HONOURABLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION No. 438 of 2006

ORDER:

The prayer sought in this writ petition is as follows:

> "To issue a writ, order or direction, more in the nature of writ of mandamus declaring the letter dated 17.08.1999 (Annexure-K) issued by the respondent–bank as illegal, arbitrary, and unconstitutional and consequently declare the same as void, ab initio , null and void and non est in the eye of law by holding that the respondent-bank is under an obligation to pay the amount of Rs.60,00,000/- with interest thereon, as per law, by duly encashing the bank guarantee executed by the said bank in favour of the writ petitioner."

The facts of the case are that M/s. Hindusthan Magnetics Limited, Hyderabad received two Export Promotion Capital Goods (for short 'EPCG') licence dated 23.04.1990 and 16.04.1991 respectively for Cost Insurance Freight (for short 'FOB') value of Rs.2,61,56,137/- under the concessional rate of customs duty of 25% as per para 197 of the Import Policy 1990-93. The licensee was under an obligation to export Audio Cassettes U-Matic Cassettes and Media for computer tapes for an FOB value of Rs.10,45,4,328/- within a period of four years from the date of first import. The licensee i.e. M/s. Hindusthan Magnetics Limited executed two bank guarantees to safeguard the revenue of the customs at the time of obtaining the licenses. As far as the bank guarantee dated 11.05.1991 for Rs.60 lakhs from the respondent-bank is concerned, it is extended up to 11.05.19096 with an undertaking which is as under:

"That the surety (M/s. Allahabad Bank) do hereby expressly and irrevocably undertake, indemnity and guarantee to the Government that if the exporter (M/s. Hindusthan Magnetics Ltd.) fails to perform the whole or part of the export obligations under the terms and conditions laid down in the aforesaid notification issued by the Ministry of Finance, Government of India, the Import and Export Policy, 1990-93 (Vol.I) and the Handbook of Procedures, 1990-93 (Vol.I) issued by the Chief Controller of Imports and Exports (now called Director General of Foreign Trade (DGFT)) the terms and conditions specified in the licence to import equipment for manufacture of Audio Video, U-matiac and Computer magnetic tapes and cassettes as also including the conditions specified in the Bond/BG or if the Importer (M/s. Hindusthan Magnetic Ltd.) is not able to furnish any information required by the Chief Controller of Imports and Exports (now called DGFT) and under the terms and conditions of the licence to import equipment for manufacture of audio, video, U-matic and computer magnetic tapes and cassettes or under the provisions of the Imports and Exports (Control) Act, 1947, or Rules (now called Foreign Trade (Development & Regulation Act, 1992 or Rules (FT(D&R) framed thereunder, or if there is any other failure of any kind whatsoever, on the part of the Importer (M/s. Hindusthan Magnetic Ltd.) for which the decision of the Government shall be final and the SURETY (M/s. Allahabad Bank) shall, / without reference to the Importer (M/s. Hindusthan Magnetic Ltd.) on the written demand of the Government pay to the Government or to any officer so authorized by the Government, the sum of Rs.60.00 lakhs only. (The full amount of duty equal to the difference between the normal rate of customs duty and the concessional rate of customs duty).

That, notwithstanding any right the Government may have directly against the Importer (M/s. Hindusthan Magnetic Ltd.) or notwithstanding any dispute raised by the Importer ((M/s. Hindusthan Magnetic Ltd.) in any form, the Government's written demand to the SURETY M/s. Allahabad bank shall state necessary details that the payment is demanded by the Government from the surety under the aforesaid terms and conditions of the Notificatiion/Policy issued by the Government of India and the Chief Controller of Imports and Exports, (now called DGFT) and under the terms and conditions of the licence to import equipment for manufacture of audio, video, U-matic and computer magnetic tapes and cassettes as also including the terms specified hereinabove bond/BG, and such demand by the Government shall be final, and binding upon the surety (M/s. Allahabad Bank).

That the surety shall not be discharged or released from the undertaking and the Surety Bond by any arrangement, variation between the Government and the Importer ((M/s.

Hindusthan Magnetic Ltd.), any indulgence to the Importer ((M/s. Hindusthan Magnetic Ltd.) by the Government with or without the consent or knowledge or any alteration in the obligation on the importer ((M/s. Hindusthan Magnetic Ltd.) or any forbearance, whether as to the payment, time, performance or otherwise whatsoever without affecting any manner the obligation of the surety (M/s. Allahabad Bank) hereinunder.

