusted in various bills issued between April and November 2008, and specifically mentions five Interim Payment Certificate Nos. 24 to 28 that made the deductions to a total amount of Rs. 3 crores. It is claimed that the NHAI, however, did not release the bank guarantee. The plaintiff wishes to know the status of the Mobilization Advance on 03.12.2008, which the consultant of the NHAI (hereafter referred to as "RITES"), admitted as having been adjusted. Strong reliance is placed upon letter dated 04.12.2008, written by RITES Ltd, which is in the following terms:

RITES Ltd.

(A Government of India Enterprise)

rites project office

Tele: 011-27781115

Khasra No. 1A

Batra Oil Co. Show Room Building
(1st Floor), G.T. Karnal Road,
Singhu Border, Delhi-110040.

No. RITES/TL-NHAI/NS-18(DL)/Bal/4126

Dated 04 Decem

To

Shri Sanjay Tripathi

Project Director

NHAI, PIU, Sonapat,

Shree Shakti Bhavan, Km-31, NH-1

Near Chopra Filling Station

Kundli, Sonapat (Haryana)

Sub: Construction of Balance work of 8-laning from Km 16,500 to Km. 29,300 of NH-1 in
the State of Delhi (Contract Package NS-18(DL)-Bal.)

Refund BG No. 7056307BG0087 dated 13.10.2008

For Rs. 3.0 Crores

Ref: Your letter No. NHAI/PIU-SNP/NS-18/DL/(Bal)/845 dated 03.12.2008

Sir,

Vide your letter No. NHAI/PIU-SNP/NS-18/DL-Bal./2008/1684 dated 05.03.08, this office
was informed that the Contractor had been released a discretionary advance of Rs. 3.0
crore by NHAI on 04.03.2008, at SBI PLR + 2% rate of interest.

2. The principal amount of the above advance has been recovered in monthly
installments of Rs. 50 Lacs from IPCs No. 24 (April 08) to 28 (October 08). However, the
recovery of Interest amount of Rs. 20,52,766/- (Details at Appendix "A" attached) is yet to
be recovered in IPC No. 29 (November 08).

3. In view of Para 2 above, the Contractor's request for release of the subject BG cannot
be recommended at this stage.

Thanking you,

Yours faithfully

Sd/-

Maj. Gen. (Retd). C.L. Verma

Team Leader

Encl: As above.

C.C. to:

M/S BJCL-BRITE (JV), Opposite MCD Jindpur School, District. Delhi, Delhi-110036.

5. It is submitted that RITES, in their creation of Interim Payment Certificate No. 28, relating to the bill of October 2008, adjusted the entire amount of interest and as such, the Mobilization advance stood adjusted and there was no cause for the NHAI continuing to retain the bank guarantee. It is alleged that in this background of 22.12.2008, the NHAI issued a Show Cause Notice that since the plaintiff was not interested in executing the work, it would not release the bank guarantee. The plaintiff states that the reply to the Show Cause Notice was issued on 02.01.2009, detailing that there was no breach of the contract and that on the contrary, the defendant, NHAI was responsible for various delays. It is alleged that a huge amount is due and payable by the NHAI to the plaintiff and that the latter's attempt in retaining the bank guarantee and seeking to encash it is unjustified and arbitrary. The NHAI, it is alleged, holds such bank guarantee in trust; once the Mobilization Advance stood adjusted by payment, there was no occasion for continuing to hold on to the bank guarantee, which constitutes a threat to the plaintiff. The relevant averments in the suit, forming the basis for the reliance sought are as follows:

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42. That the plaintiff submits that in the face of the above detailed flagrant disregard and breaches of the contractual provisions and obligations on the part of the Employer (defendant-NHAI), any attempt on the part of the said defendant to encash/invoke the aforesaid Bank Guarantees would be fraud, wholly illegal and void ab initio. At the same, under the threat of invocation of Bank Guarantees, the said defendant is illegally and unauthorized pressurizing the plaintiff to withdraw all its claims against defendant-NHAI, for the losses occasioned to the plaintiff due to the various hindrances Constituting fundamental breach of contract agreement on the part of the defendant.

