IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No. 22925 of 2015
and M.P.Nos.1, 2 and 4 of 2015

M/s. Slar Machines & Methods,
Partnership firm,
Rep. By its Partner,
V. Saravanabhavan,
Office at No.122/2 SIDCO Industrial Estate,
Ambattur,
Chennai – 600 098. ...Petitioner

-vs-

1. The Branch Manager,
National Small Industries Corporation Limited,
(Government of India Enterprise),
No.1 N S Tower, Vaisnavi Nagar,
Bye Pass Road, Hosur – 635 109.

2. The Branch Manager,
The State Bank of Travancore,
Anna Nagar(West) Branch,
W/7, North Main Road,
Anna Nagar West (Extn),
Chennai – 600 101. ... Respondents

Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, call for the records of the 1st respondent in Ref; NSIC/HSR/RMA/SMM/2015-16 dated 21.07.2015 and quash the same as illegal, ultravirus and not est in law and consequently direct the 1st respondent to return the Bank Guarantees submitted by the petitioner to the tune of Rs.52 lakhs and regularise the account of the petitioner firm.

For Petitioner : Mr. B. Vijay

For Respondents: Mr.Ajoy Kumar Gnanam [R1]

Mr.P.N. Radhakrishna [R2]

ORDER

Heard Mr.B.Vijay, learned counsel for petitioner, Mr.Ajoy Kumar Gnanam, learned counsel for 1st respondent and Mr.P.N. Radhakrishnan, learned counsel for 2nd respondent.

2. With consent of learned counsel on either side, the writ petition itself is taken up for final disposal.

3. The petitioner has filed this writ petition challenging the proceedings of the 1st respondent dated 21.07.2015 addressed to the 2nd respondent Bank invoking the Bank Guarantee for the total value of Rs.1,50,00,000/- in favour of the 1st respondent given by the writ petitioner. The impugned communication, in fact, is the reminder, to the letter dated 17.04.2015, sent to the 2nd respondent Bank invoking the Bank Guarantee and addressed the 2nd respondent accordingly. This was followed by letters dated 28.04.2015, 15.07.2015, 16.07.2015 and 17.07.2015. In the impugned communication, it has been stated that a sum of Rs.52,00,000/- has been transferred from the bank account of the writ petitioner to the bank account of the 1st respondent and while acknowledging the receipt of the same, the first respondent has demanded a sum of Rs.1,50,00,000/- as per the terms of the Bank Guarantee in favour of the 1st respondent without further delay. Further, the 1st respondent has undertaken to adjust the outstanding dues against the petitioner and if there is any balance it will be refunded to the Bank immediately.

4. The writ petitioner has challenged this communication contending that 1st respondent acted illegally in invoking the Bank Guarantee even after receiving a sum of Rs.52,00,000/- and this subsequent amount made by the petitioner in order to regularise the account. The petitioner's further case is that they had withdrawn the earlier writ petition filed by them before this Court in W.P.No.12032 of 2015 on the assurance given by the Officers of the 1st respondent that negotiate settlement can be made and the account can be regularised. Further, the petitioner would contend that without affording any opportunity of hearing to the petitioner, the Bank Guarantee has been invoked, which is arbitrary and illegal.

5. The learned counsel for the petitioner has elaborately referred to the factual matrix and has also referred the terms and conditions of the agreement dated 11.07.2013 between the 1st respondent and the petitioner.

6. On the other hand, the learned counsel appearing for the 1st respondent Government of India submits that in fact the Bank Guarantee was not invoked by the impugned proceedings but was issued on 17.04.2015 and the impugned proceedings is only a reminder letter to the 2nd respondent Bank. Further, it is submitted that none of the grounds raised by the petitioner are grounds to injunct the invocation of Bank Guarantee. In support of the contention, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of M/s. Adani Agri Fresh Ltd., Vs. Mahaboob Sharif & Ors.[Civil Appeal No.14015 of 2015 dated 02.12.2015]

7. Heard learned counsel for the parties. The first aspect which has to be considered is whether the Writ Court can injunct the invocation of a Bank Guarantee. Admittedly, the Bank Guarantee was executed by the petitioner on his own volition and in terms of agreement dated 11.07.2013.

