Supreme Court Of India

JUDGES J.S Verma, K.S ParipoornanJJ.

Larsen & Toubro Limited v. Maharashtra State Electricity Board And Others

Civil Appeal No. 8254 of 1995

13.09.1995

Bank Guarantee – An injunction was granted where the bank guarantee which was issued was to be kept alive till the successful completion of trial operations. Court found that the guarantee which had been given by the Bank was to enure only till the successful completion of the trial operations and the taking over of the plant. The documents revealed that the contractual term in this regard has been complied with and after successful completion of the trial operation, the plant had admittedly been taken over. In view of this, it was held that the terms of the bank guarantee did not permit its invocation once the trial operations had been successfully completed – Injunction – interlocutory injunction..

B.M NaikSenior Advocate (V.B Trivedi and Bharat Sangal, Advocates, with him) for the Appellant; Harish N. Salve, Senior Advocate (A.S Bhasme, Advocate, with him) for the Respondents.

Judgment

K.S Paripoornan, J.— Leave granted.

2. The appellant, petitioner in arbitration petition Lodg. No. 240 of 1994 in the High Court of Judicature at Bombay, initiated under Section 41 of the Arbitration Act, has filed this appeal by special leave against the order passed by N.D Vyas, J. dated 20-10-1994. The appellant's prayer for injunction against the first respondent (Maharashtra State Electricity Board) from invoking or claiming or demanding or releasing any amount whatsoever under certain bank guarantees given by Respondents 2 to 5 was dismissed by the aforesaid order by the learned Judge. Respondents 1 to 5 in the arbitration petition Lodg. No. 240 of 1994 as also in this appeal are — (1) Maharashtra State Electricity Board, Bombay, (2) Standard Chartered Bank, branch Bombay, (3) Grindlays Bank p.l.c, branch Bombay, (4) Citibank, N.A, branch Bombay and (5) Bank of Baroda, branch Bombay.

3. The first respondent invited tenders for supply and commission of Coal Handling Plant. The appellant's tender, which was accepted, culminated in a contract, executed between the parties, dated 9-3-1989. The value of the contract was Rs 61,11,07,200. The appellant furnished the following five Bank Guarantees:

Name of the Bank No. of the Bank Guarantee Nature of the Bank Guarantee Amount of the Bank Guarantee in Rs Last extended date 1. Standard Chartered Bank/Respondent 2 529/88/153 Security against advance payment 5,50,30,000 31-5-1994 2. ANZ Grindlays

Bank, p.l.c Respondent 3 1101/88/384.G Performance 6,17,28,000 31-3-1995 3. Citibank, N.A Respondent 4 26247 Partial release of retention money 2,72,39,850 19-11-1994 4. Bank of Baroda, Respondent 5 73/309 Security against liquidated damage 6,13,40,978 26-9-1994 5. Standard Chartered Bank, Respondent 2 529/92/380 Partial release of retention money 1,12,00,000 31-12-1994

(Vol. II, p. 4 of paper-book)

The completion of the plant seems to have been delayed. The parties are blaming each other for the delay. After taking the trial and performance test, the plant was taken over by the first respondent on 10-6-1994. On the same day a take-over certificate was also issued. It is seen that earlier on 29-3-1994, the appellant lodged its claim. The first respondent denied the claims so made. They did not make any counter-claim then. On 4-6-1994, the appellant invoked the arbitration clause as per the contract. A meeting of the arbitrators took place on 14-9-1994. The arbitrators gave certain directions. In pursuance thereto the appellant filed its claim on 30-9-1994. The arbitrators gave time to the first respondent to file their counter-claim on or before 30-11-1994. In the meanwhile on 1-10-1994 the first respondent invoked all the bank guarantees except Guarantee No. 2 mentioned hereinabove (Performance Guarantee). The Court passed an order directing the status quo to be maintained on 17-10-1994. Appellant filed Arbitration Petition Lodg. No. 240 of 1994 and contended that the bank guarantees have been fraudulently and dishonestly invoked. Regarding guarantees in respect of advance and liquidated damages, it was further alleged that they were invoked after the date of expiry of the said guarantees. Vyas, J. rejected the above pleas and declined to grant the interim relief as prayed for by the appellant. As agreed to by counsel on both sides, the interim order was made the order in the main petition itself. Arbitration Petition Lodg. No. 240 of 1994 was dismissed. Hence this appeal by special leave.

