

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.10.2020

Pronounced on : 28.10.2020

CORAM

THE HONOURABLE MR. JUSTICE **C.V.KARTHIKEYAN**

O.A.No.410 of 2020
in
C.S.(Comm.Div.) No.230 of 2020

R.Krishnamurthy & Co.,
Engineering Contractors,
A Partnership Firm,
Rep.by its Managing Partner,
R.Krishnamurthy,
having its registered office
at Sapthamlika Apartments,
2E, Front Block, No.283, Old No.188/B,
PH Road, Kilpauk, Chennai – 600 010.

... Applicant/Plaintiff

Vs.

1.RMD Kwikform India Pvt. Ltd.,
Registered office at
No.407/A6, Ansal Chamer – II,
Bhikaji Cama Place,
New Delhi – 110 066.
And also
Branch Office at
Door No.28/2, First Floor,
AMG Towers, Lawyer Jagannathan Street,
GST Road, Alandur, Chennai – 600 016,
India.

2.The Chief Manager / Asst. General Manager,
Bank of Baroda, Mount Road Branch,
Chennai – 600 002.

3.HDFC Bank Ltd.,
Kaithotta House,
New No.5, Sait Colony, First Street,
Chennai – 600 008, Tamil Nadu.

...Respondents / Defendants

Prayer:- This application filed under Order XIV Rule 8 of O.S Rules read with Order XXXIX Rule 1 and 2 of C.P.C., praying to grant an order of ad interim injunction restraining the 1st respondent / 1st defendant, its authorized signatories, representatives or any other person claiming under it form encashing the Bank Guarantees bearing No.0528IGFIN000519 for the sum of Rs.1,67,00,000/- dated 19.08.2019 and bearing No. 0528IGFIN000619 for the sum of Rs.1,00,00,000/- dated 03.10.2019 furnished by the applicant in favour of the 1st respondent / 1st defendant through 3rd respondent / 3rd defendant herein, pending disposal of the above suit.

For Applicant / Plaintiff : Mr.D.Murthy

For R1 / D1 : Mr.R.Ramasubramaniam Raja

For R2 / D2 : Mr.S.Pandurengan

ORDER

This Application has been filed by the plaintiff in the suit, R.Krishnamurthy, Engineering Contractors, a Partnership Firm, seeking interim injunction restraining the 1st defendant from encashing two Bank Guarantees bearing Nos.0528IGFIN000519 and 0528IGFIN000619 dated 19.08.2019 and 03.10.2019 respectively for a sum of Rs.1,67,00,000/- and Rs.1,00,00,000/- respectively furnished by the plaintiff in favour of the 1st defendant through the 3rd defendant bank.

2.The circumstances leading to the filing of the suit and the present application are as follows.

3.The plaintiff had been awarded a contract for construction of a Memorial for the former Chief Minister of Tamil Nadu, Selvi. J.Jayalalitha at Marina PWD site, Rajaji Salai, Chennai. They had participated in a tender and had thereafter been granted the contract. The plaintiff issued a Work Order to the 1st defendant, nominating the 1st defendant as a subcontractor under Work Order No.PVR/RK/RMD/2019/001 dated 07.08.2019 towards purchase of erection materials and hiring of erection materials. With respect to the

purchase, it had been stipulated that 30 per cent of the advance amount should be paid by the plaintiff and the balance shall be paid at the time of taking delivery from the warehouse of the 1st defendant at Chennai. With respect to the hire, one month hire should be paid in advance by the plaintiff and post dated cheques for every 15 days' hire, for the remaining period of hire should be issued by the plaintiff. The plaintiff also furnished two Bank Guarantees one for Rs.1,67,00,000/- and other for 1,00,00,000. The plaintiff had placed orders with the 1st defendant for supply of erection equipments both for purchase and for hire.

4. Thereafter, Covid-19 pandemic set in. The 1st defendant informed that their office at Chennai and yard would remain closed till 31.03.2020. There was no effective movement of materials and labour force also could not organized. There was a National lock down.

5. The plaintiff by e-mail dated 26.04.2020 sought waiver and discount of the hire charges. With respect to the equipments to be purchased, the 1st defendant stated that the equipments were locked up at Mumbai port and will be transferred to Chennai only after the lock down was lifted.

6.The plaintiff also requested by e-mail dated 29.04.2020 that the last date of receipt of the equipments on hire should be calculated as the starting period for commencement of payment of hire charges. There were several correspondences exchanged between the parties in this connection. The plaintiff claimed that there was a delay on the part of the 1st defendant both in supply of materials towards purchase and also towards hire. It was further stated that unless all the equipments were supplied, construction of the Memorial could not commenced.

