IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 22nd DAY OF FEBRUARY, 2019

THE HON'BLE MR. JUSTICE M.GOVINDARAJ

A. No.8032 of 2018
in
O.A.No.629 of 2015

In the Matter of Section 9(ii)(c) and (e) of the Arbitration & Conciliation Act, 1996
and
In the matter of Disputes Between the Applicant and the 1st Respondent under the Contract dated 07.12.2009

<u>O.A.No.629 of 2015</u>
M/s.EMAS Engineers & Contractors Pvt. Ltd.,
Karunai Kudil,
No.226, Third Floor,
Cathedral Road,
Chennai - 600 086. ..Applicant

Vs.

1.**TICEL Bio Park Limited,**
Taramani,
Chennai - 600 113.

2.**Federal Bank,**
52, (New No.107) Armenian Street,
Chennai - 600 001. ..Respondents

<u>O.A. No.8032 of 2015</u>
TICEL Bio Park Limited,
Taramani,
Chennai - 600 113. ..Applicant

Vs.

1.M/s.EMAS Engineers & Contractors Pvt. Ltd.,
Karunai Kudil,
UTI Building, II Floor,

Rajaji Salai,
Chennai – 600 001.

2.Federal Bank,
52, (New No.107) Armenian Street,
Chennai – 600 001. ..Respondents.

Original Application praying that this Hon'ble Court be pleased to Re-open the Original Application No.629 of 2015 and direct the Registry to pay Rs.4,82,50,000/- to the Applicant which has been deposited with the Registrar General of High Court by the 2nd Respondent Bank being the balance 50% of the Bank Guarantee sum. (Amended as per Order dated 02.01.2019 in Application No.9177 of 2018.)

Original Application coming on this day before this Court for hearing, the court made the following order:-

This application has been filed seeking to reopen the Original Application No.629 of 2015 and direct the registry to pay Rs.4,82,50,000/- to the applicant which has been deposited with the Registrar General of High Court by the 2nd respondent Bank being the balance 50% of the Bank Guarantee sum.

2.The applicant and the 1st respondent entered into a contractual agreement and Letter of Award was issued on 07.12.2009 , whereby the 1st respondent/applicant has undertaken to develop bio technology park in a phased manner. The work was commenced on 11.12.2009 and was required to be completed by 10.09.2011.

3. However, the 1st respondent company has failed to complete the works entrusted to them within the scehduled date. It was periodically extended from time to time . By letter dated 18.8.2014, the applicant has communicated the 1st respondent that liquidated damages for the delay of 643 days would be levied at the rate of Rs.2 lakhs per day. Joint inspections were held on 3.12.2014, 4.12.2014 and 5.12.2014 along with the 1st respondent as well as Engineering Consultant.

4. The joint inspection was followed by a review meeting on 26.2.2015, wherein, the 1st respondent was given an ultimatum that if it cannot complete the balance work on or before 31.3.2015 , the applicant would complete the same by engaging other agencies and recover the cost from the 1st respondent.

5. Despite the ultimatum given by the applicant, the 1st respondent could not complete the work and could not show any progress in the work during the extended period from 8.6.2015 to 9.7.2015 also. Therefore, the contract was termianted on 9.7.2015 and applicant had taken a decision to forefeit the performance bank guarantee in terms of clause 45 of the General Conditions of Contract read with clause 35 and clause 81.3 of the General Conditions of Contract.

6. Even though the applicant has invoked the bank guarantee on 19.6.2015, he did not receive any payment from the 2nd respondent, since the first respondent filed an application vide O.A.No.629 of 2015 under Section 9 of the Arbitration and Conciliation Act seeking an order of interim injunction restraining the 1st respondent from encashing the amount of Rs.9.65 crores pursuant to the invocation of bank guarantee dated 11.12.2009 on 19.6.2015 issued by the 2nd respondent in favour of the 1st respondent pending disposal of arbitration proceedings.

7. In the said original application, this Court by its order dated 24.06.2015 granted Status Quo. In view of the said order, the 2nd respondent refused to release the money to the applicant.

