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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th May, 2018

+ O.M.P.(I) (COMM.) 208/2018 & I.A.No.6266/2018

SANJAY TRACTORS AND AUTOMOBILES Petitioner

Through: Mr.Viraj Kadam and Mr.Prashant
Shinde, Advs.

versus

CNH INDUSTRIAL INDIA PRIVATE LIMITED Respondent

Through: Mr.Sudhir Nandrajog, Sr. Adv. with
Mr.Niraj Singh and Mr.Alok
Srivastava, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner *inter-alia* claiming the following reliefs:

“b. Interim measures of protection be granted in favour of Applicant by restraining the Respondent from invoking Bank Guarantees more particularly described in Schedule till commencement and disposal of arbitral proceeding and till accounts are settled by arbitrator in accordance with law.

c. Interim measures of protection be granted in favour of Applicant by restrain the Respondent from capriciously terminating the Dealer Agreement dated 8.3.2016 of Applicant till disposal of arbitral proceeding.

d. Interim measures of protection be granted in favour of Applicant by restrain the Respondent from appointing new dealer in the territory of Applicant till commencement and disposal of arbitral proceeding.”

2. The petitioner claims that a Partnership Firm under the name and style of 'Surya Tractors Company' entered into a Dealership Agreement with the respondent for the purpose of purchase of Tractors, Agricultural Implements and its Spare Parts and also to provide after sales services to its customers. The partnership was reconstituted on 12.11.2012. The petitioner further claims that upon such reconstitution, Dealership Agreement dated 04.12.2012 was executed between the parties.
3. In terms of the said Dealership Agreement, the petitioner had submitted four Bank Guarantees to the respondent. The said Bank Guarantees, admittedly, are unconditional and unequivocal in nature.
4. There was a further change in the constitution of the Partnership pursuant to which, a Tripartite Agreement dated 14.08.2015 was executed between the parties. In the Tripartite Agreement it was admitted that the Partnership firm owed an amount of Rs.9,74,48,700.80 to the respondent. The erstwhile partners of the earlier Partnership Firm continued to remain liable towards such liability to the respondent.
5. A new Dealership Agreement was also executed between the parties on 08.03.2016 whereunder a new dealer code was given to the Partnership Firm by the respondent. A Tripartite Agreement was also executed between the earlier partners and the new Partnership on one hand and the respondent on the other, whereunder, the petitioner acknowledged the liability of Rs.8,44,82,939.95 owed to the respondent. It was a term of the Tripartite Agreement that incase the new Partnership is unable to discharge such liability, the earlier partners would remain liable towards the same. The Bank Guarantee(s) continued to remain alive and operative.

6. The petitioner claims that while the petitioner was discharging the liability of the earlier Partnership Firm, the respondent unauthorizedly debited the account of the earlier Partnership Firm by an amount of Rs.1,46,12,000/- thereby increasing the liability of the earlier Partnership and on basis thereof is now seeking to invoke the Bank Guarantees of the petitioner.

7. The petitioner has filed an additional affidavit whereby it is further claimed that the emails dated 08.01.2018, 16.02.2018 and 13.02.2018 from the respondent to the petitioner show varying amounts as outstanding from the petitioner, though, there were absolutely no transaction transacted between the parties during such period. It is further submitted that the accounts of the respondent cannot be relied upon and this is a serious dispute to be adjudicated by the Arbitral Tribunal.

8. On the other hand, learned senior counsel for the respondent draws my attention to the averments made in the Brief Synopsis and List of Dates filed by the petitioner wherein it is admitted that the new Partnership is merely a change of name and not a reconstitution of the Firm and it is further admitted that the petitioner owed an amount of Rs.6 crores to the respondent. Further, relying upon the Statement of Account filed by the petitioner alongwith its additional affidavit, it is contended that while the account of the petitioner under the earlier code had been debited by an amount of Rs1,46,12,000/- an equivalent credit of the same amount had been given to the petitioner under the new dealership code, and therefore, as a final result, there was no difference in the amount owed by the petitioner due to such entries. It is submitted that these entries were made at the behest of the petitioner as the petitioner could not have transacted in the new

dealership code due to the amount owed by it under the new dealership code exceeding the credit limit.

9. I have considered the submissions made by the learned counsels for the parties. Admittedly, the Bank Guarantees in question are unequivocal and unconditional in nature. The law relating to the Bank Guarantees is now well settled by a catena of judgments of the Supreme Court including in ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.***, (1997) 6 SCC 450, wherein the Supreme Court held as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] and U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows: (SCC p. 574, para 12)

“The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank

guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351, CA] are apposite:

“... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.”

(emphasis supplied)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants

and Engineers (P) Ltd. [(1988) 1 SCC 174]

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

10. In ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.*** (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to alleged breach of contract by the Respondent is not a plea of fraud of a egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

“24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any “special equities” in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

“That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003.”

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable injustice”. There is no plea of any “special equities” by the appellant in its favour. So far as the plea of “irretrievable injustice” is concerned the appellant in its petition merely stated:

“That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant.”

28. The plea taken as regards “irretrievable injustice” is again vague and not supported by any evidence.

11. In ***Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.*** (2016) 10 SCC 46, the Supreme Court once again cautioned that the bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the arbitrator and not by this Court under Section 9 of the Act. I would only quote the

relevant paragraphs of the said Judgment:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar

Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , at para 14: (SCC pp. 117-18)

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”

12. In the present case, even taking the contention of the petitioner on face value, the petitioner admittedly owes an amount of Rs.6 crores to the

respondent. The Bank Guarantees in question are of a value of about Rs.5 crores. It is not denied by the petitioner that the Bank Guarantees can be invoked by the respondent even for the dues owed under the new Dealership Code. In any case, the same would have no bearing as far as the relief of injunction on the Bank Guarantees is concerned. There is no case of egregious fraud of special equities and and irretrievable injustice as referred by the Supreme Court in the above judgment, made out by the petitioner.

13. In view of the above, the respondent cannot be restrained from invoking the Bank Guarantees.

14. As far as the claim of injunction against the termination of the Dealership Agreement is concerned, learned counsel for the petitioner submits that he does not press the injunctive relief at this stage, without prejudice to the rights of the petitioner to agitate the said issue before the Arbitral Tribunal that has been constituted. He further submits that this should also not prejudice the rights of the petitioner to challenge the very appointment of the Arbitral Tribunal.

15. In view of the above, I find no merit in the present petition and same is accordingly dismissed along with pending application. There shall be no order as to cost.

Dasti.

NAVIN CHAWLA, J

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