

(2001) 02 BOM CK 0097

Bombay High Court**Case No:** Company Petition No. 1022 of 1998

Syndicate Bank

APPELLANT

Vs

Vijay Tanks and Vessels Ltd.

RESPONDENT

Date of Decision: Feb. 14, 2001**Acts Referred:**

- Companies Act, 1956 - Section 433
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 22

Citation: (2001) 3 ALLMR 744 : (2001) 3 BomCR 724(1) : (2001) 3 BOMLR 718 : (2001) 105 CompCas 501**Hon'ble Judges:** D.Y. Chandrachud, J**Bench:** Single Bench**Advocate:** Mr. N.M. Dhruva, instructed by M/s M. Dhruva and Co, for the Appellant; Mr. Virendra V. Tulzapurkar, instructed by Pandit and Pandit Co., for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.

Among the credit facilities which were extended by the Syndicate Bank, the Petitioner in this Company Petition, to the Respondent-Company-Vijay Tank and Vessels Limited, the Petitioner issued a Bank Guarantee for and at the request of the Respondent to a Company known as Southern Petrochemical Industries Pvt. Ltd. (S.P.I.C.). The Bank Guarantee, bearing No. 11/80, was in the amount of Rs. 33,65,200/- and was an unconditional and irrevocable Guarantee issued on 7th May, 1980. As is usual in the case of other unconditional Bank Guarantees, the Petitioner irrevocably and unconditionally guaranteed that it would pay an amount of Rs. 33,65,200/- on a demand in writing made by the beneficiary under the guarantee without recourse to the Respondent. The Respondent had entered into a contract with the beneficiary under the guarantee S.P.I.C. for the establishment of an Ammonia Terminal Facility and in pursuance of that contract, an unconditional and irrevocable Bank Guarantee, as aforesaid, came to be furnished. The guarantee provided that it had been issued towards the faithful performance of the contractual

obligations assumed by the Respondent and that any amounts certified by S.P.I.C. as due and payable shall be accepted as conclusive evidence by the Petitioner. It may only be noted that another Bank Guarantee No. 93/81 had been issued by the Petitioner in favour of S.P.I.C. in the amount of Rs. 50,00,000/- but, that is not the subject matter of these proceedings. On 5th May, 1980, the Respondent issued a counter guarantee in favour of the Petitioner in consideration of the issuance of the Bank Guarantee by the Petitioner to S.P.I.C.. This was lodged by the Respondent with the Petitioner by a letter dated 5th May, 1980, together with a Board Resolution dated 19th April, 1980 of the Respondent Company in support thereof. The Bank Guarantee issued by the Petitioner was renewed from time to time, the last of the renewals being upto 31st March, 1983. By a letter dated 24th December, 1982, S.P.I.C., the beneficiary under the Bank Guarantee invoked the Bank Guarantee in issue in the present case. The Respondent filed a suit being Suit No. 31 of 1983 for an injunction restraining S.P.I.C. from invoking the Guarantee. An ad interim injunction having been granted, by an order dated 11th July, 1983, the injunction granted in respect of Bank Guarantee No. 11/80 was confirmed. In an appeal preferred by the Respondent- Company, the Appellate Court by a consent order dated 31st August, 1983, permitted S.P.I.C. to recover a sum of Rs. 29,65,000/- under Bank Guarantee No. 11 / 80.

2. S.P.I.C. had instituted a suit on the Original Side of the Madras High Court being Suit No. 659 of 1983 to which the Petitioner was joined as the Defendant for a decree and order against the Petitioner in the amount of the Bank Guarantee. During the pendency of the suit, the Respondent issued an undertaking to the Petitioner on 13th January, 1995, recording that at the request of the Respondent, the Petitioner had issued two Bank Guarantees in favour of S.P.I.C., including the Bank Guarantee in question, in respect of which a suit had been filed by S.P.I.C. before the Madras High Court. The Respondent by its undertaking confirmed that in the event of the High Court deciding the matter in favour of S.P.I.C., the Respondent would be liable to pay the amount of the Guarantee along with interest, costs and charges to the Petitioner. A Board Resolution in support thereof was also passed by the Respondent.