8. In the meanwhile, the 1st respondent has expressed his willingness to refer the dispute to arbitraiton. As per the accepted procedure, the applicant nominated one arbitrator from his side and the 1st respondent has also nominated one arbitrator. Both the nominee arbitrators have elected the Presiding Arbitrator. While so, the Arbitrator nominated by the 1st respondent recused himself and the arbitration proceedings came to grinding halt and nothing progressed thereafter.

9. It appears that one of the creditors of the 1st respondent filed a petition under section 433 of the Companies Act 1956 seeking an order of winding up against it. Winding up petition was allowed and the Official Liquidator was appointed. Since no steps were taken by the 1st respondent and the Official Liquidator, this court, on the application filed by the applicant in O.A.No.629 of 2015, by its order dated 13.10.2017, vacated the order of status quo on the following lines.

> *'That the interim order granted in pursuance of the order dated 24.6.2015 made in O.A.No.629 of 2015 directing both parties hereto do maintain status*
>
> *quo be and is hereby vacated.*
>
> *2. That the Official Liquidator shall seek leave in terms of Section 446 of the Companies Act, 1956 within a period of four weeks from the date of receipt of a copy of this ordre and commence proceedings as per the governing clause in the letter of intent dated 07.12.2009.*
>
> *3. That the 2nd respondent herein be and is hereby directed to pay 50% of the amount guaranteed to the first respondent forthwith*

and the balance 50% shall be deposited in an interest bearing fixed deposit to the credit of this application pending resolution of disputes inter se the parties. '

Thereafter the applicant has been addressing the respondent to comply with the orders of the Honourable Court. The 2nd respondent has deposited 50% of the amount guaranteed with the Registrar, High Court and 50% of the amount to the applicant.

10. This court, in its order dated 13.10.2017 has categorically directed the Official Liquidator to seek leave in terms of section 446 of the Companies Act within a period of four weeks of receipt of that order and commence proceedings as per the governing clause in the letter of intent dated 7.12.2009.

11. Since the Official Liquidator has not taken any steps seeking leave under Section 446 of the Companies Act, but directed the 2nd respondent Bank to deposit the balance 50% of the amount with the Official Liquidator, the applicant has approached this Court for releasing of the balance 50% of the bank guarantee.

12. Denying the claim of the applicant, the Official Liquidator filed a report before this court. He would

submit that under section 537 of the Companies Act, 'Where any company is being wound up by the Honourable Court/Tribunal any attachment, distress or execution put in force, without leave of the Court/Tribunal against the estate or effects of the company, after commencement of the winding up or any sale held, without leave of the Court of any of the properties or effects of the company after such commencement shall be void.

13. Therefore he would pray that the present O.A.No.8032 of 2018 in OA.No.629 of 2015 may be transferred to the Company Court where the liquidation proceedings are pending and that the applicant be directed to deposit the amount of Rs.4,82,50,000/- remitted with them by 2nd respondent Bank herein and also to direct the Federal Bank to remit a sum of Rs.4,82,50,000/- to be deposited in the name of Registrar General, High Court of Madras.

14. In this back ground, it has to be seen as to;

(a) whether the bank guarantee is an independent contract?

(b) whether the bank guarantee executed by the company which subsequently went into liquidation proceedings becomes its asset?

(c) whether the transaction happened thereafter becomes void in view of section 537 of the Companies Act or not?

15. Admittedly, the Official Liquidator has not taken any steps as directed by this court under section 446 of the Companies Act. Be that as it may.

16. To elucidate the issue, it is beneficial to refer the following provision under Indian Contract Act.

> *'S.128. Surety's liability.- The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.'*

17. Section 134 of the Indian Contract Act reads thus;

> ***'S.134. Discharge of surety by release or discharge of principal-debtor.-*** *The surety is discharged by any contract between the creditor and the principal-debtor, by which the principal-debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal-debtor.''*

18. As per the above provisions, the liability of the surety namely, the Bank is co-extensive with that of the principal debtor. In the instant case, the above surety was not limited or rescinded or removed till date. As long as the principal debtor is not discharged,

automatically the surety is also not discharged . Therefore, it is very clear that in the instant case, the principal debtor is liable to pay the amount as promised. Now it has to be seen whether the bank guarantee is independent contract or not.

