IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.38 OF 2017
IN
COMMERCIAL SUIT NO.55 OF 2017

Tag Offshore Ltd. … Applicant

In the matter between

Tag Offshore Ltd. … Plaintiff
Versus
The Board of Trustees of Port of Bombay And 2 Others … Defendants

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Mr. Rahul Narichania, a/w. Mr. Kunal Shah, i/b. Bhatt & Saldanha, for the Plaintiff.

Mr. E.P. Bharucha, Senior Advocate, a/w. Mr. Ajai Fernandes and Ms. Sneha B. Pandey, i/b. Motiwalla & Co., for Defendant Nos. 1 and 2.

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CORAM : S.C.GUPTE, J.

DATED : 21 JUNE 2017

P.C.:

. Heard learned Counsel for the parties.

2. This Commercial Suit is filed by the Plaintiff seeking return of two bank guarantees and a perpetual injunction against Defendant Nos. 1 and 2 from invoking or encashing, or receiving any monies under, the same.

3. Initially, learned Counsel for the Plaintiff began his arguments

for ad-interim reliefs, on the footing that the matter required urgent orders. Defendant Nos. 1 and 2 had served a reply affidavit on the Plaintiff just day before yesterday and that, in the premises, the Plaintiff was allowed to argue the matter on the basis of denials. In the midst of the hearing, it was, however, decided by consent of both the parties, that the motion itself may be heard and decided by this Court by permitting the Plaintiff to proceed on denials. The matter is heard accordingly.

4. On 24 July 2013, the Plaintiff's vessel 'Nand Heera' collided with the Rim Bascule Bridge at Mumbai Port managed by Defendant Nos. 1 and 2. It is the Defendants' case that the collision caused damage to the Port property and entailed financial losses to Defendant No.1. As a result, the vessel was detained by Defendant No.2. After negotiations between the parties, on 20 August 2013, two bank guarantees were furnished by the Plaintiff to Defendant Nos. 1 and 2, one for a sum of Rs.1.47 crores, towards the Defendants' claim for repairs, and the other in the sum of Rs.2.63 crores, towards the business or revenue losses suffered by the Defendants and repair costs of the bridge over and above the sum of Rs.1.47 crores. The vessel was released against these two bank guarantees. The bank guarantees are now sought to be invoked by Defendant Nos. 1 and 2. The Plaintiff's objection to such invocation, as spelt out in the plaint, is that, in pursuance of the bank guarantees and subsequent discussions between the parties from time to time, the parties agreed that there would be no repairs and that pending determination of overall losses incurred by Defendant Nos. 1 and 2, as a result of the collision, encashment of both bank guarantees would be kept in abeyance. It is submitted by the Plaintiff that the bank guarantees were furnished by the Plaintiff to the

Defendants with a view to avoid detention of the vessel and without prejudice to its rights and contentions, including its right to challenge the quantum of the claim of repairs and business losses made by the Defendants. The Plaintiff submits that no pecuniary liability arises against the Plaintiff either till a mutual written agreement is arrived at between the parties or till this Court determines the Plaintiff's liability. It is submitted that until either of these events occurs, there is no entitlement on the part of the Defendants to invoke /encash the bank guarantees.

5. As far as the first bank guarantee, namely, Bank Guarantee No.402LGO485/13 dated 20 August 2013 (the guarantee of Rs.1.47 crores towards the repairs claim), is concerned, it is apparent that the bank guarantee was an unconditional and without demur guarantee on demand "*in respect of estimated cost of repairs for damage to Rim Bascule Bridge alleged to have been caused by the said vessel to the said bridge as a result of the incident*". The third Defendant bank undertook to pay amounts due under the guarantee "*unconditionally and without any demur upon a written demand by the Port*" subject to the maximum provided for therein, namely, Rs.1.47 crores. In the first place, this bank guarantee does not envisage actual carrying out of repairs. It is a guarantee towards the "*estimated cost of repairs*". So long as the invocation is in accordance with the terms of the guarantee, namely, by a written demand by the Port, no exception can be taken to it. There is no case of fraud or special equities pleaded before the Court. On these facts, it is not permissible to the Plaintiff to seek a restraint on invocation of this guarantee. (As of now, there is, infact, no invocation. The Plaintiff has come to the Court on a threatened invocation in the letter addressed to it by Defendant No.1 on 21 October 2016.)

