

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.03.2017

PRONOUNCED ON : 26.04.2017

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE MR.JUSTICE R.MAHADEVAN

O.S.A.Nos.136 and 137 of 2016

ICICI Bank Limited,
110, Prakash Presidium,
Nungambakkam High Road,
Chennai-600 034. Appellant in both OSAs.

-vs-

1. M/s.BGR Energy Systems Limited,
having its registered office at
A-5, Panamgadu Industrial Estate,
Ramapuram Post,
Sullerpet Taluk, Nellore District,
Andhra Pradesh, India.

Having its Corporate Office at
No.443, Anna Salai,
Teynampet, Chennai-600 018.

2. Bank of Baghdad,
Private S.A.Co.,Capital ID 52, 973, 256, 470,
P.O.Box 3192, Al Karada,
Baghdad, Republic of Iraq.

3. Ministry of Electricity,
General Directorate for Gas Power Plants Projects,
Nile Quarter Borsaeed Street,
P.O.Box 3099, Baghdad,
Republic of Iraq.

4. Export Credit Guarantee Corporation of India,
"The Metropolitan", 7th Floor,
Plot No.C-26/27, Bandra-Kurla Complex,
Bandra (E), Mumbai-400 051. .. Respondents in both OSAs.

O.S.A.No.136 of 2016 filed under Order 36 Rule 11 of
Original Side Rules r/w Clause 15 of the Letters Patent, to set
aside the order dated 01.06.2016 in O.A.No.977 of 2014 in

C.S.No.788 of 2014 and vacate the order of injunction in favour of the first respondent herein.

O.S.A.No.137 of 2016 filed under Order 36 Rule 11 of Original Side Rules r/w Clause 15 of the Letters Patent, to set aside the order dated 01.06.2016 in O.A.No.978 of 2014 in C.S.No.788 of 2014 and vacate the order of injunction in favour of the first respondent herein.

For Appellant :: Mr.AL.Somayaji, Sr.Counsel
for Mr.V.Adhivarahan

For Respondents :: Mr.Sathish Parasaran, Sr.Counsel
for Mr.R.Parthasarathy for R1
Mr.Satvik Varma for
M/s.Anand Sashidharan for R2

Mr.Krishna Srinivasan for
M/s.S.Ramasubramanian
Associates for R4

JUDGMENT

R.MAHADEVAN, J.

These appeals are filed against the order passed by this Court on 01.06.2016 in O.A.Nos.977 and 978 of 2014, making absolute the interim order of injunction already granted by this Court in the original applications.

2.The facts leading to the filing of these appeals are as under:

(i)The first respondent herein is a company specialised in Engineering, Procurement, Construction and other turnkey projects, more particularly, thermal power plants, water treatment and transmission, renewable energy, mineral processing and mine development. The bid submitted by the first respondent to the third respondent for the implementation of a Gas Turbine Power Plant Project in Nasiriyah, Iraq, pursuant to a tender floated was accepted resulting in the execution of a contract bearing No.28 dated 13.10.2013 for a value of USD 246,000,000/-. As per the terms of contract, the project must be commenced within 28 days from the effective date and completed within a period of 750 days.

(ii)The first respondent submitted a performance guarantee issued by an accredited Iraqi Bank, amounting to 5% of the total contract value to guarantee the performance of its obligations under the contract. Pursuant to the request made by the first

respondent herein and against deposit of 110% margin money, the appellant herein issued a counter guarantee to the second respondent, who in turn, provided a performance guarantee in favour of the third respondent for an amount of USD 12,300,000/- valid upto 8th October 2014, which validity was later extended upto 30th April 2015.

(iii) As an obligation under the contract, a letter of credit has to be opened by the third respondent herein for the purpose of securing the contract payments of the first respondent herein during the tenure of the contract. It is with this assurance, the first respondent furnished the necessary performance bank guarantee in favour of the third respondent. Accordingly, a letter of credit was opened by the third respondent through their bank, viz. the Trade Bank of Iraq, who in turn, opened the letter of credit with Citibank, Dubai.

