IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.01.2019

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

WA.No.2695/2018 & CMP.No.21994/2018

The Chief Manager
Bank of India, Chennai Bullion Banking Branch, 6th Floor, Prasnath Real Gold Tower, North Usman Road
Chennai 600 017. .. Appellant / 1st Respondent

Versus

1 M/s.Southern Gold Pvt Ltd.
No.2/573-A1, Christopher Nagar
Ancheri Post, Thrissur-680006.
Represented by its Director
Mr.Collins C.A. .. 1st Respondent / Writ Petitioner

2 The Federal Bank Ltd,
Ernakulam North Branch
Banerji Road
Ernakulam North,
Cochin-682018. .. 2nd Respondent / 2nd Respondent

Prayer:- Writ Appeal filed under Clause 15 of the Letter Patent to set aside the order of this Court dated 09.11.2018 and extended by the order dated 20.11.2018 passed in WMP.No.34578/2018 in WP.No.29607/2018, which was filed to grant an order of interim stay of all proceedings in the file of the 1st respondent in connection to the Recall Notice in Reference No.CBBB/RRt/2018-19 dated 03.11.2018 pending disposal of WP.No.29607/2018 respectively.

For Appellant : Mr.R.Umasuthan

For R1 : Mr.Muthuvenkataraman, Sr.Counsel assisted by Ms.Jayalakshmi

For R2 : Mr.S.Sathiyanarayanan

JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.,]

By consent, the writ appeal is taken up for final disposal and is disposed of by this judgment. Mr.S.Muthuvenkataraman, learned Senior Counsel assisted by Ms.Jayalakshmi, learned counsel appears on behalf of the 1st respondent and Mr.S.Sathiyanarayanan, learned counsel appears on behalf of the 2nd respondent herein.

2 The 1st respondent herein / writ petitioner filed WP.No.29607/2018 praying for issuance of a writ of certiorarified mandamus, calling for the records relating to the Re-call Notice dated 03.11.2018 with a further direction, directing the appellant herein/1st respondent in the writ petition to consider their proposals dated 29.08.2018 ; 11.10.2018 and 01.11.2018 respectively on merits and pass such further or other orders.

3 The 1st respondent / writ petitioner, pendency of the writ petition, filed WMP.No.34578/2018 praying for an order of interim stay of all further proceedings in connection with the impugned Recall Notice dated 03.11.2018.

4 The writ petition came up for admission and was entertained on 09.11.2018 and the learned Judge, had ordered notices to the respondents through Court as well as privately returnable by 20.11.2018 and pending writ petition, granted an order of ad-interim stay as prayed for till 20.11.2018 and directed the Registry to list the matter for hearing on that date.

5 The appellant/Bank who was arrayed as the 1st respondent in the writ petition, had entered appearance and when the matter was called on 20.11.2018, it appears that the said counsel made a request for filing counter affidavit. Therefore, the learned Single Judge has directed listing of the matter on 30.11.2018 and extended the order of interim stay already granted, until further orders.

6 The appellant-Bank / 1$^{st}$ respondent, aggrieved by the original order of interim stay dated 09.11.2018 and extension of the said order on 20.11.2018, came forward to prefer this writ appeal.

7 The relevant facts leading to the filing of this writ appeal, briefly narrated, are as follows:

8 The 1$^{st}$ respondent/writ petitioner had borrowed as sum of Rs.6 Crores from the appellant-Bank/1$^{st}$ respondent as Bullion Loan on 06.07.2011 and the said loan facility was periodically reviewed and enhanced. The appellant-Bank/1$^{st}$ respondent vide Sanction Letter dated 10.06.2016 had sanctioned a sum of Rs.60 Crores as the Bullion Loan in favour of the 1$^{st}$ respondent/writ petitioner.

9 According to the appellant-Bank/1$^{st}$ respondent, the said loan amount was due and liable to be paid by the 1$^{st}$ respondent/writ petitioner in Single Bullet Payment by end of 180 days after the first date of delivery of gold bullion on loan with an option to prepay without prepayment charges in full or in part and the interest on the said amount needs to be serviced every month calculated at the rate of 3.50% per annum compounded with monthly rests, calculated in dollar terms on daily product basis at London A.M., rate for Bullion Gold.

10 The 1$^{st}$ respondent/writ petitioner, as against the sanctioned loan of Rs.60 Crores, granted by the appellant-Bank, had availed/borrowed 188 Kgs of Billion Gold bars as per their drawing limit against the actual security provided at Rs.55 Crores to the appellant-Bank and admittedly, they had executed 9 Bank Guarantees for the due repayment and the period of the Bank Guarantees had also been extended from time to time.