19. The Honourable Supreme court has categorically held that bank guarantee executed in favour of the creditor is an independent distinct contract. In a case reported in ***2018 SCC OnLine Del 10345 (Citicorp International Limited Vs Shiv-Vani Oil & Gas Exploration Servies Ltd)*** , extracted the judgment of the Honourable Supreme Court in ***Ansal Engineering Projects Ltd V. Tehri Hydro Development Corporation Ltd., (1996) 5 SCC 450,*** wherein, the Supreme Court has held as follows;

> *'11. The Supreme Court has clearly noted that the discharge of a principal debtor by operation of law in bankruptcy does not absolve the surety of his liability under sections 128 and 134 of the Indian Contract Act.*
>
> *12. The contention of the learned counsel for the OL that on account of the different facts of the aforenoted case, the said judgment would not have any application to this case is not correct. The legal position is not altered merely because the bank guarantee was encashed after the winding up proceedings had commenced. Under section 128 of the Indian Contract act, the liability of the surety is*

coextensive with that of the principal debtor. Reference in this context may also be had to the judgment of the Supreme Court in Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd., (1996) 5 SCC 450. The Supreme Court held as follows;-

'4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.'

13. It clearly follows that the bank guarantee is an independent and distinct contract between the bank and the beneficiary.

It has no connection with the primary contract. Merely because the respondent company has gone into liquidation would not in any manner affect the said obligation of the bank in terms of the bank guarantee. There is no evidence on record to show that there would be a diminution in the immovable assets of the respondent company on account of encashment of the bank guarantee.

14. Regarding the plea that the applicant would steal a march over the other unsecured creditors, as noted above that the bank guarantee was an independent contract between the applicant and the bank who had agreed to be a guarantor on behalf of the respondent company. The payment which is being sought by invocation of the bank guarantee could not be sought by the respondent company from the bank that has given the guarantee. Further, the bank guarantee was furnished pursuant to orders of the Bombay High Court which were verified by the Supreme Court.

15. I accordingly, allow the present application to the extent that the applicant would be entitled to approach the Bombay High Court seeking relief of release of the amount received, which is lying deposited with the Bombay High Court pursuant to the encashment of the bank guarantee along with accumulated interest thereon.'

20. Likewise, the High Court of Bombay, in the case of ***Gas Authority of India Ltd., New Delhi Vs. Official Liquidator, through Indocan Engineering System Pvt. Ltd.,***

reported in ***2004 SCC OnLine Bom 53*** relying on various judgments of the Honourable Supreme Court, held in similar circumstances, as under;

> *'10. The second question which falls for consideration of this Corut is where after winding up order is passed by the Court and a Provisional Liquidator is appointed, whether the Bank Guarantee can be invoked and payment can be made by the Bank?*
>
> *11. The Apex Court in the case reported in (1982) 3 SCC 358: AIR 1982 SC 1497 which has been subsequently followed by the Apex Court in its subsequent Judgment reported in (2002) 5 SCC 54 and as also followed by the Calcutta High Court in the case reported in (1990) 69 Company Cases 697, has held that so far as the Bank Guarantee is concerned, there is no reason as to why the said payment of Bank Guarantee should be stayed as it was a matter specifically between the Bank and the party in whose favour the Bank Guarantee has been issued and as such there was no reason why the said payment should not be made as agreed under the said Bank Guarantee.*

21. Therefore, it is crystal clear that the bank guarantee is an independent contract between the bank and beneficiary and it cannot be connected with the primary contract. Only because the 1st respondent company has gone into liquidation, it would not in any manner affect the applicant by the bank in terms of the bank guarantee.

22. In instant case, the money is lying with the Registrar General of this court. Since the Official Liquidator has failed to take any action and in view of the findings given by the Honourable Supreme court mentioned above, the applicant is entitled to release of money as prayed for.

23. Accordingly, a direction is issued to the Registrar General to release the amount of Rs.4,82,50,000/- which has been deposited by the 2nd respondent Bank being the balance 50% of the Bank Guarantee to the applicant herein forthwith.

24. The application is disposed of accordingly.

Sd/-M.G.R.J
22/02/2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

COURT OFFICER(O.S.)
JJ 02/04/2019
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