(iv) During early and mid 2014, Republic of Iraq started to face turmoil including terrorist activities, pursuant to which the Indian Nationals were advised by the Ministry of External Affairs to leave Iraq and not to undertake travel to Iraq. In view of the said situation, the first respondent could not undertake the execution of work. In the mean time, the third respondent vide communication dated 16.06.2014, instructed the Citi Bank, Dubai, to withhold any payment under the Letter of Credit to the first respondent. The third respondent informed the first respondent that it was in the process of invoking the bank guarantee issued by the appellant herein in view of the non-progress of work, which made the first respondent herein to file the suit before this Court in C.S.No.788 of 2014, praying for a permanent injunction restraining the appellant bank from making any payment against the performance bank guarantee opened through them and also restraining them from making any payment against the counter guarantee for USD 12,300,000/- issued in favour of the second respondent, pursuant to the performance bank guarantee for the sum of USD 12,300,000/- as aforesaid.

3. Along with the suit, the first respondent filed original applications in O.A.Nos.977 and 978 of 2014 praying to grant ad-interim injunction. By order dated 02.12.2014, this Court granted interim injunction for a period of four weeks, after coming to the conclusion that prima facie case has been made out by the first respondent. The said injunction was periodically extended.

4. Against the said order, the appellant-Bank filed applications in A.Nos.1495 and 1496 of 2016 praying to vacate the interim injunction. This Court dismissed the said applications and made the interim injunction granted in O.A.Nos.977 and 978 of 2014 absolute, by order dated 01.06.2016.

5.Challenging the said order, the present appeals have been filed.

6.Amongst many grounds raised in these appeals, the most important ground is that the learned single Judge has omitted to consider the fact that the appellant bank had issued the counter guarantee based on the sole request of the first respondent herein and such counter guarantee was made subject to Iraqi laws and jurisdiction at the behest and sole request of the first respondent as per the format furnished by the first respondent. Further, there could be no injunction against payment under a bank guarantee without a corresponding restraint against invocation / encashment by the beneficiary. In this case, the appellant bank alone has been restrained from honouring its commitments under a counter guarantee without any corresponding restraint being fastened upon the beneficiary. There is no restraint either against the beneficiary of the counter guarantee or against the beneficiary of the performance bank guarantee. Hence the injunction granted by this Court is not in accordance with law. Yet another important ground raised is that the learned single Judge ought to have considered the fact that the first respondent had knowingly taken a business risk in entering into a contract with a war-prone nation. It is also stated that being a financial institution having global presence, the reputation of the appellant bank has been tarnished in the international banking circles for its failure to honour its obligations to the second respondent under the irrevocable unconditional guarantee.

7.Reiterating the grounds made in the appeals, Mr.AL.Somayaji, learned senior counsel appearing for the appellant-Bank has submitted that the first respondent/plaintiff produced the contract entered between them and the Republic of Iraq dated 13.10.2013 as Document No.2 along with the plaint by deliberately omitting to include Pages 33 to 43 in the contract. The said pages relate to Particular Conditions which contains a clause to the effect that the contract is subject to arbitration and the venue of arbitration is Amman, Jordan and Iraqi laws will be applicable. Another clause is also found relating to force majeure conditions which states that the current situation prevailing in Iraq cannot be construed as a force majeure. Thus, force majeure is not an element to be considered, since the same was very much known to all parties at the time of signing the agreement itself. He further stated that the plaintiff has ventured into the contract with Iraq during the fag end of 2013 and it is the case of the plaintiff that within three to four months, Iraq started to face turmoil. It has not been pleaded in the suit that absolute peace reigned in October 2013 and how the situation turned worse within early 2014 to file the suit in 2014. Thus, the plaintiff has not sought to explain how it

