Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 872 OF 2019

DR Services through its Proprietor ...Petitioner
Versus
The State of Maharashtra And Ors ...Respondents

Mr GS Godbole, *i/b DP Adsule, for the Petitioner.*
Mr Anil Sakhare, Senior Advocate, *with Mr Kedar Dighe, for the Respondents.*

CORAM: G.S. PATEL, J.
DATED: 22nd November 2019

PC:-

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. It is directed against an order dated 18th July 2019 on an interim application under Section 17 of the Arbitration and Conciliation, Act. The order was passed by the learned sole arbitrator, Mr Justice RM Savant, former Judge of this Court on an application made by the claimant in arbitration seeking to restrain the State of Maharashtra and other respondents from encashing a bank guarantee of about Rs.7.95 crores and for a similar restraint against the release of a performance security of Rs.1.90 crores.

2. At the forefront, I note Mr Godbole's principal ground of challenge, viz., that in disposing of the Section 17 application the learned sole arbitrator only applied the law but did not consider even a single document placed before him by the claimants. It is his submission that an appeal under Section 37 enjoys a wider remit than a challenge under Section 34 to a final award. The principle that govern appeals from interim orders in civil actions will govern appeals under Section 37. The proposition as placed is, I think, overbroad, especially when one bears in mind that the fundamental underpinning of arbitration law jurisprudence is to minimize judicial intervention.

3. The dispute pertains to a toll collection contract for the toll plaza at Kamothe and Kopara on the Sion-Panvel Highway. The State Government invited tenders. The claimant's was the highest bid. The work order was issued on 30th November 2018. Clause 17 of the tender required the claimant to furnish a bank guarantee of Rs. 7.95 crores and a performance security in the amount of Rs.1.90 crores. The claimant complied, albeit belatedly. It commenced work.

4. There was an allegation that the claimant was in breach because it did not deposit the weekly remittance due to the respondents. The State Government terminated the contract on 28th December 2018. There was a second termination notice on 29th January 2019. The claimant promised to make good the deficiency in the deposit and by this got for itself an extension or a further opportunity. The contract was finally terminated on 20th March 2019.

5. The State Government sent a notice of invocation of bank guarantee and performance security. The claimant filed Writ Petition No. 3952 of 2019 in this Court. That was disposed on 10th April 2019 by the Division Bench (The Chief Justice and NM Jamdar J), a copy of which is at page 262. Paragraph 6 of that order says:

> "6. It is further agreed between the parties that the bank guarantee executed in the sum of Rs. 7.95 Crores by Bank of Maharashtra at the asking of he petitioner would not be enforced for a period of four weeks from today and a letter, if delivered to the branch Manager of the said Bank invoking the bank guarantee would be withdrawn. The petitioner would be entitled to seek interim measure under Section 9 of the Arbitration and Conciliation Act, 1996."

6. This is the position that continued even before the learned sole arbitrator and continues even before me today.

7. A copy of that order in the writ petition was sent to the learned sole arbitrator. The claimant said it would make its application under Section 11. It seems that the claimant had, in the meantime, approached the Supreme Court in an Special Leave Petition from the order of 10th April 2019. Before the learned sole arbitrator because the State Government contended that when claimant filed its Section 17 application and when it was taken up on 3rd May 2019, it did not disclose that on 24th April 2019 it had filed a Special Leave Petition in the Supreme Court. The State Government therefore sought an order from the learned Sole Arbitrator that the interim or ad interim protective order be vacated.

8. What the learned sole arbitrator had before him were these two opposing applications: first, the Section 17 application by the claimant, and, second, the application by the respondent to vacate the stay. The learned Sole Arbitrator considered the Section 17 application and the State Government's reply and the facts on record. He then turned to the law. That, as we know, is now well settled. There are only two circumstances, fraud and irretrievable damage or injustice, that, if proved, would entitle an applicant to an injunction against the encashment of a bank guarantee. The usual well-settled authorities were cited before the learned sole arbitrator: *UP Cooperative Federation Limited v Singh Consultants and Engineers (P) Ltd*,[1]; and *Mahatma Gandhi Sahakari Sakhar Karkhana v National Heavy Engineering Cooperative Ltd*.[2] These two Supreme Court authorities hold the field. There has been no deviation from the ratio of either, nor any dilution of the principles they set out.

9. A third decision cited was of this Court in *Felguera Gruas India Pvt Ltd v Tuticorin Coal Terminal Pvt Ltd*.[3] This is an interesting case inter alia on account of later developments. The decision cited before the learned sole arbitrator pertained to an application seeking a restraint against bank guarantee in cash. The applicant was Felguera Gruas India Pvt Ltd or FGIPL. It failed right up to the Supreme Court in its efforts to get an injunction against the invocation of its bank guarantees. It proceeded in arbitration against same respondent, Tuticorin Coal Terminal Pvt Ltd. In that arbitration it has now finally obtained a 250-page award from a

1 (1988) 1 SCC 174.