4. We heard appellant’s Counsel, Mr B.M Naik, Senior Advocate, and Mr Harish N. Salve, Senior Advocate, who appeared for the respondents. At the outset we should make it clear that the bank guarantee relating to performance, Item No. 2 mentioned in the preceding paragraph, was not invoked and is not covered by the subject-matter of this proceeding.

5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee/irrevocable letter of credit. After survey of the earlier decisions of this Court in United Commercial Bank v. Bank of India 1981 2 SCC 766, U.P Coop. Federation Ltd. v. Singh Consultants & Engineers (P) Ltd. 1988 1 SCC 174, General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd. 1991 4 SCC 230 and the decision of the Court of Appeal in England in Elian and Rabbath v. Matsas and Matsas 1966 2 Lloyd’s Rep 495, CA and a few American decisions, this Court in Svenska Handelsbanken v. Indian Charge Chrome 1994 1 SCC 502, laid down the law thus: (SCC pp. 523-27, paras 60-72)

“... in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and

fraud has to be an established fraud....

... irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms....

... there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

6. In the order appealed against the learned Judge has referred to the decisions aforesaid and has held thus:

"... Only in the event of fraud or irretrievable injustice, the Court would be entitled to interfere in a transaction involving a bank guarantee and under no other circumstances. The petitioners have failed on both these counts."

(Paper-book — Vol. I, p. 7)

7. Appellant's counsel contended that the bank guarantees have been fraudulently and dishonestly invoked by the first respondent. It was submitted that so far as the bank guarantee towards advance was concerned, no amount remains as balance towards advance and in fact a sum of Rs 27,000 is recoverable from the first respondent. With regard to the two bank guarantees, dealing with retention money (Items Nos. 3 and 5) it was contended that the trial was taken by the first respondent after which performance test was also done and thereafter the take over was completed and so, on the basis of the contract, the first respondent was bound to return the retention guarantees. Regarding liquidated damages (Item No. 4) it was contended that the first respondent should prove that they suffered damages and quantify the same before invoking the guarantee. It was also contended that the invocation of the guarantees relating to advance and liquidated damages was after the expiry of the period. The learned Judge found that no fraud or irretrievable injustice has been made out. The Court also held that the appellant will be able to claim relief before the arbitrators by way of damages, for amounts wrongly recovered, and so no irretrievable injustice can be said to exist. The learned Judge also held that the first respondent by separate letters dated 14-9-1994 and 10-5-1994 addressed to the Bank of Baroda and Standard Chartered Bank respectively, while requesting to extend the bank guarantee, specifically stated that, if it was not so done, the communication should be treated as notice for encashment of the bank guarantee and these communications addressed to the respective banks prior to the guarantees would serve the purpose of notice to the banks and so it cannot be held that the invocation was after the date of expiry of the said guarantees.

8. Having heard counsel and on perusing the relevant records, we are of the view that the order of the Court below regarding Item No. 3 — Partial release of retention money in the sum of Rs 2,72,39,850, guarantee given by the Citibank alone requires modification. We will deal with the various items in seriatim:

Item No. 1: Security against advance payment (Advance Bank Guarantee)

The guarantee given on this count by the Standard Chartered Bank for a sum of Rs 5,50,30,000 is contained in paper-book Vol. II at pp. 109 to 113. It was agreed at the bar that the bank guarantee has not been invoked for the entire sum of Rs 5.50 crores but is limited to a sum of Rs 8 lakhs only. We find that dispute exists with regard to the said subject-matter, as is evident from the relevant papers — (Vol. II, pp. 312 and 316). It is seen from the communication dated 10-5-1994 addressed by the first respondent to the appellant, with an endorsement to the Standard Chartered Bank, that a request was made to extend the validity of the bank guarantee for a further period of 6 months, i.e, 30-11-1994 and in case the extension is not received before that date, the communication be treated as notice for encashment (Vol. II, pp. 33 to 34 of the paper-book). We are of the view that the invocation of the guarantee is in time. We hold that in the light of the dispute pending before the arbitrator, the court below was justified in declining to grant an injunction against the invocation of the bank guarantee on this count.