That this Indemnity-cum-Guarantee Bond executed by the SURETY (M/s. Allahabad Bank) shall remain valid and in full force until all the obligations under the aforesaid Notification of the Government of India, dated 3rd May, 1990, the Import & Export Policy, 1990-93 (Vol.I) and the Handbook of Procedures, 1990-93 (Vol.I) issued by the Chief Controller of Imports and Exports (now DGFT), the terms and conditions of the licence to import equipment for manufacture of audio, video, U-matic and computer magnetic tapes and cassettes as also including the conditions specified in the Bond/BG, are all duly completed to the full and final satisfaction of the Government.

That, the Indemnity-cum-Surety Bond executed by the Importer ((M/s. Hindusthan Magnetic Ltd.) and the Surety (M/s. Allahabad Bank) shall be continuing indemnity and a continuing guarantee and shall not be discharged by any change in the constitution of the Importer ((M/s. Hindusthan Magnetic Ltd.) or the Surety (M/s. Allahabad Bank). It is further indemnified by the Government under this Bond shall be made within seven days from the receipt of the written demand of the Government or any officer authorized by the Government.

That this Indemnity-cum-Surety Bond is executed by the above named parties in the public interest.

That the above Bond shall remain in force till all the obligations of the Importer and the Surety are fulfilled to the full and final satisfaction of the Government specified above, and that such satisfaction is communicated to the Surety (M/s. Allahabad Bank).

That, the Surety (M/s. Allahabad Bank) hereby agrees to renew/extend the guarantee period at instance of the importer ((M/s. Hindusthan Magnetic Ltd.) provided the importer complies which satisfied the usual terms and conditions of the bank for renewing/extending the guarantee."

The main issue urged in the present writ petition is the honouring of bank guarantee executed by the respondent-bank in favour of the then Chief Controller of Imports and Exports, at present called as Director General of Foreign Trade (for short 'DGFT'). It is stated that the first bank guarantee was forfeited by Punjab and Sindh Bank based on the forfeiture order given by the petitioner. As far as the respondent-bank is concerned, after the forfeiture order of the DGFT dated 27.09.1995, it was communicated to the respondent-bank, but the bank did not forfeit the bank guarantee and did not pay the amount of bank guarantee value to the DGFT. In those circumstances, a reminder was issued on 29.12.1995, but the same was not honoured and no amounts were paid to the DGFT. In reply, the respondent bank has addressed a letter dated 17.8.1999 to the petitioner stating that forfeiture of the bank guarantee was time barred. Aggrieved by the same, the present writ petition is filed.

Per contra, though the writ petition is filed in the year 2006, no counter-affidavit has been filed on behalf of the respondent bank. However, the learned counsel for the respondent-bank would contend that the bank guarantee invoked by the petitioner was time barred since by the time the petitioner invoked the bank guarantee through letter/notice dated 29.07.1999, the validity of the bank guarantee got expired. Hence, the demand made by the petitioner for forfeiture of the bank guarantee is not maintainable. The learned counsel also brought to the notice of the Court the letter dated 17.08.1999 addressed by the respondent bank to the petitioner stating that Clause 14 on page 6 of Guarantee documents dated 11.05.1991 and the extension letter dated 10.10.1996 clearly states that '*in liability under the captioned guarantee is restricted to Rs.60.00 lacs shall remain in force until 11th*

May, 1999. Unless a suit or action to enforce your claim under the guarantee is filed against us on or before the 11th May,1999, all your rights under the said guarantees shall be forfeited and we shall be released and discharged from all liabilities thereunder.' Therefore, since the bank guarantee is invoked after the expiry date, the demand made by the petitioner is not maintainable. Therefore, there are no merits in the writ petition and the same is liable to be dismissed.

To support his contention, the learned counsel for the petitioner relied on the following citations:

i) M/S. HYDERABAD COMMERCIALS v. INDIAN BANK AND OTHERS[1].

Perusal of the said judgment, it is apparent that it is not applicable to the facts of the present case as the issue therein is unauthorized transfer of huge amount buy a Nationalised Bank from the account of one customer to another customer.

ii) ABL INTERNATIONAL LTD. AND ANOTHER v. EXPORT CREDITGUARANTEE CORPORATION OF INDIA LTD. AND OTHERS[2].

