

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

C.M.A.No.628 of 2015

Between:

M/s.EMC Limited (Formerly known as
Electrical Manufacturing Company Limited), Kolkata,
rep. by its Managing Director.

.....Appellant

And

M/s.ICOMM Tele Limited, Hyderabad,
Rep. by its Deputy Manager & another.

.....Respondents.

JUDGMENT PRONOUNCED ON : 30.06.2017

HON'BLE SRI JUSTICE : SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE : U.DURGA PRASAD RAO

1. Whether Reporters of : Yes/No
Local newspapers
may be allowed to see
the Judgment ?
2. Whether the copies of : Yes/No
judgment may be
marked to
Law Reporters/Journals ?
3. Whether Their Ladyship/ : Yes/No
Lordship wish to see the
fair copy of the judgment ?

HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE U. DURGA PRASAD RAO
CIVIL MISCELLANEOUS APPEAL No.628 of 2015

DATE: 30.06.2017

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.....Respondents.

For Appellant : Sri A.Chandrasekhar, Advocate.

For Respondents : Sri P.Nagendra Reddy &
Sri N.V.Subba Raju, Advocates.

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> Head Note:

? CITATIONS:

1. (2007) 6 SCC 470
2. (1988) 1 SCC 174
3. (1991) 4 SCC 230

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HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
CIVIL MISCELLANEOUS APPEAL No.628 of 2015

JUDGMENT : (Per Hon'ble Sri Justice Suresh Kumar Kait)

Vide the present appeal, the appellant has challenged the order dated 11th February 2015 passed in O.P.No.2602 of 2013 by the II Additional Chief Judge, City Civil Court, Hyderabad, thereby 2nd respondent-Bank is restrained from making any payment under the two unconditional bank guarantees both dated 10th May 2011 for Rs.10,45,00,125/- and Rs.9,18,24,577/- respectively, which were issued in favour of the appellant.

2. Brief facts of the case are that, vide the Memorandum of Understanding dated 22nd April 2008 the appellant and the 1st respondent entered into an agreement. Accordingly, in terms and conditions contained in the letter dated 11th August 2009 issued by the appellant to the 1st respondent, they proceeded to participate in various tenders of Power Grid Corporation of India Limited. On 22nd January 2010, Power Grid Corporation of India Limited issued advertisements inviting bids from interested parties, *inter alia*, for Tower packages P219-TW07, P219-TW08, P219-TW09 and P219-TW10 for 765 KV Satna-Gwalior (Ckt-I & II) Transmission. Accordingly, the appellant and 1st respondent participated in two several tenders for P219-TW09 and P219-TW10 in accordance with the terms and conditions contained in the letter dated 11th August 2009.

3. On 30th and 31st of December 2010, Power Grid Corporation of India Limited issued two separate letters notifying respectively that the supply and service of the aforesaid contracts had been awarded in favour of the joint

venture of the appellant and the 1st respondent. On 10th May 2011, 1st respondent furnished two several bank guarantees for Rs.10.45 Crores and Rs.9.18 Crores in favour of appellant in respect of the aforesaid two several contracts both valid upto 31st of May 2013, which were subsequently extended/renewed for a further period of Six months. Vide letter dated 18th May 2011, the appellant requested the 2nd respondent-Bank to confirm the issuance of bank guarantees, accordingly, the 2nd respondent confirmed the same. Both the communications mentioned above are annexed at Pages 244 and 245 respectively. Thereafter, on 19th May 2011 and 20th May 2011, appellant released advance payment of Rs.10.45 Crores and 9.18 Crores to the 1st respondent-ICOMM Tele Limited for supply of materials. However, the 1st respondent supplied negligible portion of materials in respect of two contracts (value of Rs.27,04,511/- towards the BG of Rs.10.45 Crores and Rs.19,03,370/- towards the BG of Rs.9.18 Crores). The aforesaid fact is evident from pages 106 and 107 of the counter filed in O.P.No.2602 of 2013 in paragraph XXXV at pages 248 and 249.

4. However, because of the delay in supplying the balance quantity of materials the 1st respondent, vide communication dated 29th September 2011 and 10th October 2011, agreed to give its consent to the appellant to purchase the balance materials from 3rd parties and to return the advance money paid by the appellant to the 1st respondent.