claims tranquillity in Iraq hardly a few months after the contract was signed. He contended that the performance bank guarantee and the counter guarantee are the off-shoots of the contract dated 13.10.2013. By suppressing the relevant pages, ie., pages-33 to 43 of the particular conditions of contract in the plaint, the plaintiff has played a fraud on the Court and hence the plaintiff is not entitled for the relief of injunction. He submitted that the counter guarantee executed by ICICI Bank in favour of the Bank of Baghdad contains a clause specifically stating that the counter guarantee is subject to Iraqi laws. Clause 5 of the performance bank guarantee also specifically states that the performance bond is subject to Iraqi laws. When such being the case, the plaint itself is not maintainable, according to the learned counsel for the appellant. Thus, the main point urged by the learned counsel for the appellant is that the clauses relating to place of arbitration have been missing in the contract originally filed before this Court, which would go to show that the information relating to place of arbitration have been suppressed in the plaint. Further, the counter guarantee executed by ICICI Bank contains a clause specifically stating that the counter guarantee is subject to Iraqi laws and further, Clause 5 of the performance bank guarantee specifically states that the performance bond is subject to Iraqi laws. Since the relevant pages in the contract relating to the laws applicable have also not been enclosed in the plaint, the laws applicable for the contract have also been suppressed. Thus, there are material suppressions in the plaint. He also stated that the undertaking given by ICICI Bank to the Bank of Baghdad, at the request of the plaintiff with regard to performance bond, which is enclosed in Page Nos.195 and 196 of the Common Typed Set-II, cannot be ousted.

8.The learned senior counsel for the appellant also submitted that this Court has no jurisdiction to entertain the suit in terms of Condition No.46 in the contract, which provides for disputes and arbitration. Clause 46.1(g)(1) provides that disputes involving foreign contractors, should be referred to Arbitration as per rules of London Chambers of International Arbitration and the seat of arbitration should be Amman, Jordan and the governing law should be law of Iraq. He relied upon a decision of this Court in Gammon-OJSC Mosmetrostroy JV v. Chennai Metro Rail Limited and others, reported in CDJ 2015 MHC 6294, in support of his contention that mere issuance of a guarantee from one place would not confer jurisdiction upon Courts. He also mainly contended that the order passed by the learned single Judge does not at all touch upon the issue of jurisdiction. It omitted to refer to or discuss most of the substantive contentions raised by the appellant herein. The order deals with only one of the contentions, viz.the counter guarantee is a separate contract. Even though the learned single

Judge agreed with that contention, he proceeded to dismiss the applications filed to vacate the injunction. Further, the learned single Judge made only the injunction against the paying banker absolute and there is no discussion whatsoever on the balance of convenience, hardship faced by the bank, material omissions and suppressions practised by the first respondent herein including suppression of arbitration remedy. Stating so, the learned counsel for the appellant, prayed for setting aside the interim order of injunction.

9.The learned senior counsel appearing for the appellant relied upon a decision of the Hon'ble Supreme Court in Krishna Hare Gaur vs. Vinod Kumar Tyagi and others, reported in CDJ 2015 SC 119, to emphasise that a person playing fraud upon Court is not entitled for equitable remedy. He also relied upon a decision of this Court in Omni Agate Systems Private Limited v. Southern Railway, reported in 2011-3-L.W.865 to emphasise his contention that payment under bank guarantees should not be restrained by injunctions.

10.Mr.Sathish Parasaran, learned senior counsel appearing for the first respondent has submitted that the third respondent has violated the fundamental terms of the contract. The opening of an irrevocable letter of credit is an essential term of the contract. The third respondent, though opened the letter of credit, instructed the bank in Iraq not to make payment to the first respondent. He emphasised that the situation in Iraq prevailing at the relevant point of time, was treated as force majeure and stood in the way of executing the work. The labour force which went from India have to leave the country. The Indian Embassy advised not to travel to Iraq. All these factors contributed for the delay in the execution of contract. Under such circumstances, it is inequitable on the part of the third respondent to enforce the performance bank guarantee. There is a serious dispute with regard to execution of work and unless the same is settled, the third respondent cannot be permitted to appropriate the guarantee amount. Knowing fully well about the performance as well as the conditions, a fraud was played by the bankers. The effective date of performance was lost sight of, since the jurisdiction is not binding on any of the parties. There cannot be any claim to deviate the interest of the plaintiff on jurisdiction. Thus, submitting that the injunction granted by this Court cannot be justified, the learned senior counsel prayed for dismissal of these appeals.

