HON'BLE SRI JUSTICE SURESH KUMAR KAIT

WRIT PETITION No.20875 of 2014

ORDER:

Vide the present petition, the petitioner seeks Mandamus declaring the action of the respondents No.1 and 2 in not honouring the commitments made under Bank Guarantee Nos.32 to 39/2011-12 & 39/2010-11 issued in favour of the petitioner for and on behalf of the 3rd respondent, as illegal and violative of Articles 14, 19 and 300 A of the Constitution of India and consequently to direct them to pay the amount of Rs.4.89 crores covered under the said Bank Guarantees to the petitioner with interest @ 18% p.a. from 13.03.2013.

Heard the learned Senior Counsel for the petitioner and the learned counsel for the respondents.

Learned Senior Counsel for the petitioner submits that the petitioner is a company, incorporated under the provisions of the Companies Act, 1956 and it had entered into Memorandum of Understanding (MOU) dated 27.05.2011 with the 3rd respondent for execution of part of the work involving upgradation to 2 lane of Chhindwara-Multai section of NH 69A stretching from Km 192.700 to Km. 244.425 for a value of Rs.100 crores as an Item Rate contract. Pursuant to the allotment of the said work, the 3rd respondent, towards performance security, made advance payments to them. Accordingly, furnished the Bank Guarantees bearing Nos. 32 to 39/2011-12 & 39/2010-11, dated 18.08.2011, 23.09.2011 and 07.02.2011 through the 1st respondent bank being the guarantor for Rs.10 crores. The Bank Guarantees furnished by the 1st respondent are in the nature of irrecovable, unconditional and absolute, which could be invoked by the petitioner with a written demand notice to the 1st respondent bank. He submits that because of the 3rd respondent slow rate of execution of work, the petitioner issued a letter dated 21.02.2013 asking the 3rd respondent to accelerate/speed-up the execution of work. Despite repeated reminders, the 3rd respondent failed to do so. Consequently, the petitioner issued a letter, dated 01.03.2013 for terminating the MOU dated 27.05.2011. Due to failure of the said work by the 3rd respondent, the petitioner suffered huge financial loss which forced the petitioner to issue a letter dated 13.03.2013 to the 1st respondent invoking all the aforementioned bank guarantees.

Learned Senior Counsel further submits that the 1st respondent, even after receipt of reminders from the petitioner, vide letters dated 13.03.2013, 21.03.2013, 27.03.2013 and 04.04.2013, did not honour the invoked Bank Guarantees. Challenging the inaction of the 1st respondent, the petitioner filed W.P.No.11545 of 2013 before this Court and the same was disposed of vide order dated 29.04.2013, whereby the respondents No.1 and 2 were directed to release the amount of Rs.5.11 crores.

Learned Senior Counsel argued that the 1st respondent filed O.A.No.39 of 2013 and also filed four Interlocutory Applications before the Debts Recovery Tribunal (DRT), Visakhapatnam, which are as under:

S.No.	I.A No.	Date of filing	Relief Sought
01	82/2013	29-01-2013	For attachment as against the alleged amounts in the hands of the respondents 17 and others.
02	295/2013	30-03-2013	To appropriate the extent of receivables due from the garnishee M/s. KNR Constructions and attached in pursuance of orders in IA 82/2013 towards the amounts of bank guarantees invoked by the said garnishee
03	309/2013	12-04-2013	Permission to deposit the differential amounts between the amounts attached in the hands of the garnishee M/s KNR Constructions Private Ltd and the bank guarantee amounts invoked.
04	276/2013	30-03-2013	To permit the petitioner bank to withhold and appropriate the extent of the receivables due from the garnishee M/s KNR Constructions.

S.No.	I.A No.	Date of filing	Relief Sought
01	407/2013	31-05-2013	To determine the issue of the jurisdiction of the DRT for passing garnishee order before judgment as a preliminary issue.
02	408/2013	31-05-2013	Direction to the applicant bank to pay, Rs.4,89,76,532/- the amount withheld by it under the invoked bank guarantee.
03	404/2013	13-06-2013	To clarify the order dt.01-02-2013 in I.A.No.82/2013 that there is no interim attachment order as against the payable bank guarantee amount by the respondent bank.