2 (2007) 6 SCC 470.

3 AIR 2018 Bombay 153.

three-member tribunal. That matter was before me recently, though in another context. One of the claims that Felguera Gruas made and on which it succeeded was precisely the amount of bank guarantee, roughly around Rs. 43 crores. This claim was allowed with a finding that the respondent had wrongfully invoked the bank guarantee. The *Felguera Gruas* litigation trajectory is therefore demonstration of the law on injunctions against bank guarantees in actual operation: no interim injunction is granted, but a claim for final relief may succeed. The window for interference remains very narrow. But if the invocation is indeed wrongful, the remedy or cure will come after the fullness of evidence is taken in the final award subject to proper proof.

10. Now in the case at hand the learned sole arbitrator considered the statutory provisions and concluded that clause 17 of the bank guarantee and the relevant provisions of the performance and security showed that both are irrevocable, continuing and unconditional. These were both securities furnished for due performance of the contract. In paragraph 12 of the impugned order the learned sole arbitrator returned to the authorities in question. He began by setting out the relevant principles. There can be no quarrel with any of these, including that the bank guarantees is an independent contract, and that the exception to honouring an unconditional and irrevocable bank guarantee (that is to say allowing a restraint against its encashment) is confined to cases where there is a clear, defined and apparent fraud of which the bank has notice, and the fraud is shown to be one of so egregious in nature that it would vitiate the entire underlying transaction. The second (and only other) ground for interference is irretrievable injury or injustice.

11. Mr Godbole wisely does not place his case before me on the first ground. He simply cannot. There is no fraud. The only case is that there was a delay on the part of the respondents and therefore there is irretrievable injustice or prejudice or injury caused by the invocation. But this is not what the law requires. If it was as simple as this then every single invocation of a bank guarantee will necessarily be met with an injunction, for every encashment necessarily involves some level of financial discomfort.

12. The grounds urged before the learned sole arbitrator are set out in paragraph 14 and while today Mr Godbole's forensic acuity may allow him to invoke other grounds, I do not think it would be even remotely proper to interfere on grounds not taken or pleaded before the learned sole arbitrator. Paragraph 14 at pages 57 and 58 reads thus:

> "14. It is in the context of the law laid down by the Apex Court and the Division Bench of the Hon'ble High Court that the case of the Claimant would be considered. As indicated herein above, the case for injunction against the Respondents can be found in the pleadings in paragraphs 4 and 11 of the application filed by the Claimant. In paragraph 4, it is stated that the action of the Respondents in terminating the contract is arbitrary and illegal. It is further stated that the said contract has been terminated without giving the Claimant an opportunity of hearing or giving proper show cause notice and without giving the time for deposit of the amount. In paragraph 11, it is stated that if the bank Guarantee is encashed, then the residential flats of the Claimant and other investors will be seized. It is stated that the said Bank Guarantee has been furnished by mortgaging the immovable properties of the Claimant as

> well as other investors. It is again reiterated that the termination of the contract has been done arbitrarily and illegality. **The aforesaid case does not satisfy the requirement of there being a fraud or an irretrievable damage or injustice would be caused which are the circumstances which can be said to be a *sine qua non* to restrain the beneficiary from invoking the bank Guarantee and which would entitle the party which has furnished the bank Guarantee to an injunction. The submissions of the learned Senior counsel Mr Rajiv Chavan for the Claimant were revolving around there being a dispute in respect of the underlying contract which in the instant case is the Toll Collection Contract. It is trite that the contract relating to the Bank Guarantee is an independent and separate contract and that the bank is not concerned with the inter se dispute between the parties in respect of the underlying contract.**
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> Having regard to the well settled position of law as aforesaid, it would have to be said that the Claimant would not be entitled to relief in the application filed by it under Section 17 of the 1996 Act."

(*Emphasis added*)

13. I see no reason to hold that there is anything remotely erroneous in this statement of the legal position and appreciation on facts. The view of the learned sole arbitrator is not merely probable or plausible. It is the only possible view.

14. There is absolutely no merit in this appeal. It is dismissed. This is a commercial division matter and ordinarily should receive an order of costs but I will only request that the costs of this appeal be taken into account by the learned sole arbitrator at the time of making of his final award.

15. At this stage Mr Godbole asks for a continuance of the ad-interim order operating since 10th April 2019. Only because it has been operating from 10th April 2019 and absolutely for no other reason that I can tell on merits, it is continued for a further period of three weeks from today.

(G. S. PATEL, J)