

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 12th July, 2010.

+ W.P.(C) 7800/2008

ORG INFORMATICS LTD

..... Petitioner

Through: Ms. Arti Bansal & Mr. Sanjiv Goel, Advocates

Versus

MTNL & ORS

..... Respondents

Through: Mr. Ravi Sikri & Mr. Vaibhav Kalra,
Advocates for respondent no.1.
Mr. Vipin Jai, Advocate with Mr. B.K. Mangla
& Mr. Shailly Dinkar, Advocates for
Respondent no.2.
Mr. Rahul Dhawan, Advocate for respondent
no.3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. The petitioner by this writ petition seeks to restrain the respondent no.1 MTNL from invoking / encashing the Performance Bank Guarantee furnished by the respondent no.2 Bank at the instance of the petitioner to the respondent no.1 MTNL. The petitioner also seeks return of the deed of said Bank Guarantee.

2. It is not in dispute that the Bank Guarantee in question is unconditional. The law with respect to the said Bank Guarantee need not be restated. It has

been repeatedly held that there can be no stay of encashment or interference with such Bank Guarantees.

3. The counsel for the petitioner however claims restrain on encashment and return of the Bank Guarantee contending that the agreement in consideration of which the said Bank Guarantee was furnished has since been assigned by the petitioner with the consent of the respondent no.1 MTNL in favour of the respondent no.3. It is thus contended that the agreement along with its benefits and obligations having been assigned in favour of the respondent no.3 and the respondent no.3 having furnished an identical Performance Bank Guarantee in favour of the respondent no.1 MTNL, the respondent no.1 MTNL ceased to have any right to invoke the said Bank Guarantee. Reliance in this regard is placed on Clause 12 of the Tri Partite agreement dated 11th April, 2008 between petitioner, respondent no.1 and the respondent no.3 and which is as under:

“12. The AGREEMENT together with the Schedules, Annexures annexed hereto constitute the entire AGREEMENT between the parties and revokes and supersedes all previous discussions/correspondence between the parties, if any, concerning the matters covered herein whether written, oral or implied. There are no representations, warranties, terms and conditions binding the parties, which are not expressly set out in this AGREEMENT”.

4. This Court vide order dated 4th November, 2008 which continues to remain in force restrained the respondent no.2 Bank from releasing the amount under the Bank Guarantee which had already been invoked, to the respondent

no.1 MTNL.

5. The respondent no.1 MTNL has opposed this petition by raising three contentions. Firstly, it is contended that the agreement between the petitioner and the respondent no.1 MTNL as well as the Tri Partite Agreement aforesaid both contain a Clause for arbitration of disputes and differences arising between the parties. It is contended that the alternative remedy of arbitration agreed to by the parties for resolution of all the disputes being available, the writ jurisdiction ought not to be permitted to be invoked. Secondly, it is contended that the Bank Guarantee has been invoked for the dues owed under the Agreement by the petitioner till the date of Tri Partite agreement aforesaid. Lastly, it is contended that the respondent no.1 MTNL is interested in recovering its dues, be it from the petitioner or from the respondent no.3 and if the respondent no.3 is willing to make a statement that, notwithstanding the dues owing whereto the Bank Guarantee has been invoked being for the period prior to the date of the Tri Partite agreement, it is liable for the same, the respondent no.1 MTNL has no objection and will recover the same from the respondent no.3 or from the Bank Guarantee furnished at the instance of the respondent no.3.

6. The counsel for the respondent no.3 states that a counter affidavit has been filed. However, the same is not found on record. A copy thereof has been handed over in the Court. The counsel for the respondent no.3 has denied that the respondent no.3 can be held liable for the claims, if any, of the

respondent no.1 MTNL of the date prior to the date on which the agreement was assigned by the petitioner in favour of the respondent no.3.

7. As far as the first of the aforesaid objections of the respondent no.1 MTNL is concerned, the counsel for the petitioner relies on:

- (i) ***Popcorn Entertainment Vs. City Industrial Development Corporation*** (2007) 9 SCC 593.
- (ii) ***Harbanslal Sahnia Vs. Indian Oil Corporation Ltd.*** (2003) 2 SCC 107.
- (iii) ***R.K. Machine Tools Ltd. Vs. Union of India***, WP(C) No.13457/2009 decided on 11th February, 2010.

to contend that the rule of alternative remedy is not an absolute rule but a rule of discretion. In each of those cases notwithstanding the alternative remedy being available, the Court finding either that fundamental rights were involved or finding a grave mistake to have been committed declined the objection to maintainability on ground of alternative remedy. However, the same cannot be said to be the case here. None of the judgments cited are with respect to monetary claims as in the present case or relate to Bank Guarantee. No fundamental rights of the petitioner can be said to be involved in the aforesaid disputes. Thus, the objection taken by the respondent no.1 MTNL as to the maintainability of the present writ petition particularly when the same entails disputed questions of fact as aforesaid has merit.