Items Nos. 3 and 5: Partial release of retention money

Items 3 and 5, though come under the same category, are not similar in content and scope. Item 3, relates to bank guarantee furnished by the Citibank, N.A in the sum of Rs 2.72 crores. It is a conditional guarantee. Copy of the document is available in paper-book Vol. II at pp. 122 to 126. The relevant portions in the guarantee in Vol. II at pp. 124 and 125 of the paper-book, are as follows:

“And whereas at the request of the contractors, we, Citibank N.A (hereinafter referred to as ‘The Bank’) has agreed to guarantee Rs 2,72,39,850 (Rupees two crores, seventy-two lakhs, thirty-nine thousand, eight hundred fifty only) covering the amount of the said payments till successful completion of trial operations.

In pursuance of the said agreement and in consideration of the Board making the said payment to the contractors, the Bank hereby agree with the Board as follows:

1. The Bank hereby agree unequivocally and unconditionally to guarantee the said amount released by the Board till successful completion of trial operations in due performance of the contract and undertakes to at Bombay within 48 hours on demand in writing from MSEB, or any officer authorised by it in this behalf of any amount up to and not exceeding Rs 2,72,39,850 (Rupees two crores, seventy-two lakhs, thirty-nine thousand, eight hundred fifty only) to the Maharashtra State Electricity Board on behalf of the contractors....

2. That the guarantee hereby given shall be continuing guarantee up to 19-5-1990. The validity of this Bank Guarantee will be extended one month prior to its present validity at the request of the Board for suitable period(s) till successful completion of trial operations.”

(emphasis supplied)

9. Volume II, pp. 46 to 108, contains a copy of the agreement executed between the appellant and the first respondent Board. The following clauses therein at paragraphs 70.1,

70.2, 70.3 and 70.4.01, appearing at pp. 92 to 95, are relevant in this connection. They are as follows:

"*70.1 (i)****

*(ii)****

(iii) After the precommissioning tests are satisfactorily completed equipment shall be considered ready for initial operation. During initial operation, the complete equipment shall be operated integral with sub-system and supporting equipment as a complete plant.

70.2 Trial Operation:

(i) After satisfactory initial operation, the plant shall then be put on trial operation. The period of trial operation shall be 30 days from the date of completion of initial operation. During the period of trial operation, all the necessary adjustments in the plant/equipments shall be made by the Contractor and make ready the same in all respects for performance and guarantee test. Out of the total period of 30 days of trial operation, the plant shall run for at least a period of 100 hours at the rated capacity. Out of these 100 hours a minimum of 20 hours of operation at the rated load shall be established for the mode of operation from wagon tippler to the bunker.

70.3 Performance Tests at Sites:

(i) The performance test shall be conducted at site by the Contractor, after successful completion of trial operation. The duration of the performance test of the plant at the rated capacity shall be of 2 hours. Performance Guarantee test shall in any case be conducted within 45 days of successful completion of trial operation or within the extended period as can be mutually agreed. In case the performance test cannot be conducted within a period of 75 days after successful completion of trial operation due to reasons solely attributable to owner, the time frame and method of conductance of the same shall be discussed mutually and finalised.

(v) Any special equipment, tools and tackles required for the successful completion of the performance tests shall be provided by the Contractor free of cost.

70.4.01 Upon successful completion of all the performance tests at site, the owner shall issue to the Contractor a 'Taking Over Certificate' as a proof of the final acceptance of the equipment...."

(emphasis supplied)

The first respondent Board intimated the appellant by communication dated 10-6-1994 thus:

"After reasonable completion of the Coal Handling Plant Works as per the contract 2-M Part A, capacity operation of the various equipments of CHP were planned from 15-1-1994.

Rates as well as design capacity trials were also tried. Certain points for stabilisation which were pointed to L&T were attended. Since these trials are generally satisfactory as per clauses 70.2 and 70.3, all the commissioned equipments under the contract of 2-M Part A are taken over by MSEB for regular operation and maintenance from 10-6-1994 as per clause 70.4 of Contract Agreement Vol. I."