43. That the plaintiff submits that the threatened invocation of Bank Guarantees is a fraud being played by the defendant-NHAI. The plaintiff would suffer irretrievable loss and injury in case the said defendant is permitted to invoke the Bank Guarantees, in question, since the plaintiff has already paid/adjusted the said amount to the defendant-NHAI, which had been acknowledged by them. The instant invocation is merely a vengeance on the

defendant, so that the plaintiff may suffer damage to its goodwill and reputation due to utmost malafide and dishonest intentions of the defendant-NHAI. The special equities are also in favor of the plaintiff and against the defendant-NHAI in as much the said defendant, by taking advantage of its own defaults, breaches and wrongs, is practicing a fraud upon the plaintiff as well as upon the Bank (defendant No. 2 herein) issuing the Bank Guarantees, in question. The threatened invocation of Bank Guarantees amounts to gross misrepresentation and suppression of material facts, which clearly amount to fraud being perpetrated by the defendant-NHAI, giving rise to special equities in favour of the plaintiff.

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6. This Court, after considering the materials on record, granted an ex-parte ad-interim order on 12.01.2009, restraining invocation and encashment of the bank guarantee. The interim order was continued on 17.03.2009. The NHAI entered appearance and filed its written statement, contesting the suit. It alleges that the suit is not maintainable in view of Clauses 67.1, 67.2, 67.3 and 67.4 of the contract between the parties since the dispute is founded on allegations arising under the contract and are, therefore, arbitrable. The NHAI further states that the contract stood terminated by notice dated 13.01.2009, pursuant to exercise of discretion under Clause 63.1. It is urged that the bank guarantee being unconditional, no cause for judicial interference can be made-out.

7. The NHAI contends that in OMP 17/2009, the plaintiff sought restraint of four other bank guarantees in relation to the same contract. It is further stated that the said proceeding was dismissed on 15.01.2009 and the Court held that the bank guarantee could not be interfered with.

8. The NHAI contends that even on the merits, the plaintiff does not have any arguable case. It is alleged that the agreement provided that the work had to be completed by 28.06.2007. Despite extension of time, the plaintiff was able to complete only 47.16% of the contract. It refers to letters written by the NHAI and the Supervision Consultant, warning of slow progress. Specific reliance is placed on notices dated 24.11.2006, 30.03.2007 and 31.03.2008. It is stated that even if the plaintiff's contention about the existence of hindrances at the NHAI's behest were to be facially accepted, there were stretches where such hindrances did not exist. The NHAI points to the stretch between Km. 16.5 and 29.3 (RHS). It is further stated that the plaintiff's request for extension of time was granted for the period 24.07.2008 to 31.12.2008, subject to levy of liquidated damages.

9. The NHAI points to Clause 63.3 in support of the submission that certain retention amount under the Contract can justifiably be withheld, after termination of the contract. The said stipulation reads as follows:

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Sub-clause 63.3 PAYMENT AFTER TERMINATION

If the Employer terminates the Contractor's employment under this Clause, he shall not be liable to pay to the Contractor any further amount (including damages) in respect of the Contract until the expiration of the Defects Liability Period and there after until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum (if any) as the Engineer may certify would have been payable to him upon due completion by him after deducting the said amount. If such amount exceeds the sum which would have been payable to the Contractor on due completion by him, then the Contractor shall, upon demand, pay to the Employer the amount of such excess and it shall be deemed a debt due by the Contractor to the Employer and shall be recoverable accordingly.

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10. It is contended that the NHAI is yet to realize the balance of Rs. 6 crores, as dues, under the contract, which can be adjusted from the security deposited or through sales proceeds and equipment, plant and machinery seized from the plaintiff without prejudice to its rights.