3. The suit instituted by S.P.I.C. against the Petitioner was decreed by a Judgment and Order of a Learned Single Judge of the Madras High Court, Mr. Justice S. S. Subramani delivered on 31st August, 1995. The High Court came to the conclusion that the Bank Guarantee was an unconditional and irrevocable Bank Guarantee and that the Petitioner as the guaranteeing Banker was obliged to pay the amount thereunder in accordance with the principles of law laid down by several judgments of the Supreme Court. In these circumstances, the Plaintiff before the Madras High Court, S.P.I.C., was held to be entitled to recover from the Petitioner herein, a sum of Rs. 29.65 lakhs with interest at the rate of 12% from the date of the suit until realisation. The Judgment and order of the Learned Single Judge of the Madras High Court has been affirmed in Appeal by a Division Bench of the High Court on 28th

June, 1999 in O.S.A. No. 26 of 1996, in so far as Guarantee No. 11/80, which forms the subject matter of the present proceedings is concerned. It must be noted that the Petitioner-Bank had duly contested the proceedings before the Learned Single Judge as well as before the Division Bench of the Madras High Court and it was the case of the Bank that the Guarantee had stood discharged. The suit having been decreed by the Learned Single Judge, that Judgment has, as stated earlier, been affirmed in appeal. On 2nd May, 1997 after the Judgment came to be delivered by the Learned Single Judge of the High Court, the Bank made the payment to S.P.I.C. which was due and payable under the terms of the guarantee and in accordance with the judgment and order passed by the Learned Single Judge of the Madras High Court. It has been stated in the Company Petition that S.P.I.C. had instituted an Execution Application being Application No. 77 of 1997 to enforce the decree and order of the Learned Single Judge upon which, payment was made by the Petitioner and a receipt came to be executed on 5th May, 1997 by S.P.I.C.

4. On 9th June, 1997, the petitioner invoked the undertaking executed by the Respondent on 13th January, 1995 and called upon the Respondent to make the payment of the amount under the Bank Guarantee. By its reply dated 25th June, 1997, the Respondent declined to pay the amount representing the proceeds of the Bank Guarantee contending that the Guarantee had already expired: that the Respondent was not a party to the suit instituted by S.P.I.C. against the Petitioner and that the Respondent had a counter-claim against S.P.I.C. A further notice dated 22nd November, 1997 and thereafter, a statutory notice dated 4th September, 1998 were issued on behalf of the Petitioner, which the Respondent replied through its Advocate on 16th September, 1998.

5. In order to appreciate the defence which has been sought to be made out by the Respondent, it would be necessary to state that the Respondent had initiated proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 and a Reference had been registered before the B.I.F.R. In the said proceedings, a scheme was sanctioned by the B.I.F.R. by which the Respondent was to dispose of its immovable property situate at L.B.S. Marg, Mulund (West), Mumbai and to pay to the Petitioner and various other creditors from the sale proceeds received from the sale of the Immovable property. A Memorandum of Understanding dated 7th October, 1993 came to be entered into between the Respondent and the other Bankers to whom there were dues owing by the Respondent, including the Petitioner. The said Memorandum of Understanding recorded that upon the disposal of the Immovable property referred to above, the Petitioner would be paid an amount of Rs. 6.50 crores. The relevant part of the Memorandum of Understanding in so far as the Petitioner is concerned, provided as follows :

"Syndicate Bank agrees to release all the securities held by them including the personal guarantees of the Directors and Associate Concerns. The Borrowers shall arrange to secure release of export incentives amounting to Rs. 95 lakhs from the

office of the Joint Chief Controller of Imports and Exports (J.C.C.I.E.)/such other authorities and deposit the same with Syndicate Bank towards partial liquidation of their outstandings.

The Borrowers agree that their/Directors counter guarantees /personal guarantees pertaining to Bank Guarantees No. 11/80 and No. 93/81 aggregating to Rs. 83,65,200/- favouring M/s. Southern Petrochemical Industries Corporation Ltd. will continue in order to maintain the status quo, the subject guarantees being subjudice in respect of Suit No. 659/83 filed by M/s. Southern Petrochemical Industries Corporation Ltd. against Syndicate Bank, till the said suit is finally decided by the Honourable High court of Madras."

