GAHC010187972018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5968/2018

NATIONAL SMALL INDUSTRIES CORPORATION LTD.
(NSIC), REP. BY ITS SENIOR BRANCH MANAGER, SRI VINOD VYAS, 3RD BYE LANE, BAMUNIMAIDAN, GHY-21, DIST- KAMRUP (M), ASSAM

VERSUS

ALLAHABAD BANK AND 4 ORS.
REP. BY ITS MANAGING DIRECTOR ANND CEO, 2 NETAJI SUBHAS ROAD, MURGIGHATA, BBD BAGH, KOLKATA- 700001

2:THE ZONAL MANAGER
ALLAHABAD BANK
T R PHUKAN ROAD
RAILWAY COLONY
DIBRUGARH
ASSAM
786003

3:THE BRANCH MANAGER
ALLAHABAD BANK
JORHAT BRANCH
GAR ALI
P.O. JORHAT
ASSAM- 785001

4:M/S HI RISE INFRATECH PVT. LTD.
REGD. OFFICE- 79
PRATAP NAGAR
JAIL ROAD
NEW DELHI- 110064
H.O. NAZIR ROAD
TARAJAN, JORHAT- 785001

5:SRI GAURI KUMAR PACHANI
S/O- LT DULAL CHANDRA PACHANI
DIRECTOR
M/S HI RISE INFRATECH PVT. LTD.
NAZIR ROAD
TARAJAN
JORHAT
ASSAM- 78500

Advocate for the Petitioner : MR. P J BARMAN

Advocate for the Respondent : MR. S K TALUKDAR (R4, R5)

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT

Date : 01-12-2020

Heard Shri PJ Barman, learned counsel for the petitioner. Also heard Shri S Chamaria, learned counsel for the respondent-Allahabad Bank as well as Shri SK Talukdar, learned counsel for the respondent nos. 4 and 5.

2. Considering the subject matter in dispute and as agreed to by the learned counsel for the parties, the present writ petition is disposed of at the admission stage.

3. The petitioner, National Small Industries Corporation (hereinafter referred to as NSIC) is a Government of India Enterprise and a Government Company within the meaning of Section 617 of the Companies Act, 1956. As a part of his business, the petitioner had rendered financial assistance to the respondent no. 4, who had submitted an application dated 09.02.2016 for procurement of raw materials and, as a part of the terms and conditions embodied in an agreement dated 10.02.2016, the said respondent no. 4 had submitted two nos. of Bank Guarantees (for short BG) issued by the respondent Bank (hereinafter Bank) of Rs. 25 lakhs and 15 lakhs. As the respondent no. 4 had defaulted in making repayments and the outstanding rose over to Rs. 25 lakhs, the petitioner had no other option but to invoke

the BG and, accordingly, issued a communication to the Bank on 03.01.2018, vide registered A/D post which was duly received on 05.01.2018. Subsequently, the Bank also issued an e-mail dated 08.02.2018 by which receipt of the registered letter was confirmed. Instead of acting in accordance with law, the Bank referred to some negotiations which were allegedly going on between the petitioner and the respondent nos. 4 & 5. The Bank however asured that if the negations get failed the BG would be invoked. However, the amount in question was not paid to the petitioner by invoking the BG. The petitioner had issued a number of reminders as well as legal notice which, however, were not paid any heed to. Accordingly, the present writ petition has been filed.

4. Shri Barman, learned counsel for the petitioner submits that the law relating to invocation BG is well settled. As and when, a request for the invocation of BG is made, there is no other option on the part of the Bank to delay or refuse such invocation. In fact, the Hon'ble Supreme Court has laid down an embargo not to pass any injunction/stay in any case/suit challenging invocation of BG, unless there is an element of fraud or suffering of irretrievable loss. Under the aforesaid prevailing law of the land, the action of the Bank in withholding the invocation of the BG is absolutely illegal and arbitrary.

5. Shri Barman has placed reliance upon a judgment and order dated 06.01.2017 passed by this Court in CRP (I/O) No.139/2016 [The National Small Industries Corporation (NSIC) Ltd. & Ors. Vs. M/S Glove Infracon Pvt. Ltd. & Ors.]. The said case was instituted by the present petitioner. This Court had held that when the BG was unconditional and payable on demand, the beneficiary becomes entitled to realize the effects of such BG in terms of the demand by the beneficiary up-to the extent of the sum guaranteed irrespective of any dispute that might have been raised later in point of time.