11. In addition to the averments, it is argued that the bank guarantee being unconditional, the plaintiff has not shown any cause beyond merely invoking a ritualistic pleading fraud, justifying why declaratory or injunctive relief can be granted. It is argued that the value of the work left unfinished is to the extent of Rs. 49 crores. The total extent of retention amount that can be justifiably kept by the NHAI is in excess of Rs. 18 crores. It is also stated that the NHAI has been forced to award the unfinished part of the contract to a third party, the value of which is Rs. 85 crores.

12. The above discussion shows that the plaintiff essentially says that the NHAI cannot invoke the bank guarantee, since the advance payments made to it (the plaintiff) have been adjusted from the running bills paid, in that regard. It cites various reasons, to suggest that NHAI's anticipated demand under the bank guarantee would be without basis. It alleges that if such demand is made, the same would be "fraud" and cause it (the plaintiff) irretrievable injustice. The reasons so cited are that the NHAI itself was responsible for the tardy or slow progress, of the work awarded, since various hindrances had been created in the smooth and timely implementation of the project, including not ensuring removal of certain obstructions, delay in taking measures such as diversion of traffic, obtaining statutory approval, and so on. It says that having been guilty of these lapses, and also not having released the full amount of advance, the NHAI cannot under any circumstances invoke the bank guarantee.

13. The defendant's plea, on the other hand, is that the bank guarantee is unconditional, and completely autonomous of the contractual obligations of the parties. It is submitted that there is sufficient material on record to say that the plaintiff did not perform the contract a substantial part of which was left unfinished, even after extension of time for performance was given on condition that it (the plaintiff) was to pay liquidated damages for the delay. It is also contended that the Court should not adopt a narrow insular view in regard to the purpose for insistence of issuance of the guarantee, which had to be seen in the overall context of the obligations of parties. It was not as if the plaintiff's obligations ceased, the moment the advance amounts were deducted from running bills; its responsibility to ensure smooth discharge (by performance) of the contract till the parties completed all the steps agreed to by them. The defendant points to the obligation to retain 20% of the contract amount, during the defect liability period. It is emphasized that the plaintiff's failure to perform the contract, led to issuance of a show cause notice, and the eventual termination of the contract. The defendant argues that the suit is not maintainable, and that in any event the plaintiff cannot get any injunctive relief, as the features of this case do not show any rare or exceptional fact, which can impel the Court to interdict the independence of the bank guarantee in question.

14. It has now been settled since long that courts would normally never interfere with injunctions, in respect of banker's obligations under letters of credit and bank guarantees, by looking into underlying contracts between two parties. The reasoning behind this is that such credits constitute independent and solemn bargain between the banks and the beneficiaries to such credits, which are the bedrock of commerce and international trade. In *Bolivinter Oil SA v. Chase Manhattan Bank* (1984) 1 All ER 351, it was held that:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. 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 charged....

In AIR 1997 1644 (SC) , the Supreme Court, after reviewing the previous judgments, and the settled position in law for about two decades, reiterated that injunction can be granted only in rare and exceptional circumstances, in the following terms:

The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

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On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the Itek Corporation Case.

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Before us, however, in the course of argument, the learned advocate for the respondent urged for the first time in this case there would be irretrievable injustice to the respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the board for industrial and financial reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The respondent contends that even if it succeeds before the arbitrator it will not be able to realise his claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the "irretrievable injustice" exception.... There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations....

15. Earlier, in [General Electric Technical Services Company Inc. Vs. M/s. Punj Sons \(P\) Ltd. and another](#), , it was held that:

20. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury....

In [U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers \(P\) Ltd.](#), , the Supreme Court had emphasized that apart from fraud, if there was to be irretrievable injustice, injunction could be granted:

...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 exception case that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere....

In [State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another](#), , the Supreme Court clarified the position on this aspect in the following

words:

The rule is well settled that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee....

Recently, [Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company](#), re-stated the law as follows:

...we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit:

- (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- (ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
- (iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.
- (iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.
- (v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.
- (vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned....