6. Learned Counsel for the Plaintiff submits that in any event the claims of Defendant Nos. 1 and 2 for which these bank guarantees are invoked are barred by the law of limitation. The submission runs counter to the argument of the Plaintiff recorded earlier, namely, that pending determination of overall losses incurred by Defendant Nos.1 and 2, as a result of the collusion, encashment of both bank guarantees would be kept in abeyance. For if that be so, the Plaintiff's case in fact is that the invocation of the bank guarantees is premature. It cannot possibly be barred by the law of limitation. In any event, there is no *prima facie* substance in the contention that the invocation of the bank guarantees is barred by limitation. The bank guarantees have been renewed from time to time in pursuance of subsequent discussions between the parties, such renewal being borne out by the record of the case.

7. As far as the second bank guarantee, namely, Bank Guarantee No.402LGO486/13 dated 20 August 2013 is concerned, the bank guarantee is, however, clearly conditional upon "*any sum or sums that may be found to be due to the Board in respect of its claim for loss of revenue and balance of repair costs in excess of Rs.1.47 crores in connection with the subject incident* ***which may be determined either by a mutual written agreement between the board and the owners/P & I Club or by a judgment of the Bombay High Court***". The guarantee is to pay unconditionally and without demur this sum or sums determined in the manner provided for. The bank guarantee further provides that Defendant No.1 will submit its claim for the alleged loss of revenue and balance of repair costs in excess of Rs.1.47 crores in connection with the subject

incident within three months following completion of the repairs to the bridge for damages attributable to the incident. The bank guarantee further records an agreement between the parties that, in the event there is any dispute between the owners/P & I Club in relation to the Defendants' claim for the alleged loss of revenue, the matter will be submitted to the jurisdiction of this Court. The Defendants appear to have unilaterally worked out their business loss and estimated damages/balance repairs cost in the statements/workings enclosed with their letter of 21 October 2016, threatening to invoke this bank guarantee (together with the first guarantee of Rs.1.47 crores referred to above). This working has not been approved by the Plaintiff. There is no mutual written agreement between the parties in this behalf. On the other hand, the documents on record clearly establish that there is a dispute between the parties as to the working of this loss of revenue and balance of repair costs in excess of Rs.1.47 crores. In case of such dispute, as the bank guarantee provides, the liability under the guarantee will have to be decided by this Court in a suit.

8. Learned Counsel for Defendant Nos. 1 and 2 relies on minutes of meeting between the parties and submits that there is an agreement between the parties that a "*lumpsum damage cost (no cost for repairs) may be recovered*" from the Plaintiff "*for their negligence in causing the accident and loss of business to Port*." It is submitted that there is an agreement that the amount would be worked out in consultation with the Finance Department and the same would be intimated to the Plaintiff. Apart from the fact that these minutes are disputed by the Plaintiff, what they prima facie indicate, on their own terms, is that the amount of lumpsum damage cost, to be recovered from the Plaintiff would be worked out and intimated

to the Plaintiff. These minutes do not detract from the original agreement between the parties that once the amounts are worked out and intimated to the Plaintiff, it would have to either agree to the amount in writing, or dispute the same, in which case the determination of the loss is a matter to be decided by this Court. On these facts, Defendant Nos. 1 and 2 cannot proceed to invoke/encash this particular bank guarantee. The condition of invocation of the guarantee, namely, prior determination by an agreement between the parties or by this Court of the amount due thereunder, is not satisfied. Learned Counsel for Defendant Nos. 1 and 2 also submits that under Section 116 of the Major Port Trusts Act, 1963, any damage caused to the property of the Board due to negligence of any person having the guidance or command of a vessel can be recovered simply on the application of the Board. Relying on the judgment of the Supreme Court in the case of **Luga Bay Shipping Corporation vs. Board of Trustees of the Port of Cochin**[1], learned Counsel submits that the Defendants can unilaterally decide the quantum of damages and there is no question of any civil court adjudicating the same. That may be so. The point is, if such damage is sought to be recovered through invocation of the bank guarantee, it can only be done on the terms of the guarantee and not otherwise.

9. Learned Counsel for Defendant Nos. 1 and 2 submits that, in the event this Court is not inclined to allow invocation of this bank guarantee, the Plaintiff may at least be directed to keep the same alive during the pendency of the present suit. The request is clearly in order.

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1 AIR 1997 Supreme Court 544

10. In the premises, the Notice of Motion is allowed in terms of prayer clause (b) of the Notice of Motion. Prayer clause (a) is rejected.

11. The Plaintiff shall renew the bank guarantee described in prayer clause (b) and keep the same alive during the pendency of the present suit or until further orders, whichever is later.

12. Learned Counsel for the Plaintiff requests for directing Defendant Nos. 1 and 2 to stay their hands for a period of one week from today. The interim order requested for in terms of prayer clause (a) having been comprehensively rejected after a full hearing, there is no case for granting any stay for even a limited period. The request is rejected.

(S.C.GUPTE, J.)