Accordingly, the DRT, Visakhapatnam passed interim order dated 01.02.2013 in I.A.No.82 of 2013. However, dismissed all the I.As filed by 1st respondent bank and allowed the I.As filed by the petitioners by a common order dated 11.7.2014. While dismissing the I.A.No. 82 of 2013 filed by the 1st respondent categorically observed that the 1st respondent bank has miserably failed to prove that the petitioner is indebted to the 3rd respondent company.

The 1st respondent bank filed its counter-affidavit, whereby stated that there are serious disputed questions of facts, under which, the 2nd respondent bank has exercised the right of setoff as against the petitioner, and therefore, seeking for adjudication of the disputed facts in writ proceedings was *per se* not maintainable. Further, the matter was seized by the DRT, Visakhapatnam in O.A.No.39 of 2013 and the petitioner is Respondent No.17 therein. However, by suppressing the facts, the petitioner has approached this court.

Learned counsel appearing on behalf of the 1st respondent bank submits that with regard to the dismissal of applications in I.A.Nos.82 of 2013, 295 of 2013 and 309 of 2013, the bank has already approached DRT, Kolkatta and the appeal since seized by the DRT (with TA No.223 of 2014, 224 of 2014 and 225 of 204 filed on 25.09.2014) concerning the subject relief, therefore, the present petition is not maintainable.

Learned counsel further submits that the 1st respondent bank has no concern or connection in the matter of issuance of the bank guarantee and the underlying obligations, as the 2nd respondent branch of SBI is proper and necessary party, and effective adjudication can be made by joining the 2nd respondent alone. Hence, the 1st respondent being the Chairman and Managing Director of the Bank may be struck off from the array of the parties.

Learned counsel further submits that the respondent bank has invested with the statutory rights under the provisions of Indian Contract Act, 1872 (for short "the Act") in the matters of exercise of its right and under Section 171 of the Act. He submits that the petitioner cannot be permitted to assail the rights of the respondent bank as conferred under the provisions of the Act. He has fairly conceded that the petitioner invoked all the Bank Guarantees aggregating to Rs.10 crores.

Learned counsel further submits that in para-7 of the counter-affidavit, it is stated that the petitioner invoked all the Bank Guarantees aggregating Rs.10 crores vide letter dated 13.3.2013. (However, the said figure is written mistakenly, whereas exact figure is Rs.9 crores). It is incorrect to state that the 2nd respondent refused to honour the notification of the bank guarantees without assigning any reasons.

During the time of arguments in WP No.11545 of 2013, the 2nd respondent reported to this Court that the order of attachment against the petitioner for a sum of Rs.4.89 crores from the DRT, Visakhapatnam was obtained and at that juncture, the undisputed amount of Rs.5.11 crores were directed to be released and accordingly the respondent bank was obliged to pay Rs.5.11 crores out of Rs.10 crores.

The petitioner also filed its reply affidavit, whereby stated that Bank Guarantee is an independent contract. The 3rd respondent furnished bank guarantee through the 2nd respondent towards performance, security and advance payments and the said Bank Guarantees are in the nature of irrecovable, unconditional and absolute guarantees, which can be invoked by the petitioner with a written demand. The Bank Guarantees are furnished by the 3rd respondent towards security for complying with the 3rd respondent obligations in accordance with the terms of MOU dated 27.05.2011 entered into between the petitioner company and the 3rd respondent. Despite of repeated reminders, the 3rd respondent failed to show any quantitative improvement. Consequently, the petitioner terminated the MOU vide its letter dated 01.03.2013.

By this reply counter affidavit, it is specifically stated that the petitioner does not owe a single pie to the 3rd respondent and there are no securities whatsoever in the hands of the petitioner which are payable to the 3rd respondent and further the 3rd respondent owes an amount of Rs.11,07,16,505/- to the petitioner company. The 2nd respondent is restrained in exercising a right of general lien under Section 171 of the Indian Contract Act, 1872 against the petitioner company to the conditions mentioned in the Bank Guarantee. Accordingly, the 2nd respondent is restrained from exercising right of setoff contrary to the conditions stipulated in the Bank Guarantee.