16. In this case, the bank guarantee is an unconditional one. The plaintiff's contention is that having regard to the circumstances in which it was issued, i.e. to secure part of mobilization advance, the Court should be alive to the fact that such amounts had been

recovered from the pending bills, by the NHAI; therefore, insisting on continuance of the bank guarantee for the rest of the period of contract, is mala fide, and amounts to a fraud. If invoked the action would cause irretrievable injustice or harm, to the plaintiff.

17. The previous discussion pertaining to the position in law shows that insistence of contractual obligations, independent of the bank guarantee, cannot ipso facto be a ground for interdicting the bank's undertaking to pay. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee, through injunction except on the ground of fraud and irretrievable injury. Such fraud has to be "egregious", or flagrant or conspicuously bad or offensive. In other words, the fraud or injustice should be transparent, in regard to the invocation of the guarantee itself. In turn, this implies that the issuing bank, which is called upon to honour its commitment, will not decide upon the relative rights of the contracting parties, in relation to their contract.

18. The contract between the parties specified a time limit for performance of the plaintiff's obligations. The time for performance was extended. The defendant relies upon the circumstance that while extending time, the condition of recovering liquidated damages was imposed. NHAI also says that it terminated the contract, and has subsequently entrusted the balance work to another party, at enormous cost. It also alleges that a sum of Rs. 6 lakh is payable by the plaintiff, and that under the contract, a retention amount of Rs. 18 crores is to be kept with it.

19. The fact that the plaintiff would be put to hardship if the relief sought is refused, is by itself not something that constitutes "irretrievable injury". The plaintiff has not been able to show that the bank guarantee in question would have to be discharged on the adjustment of amounts paid to it, by NHAI on its running bills. The guarantee, as mentioned earlier, is unconditional. The dispute about interpretation of the contractual terms, or that some omissions and defaults are alleged against NHAI is not of a magnitude as to be characterized as "fraud". The term "fraud" is defined in Section 17 of the Contract Act, as follows:

17. "FRAUD" DEFINED.

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A - "if you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

There is nothing in the above definition which can be applied to the facts, which are alleged in the suit. The plaintiff does not explain how the invocation of the guarantee, or rather, its continuation, amounts to a fraud. As to irretrievable injustice, the decision in General Electric Technical Services Co. Inc. (supra) clarifies that even if the financial hardship is such that a company or enterprise is sick, or likely to face bankruptcy, such a condition is not satisfied. Here, the possibility of the NHAI invoking the guarantee, and the resultant liability arising to the plaintiff is not sufficient, to fit the description. The irretrievable injustice should be of a magnitude as to transcend the irreparable injury requirement, inherent in every temporary injunction order. Being a contract for performance of work, the aggrieved party can seek damages. For these reasons, the Court is satisfied that the injunction sought cannot be granted.

20. The above discussion would have been dispositive of the temporary injunction application. However, this Court is mindful of the circumstance that the plaintiff seeks a decree for declaring that the defendant NHAI cannot invoke the bank guarantee; that is the first relief sought in the suit; the injunctive relief is a consequential one. The entire suit talks of the relative rights and obligations of the parties vis-à-vis each other, in performance of the contract.

21. Section 34 of the Specific Relief Act, 1963, which enables courts to grant declarations, reads as follows:

34 DISCRETION OF COURT AS TO DECLARATION OF STATUS OR RIGHT.

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

PROVIDED that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

Explanation: A trustee of property is a "person interested to deny" a title adverse to the title of some-one who is not in existence and for whom, if in existence, he would be a trustee."

In [K.P. Ramakrishna Pattar Vs. K.P. Narayana Pattar and Another](#), , a declaration was sought that a contract subsisted; it related to some tax. Accepting that such declaration of contractual rights could not be claimed under the then Section 42 of the Specific Relief Act, as such declarations could not be held to relate to any person's legal character, it was held:

We think that the contention must be upheld, to this extent, namely, that Section 42 of the Specific Relief Act does not contemplate a suit like the present. We take it that a man's "legal character" is the same thing as a man's status. "A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general....

