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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JRISDICTION

NOTICE OF MOTION NO.605 OF 2015
IN
SUIT NO.320 OF 2015

Reliance Industries Limited & Anr. ...Applicants
In the matter between
Reliance Industries Limited & Anr. ...Plaintiffs
V/s.
State Bank of India & Ors. ...Defendants

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Dr. Milind Sathe, Senior Counsel, a/w Mr. Ankit Lohia, Rishit Badiani, Ms. Reshma Ranadive, Mr. Ketan Dave, Abhishek Dimri i/b. M/s. A. S. Dayal and Associates for the Plaintiff's.
Mr. Rupesh Ramchandra Lanjekar for the Defendant No.1.
….......

CORAM : A. K. MENON, J.

DATE : 16TH OCTOBER, 2015.

P.C.:

By the present Notice of Motion, the plaintiffs are seeking an order preventing invocation/encashment or payment/ receipt of monies in respect of the two Letters of Credit both dated 25th July, 2008 copies of which appears at Exhibit G & H. The Letters of Credit are issued by the defendant no.2 United Bank Limited in favour of the Republic of Yemen through the Ministry of Oil and Minerals pursuant to Production Sharing Agreements between the plaintiffs on one hand and the defendant nos.3

and 4 as well as the Republic of Yemen on the other. Based on the aforesaid Letters of Credit the defendant no.1-State Bank of India issued counter guarantees. The State Bank has issued the counter guarantees by letter dated 6th August, 2008, copy of which appears at Exhibit-I. By virtue of the agreement dated 6th August, 2008 arrived at between plaintiff no.1 and defendant no.1, the defendant no.1 agreed to undertake the obligation to accept and pay drafts raised under Letters of Credit issued at the request of the plaintiffs. Pursuant to the said agreement between the plaintiffs and the first defendant, the defendant no.1 acting on behalf of plaintiff no.2 issued a request to the first defendant to establish Standby Letters of Credit to arrange for the defendant no.2, a Bank inter alia carrying a business in Yemen. These Letters of Credit were accordingly issued. Thus, the State Bank of India became liable to pay any amounts demanded by the defendant no.2 Bank on account of failure or delay in performance of the contracts. The plaintiffs seeks a permanent injunction, restraining the aforesaid defendants and their servants, agents, officers from invoking, encashing or paying monies under the Letters of Credit and the corresponding counter guarantees.

2] Pursuant to two Production Sharing Agreements both dated 20th November, 2007 in respect of the block nos.34 and 37 (where the plaintiff no.2 along with defendant nos.3 and 4 were to carry out exploratory work) the plaintiffs had undertaken necessary studies in furtherance of its intention to pursue oil exploration in the said block. 34 and 37 of the Jeza Basin. The Contract consists of two consecutive periods of performance namely the “Exploration Period” prior to discovery of oil and “the Development Period” which would come into effect after commercial discovery of oil.

3] It is the plaintiffs case that the aforesaid contracts were frustrated and rendered impossible of performance on account of the serious law and order situation prevailing in Yemen and more particularly due to the collapse of the Republic of Yemen and the continuing force majeure events in the region. The plaintiffs have set out in the plaint the attempts made by plaintiff no.2 as a contractor to perform the Production Sharing Agreements. The particulars of the steps taken by the plaintiffs are set out in paragraph 25 to 28 which state the relevant particulars and the difficulties faced by the plaintiffs in the performance of the contract. The plaintiffs have also stated that they were able to make very little progress and their sub-contractor M/s. Integra was unsuccessful in conducting a seismic survey which was one of the pre-requisites of the contract. Repeated attempts by the said sub-contractor to mobilize technical man power to resume the seismic survey failed due to the situation prevailing in Yemen and the region which, inter alia, was caused by travel advisories alerting persons against travelling to the region due to the threat to life and liberty and the safety of employees and equipment. The plaintiffs have thereafter set out the steps taken by them in an attempt to deal with the situation but ultimately it was impossible for them to perform their obligation under the contracts.

4] It is the plaintiffs case that the conditions prevailing are contemplated in Article 22.2 of the Production Sharing Agreements which provides for force majeure resulting in suspension of operation. However, the plaintiffs were concerned about the attempts of certain interested parties who were not parties to the Production Sharing Agreements but who contended that the plaintiffs had failed in performing the agreements and that non-performance of delay could result in enforcement of claims under which they were secured by the Letters of Credit and counter guarantees issued by defendant no.1.