The Memorandum of Understanding provides that the Petitioner would release all the securities held by it, including personal guarantees of the Directors of the Company. However, on 7th October, 1993, when the Memorandum of Understanding was signed, the suit filed by the S.P.I.C. against the Petitioner before the Madras High Court on the two Bank Guarantees which had been issued by the Petitioner, was pending. The Memorandum of Understanding thus, contemplated specifically that the counter guarantee/personal guarantees issued by the Respondent and its Directors pertaining to the two Bank Guarantees, including Bank Guarantee No. 11 /80, which was the subject matter of these proceedings before the Madras High Court will continue to remain in force until the suit was finally decided by the Madras High Court.

6. On 14th January, 1995, the Petitioner released all the personal guarantees executed in its favour by the erstwhile and present Directors of the Respondents and its Associate Concerns consequent upon the Respondent clearing the dues of the Bank. In para 7 of the Company Petition, it has been stated that the Bank received an amount of Rs. 6.50 crores upon the disposal of the Mulund property by the Respondent. By an another letter dated 14th January, 1995, the Petitioner relinquished its pari pasu charge in respect of those properties where a charge was created in favour of the Bank. By a receipt dated 14th January, 1995, the Petitioner acknowledged having received an amount of Rs. 9.37 crores "in full and final settlement on fund based liabilities" of the Respondent. Thereafter, as contemplated by the Memorandum of Understanding, the Petitioner issued a no objection to the Respondent for having banking facilities with other Banks.

7. The defences of the Respondent may now be adverted to. On behalf of the Respondent, it has been sought to be submitted that the Petitioner-Bank in pursuance of the scheme which was framed by the B.I.F.R., received an amount of Rs. 9.37 crores towards its outstandings and released the personal guarantees of the Directors, and the securities which had been held by the Petitioner. In these circumstances, it is sought to be submitted that it was not open to the Petitioner to claim any amount under the proceeds of the Bank Guarantee and that what the Petitioner had received towards the payment of its dues, was in full and final

settlement. In my view, there is absolutely no merit in these submissions. The Memorandum of Understanding dated 7th October, 1993, which had been entered into between the Banks, Including the Petitioner and the Respondent, expressly contemplated that counter guarantees had been executed by the Respondent and personal guarantees had been issued by its Directors, which pertained specifically to the Bank Guarantees furnished by the Petitioner to S.P.I.C. The suit which had been filed by S.P.I.C. against the Petitioner was then pending before the Madras High Court. In the circumstances, the parties specifically provided in the Memorandum of Understanding dated 7th October, 1993 that these counter guarantees and personal guarantees will continue to subsist until the suit was finally decided. Therefore, while the Petitioner released all the securities held by it and the personal guarantees of the Directors of the Respondent in lieu of receiving certain payments from the Respondent out of the sale of the immovable property at Mulund, the counter guarantees and personal guarantees of the Respondent and the Directors of the Respondent in relation to the Bank Guarantee in question, would continue to subsist. Indeed, it would be significant to note that on 13th January, 1995, the Respondent had furnished a solemn undertaking to the Petitioner to pay to the Petitioner the amount of the Bank Guarantee upon the decision of the Madras High Court. The counter guarantee issued by the Respondent on 5th May, 1980 and the undertaking issued by the Respondent on 13th January, 1995 were thus, not affected by the Memorandum of Understanding dated 7th October, 1997.

8. The next defence was that, it was the contention of the Petitioner itself in the Madras High Court that the Bank Guarantee had been discharged, There is no merit in this submission also, for the simple reason that the Petitioner duly espoused its legal remedies by defending the suit before the Madras High Court. All the contentions, which were open to the Petitioner, were raised before the Madras High Court and against the Judgment of the Learned Single Judge, even an appeal was filed by the Petitioner. The appeal was dismissed by the Division Bench of the Madras High Court and the decree and the order of the Learned Single Judge were confirmed. The Plaintiff was bound to honour its obligation to pay the proceeds of an unconditional and irrevocable Bank Guarantee which had been issued to the beneficiary under the Guarantee. This obligation contractually assumed was supported by an adjudicatory direction issued by the Learned Single Judge and in appeal, by the Division Bench of the Madras High Court. Similarly, there is no merit in the submission that since the Respondent was not a party to the proceedings before the Madras High Court, its rights and claims against S.P.I.C. have yet to be adjudicated and cannot be adjudicated in these proceedings. The Petitioner had issued an unconditional and irrevocable Bank Guarantee for and at the behest of the Respondent. A claim under the Bank Guarantee was made upon the Petitioner by the beneficiary of the Bank Guarantee. The Petitioner as a guaranteeing Bank was bound and obliged to pay. The Petitioner did not do so, whereupon the beneficiary under the Guarantee filed a suit before the Madras High Court which, as