5. Learned counsel appearing on behalf of the appellant submitted that the 1st respondent is bound and obliged to repay the sum of Rs.12,21,64,692/- and Rs.10,77,50,963/- to the appellant. Vide communication dated 31st May 2013, the 2nd respondent-bank had informed

the appellant about extending the bank guarantees. Thereafter, on 24th of August 2013, the appellant had issued letter to the 1st respondent regarding completion of 400 KV D/C (Quad) Agra-Sikar Line Part-I & II due to inordinate delay of supply of Tower parts. Whereas, on 26th August 2013, the 1st respondent issued letter to the 2nd respondent-bank regarding submission of original bank guarantees. Learned Counsel argued that in the said letter, the 2nd respondent-bank was informed by the 1st respondent that the appellant has returned the two original bank guarantees for cancellation and hence requested by the 1st respondent to cancel the same. This letter came to the knowledge of the appellant only from Section 9 petition filed by the 1st respondent. On 29th August 2013, e-mail was issued by the 1st respondent to the appellant regarding meeting and/or conciliation of the supply of Tower parts. Thereafter, on 7th October 2017, appellant had communicated to the 2nd respondent-bank requesting to extend the validity of bank guarantees for a further period of Six months, and in alternative, to make payment of the claim amount under the two bank guarantees to the appellant. The said facts are evident from the communication dated 22nd and 30th November 2013.

6. Learned counsel further submits that to the utter shock and surprise, the 1st respondent issued letter to the 2nd respondent-bank informing that the bank guarantees were returned to the 1st respondent by appellant and the same were sent to the 2nd respondent-bank for cancellation. It was also informed that extension of those bank guarantees is not required as the originals of the same were returned. However, no communication was sent to the appellant, but appellant came to know about the said letter from Section 9 application filed by the 1st respondent.

7. Thereafter, the appellant issued letter dated 3rd December 2013 and called upon the 2nd respondent-bank to encash the bank guarantees and make payment thereof to the appellant. On 7th December 2013, the 1st respondent filed petition under Section 9 of Arbitration and Conciliation Act, 1996 before the City Civil Court and obtained *ex parte ad interim* order of injunction restraining payments under the bank guarantees. On 9th December 2013, the 2nd respondent-bank had sent a communication to the appellant informing that the matter has been taken up with the 1st respondent and assured that the matter will be settled shortly. The said fact is admitted by the 2nd respondent-bank while filing counter affidavit to the application under Section 37 of the Arbitration and Conciliation Act. On 9th December 2013, the 2nd respondent-Bank had informed the appellant that the 1st respondent has neither agreed for extension of bank guarantees nor for encashment thereof. It is also informed that the 1st respondent had returned the original bank guarantees to the 2nd respondent-bank for cancellation. However, the 2nd respondent has advised the appellant to submit the original bank guarantees to them.

8. Learned counsel for appellant further submitted that the appellant received an envelope containing the copy of O.P.No.2602 of 2013 vide communication dated 10th December 2013, however, copy of the order dated 7th December 2013 passed by the Court was not forwarded to the appellant. Thereafter, on 12th December 2013, the appellant forwarded the original extended bank guarantees, as given to them by the 1st respondent, to the 2nd respondent-bank and requested to make payment. On 13th December 2013, the 2nd respondent-bank had informed the appellant about the order dated 7th December 2013, passed by the City Civil Court, Hyderabad.

9. Learned counsel for the appellant would argue that the learned Judge has failed to appreciate the fact that the unconditional bank guarantees could not have been cancelled by any act of the 1st respondent or the 2nd respondent-bank and the 2nd respondent-bank was under liability and obligation to make payment under the said two unconditional bank guarantees to the appellant as the said bank guarantees had been invoked during the period of validity by letters dated 7th October 2013, 22nd and 30th November 2013 and 3rd December 2013.

10. On the other hand, learned counsel appearing on behalf of the 2nd respondent-bank submitted that on 26th of August 2013, the 1st respondent, vide its letter, returned original bank guarantees stating that the beneficiary has returned the bank guarantees for cancellation, hence, requested to cancel the bank guarantees. Accordingly, 2nd respondent-Bank acting upon the same, cancelled the bank guarantees on 27th of August 2013. The 1st respondent vide letter dated 30th November 2013 addressed to the 2nd respondent-bank, stated that the extension of two bank guarantees is not required as the originals were returned. The 2nd respondent-bank had addressed a letter dated 5th December 2013 to the 1st respondent stating that on receipt of the cancellation letter dated 26th August 2013 along with original two bank guarantees, they have closed/cancelled the said bank guarantees in their record/system on 27th of August 2013. The 2nd respondent-bank had also addressed a letter dated 7th December 2013 to the appellant stating that the subject matter will be resolved shortly. Thereafter, vide letter dated 13th December 2013, the 2nd respondent had informed the appellant that they were not in a position to receive the bank guarantees and make payment since they have received a copy of order dated 7th December

2013 issued by the City Civil Court, Hyderabad. Learned counsel for the 2nd respondent-bank further submitted that the 2nd respondent-bank had addressed a letter dated 13th December 2013 to 1st respondent stating that they received cancellation letter dated 26th August 2013 along with two original bank guarantees and sought confirmation whether original bank guarantees were returned by the beneficiary for cancellation.