5] Dr. Sathe, the learned senior counsel appearing on behalf of the plaintiffs has taken me through the relevant contractual provisions, the terms of the Letters of Credit and the Counter Guarantees. On a reading of the Letters of Credit, it is clear that these were intended to be continuing Letters of Credit, the first of which was standby credit of USD 11 to 13 million bearing no. 116/08 and the the second letter for USD 14 million bearing no. 117/08. It is the case of the plaintiffs that the value of the second Letter of Credit has since been reduced from 14 million US dollars to 12 million US dollars. The value of both the standby Letters of Credit were thereafter reduced by US Dollar 1 million each. Vide letter dated 9th January, 2011 the banks confirmed that the value of the standby Letters of Credit now stand reduced to U. S. Dollars 12 million and U.S. Dollars 13 million respectively and which continue to be operational for a total sum of U.S. Dollars 25 million.

6] Upon the situation in Yemen deteriorating the plaintiff's were forced to invoke the Force Majeure provision and vide letter dated 17th March, 2015 addressed to the Deputy Chairman for Exploration Affairs, advised them that the obligations of the plaintiff's under the Production Sharing Agreements stand suspended due to the operation of the Article 22.1 of the Production Sharing Agreements and that accordingly all Letters of Credit stand suspended during the continuance of the Force Majeure events. A copy of this letter has been marked to the other partners under the Production Sharing Agreements.

7] Vide a letter dated 18th March, 2015 the plaintiffs also intimated the first defendant of the suspension of the Letters of Credit on account of Force Majeure and requested the first defendant to confirm that the counter guarantees issued by the first defendant shall also stand suspended. The first defendant, however, vide their response letter dated 18th March, 2015 informed the plaintiff's that the counter guarantees issued do not provide for any suspension based on the Force Majeure events and that their undertaking under the standby letters of Credit to the issuing bank i.e. defendant no. 2 is to make payment within two days from receipt of the claim unless the first defendant is closed due to existence of a Force Majeure event in India. The first defendant informed the plaintiffs that if they received a claim from the second defendant, they would be constrained to make payment in compliance with the counter guarantees. By reason of this position, the plaintiffs have prayed that defendants be restrained as aforesaid.

8] The State Bank of India are represented by counsel who has on instructions, stated that they are submitting orders of the Court. As far as defendant nos.2, 3 and 4 are concerned, affidavits of service have been filed. No appearance has been entered on their behalf. Dr. Sathe submitted that in view of this factual position and the situation prevailing in Yemen the plaintiffs are entitled to protection. Dr. Sathe relied upon a decision of the ***United States District, Itek Corporation V/s. The First National Bank of Boston*** and submitted that a similar situation arose in Iran in April 1979 where the head of the Imperial Government was driven into exile and the Kingdom of Republic of Iran was taken over. A Force Majeure, notice came to be issued. First National Bombay and Boston had issued standby Letters of Credit in favour of a Iranian Bank Melli. Irreparable harm was likely to be caused if the Letter of Credit was negotiated and it would have had an adverse impact on the issuing banks. In the circumstances, preliminary injunction was granted. Learned counsel further submitted that the Hon'ble Supreme Court in ***U.P. State Sugar Corporation V/s. Sumac International Ltd. (1997) 1 Supreme Court Cases 568,*** the view taken in the judgment of the United States District (supra) was approved. Specific reference was made to paragraph 14 wherein the Hon'ble Supreme Court has adopted a similar view and observed that there was good reason in that case the Court was prima facie satisfied in granting injunction. Dr. Sathe, therefore, submitted that in the present case the ad-interim injunctions granted on 24th March, 2015 are liable to be confirmed.

9] Dr. Sathe for the plaintiffs submitted on instructions, that the plaintiffs have already invoked the Arbitration Proceedings under the Production Sharing Contracts and that the proceedings are now under way. Having considered the factual aspects and having heard learned counsel, I am of the view that in view of the invocation of the Force Majeure provision and the effect thereof, the plaintiffs are entitled to be protected. The balance of convenience also rests in favour of the plaintiffs. None of the other defendants have chosen to appear. The Republic of Yemen is not a party to the suit due to the collapse of the regime, Accordingly I pass the following order:-

(i) The Notice of Motion is made absolute in terms of clauses (a) and (b) which read as follows:-

> (a) that pending the hearing and final disposal of the suit, this Court be pleased to restrain the defendants or any of them either by themselves or through their servants, agents, officers and subordinates from in any manner invoking, encashing, paying or receiving moneys in respect of the Letters of Credit dated 25th July, 2008 and respective counter-guarantees in any manner whatsoever;
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> (b) that pending the hearing and final disposal of the suit, this Court be pleased to restrain defendant nos.1 and 2 either by themselves or through their servants, agents, officers and subordinates in any manner making any payment in respect of

and and Letters of Credit dated 25th July, 2008 and respective counter guarantees under the Indemnity and Agreement dated 6th August, 2008.

(ii) The plaintiff's shall serve the copy of this order upon the defendant nos.2 to 4 as also the Republic Yemen through whatever channels available and file an affidavit of service/attempted service within a period of four weeks from today.

(iii) In the event governance is restored in Yemen, the legitimate regime will have liberty to apply.

(iv) There will be no orders to costs.

(A. K. MENON, J.)

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