stated earlier, has been decreed and the Judgment of the Learned Single Judge has been affirmed by the Division Bench of the High Court. In fact, the narration of facts in the earlier paras of the Judgment would show that the Respondent had consented in the suit for injunction filed by the Respondent before the Madras High Court to the Petitioner making payment under the Bank Guarantee to S.P.I.C. In the Judgment of the Learned Single Judge of the Madras High in the suit instituted by S.P.I.C. (page 56- 57 of the Paper-Book), there is a clear reference to the fact that in the Appellate Court proceedings before the Madras High Court, the Respondent had agreed to a consent order on 31st August, 1983, by which S.P.I.C. was permitted to recover an amount of Rs. 29.65 lakhs under the Bank Guarantee bearing No. 11/80 from the Petitioner in case the Respondent failed to pay the amount within a period of one month. The Respondent having agreed to the order dated 31st August, 1983, which was passed by the Division Bench of the Madras High Court, in the Respondent's application for injunction cannot possibly be heard to complain of the payment of the due proceeds of the Bank Guarantee by the Petitioner herein.

9. Finally it may be stated that it was sought to be submitted on behalf of the Respondent that since the scheme is still to be implemented, the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will apply and the winding up Petition is not maintainable. In the Rejoinder, which has been filed on behalf of the Petitioner, at Exh. 6 is annexed an order dated 22nd September, 1995 passed by the B.I.F.R. in which it has been stated that as a result of the measures which have been adopted under the provisions of the Act. the Respondent Company has made its net worth positive as on 31st March, 1995. The B.I.F.R. concluded that the Company has ceased to be a Sick Industry within the meaning of the Act and its case no longer required to be dealt with by the B.I.F.R. The proceedings before the B.I.F.R. have been closed. The fact that as stated on behalf of the Respondent, certain payments out of the proceeds of the Immovable property at Mulund are still to be made to E.C.G.C., cannot be a ground for invoking the provisions of Section 22 of the Act.

10. The Petitioner has filed a suit against the Respondent being Suit No. 4655 of 1998 which is pending in this Court for recovering the proceeds of the Bank Guarantee. In my view, there is a debt due and payable by the Respondent to the Petitioner. The Respondent has no bona fide defence in the present winding up proceedings. In the circumstances of the case, it would be appropriate to direct the Respondent to furnish security which will enure to the credit of the suit instituted by the Petitioner for the recovery of its dues. Hence it would be in the interests of justice to pass the following conditional order :

(1) The Respondent shall within a period of 12 weeks from today furnish security in the amount of Rs. 29.65 lakhs being the total amount of Bank Guarantee in respect of which the Petitioner has made payment to the beneficiary under the Bank Guarantee. The security shall be furnished by the Respondent to the satisfaction of

the Prothonotary & Senior Master. 50% of the total amount of the security in the amount of Rs. 29.65 lakhs shall be covered by an unconditional Bank Guarantee of a Nationalised Bank to be furnished by the Respondent in favour of the Prothonotary fit Senior Master, while the balance of the amount shall be secured in the form of security to the satisfaction of the Prothonotary & Senior Master. The Bank Guarantee shall be kept alive during the pendency of the suit (4655/ 1998) instituted by the Petitioner and shall together with the security for the balance of the amount lie to the credit of the said suit.

2. Upon the failure of the Respondent to furnish the security as aforesaid, the Company Petition shall stand admitted and be liable to be advertised forthwith. In that event, the Petition shall be advertised. Petition to be advertised in Free Press Journal, Navshakti and Maharashtra Government Gazette. The Petitioner to deposit a sum of Rs. 2000/- with the Prothonotary & Senior Master within a period of four weeks from failure to furnish the security, towards publication charges.

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