(emphasis supplied)

The appellant wrote to the first respondent on 21-2-1994 that the plant was completed and so all bank guarantees have served their contractual requirements. On a perusal of the relevant clauses in the contract, executed between the appellant and the first respondent, and the communication of the first respondent dated 10-6-1994, it is fairly clear that the stipulations or conditions mentioned as per clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the plant was admittedly taken over by the first respondent. The guarantee given by the Citibank, N.A dated 10-5-1989 appearing in Vol. II at pp. 122 to 126 will enure only till successful completion of the trial operations and the plant is taken over. That event having ensued, the invocation of the guarantee given by the Citibank dated 10-5-1985 in the sum of Rs 2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to Respondents 1 to 4 deserves to be issued on that score. The court below was in error in not doing so. We hereby restrain Respondents 1 and 4 from invoking the bank guarantee aforesaid.

10. But Item 5 partial release of retention money, for which the second respondent, Standard Chartered Bank has given a bank guarantee for Rs 1,12,00,000 (Rs 1.12 crores) stands on a different footing. The relevant guarantee is contained in paper-book Vol. II at pp. 134 to 138. The first respondent made an ad hoc payment of Rs 1.11 crores out of the total retention amount for which the guarantee was furnished by the Standard Chartered Bank. It is an unequivocal and unconditional guarantee. We hold that no fraud or irretrievable injustice has been made out by the appellant. The court below was justified in declining to issue an order of injunction on this count.

11. The last item is covered by the guarantee specified as No. 4 hereinabove. It was furnished by the Bank of Baroda as a security against "liquidated damages". The guarantee is contained in paper-book Vol. II, pp. 129-131.

12. The Bank has given guarantee for Rs 6.13 crores against the liquidated damages recoverable by the first respondent Board, from the appellant. The relevant clauses regarding levy of liquidated damages is contained at pp. 99 and 100 of the paper-book, (clause 75.01), to the following effect:

"75.01 If the Contractor fails to complete the works as per the clause 72.01 Items 1, 2 and 3 within a period of 25 months from the date of letter of intent or within any extension of time granted by the owner then the liquidated damages shall be levied by the owner on the Contractor at the rate of 1/2% (one-half of one per cent) per week of delay of the contract price for the works limited to 10% (ten per cent) of the contract price of the works."

Appellant's counsel argued that before invoking the bank guarantee the first respondent

should have levied the liquidated damages and only for the sum so determined, and intimated to the appellant, the bank guarantee can be invoked. It was further argued that the guarantee was due for expiry on 26-9-1994 and it has been invoked after the expiry of the said period. There is no force in the above pleas. It is common ground that the arbitration proceeding for resolving the dispute between the parties (appellant and the respondent) is pending before the arbitrator. The parties are at issue as to whether the plant was completed in time or was delayed. They are blaming each other for the delay. That is a matter to be adjudicated in the proceedings. It is also brought to our notice that the first respondent has claimed liquidated damages as per clause 75.01 of the contract of more than eight crores — much more than the amount of Rs 6.13 crores guaranteed. Since the decision in the arbitration proceedings has an impact on this aspect, we are of the view that no prima facie case of fraud or irretrievable injustice is made out to restrain Respondents 1 and 5 from invoking the bank guarantee. Perusal of the communication dated 14-9-1994, sent by the first respondent to the appellant and also to the Bank of Baroda appearing in paper-book Vol. I at pp. 35 to 36, will show that a request to extend the validity of the bank guarantee which was to expire on 26-9-1994, was made and if not so done, the communication was to be treated as notice for encashment of the bank guarantee. The plea that the invocation was not in proper time is also without substance.

13. In the result, we hold that the appeal succeeds in part. The appellant is entitled to an order of injunction, to a limited extent, against Respondents 1 and 4 (Citibank, N.A), restraining them from invoking the bank guarantee given by the fourth respondent — Citibank, N.A dated 10-5-1989 (Item 3 stated hereinabove) (Vol. II at pp. 122 to 126 of the paper-book). Subject to the above modifications, the order passed by the court below dated 20-10-1994 is affirmed. In the circumstances, there shall be no order as to costs.