8. Though the petitioner terms this agreement as a statutory agreement, it is only a commercial contract entered into between the petitioner and the 1st respondent, which is a company, a wholly owned Government of India Enterprise. Thus, a writ petition is not maintainable in such cases where the contract between the parties is in the private law field.

9. Having held so, it needs to be ascertained as to under what circumstances a Bank Guarantee can be injuncted. The law has been well settled in several decisions, one of which is the decision in M/s.Adani Agri Fresh Ltd., wherein it is held that Deed of Guarantee could not be injuncted from being given effect to, on the basis of the principle adopted in determining “prima facie case”, “balance of convenience” and “irreparable loss” which are the usual parameters on the basis whereof injunctions are granted. It was further held that insofar as the injunction of an unconditional Bank Guarantee is concerned, the same could be granted only if the Court was satisfied about the commission of a flagrant fraud, at the hand on one or the other contracting parties, or alternatively if the Court was satisfied that irreparable injury or some irretrievable injustice could be caused to the concerned parties.

10. Admittedly, in the instant case, the petitioner has not committed any flagrant fraud. The remaining two parameters, which has to be considered is irreparable injury and irretrievable injustice. The petitioner contention is that they substantially paid and wanted to regularise their account and in the meantime, if the Bank

Guarantee is invoked, they would put to irreparable injury. Thus, whether the petitioner has been put to irreparable injury or not is a question of fact to be decided not in a writ petition. This is more so, because in terms of the agreement dated 11.07.2013, if there is any dispute or difference between the parties, the matter has to be decided by arbitration by referring the matter to the sole arbitrator in terms of the agreement. The 1st respondent or such officer as he may appoint to be the Arbitrator. The 3rd aspect is whether the irretrievable injustice has been caused to the petitioner. As pointed that the contract between the parties is purely a commercial contract, whether, at all, injustice has been done at the hands of the 1st respondent or not is also a question of fact. Therefore, these aspects cannot be adjudicated in a writ petition.

11. The learned counsel for the 1st respondent is right in his submission by pointing out that the impugned communication is only a reminder to the 2nd respondent Bank and the Bank Guarantee was invoked as early as on 17.04.2015. Further, the fact remains that the invocation of Bank Guarantee was done on 17.04.2015 by addressing the second respondent Bank, without marking a copy to the petitioner by the 1st respondent. Therefore, the petitioner can very well state that they are aggrieved by the communication dated 21.07.2015, which being the latest communication. That apart, in the interregnum, the writ petition was filed by the petitioner in W.P.No.12032 of 2015, in which, there was an interim order. Therefore, for all purposes 21.07.2015 could be reckoned as the date on which the dispute arose between the petitioner and the 1st respondent.

12. However, as pointed out earlier, the grievance raised by the petitioner before this Court cannot be tested in a writ petition as the contract between the petitioner and the 1st respondent is purely a commercial contract and if at all, there has any grievance, he should invoke Clause 34(a) of the agreement dated 11.07.2013.

13. For all the above reasons, the writ petition is dismissed as not maintainable. However, liberty is granted to the petitioner to invoke Clause 34(a) of the agreement dated 11.07.2013, if so advised. In the event, if the petitioner invokes such remedy, the period during which the earlier writ petition was filed i.e., from 21.04.2015 to till the date of the disposal of this writ petition i.e., 21.01.2020 (i.e)., till receipt of certified copy of this order shall be excluded while computing limitation.

Apart from the above, it will be open to the petitioner to approach the 1st respondent and submit a one time settlement proposal and if the 1st respondent feels it is genuine, it is open to the 1st respondent to consider the same. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Branch Manager,
   National Small Industries Corporation Limited,
   (Government of India Enterprise),
   No.1 N S Tower, Vaisnavi Nagar,
   Bye Pass Road, Hosur - 635 109.

2. The Branch Manager,
   The State Bank of Travancore,
   Anna Nagar(West) Branch,
   W/7, North Main Road,
   Anna Nagar West (Extn),
   Chennai - 600 101.

+1cc to Mr.P.N.Radhakrishnan, Advocate Sr.3799
+1cc to Mr.Ajoy Kumar Gnanam, Advocate Sr.3737
+2cc to Mr.B.Vijay, Advocate Sr.4156

W.P.No.22925 of 2015
and M.P.Nos.1, 2 and 4 of 2015

pa[co]
srg 16/03/2020