Learned counsel for the respondent bank has drawn attention of this Court to the MOU entered into between the petitioner and the 3rd respondent dated 27.5.2011, however, failed to point out how the petitioner is bound to pay the amount due to the 3rd respondent.

The learned counsel for the petitioner has also drawn attention of this Court to Agreement of Loan for Overall Limit, Form C.1 to clause 13, which is at page-43 of the paper book filed by the respondent bank, whereby stated in clause 13, as under:

> *"13. Registers of immovable properties and goods book-debits, movables and other assets hypothecated/ pledged/ mortgaged or otherwise charged to the Bank shall be kept by the borrower in respect of each of the aforesaid credit facilities and such registers shall contain all particulars of such immovable properties and goods book-debts movables and other assets hypothecated, pledged, mortgaged or otherwise charged and/or such immovable properties and goods book-debts, movables and other assets as have been released by the bank and withdrawn by the Borrower. Such Registers shall at all times be open for inspection of the Bank and the Borrower shall if so required by the Bank furnish to the bank daily or at such intervals as the Bank may direct from time to time a schedule or copy of all the entries which shall have been made in the said Registers."*

This clause also does not say that the petitioner Bank Guarantees can be invoked for the amount due to the 3rd respondent. Moreover, as per **clause 53,** the petitioner is not bound to pay any amount to the respondent bank, due to 3rd respondent. The same is reproduced as under:

> *(i) the Borrower irrecovably constitutes and appoints the Bank to be the Borrower's true and lawful attorney to do and in the name and on behalf of the Borrower and where the Borrower is more than one individual jointly and severally, all or any of the following acts deeds and things, that is to say :*
>
> (a), (b), (c),……
>
> *(d) To demand and receive all debts, sums of money, principal money, dividends interest and dues of whatever nature;*

It is an admitted fact that in the present case the petitioner was the individual borrower but not the joint borrower with the 3rd respondent. A perusal of Clause 53 as noted above, in my considered opinion, if the borrowers are two or more, then the respondent bank has a right to recover the amount jointly or severally, but not in the case on hand.

It is not in dispute that the petitioner has also filed its categorical objections on 23.06.2013 before the DRT, Visakhapatnam in O.A No.39 of 2013 by categorically stating that the website/Mail id i.e., knrconstruct@gmail.com does not belong to the petitioner. In fact the petitioner has filed documentary evidence in the said IA No.82/2013 to the fact that the 3rd respondent owes an amount of Rs.11,07,16,505/- to the petitioner company. The DRT, after considering all the documents, has given a categorical finding that the 2nd respondent failed to prove that the petitioner is indebted any amount to the borrower company.

It is also not in dispute that the respondent bank has lost its battle before DRT, Patna, against which, the appeals filed on 25.09.2014 vide TA No.223 of 2014, 224 of 2014 and 225 of 2014 are pending adjudication. But there is no stay granted by the Appellate Tribunal. Thus, the petitioner has judicial order in their favour, whereas the respondent lost its battle. In the garb of other provisions which are not applicable in case of the petitioner, the respondent bank cannot withhold the amount which otherwise the petitioner is entitled to.

In view of the above discussion, I hereby direct the respondents No.1 and 2 to pay an amount of Rs.4.89 crores covered under the Bank Guarantees to the petitioner with interest @ 9% p.a. from 13.03.2013 within four (04) weeks from today.

I hereby make it clear that if the respondents No.1 & 2 fail to pay the amount within the time framed by this Court, the petitioner shall be entitled to the interest @ 18% p.a. on delayed payment.

I further make it clear that the order passed by this Court shall be subject to the outcome of the case before the Appellate Tribunal.

With the above direction, the Writ Petition is disposed of. No costs. Pending miscellaneous petitions, if any, shall stand closed.

JUSTICE SURESH KUMAR KAIT.

Date :21-09-2016
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