11. Learned counsel argued that since the bank received the original bank guarantees from the 1st respondent stating that the said bank guarantees are returned by the beneficiaries, therefore, they had no liability to allow the appellant to encash the bank guarantees. More over, the 2nd respondent received order dated 7th December 2013 issued by the City Civil Court, Hyderabad, whereby they were restrained from acting on the bank guarantees on the request of the appellant to encash the bank guarantees.

12. We have heard learned counsel for the parties.

13. The aforesaid two unconditional bank guarantees both dated 10th of May 2011 were invoked by the appellant by its letters dated 7th October, 2013, 22nd and 30th of November 2013 and 3rd of December 2013, but the 2nd respondent-bank has failed to make payment. Respondent No.1 thereafter, obtained an *ex parte ad interim* order of injunction dated 7th December 2013 restraining payment by the 2nd respondent-bank. The said order was obtained by suppression of material facts and without making out any case on the ground of fraud or special equity. The said *ad interim* order was subsequently confirmed by impugned order dated 11th February, 2015.

14. It is pertinent to mention here that the 2nd respondent-bank is not even a party to the agreement on the basis of which, 1st respondent has filed the petition under Section 9 of Arbitration and Conciliation Act, 1996 and obtained an order clandestinely.

15. It is not in dispute that the appellant has contested O.P.No.2602 of 2013 (M/s.ICOMM Tele Limited Vs. M/s.EMC Limited & Ors.) by filing counter affidavit. However, the trial Court granted injunction restraining the appellant from acting upon its letter dated 30th of November 2013 invoking the bank guarantees issued by 2nd respondent on behalf of 1st respondent. The said order also restrained respondent No.1 from making payments/ honouring the respective bank guarantees and also acting upon the letter dated 5th December 2013 by making payment of the amount covered by the bank guarantees.

16. In view of the facts recorded above, we are of the considered view that the learned Judge has erred in law and on facts while passing the impugned order dated 11th February 2-15 for the reasons that an application under Section 9 of Arbitration and Conciliation Act, 1996 is neither maintainable in law nor on facts of the case. Moreover, the learned Judge has not given any reason for restraining invocation of bank guarantees. No case was pleaded or made out on the grounds of fraud by 1st respondent to obtain an orders of injunction. However, the learned Judge has failed to appreciate that the 2nd respondent-bank was not a party to the alleged Arbitration Agreement relied on by the 1st respondent. In any event, no order of injunction could have been passed against the 2nd respondent.

17. The learned Judge has also ignored that the bank guarantees were unconditional and the 2nd respondent was under an obligation to make payment under the aforementioned two unconditional bank guarantees in terms of the letters of invocation issued by appellant during the validity period of bank guarantees. The learned Judge has fell into serious error by holding that the 2nd respondent-bank could not have closed or cancelled the bank guarantees in their records/system on 27th August 2013 without there being any consent on the part of the appellant. The liability under the bank guarantees was that of 2nd respondent and the appellant could not have prevented the payment under the said two unconditional bank guarantees by obtaining orders of injunction from the learned Judge. Moreover, the purported draft Memorandum of Understanding dated 22nd April 2008 is not duly signed and returned in acceptance of the same and said understanding is undated and incomplete document. Thus, Clause 8 thereof is not binding upon the appellant in any manner whatsoever. Therefore, the learned Judge has erred in facts while passing the impugned order dated 11th February 2015 that the subject matter of the contract forming the subject matter of the petition under Section 9 of the Arbitration and Conciliation Act, 1996 was never included in the said purported draft Memorandum of Understanding relied upon by the 1st respondent. Therefore, the terms and conditions of the said understanding do not govern the relationship between the parties in respect of the contracts/tenders forming the subject matter of said petition.

18. In addition to above, the learned Judge also erred in facts while passing the impugned order that the subject matter of the petition were tenders being P219-TW09 and P219-TW10 for 765 KV Satna-Gwalior (Ckt-I & II) Transmission lines floated by the Power Grid Corporation of

India Ltd., but the aforesaid tenders were never included in the said draft Memorandum of Understanding.