8. That brings me to the next aspect of the case that is whether from the Tri Partite agreement aforesaid, it could be said that the liabilities of the petitioner

under the Bank Guarantee also stood extinguished. The counsel for the petitioner has been unable to show any Clause in the Agreement whereunder the respondent no.1 MTNL may have agreed to the return of the said Bank Guarantee. Else, it transpires that under the Agreement first executed between the petitioner and the respondent no.1 MTNL, the petitioner was entitled to assign the rights in the Agreement to its associate company and the petitioner had represented to the respondent no.1 MTNL that the respondent no.3 was its associate company and had also undertaken that the share holding of the petitioner in the respondent no.3 shall never be diluted below 20% during the currency of the Agreement. From the said terms, it would appear that the assignment was a matter of convenience of the petitioner. The same was not to affect or prejudice the right if any of the respondent no.1 MTNL. In so far as the reliance on Clause 12 of the agreement is concerned, the Tri Partite Agreement as aforesaid does not deal with the rights which may have accrued to the parties till the date of the Tri Partite agreement and nowhere confirms that as on that date the respondent no.1 MTNL has no claims whatsoever under the agreement. The Clause 12 has to be read in the said context, as revoking and superseding the discussions and agreements relating to the matters catered therein i.e. of assignment. It cannot be read as extinguishing the liability if any as on that date of the petitioner. However, this discussion is only to show that the action of the respondent no.1 MTNL cannot be said to be so illegal or arbitrary so as to invite interference by this Court in writ jurisdiction. This Court is neither competent to nor has weighed the disputed questions of law

and fact involved in the controversy and the aforesaid ought not to be construed as a final opinion on the liability of the petitioner. The petitioner would have liberty to raise the disputes before an appropriate forum.

9. The Bank Guarantee is an independent contract. In the absence of any provision in the Tri Partite Agreement to the effect that the said Bank Guarantee has come to an end or that respondent no.1 MTNL has ceased to have any right therein, the purpose for which the Bank Guarantee was obtained i.e. of the respondent no.1 MTNL receiving the monies irrespective of any disputes raised, cannot be allowed to be defeated. The petitioner and the respondent no.3 for their *inter se* disputes, if any, and which also do not inspire confidence considering that the assignment in favour of the respondent no.3 was allowed on the representation of it being an associate company of the petitioner, cannot be allowed to deprive the respondent no.1 MTNL of its claims under the Bank Guarantee. The petitioner thus cannot be held to be entitled to the orders sought.

10. This brings me to another aspect of the matter. The matter was listed on 22nd March, 2010 when the counsel for the petitioner in the absence of the counsel for the respondent obtained adjournment representing that settlement talks were on between the parties. The counsel for the respondent no.1 MTNL subsequently mentioned the matter and denied that there were any compromise talks. In these circumstances, the date was preponed and the petitioner was directed to file an affidavit explaining the circumstances in which

representation was made to the Court of the settlement being under way. The petitioner in response to the said direction has filed the affidavit of one Mr. Puneet Anurag but which does not show as to what is his authority to file the affidavit or what is his designation in the petitioner company. The counsel is also unable to give any information about the same. In any case, in the said affidavit, it is only stated that the communications were misunderstood on behalf of the petitioner. The only inference to be drawn is that the petitioner by taking adjournment was seeking to perpetuate the interim order of restrain of payment under the Bank Guarantee.

11. The Supreme Court in *Abhimanyoo Ram Vs. State of U.P.* MANU/SC/8524/2008 and also recently in *Ramesh Chandra Sankla Vs. Vikram Cement* AIR 2009 SC 713 has held that the Court at the time of final disposal must balance the equities flowing from the interim order and that a litigant cannot retain the benefit of an interim order. Following the said dicta this Court in *Green Delhi Bqs Ltd. Vs. Delhi Transport Corporation* MANU/DE/1333/2009 while vacating the stay with respect to the encashment of Bank Guarantee had directed the petitioner therein who had obtained the stay, to pay interest on the amount of the Bank Guarantee for the reason of depriving the beneficiary of the amount thereof. The said order was upheld by the Division Bench of this Court.

12. Following the said dicta, while dismissing the writ petition and directing the respondent no.2 Bank to immediately release the amount under the Bank

Guarantee in favour of the respondent no.1 MTNL, the petitioner is also directed to pay interest at the rate of 9% per annum on the amount of the Bank Guarantee, i.e. Rs.25,00,000/-, from 4th November, 2008 i.e. when the stay was obtained till three days hereafter. The said amount be paid within six weeks hereof. It is further clarified that the view, expressed hereinabove is only as in the case of interim relief and it shall remain open to the petitioner to raise a dispute claiming the amounts aforesaid from the respondent no.1 or from the respondent no.3 or jointly from them. The petition is disposed of. Since interest has been awarded, no order as to costs.

RAJIV SAHAI ENDLAW, J

JULY 12, 2010

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