11.The learned counsel for the first respondent relied upon a decision of the Delhi High Court in Bhandari Engineers & Builders Pvt.Ltd. v. Vijaya Bank & Ors., reported in (2010) 168 DLT 47 (DB), in fortification of his contention that the Courts can interfere with the encashment of the letter of credit if the fraud perpetrated must be one of gross nature which shakes the

conscience of the Court and the said fraud is known to the parties including the party representing the bank. He also relied on a decision of the Hon'ble Supreme Court in Hindustan Construction Co.Ltd. v. State of Bihar and others, reported in (1999) 8 SCC 436, to state that the Court can grant injunction against invocation of bank guarantee depending upon the terms of the bank guarantee, which are very material to the case.

12.Mr.Satvik Varma, learned counsel appearing for the second respondent has submitted that while the first respondent filed some portions of the Particular Conditions of Contract and the General Conditions of contract, the first respondent deliberately did not file Clause-37, which provided that the current situation in Iraq (at the time of signing the contract) will not be considered to be force majeure. Clause-46 relating to arbitration also was not filed. The performance bank guarantee was issued prior to the letter of credit and it was only because the advance payment guarantee was not furnished, the letter of credit was suspended. There was no problem in the place where the site was located and the first respondent had also obtained a letter from the Indian Ambassador, which was provided to the fourth respondent, viz. ECGC, confirming that the area where the site was located was considered relatively safe. Thus the first respondent has played fraud before this Court and obtained interim injunction suppressing the facts. The plaintiff, therefore, has disentitled itself to the equitable relief of injunction on account of deliberate suppression of material facts in the plaint as well as suppression of documentary evidence from the scrutiny of this Court. Concealment of material facts or documents deserves to be seriously viewed, for one who comes to the Court owes a duty to the Court to disclose all facts and documents to the Court. He relied upon a decision of the Hon'ble Supreme Court in Wheels India v. Nirmal Singh, reported in 2010 SCC OnLine Del 2852, in support of the said contention and submitted that had the relevant facts been disclosed, there was little chance of obtaining an ex-parte injunction. He contended that the impugned order is contrary to the well settled position of law that cancellation or a dispute under the underlying contract, which is a separate and distinct contract, is not a ground to injunct a party from invoking a bank guarantee or restrain a bank from performing its obligations under such bank guarantee. In support of the said contention, he relied on a decision of the Hon'ble Supreme Court in Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and another, reported in (2016) 10 SCC 46. He emphatically stressed that the learned single Judge had failed to note that the effect of injunction is that the second respondent, who was bound to comply with its obligation under the Performance Bank Guarantee is put to undue hardship as the appellant has been enjoined from making the payment due under the irrevocable counter

guarantee for no fault of theirs and the second respondent. Further, stating that the bank guarantee related laws have to be strictly followed and that the Hon'ble Supreme Court has come down heavily upon injuncting the bank guarantees frequently, he emphasised that only if any fraud or irreparable injury is caused, the bank guarantee can be injuncted. In the present case, there is no force majeure so as to halt the entire project, according to the learned counsel for the second respondent.

13. The learned counsel for the second respondent has further submitted that once the appellant pointed out the material suppressions of the first respondent, the first respondent filed an application on 28.04.2016 to bring on the record the remaining portions of the contract and it was served upon the appellant in May 2016. The impugned order was passed on 01.06.2016. Since this Court was on summer vacation during the month of May 2016, the complete contract was not before the learned single Judge at the time of passing the impugned order dated 01.06.2016.

14. The learned counsel for the second respondent finally submitted that the first respondent has a remedy of dispute resolution through arbitration and since the EPC contract stipulates arbitration in neutral seat of Amman, Jordan, as per the London Court of International Arbitration Rules, the first respondent has an efficacious forum to agitate any dispute and protect its rights. Therefore, no irreparable harm will be caused to the first respondent if the injunction is set aside, according to the learned counsel for the second respondent.