6. Shri S Chamaria, learned counsel appearing on behalf of the Bank has submitted that an affidavit-in-opposition had been filed on 29.10.2019 in which the allegation made in the writ petition was rebutted. He has tried to defend the action of the Bank by submitting that there was a communication by the party dated 18.01.2018 that some negotiations were on

with one of the officials of the petitioner and, therefore, the invocation was not effected. He further submits that that there is no *mala fide* in the action of the Bank. The learned counsel, however, fairly submits that the invocation was within time during the validity of the BG in question.

7. Shri SK Talukdar, learned counsel for the respondent nos.4 and 5 submits that it is a fact that negotiations were on with the official of the petitioner regarding the repayment and, therefore, if in the meantime, the BG was invoked, irreparable loss and injury could be suffered by them. It has further been submitted that failure to make the repayment in time to the petitioner was for *bona fide* reasons. However, no affidavit-in-opposition has been filed by the said respondent nos. 4 and 5.

8. Rejoining his submissions, Shri Barman, learned counsel for the petitioner submits that necessary affidavit-in-reply was filed by the petitioner on 18.11.2019. It has been reiterated that the grounds sought to be projected in defending the case by the Bank are absolutely untenable in law which is clear and settled.

9. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed before this Court have also been carefully examined. The sole issue which requires determination is as to whether the Bank was justified in withholding the invocation of the BG in question.

10. To resolve the controversy in question, it would be beneficial to refer to the interpretation given by the Hon'ble Supreme Court on the aforesaid subject of invocation of BG.

11. In the case of ***UP State Sugar Corporation Vs. Sumac International Ltd.***, reported in **(1997) 1 SCC 568**, it was held as follows: -

"*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 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. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the suppler has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on*

demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an agregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984 [1] AER 351 at 352):

> *"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 charged".*

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee."

12. In the case of ***Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co.***, reported in **(2007) 8 SCC 110**, apart from laying down the law, a note of caution has been given to the Courts to go slow in matters of grant of injunction concerning a BG. The relevant portion is extracted hereinbelow: -

"*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 realize 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 realization 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. In the case of ***Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd.***, reported in **(2007) 6 SCC 470**, it has been laid down as follows: -

"*If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury*."

14. The Hon'ble Supreme Court in the decision rendered in the case of ***Vinitec Electronics Private Ltd. Vs. HCL Infosystems Ltd.***, reported in **(2008) 1 SCC 544** has taken into consideration the law already laid down and has finally concluded in the following manner: -

> "*What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one*."

15. From the aforesaid decisions, it can be concluded that a BG is an exclusive contract which is absolute in nature and is liable to be honoured by the Bank as and when a request for invocation is made by the beneficiary. While doing so, the Bank is precluded from raising any question as regards the reason or need to invoke the same as it is the absolute discretion of the beneficiary. It is further clear that even in a case wherein such invocation of a BG is the subject matter of challenge, an injunction or stay is normally required to be refused unless a case of irretrievable loss or fraud is *prima facie* made out.

16. In the instant case, the action of the Bank in not honouring the request to invoke the BG in question appears to be *ex facie* illegal. What is more intriguing is that such action of the Bank is unilateral and not in compliance of any order of stay or injunction passed by a competent court of law. As has been held above, the Bank does not have any option but to release the amount of the BG as and when a request by the beneficiary is made. In the instant case, the said request was made on 03.01.2018 which was admittedly received by the Bank and such request was made during the validity of the BG in question. This Court has also taken note of the fact that the beneficiary is none other but a Government of India Enterprise and it is rather surprising that this Court had to be approached for enforcing its rights relating to release of the amount in a BG.

17. In view of the aforesaid facts and circumstances, the instant writ petition is allowed by directing that the amount of Rs.25 lakhs against the BG No. 0210466/27/2015-16, dated

11.02.2016 be released to the petitioner forthwith and in any case, not later than 15 days from the date of receipt of a certified copy of this order. This Court also deprecates the conduct of the Bank in refusing to honour the BG in absence of any order of a competent Court of law and accordingly imposes cost of Rs.25,000/- (Rupees Twenty Five Thousand) only to be paid to the petitioner.

18. The writ petition is accordingly disposed of.

JUDGE

Comparing Assistant