A perusal of the said judgment would reveal that the dispute arose therein was with regard to the maintainability of writ petition when disputed questions of fact are involved and the principle of applicability of Article 14 of Contractual dealings

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[1] AIR 1991 SC page 247

[2] (2004) 3 SCC 353

of the State and etc. Therefore, it is not applicable to the facts of the present case.

iii) ZONAL MANAGER, CENTRAL BANK OF INDIA v. DEVI ISPAT LIMITED AND OTHERS[3].

The issue involved in the said judgment is the scope of judicial review/interference in contractual matters when a public sector bank discharging the public functions and having status of "State", despite clearance of its outstanding dues in entirety by borrower, failed to return latter's title deeds. Therefore, this decision is also not applicable to the facts of the present case.

On the other hand, the learned counsel for the respondent-bank raised a preliminary objection with regard to the maintainability of the writ petition regarding the enforcement of the contractual obligation in the form of a bank guarantee since the invocation of the bank guarantee involved disputed questions of fact relating to issuance of the letters and interpretation of the same on invoking the bank guarantee.

To support his contention, he relied on an order passed by this Court in W.P.No.22344/2006 dated 31.10.2014. The prayer sought in the above said writ petition is assailing the action of the first respondent-Canara Bank in not making payment of remaining amount under the bank guarantee to a tune of Rs.54,56,750/- as illegal, arbitrary and against the terms of the bank guarantee No.2657BG:130 2003 dated 8.9.2003 and a

[3] (2010) 11 SCC 186

further direction to the first respondent bank to honour the said bank guarantee. In the said judgment, this Court was pleased to consider the various judgments of this Court and the Apex Court and pleased to held that the nature of the controversy involved and keeping in view the pendency of the civil litigation between the parties, held that the writ petition is not maintainable as the petitioners failed to make out a case warranting the interference of this Court under Article 226 of the Constitution of India.

Perusal of the affidavit and the material enclosed to the writ petition and after hearing the arguments of both the counsel, the undisputed facts are that M/s. Hindusthan Magnetics Limited executed bank guarantee to safeguard the revenue of the customs at the time of obtaining the EPCG licences which was valid up to 11.05.1999 as mentioned in the affidavit and also as per the undertaking given by the respondent-bank that M/s. Allahabad Bank hereby agrees to renew/extend the guarantee period at the instance of the importer (M/s Hindusthan Magnetics Limited) provided the importer complies and satisfies the usual terms and conditions of the bank for renewing/extending the bank guarantee. As the said M/s. Hindusthan Limited could not fulfill the E.O. up to 31.12.1987, the petitioner issued orders of forfeiture of the bank guarantee on 29.07.199 to the respondent bank, but the respondent bank through a letter dated 17.08.1989 intimated the petitioner that the forfeiture of the bank guarantee was time barred.

A perusal of the undertaking would reveal that the bank guarantee was executed by M/s. Hindusthan Private Limited in favour of the petitioner to safeguard the revenue of the customs at the time of obtaining the EPCG licenses and the respondent bank as surety expressly and irrevocably undertaking, indemnify and guarantee to the government if the exporter fails to perform the whole or part of the export obligations under the terms and conditions laid down in the notification, without reference to the importer on the written demand of the government pay to the government or to any officer so authorized by the government the sum of Rs.60 lakhs (Bank Guarantee amount). Admittedly, M/s. Hindusthan Magnetic Ltd., has not renewed/extended the bank guarantee period beyond 11.05.1999. Further, by the time the petitioner ordered forfeiture of the bank guarantee and addressed letter dated 29.07.1999 to the respondent-bank, the bank guarantee period already expired on 11.05.1999 itself. Therefore, the question of demand of bank guarantee amount of Rs.60 lakhs to the petitioner does not arise. That apart with regard to the maintainability of the writ petition on the aspect of disputed questions of fact for revocation of bank guarantee and the interpretation of the terms and conditions, this Court cannot go into and appreciate the same by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of the India. As such, in the present facts and circumstances of the case, this Court feels that no prima facie case is made out by the petitioner seeking interference of this Court in exercise of its power of judicial review. As such, there are no merits in the writ petition and the same is liable to be dismissed.

Accordingly, the writ petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

P. KESHAVA RAO,J

Date:17.4.2018
ccm

HONOURABLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION No.438 of 2006

Date:17.04.2018

ccm