15. We have heard the submissions of the learned counsel for the fourth respondent, as well.

16. Originally, interim injunction was granted in O.A.Nos.977 and 978 of 2014 on 02.12.2014 by a learned single Judge of this Court, on the premise that prima facie case has been made out by the first respondent herein. Subsequently, the said injunction was made absolute by this Court on 01.06.2016 by making the following observation:

" 22. There is no dispute that contract of guarantee is a separate contract, unconnected with the contract, performance of which was guaranteed. It is also an accepted position that to the extent possible, the Court must desist from granting injunction, restraining the bank from enforcing bank guarantee. The Courts have, over a period of time, developed two exceptions to this general rule, so as to enable a party to a contract to seek injunction, against enforcement of bank guarantee:

(a)the party must demonstrate that a fraud of a grievous nature has been committed to the knowledge of the bank;

(b)injustice of the kind which would make it impossible for the guarantor to reimburse himself or it would result in irreparable harm or injustice to one of the parties."

Thus, observing that fraud, irretrievable injury, irreparable injustice and extraordinary special equities are exceptions carved out to restrain the bank from honouring the bank guarantee, and that the third respondent suspended the irrevocable letter of credit even without issuing notice to the first respondent, the order of injunction was made absolute and the applications filed for vacating the injunction were dismissed.

17.It was also observed that there are certain triable issues in the suit, the most important being the adjudication of the term "war risk" which gives right to the parties to make an attempt to develop a mutually satisfactory solution, if the execution of the work on the facilities becomes impossible or is substantially prevented for a single period of more than 60 days or an aggregate period of more than 120 days on account of any war risks, failing which, to terminate the very contract.

18.The principles laid down by this Court, in the above order are not in dispute. It is the submission of the learned senior counsel for the appellant-Bank that the clauses relating to arbitration are missing in the contract originally filed before this Court. Further, it is his submission that counter guarantee executed by ICICI Bank contains a clause specifically stating that the counter guarantee is subject to Iraqi laws and further, Clause 5 of the performance bank guarantee specifically states that the performance bond is subject to Iraqi laws. It is also his submission that this Court has no jurisdiction to entertain the suit in terms of Condition No.46 in the contract, which provides for disputes and arbitration. Clause 46.1(g)(1) provides that disputes involving foreign contractors, should be referred to Arbitration as per rules of London Chambers of International Arbitration and the seat of arbitration should be Amman, Jordan and the governing law should be law of Iraq. It is the submission of the learned counsel for the second respondent that while the first respondent filed some portions of the Particular Conditions of Contract and the General Conditions of contract, Clause-37 was not deliberately filed, which provided that the current situation in Iraq (at the time of signing the contract) will not be considered to be force majeure. Clause-46 relating to arbitration was also not filed. The performance bank

guarantee was issued prior to the letter of credit and it was only because the advance payment guarantee was not furnished, the letter of credit was suspended. There was no problem in the place where the site was located and the first respondent had also obtained a letter from the Indian Ambassador, which was provided to the fourth respondent, viz. ECGC, confirming that the area where the site was located was considered relatively safe. Thus the first respondent has played fraud before this Court and obtained the order of interim injunction suppressing the facts, according to the counsel for the second respondent.

19. These points have not been put forth before this Court while passing the above orders. Further, these appeals arise out of the interim order of injunction which was subsequently made absolute, and not against the order passed in the main suit. Thus, the issues regarding suppression of material facts and jurisdiction of the Court, have to be dealt with and thereafter orders have to be passed in the original applications. Hence the order passed by this Court on 01.06.2016 in O.A.Nos.977 and 978 of 2014 making the injunction absolute, is quashed and the matter is remitted to the learned single Judge to pass orders in the said original applications, after considering the issues regarding suppression of material facts and jurisdiction of the Court. Till the order is passed in the original applications, status quo as on today shall be maintained by both parties.

20. The appeals are disposed of accordingly. No costs.

-s/d-
Assistant Registrar (CS-IV)

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Sub-Assistant Registrar

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