11 In terms of the Bank Guarantee, the liability of the 2$^{nd}$ respondent herein, viz., the Federal Bank Limited, Ernakulam North Branch, Cochin, Kerala State, is absolute and unconditional and the 2$^{nd}$ respondent has also undertaken to pay the Bank Guarantee amount demanded by the appellant-Bank, notwithstanding any dispute or protest raised by the 1$^{st}$ respondent/writ petitioner in any suit or proceedings

pending before the Court within three days of invocation.

12 It is also the case of the appellant-Bank that the price of gold used to vary/fluctuate in between the date of delivery and the due date of repayment and with a view to protect their interest against the price fluctuation, the 1st respondent/writ petitioner requested the appellant-Bank to take Good Till Cancellation Cover [in short ''GTC''] with the vendor at their behest. According to the appellant-bank, under 13 Nos. of GTC Cover, relating to 188 Kgs of gold, a sum of Rs.517,77,97,016/- had been paid through ''Swift Transaction'' and the said sum has to be reimbursed by the 1st respondent/writ petitioner inasmuch as the said amounts were paid by them, by the supplier Bank, viz., M/s.Rand Merchant Bank, South Africa. It is also the case of the appellant-Bank that the liability on account of 13 Nos. of GTC Cover, amounting to a sum of Rs.5,25,27,603/- which was to be reimbursed by the 1st respondent/writ petitioner had also been paid by them.

13 Insofar as the sum of Rs.15,77,97,016/- is concerned, it is liable on account of 13 Nos. of FTC Cover, despite the request and demands made, the 1st respondent/writ petitioner had failed to pay the same and the 1st respondent/writ petitioner vide representation dated 11.10.2018, requested the appellant-Bank to grant a moratorium period of one year to discharge the liability and since the appellant-Bank found that the said request was not bona fide, owing to the conduct of the 1st respondent/writ petitioner, had called upon the 1st respondent/writ petitioner to pay the over dues and protect their loan account from falling into the classification ''Non Performance Assets'' [NPA] category and despite indulgence shown, the 1st respondent/writ petitioner did not clear the dues and therefore, the loan account was classified as NPA on 31.10.2018.



14 The appellant-Bank, on account of the fact that the borrowal accounts of the 1st respondent/writ petitioner had become NPA on 31.10.2018, had recalled the loan vide their impugned Recall Notice dated 03.11.2018 and called upon the 1st respondent/writ petitioner to discharge the same and in terms of the Bank Guarantee issued by the 2nd respondent in favour of the appellant-Bank, they have also invoked the Bank Guarantee vide their impugned letter dated 03.11.2018

and the 1st respondent/writ petitioner, challenging the legality of the Recall Notice dated 03.11.2018, came forward to file the above writ petition and pendency of the same, initially had obtained interim orders for a limited period and thereafter, the said interim order was extended until further orders and challenging the legality of the original interim order as well as the extension of the same, the appellant-Bank, who was arrayed as the 1st respondent in the writ petition, came forward to prefer the present writ appeal.

15 The learned counsel for the appellant-Bank had invited the attention of this Court to the typed set of documents as well as the additional typed set of documents and would submit that insofar as 13 Nos. of GTC Cover, relating to 188 Kgs of gold, admittedly a sum of Rs.15,77,97,016/- had been paid and therefore, the 1st respondent/writ petitioner is under obligation to reimburse the same and though initially, they for some time to settle the said amount, on account of vagaries of business and other difficulties, did not do so and also gave a proposal which was found to be inviable and since the loan account of the 1st respondent/writ petitioner was classified as Non Performance Assets on 31.10.2018, the over dues were treated as outstanding amount and the entire amount was recalled and in the light of the fact that the Bank Guarantees executed in their favour are unconditional one, they are entitled to invoke the Bank Guarantees and realise the amounts. It is the further submission of the learned counsel for the appellant-Bank that it is not even the case of the 1st respondent/writ petitioner that the execution of the Bank Guarantees is vitiated by fraud or other unlawful events and technically the order of interim order granted by the learned Single Judge had prevented the appellant-Bank from invoking the Bank Guarantees and no reason, whatsoever, had been recorded also in the impugned order as to the grant of interim orders and therefore, prays for setting aside of the original interim order as well as the order extending the interim stay until further orders and prays for dismissal of the petition filed by the 1st respondent/writ petitioner for interim stay and allowing of this writ appeal.