In [Tian Sahu Vs. Mulchand Sahu and others](#) the plaintiff had sought declaration that he was entitled to contribution from the defendant if and when occasion arose; the Court held that such a suit was not maintainable. An identical view was taken in [Sripatrao Sadashiv Upre Vs. Shankarrao Sarnaik](#), . Following these two later cases it was held, by the Lahore High Court, in *Nathu Ram v. Mula* AIR 1937 Lah 25 that:

A suit for a declaration that the defendant would be liable to contribute to the plaintiff all moneys which the plaintiff as the defendant's surety would be liable to pay does not come u/s 42 as it affects only the pecuniary relationship between the parties to the contract.

This view was again followed in *Firm Gopal Das Parmanand v. Mul Raj* AIR 1937 Lah 389 where a declaration that certain sum deposited by the plaintiff with the defendant (as margin money) was accountable by the defendant - to the plaintiff - was refused. The Court held that such a declaration could not be granted u/s 42 of the Specific Relief Act as it affected only the pecuniary relationship between the parties to the contract. In *Madanlal v. State of Madhya Bharat* (S) AIR 1955 MP 111 a declaration had been sought that under a contract the plaintiff was not responsible for payment of any amount due on account of the sale and distribution of food-grains; the Court held that as the declaration

did not relate to any legal character or right to property it could not be claimed u/s 42 of the Specific Relief Act. These views were affirmed and applied by the Allahabad High Court, in [Mahabir Jute Mills Vs. Firm Kedar Nath Ram Bharose](#), , and also by the Bombay High Court, in [Major General Shanta Shamsheer Jung Bahadur Rana Vs. Kamani Brothers Private Ltd. and Ors.](#) ,

22. In the present case, the plaintiff wishes the Court to interpret a contractual term; it does not pertain to the legal right or legal status of either party to the suit. The document imposes mutual duties and obligations. The plaintiff does not say that the contract spells out the legal status of parties. It is also not that the contract is sought to be declared as void, in totality, so that the plaintiff's right to some property is at stake. It is that the plaintiff wishes that such declaration is necessary to stall the performance of an independent obligation assumed by the bank, in respect of the bank guarantee. The contract itself envisions that any dispute is to be submitted to arbitration. Indeed in relation to invocation of other bank guarantees, the plaintiff had sought interim relief, by filing an application for injunction u/s 9 of the Arbitration and Conciliation Act, 1996, which was rejected. Section 41 of the Specific Relief Act bars a court from granting injunctions of certain contracts. Section 14, in its material part, defines what such contracts are:

14. CONTRACTS NOT SPECIFICALLY ENFORCEABLE.

(1) The following contracts cannot be specifically enforced, namely,-

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of continuous duty which the court cannot supervise....

Here, the contract is determinable; the nature of obligations runs into minute details and depends on volition of parties; also, if the claim were to be granted, the Court would have to continuously supervise duties of the parties. Such contract cannot be specifically enforced. If such is the correct position, the Court cannot also achieve that end, by indirectly isolating a term in the contract, pertaining to the guarantee, and "declare" that the NHAI cannot invoke it as granting such a declaration would result in the achieving indirectly what cannot be done directly.

23. In view of the above discussion, this Court concludes that the declaratory relief sought cannot be granted in law. The consequential injunction is also directed against the NHAI,

and that relief is dependent upon the grant of the main declaratory decree. It is well known that what cannot be done directly, cannot be performed indirectly, which is precisely what would happen if the "declaration" about the plaintiff's right of the kind sought is granted - in effect, the defendant would be prevented from invoking its rights under an independent contract with the issuing bank. Therefore, the Court is of opinion that the suit is not maintainable.

24. In view of the above discussion, the Court, invokes its power under Order VII, Rule 11(d), Code of Civil Procedure, and rejects the suit. Consequently, all pending applications are dismissed. In the circumstances, the parties shall bear their respective costs.