19. In the case of **Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. & another**¹, the Hon'ble Supreme Court held that the sole discretion is conferred on the purchasers as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach of the terms and conditions of the said agreement. The right of the purchaser to recover from the guarantor, the guaranteed amount shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any tribunal or Court with regard thereto or in connection therewith.

20. In the case of **U.P.Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**², the Hon'ble Supreme Court observed that Commitments of banks must be honoured free from interference by the Courts. Otherwise, trust in commerce, internal and international, would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere.

21. In the case of **General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd.**³, the Hon'ble Supreme Court held that if the documentary credits are irrevocable and independent, the bank must pay when demand is made. Accordingly opined that if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any

¹ (2007) 6 SCC 470

² (1988) 1 SCC 174

³ (1991) 4 SCC 230

objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

22. It is pertinent to mention here that pursuant to order dated 15.11.2016, Sri Vedula Venkata Ramana, learned Senior Counsel representing Sri A.Chandrashekar, learned counsel for the appellant, placed two documents before the Court and stated that they are the originals of bank guarantees bearing Nos.1239 IGFIN001011 and 1239 IGFIN001111. Sri N.V.Subba Raju, learned counsel for the 2nd respondent bank, also produced two documents stating that they are the original bank guarantees with the same number.

23. As there can be only one set of originals for these two bank guarantees but as two sets have been placed before this Court, vide order dated 22.11.2016, Registrar (Judicial) of this Court was directed to forthwith forward those Four documents to the Central Forensic Science Laboratory, Hyderabad for obtaining an expert opinion as to which set of documents, namely, the set of documents marked with '✓' produced by the 2nd respondent bank or the set of documents marked with 'X' produced by Sri Vedula Venkata Ramana, learned counsel for the appellant, are original bank guarantees.

24. In terms of order dated 22.11.2016, the Central Forensic Science Laboratory, Hyderabad has furnished its opinion to the effect that the set of documents handed over by the counsel for the appellant, which are marked with 'X' by this Court and were marked by the Laboratory as Exhibits X6 to X10 and Y6 to Y10, were determined to be copies of reproduction, while the set of documents handed over by learned counsel for the 2nd respondent bank, which were marked with '✓' and were marked as Exhibits X1 to X5 and Y1 to Y5 before the Central Forensic Science Laboratory, were determined to be original documents. Thus, it is established from the report of the Central Forensic Science Laboratory that respondent No.1 had handed over the duplicate bank guarantees by keeping the originals with them, which were thereafter returned to the 2nd respondent bank for cancellation.

25. It is necessary to mention here that by various orders, Registrar (Judicial) of this Court was directed to keep the report of the Central Forensic Science Laboratory, Hyderabad and the bank guarantees in a sealed cover and those documents were opened as and when required by the Court. Even during writing of this judgment, the documents were received from the Registrar (Judicial) in a sealed cover, which were opened, perused and thereafter sent to the Registrar (Judicial) to keep those documents in a sealed cover under his custody.

26. Though the report of the Forensic Science Laboratory is not much relevant in adjudicating the issue raised by the appellant, however, from the report of the Laboratory, at least it is established how the appellant and the

2nd respondent bank were claiming the two sets of bank guarantees being originals.

27. Since the issue has already been adjudicated by this Court, the Registrar (Judicial) is directed to handover these documents to the concerned parties by keeping the photocopies of the same in the file.

28. In view of the above discussion and the legal position, we hereby set aside the order dated 11th February 2015 passed in O.P.No.2602 of 2013 by the II Additional Chief Judge, City Civil Court, Hyderabad. Consequently we allow the appeal with costs of Rs.50,000/- each to be paid by respondents 1 and 2. Out of the amount of costs, an amount of Rs.25,000/- shall be paid in favour of the petitioner, an amount of Rs.25,000/- shall be paid in favour of Advocates' Welfare Fund, Bar Council of Andhra Pradesh, an amount of Rs.10,000/- each shall be paid in favour of High Court Legal Services Committee, A.P. State Legal Services Authority and Telangana State Legal Services Authority and an amount of Rs.20,000/- shall be paid in favour of District Bar Association, Guntur.

Pending miscellaneous applications, if any, shall stand closed.

SURESH KUMAR KAIT, J

U. DURGA PRASAD RAO, J

30th June, 2017

N.B:

L.R. copy be marked.

(b/o)

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