16 Per contra, Mr.Muthuvenkataraman, learned Senior Counsel assisted by Ms.Jayalakshmi, learned counsel appearing for the 1st respondent/writ petitioner had invited

the attention of this Court to two typed set of documents filed on their behalf and would submit that admittedly, insofar as the loan of Rs.55 Crores is concerned, the said loan amount is fully covered by 9 Bank Guarantees and that apart, equitable mortgage has also been created in favour of the appellant-Bank in respect of the loan and the building situate as S.No.131/84 [Old S.No.532/2], Ollur Village, Thrissur Taluk, Kerala State, stand in the name of Mr.C.A.Collins and Mr.C.A.Raphy, who are the Directors of the 1st respondent/writ petitioner Company and as such, the entire amount said to be outstanding and due and payable to the appellant-Bank had been fully secured in the form of the above said securities. Alternately, it is the submission of the learned Senior counsel appearing for the 1st respondent/writ petitioner that insofar as the sum of Rs.15,77,97,016/- which according to the appellant-Bank, is to be reimbursed by the 1st respondent/writ petitioner is concerned, the said portion of the amount can be realised by invoking the Bank Guarantees executed in favour of the appellant-Bank by the 2nd respondent-Bank and suitable modification may be passed in the impugned order dated 09.11.2018 and in the order extending the said interim on 20.11.2018 and this Court may also fix a date for final disposal of the writ petition.

17 In response to the said submission, the learned counsel for the appellant-Bank would submit that the Bank Guarantee covers the sum of Rs.55 Crores and odd and insofar as the sum of Rs.15,77,97,016/- is concerned, the said amount is not covered by any Bank Guarantee and therefore, it is always open to the appellant-Bank to go for the recovery of the same by invoking appropriate provisions of law and prays for allowing of the writ appeal.

18 This Court paid its best attention to the rival submissions and also perused the materials placed before it in the form of typed set of documents.

19 It is not in dispute that under 13 Nos. of GTC Cover, a sum of Rs.15,77,97,016/- had been paid and according to the appellant-Bank, the said sum already paid, is liable to be reimbursed by the 1st respondent/writ petitioner.

20 A perusal of the exchange of correspondences between the 1st respondent/writ petitioner and the appellant-Bank would disclose that the 1st respondent/writ petitioner, on account of vagaries of business weather, are undergoing some difficult period and on account of the same, they are facing some severe liquidity crisis and therefore, submitted a proposal, which according to the appellant-Bank, is not feasible of compliance.

21 It is to be noted at this juncture that the present writ appeal is against the interim orders granted by the learned Single Judge and though an elaborate argument was made by the learned counsel for the appellant touching upon the merits of the main writ petition, this Court is not inclined to go into the same for the reason that the main writ petition is pending disposal on the file of the learned Single Judge.

22 However, taking into consideration, the interest of the appellant-Bank and the alleged financial difficulties being undergone by the 1st respondent/writ petitioner, coupled with the submissions made by the learned Senior counsel appearing for the 1st respondent/writ petitioner on instructions on that the sum of Rs.15,77,97,016/- can be realised by invoking the Bank Guarantees executed by the 1st respondent/writ petitioner to that effect. This Court is of the considered view that the order dated 20.11.2018, extending the order of interim stay granted on 09.11.2018, until further orders, requires modification and it is made clear that the present modification is without prejudice to the rights of the appellant-Bank as well as the 1st respondent-writ petitioner in the pending writ petition.

23 In the result, the writ appeal is partly allowed and the interim orders dated 09.11.2018 and 20.11.2018, extending the said interim orders until further orders, is modified to the effect that it is open to the appellant-Bank/1st respondent in the writ petition to invoke the Bank Guarantees, viz., IBG34070 dated 05.07.2012, amounting to Rs.11,00,000/- and IBG65366 dated 31.12.2015 amounting to Rs.5,00,00,000/- executed by the appellant-Bank in favour of the 2nd respondent Bank for a sum of Rs.16 Crores.

24 It is also brought to the knowledge of this Court that the 1st respondent/writ petitioner had filed WP [Civil] No.37562/2018 before the High Court of Kerala and obtained interim orders on 16.11.2018 in respect of the very same Recall Notice dated 03.11.2018. It is open to both parties to approach the High Court of Kerala and get suitable modification of the said interim order in the light of the present order being passed in this writ appeal. No costs. Consequently, the connected miscellaneous petition is closed.

25 The Registry is directed to accord priority for the early disposal of the writ petition in WP.No.34578/2018 for final disposal.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

AP

To

1 The Federal Bank Ltd,
Ernakulam North Branch
Banerji Road
Ernakulam North,
Cochin-682018.

2 The Chief Manager
Bank of India, Chennai Bullion Banking
Branch, 6th Floor, Prasnath Real Gold
Tower, North Usman Road
Chennai 600 017.

+1 CC to Mr.S.Sathiyanarayanan, Advocate sr 5376.
+1 CC to Mrs.R.Umasudan, Advocate sr 4917.
+1 CC to Mr.S.Muthuvenkataraman, Advocate sr 4864.

WA.No.2695/2018

EV(CO)
SP(12/02/2019)