7.The 1st defendant sent a notice intimation letter dated 14.08.2020 stating that de-shuttering of some more hired equipment could be delayed and supply would extend up to September / October 2020. They had therefore sought extension of Bank Guarantee till 31.10.2020. The plaintiff also informed the 1st defendant that their payments from the PWD was getting delayed. The 1st defendant stated that by e-mail dated 25.08.2020 hire charges were overdue to an extent of Rs.76,33,347/- and sought payment of the sum, failing which they threatened to invoke the Bank Guarantees. The amount was demanded to be paid by 27.08.2020. It was at this stage, that the suit had been filed seeking permanent

injunction restraining the 1st defendant from encashing the two Bank Guarantees and for a declaration that the Bank Guarantees shall continue to hold till the execution of the project.

8.When the present application came up for consideration on 16.09.2020, this Court had directed notice to the defendants. Notice through E-mail was also permitted. The next hearing date was fixed on 24.09.2020. In the mean while, on 18.09.2020, the 1st defendant had encashed one of the Bank Guarantees for a sum of Rs.1,67,00,000/-.

9.Counter was filed and reply was also filed. Documents were also filed by both the sides.

10.In the counter affidavit filed by the 1st defendant, it had been stated that the relief sought in the plaint are not maintainable. It was also stated that Bank Guarantees are contracts between the parties and the Court cannot rewrite those contracts and impose fresh or new conditions. It was also stated that the Bank Guarantee for a sum of Rs.1,67,00,000/- had been invoked and encashed on 18.09.2020 and therefore, the relief with respect to that Bank Guarantee had become infructuous. It was

stated that according to the Work Order dated 07.08.2019, the initial duration of the hire was four months only and the total sum was Rs.2,71,81,517.43 including GST @ 18%. It was stated that the hire started from the date the equipments were collected from the yard of the 1st defendant and ended on the day when they were returned back to the yard by the plaintiff.

11.The equipments were taken on hire in October 2019 and from that date, the hire charges were stated to be paid. A portion of the equipments were returned in September 2020 and it was stated that till that date the hire charges were payable. It was stated that the letter dated 03.08.2020 calling upon the plaintiff to pay a sum of Rs.76,33,347/- was with respect to the balance hire charges for the contracted four months hire duration after adjusting the advances already paid.

12.It was stated that a further letter was issued on 14.08.2020 calling upon the plaintiff to return the equipments. It was stated that if hire charges for the four months period was paid, then the 1st defendant was prepared to negotiate the hire charges for the extended period. The plaintiff had made a part payment of Rs.40,00,000/- on 29.08.2020. They

agreed to pay the balance Rs.36,33,347/- on or before 10.09.2020. They also agreed to extend the Bank Guarantee for a sum of Rs.1,67,00,000/- which was to expire on 18.09.2020.

13.It was stated that suppressing all these facts, the plaintiff had filed the suit. The plaintiff had also failed to pay the balance of Rs.36,33,347/- even at the time of institution of the suit. It was further stated that apart from this amount which was the balance for the four months' period as mentioned in the Work Order, the plaintiff had to pay a further sum of Rs.3,58,92,649/- for the extended hire duration. The plaintiff also did not renew the Bank Guarantee for Rs.1,67,00,000/- which was to expire on 18.09.2020 and therefore, the 1st defendant, left with no alternative, invoked the said guarantee. It was stated that after adjusting the said amount of 1,67,00,000/-, the plaintiff was still payable a sum of Rs.2,29,65,759.14/- towards hire charges. It was stated that the 1st defendant has, as security, the other Bank Guarantee for a sum of Rs.1,00,00,000/- alone. It was further stated that the office of the 1st defendant was closed only for 54 days during the lock down. The allegations of the plaintiff that an amount of Rs.76,33,347.12/- alone is payable was specifically denied. It was stated that the plaintiff will have

to clear the dues towards the hire charges and also return the equipments. It was also stated that the value of the equipments lent out on hire was about Rs.8,00,00,000/-. It was stated that the Application should be dismissed.

14.A reply affidavit was filed by the plaintiff, wherein, it was stated that invocation of Bank Guarantee for a sum of Rs.1,67,00,000/- on 18.09.2020 was an act of fraud. It was stated that there was no amount due and payable against the materials purchased and it was stated that the said Bank Guarantee was only towards the purchase of equipments and it was therefore stated that the invocation of the Bank Guarantee was not in accordance with the Work Order or as agreed by the parties. It was stated that a consultant from IIT Madras had not given clearance for the project and therefore, the plaintiff could not commence and complete construction. It was again reiterated that unless all the materials are supplied, construction of the Memorial is not possible. It was stated that an invoice dated 16.09.2020 had been fabricated by the 1st defendant to make an unreasonable demand and to justify the invocation of the Bank Guarantee. It was denied that there was suppression of material facts at the time of filing the suit. It was stated that the Bank Guarantee of

Rs.1,67,00,000/- was towards supply of materials purchased and the Bank Guarantee for Rs.1,00,00,000/- was for supply of materials through hire charges. It was stated that the 1st defendant should be called upon to return back the sum of Rs.1,67,00,000/- and that there must be an injunction with respect to the 2nd Bank Guarantee for Rs.1,00,00,000/-.

15.A counter affidavit has been filed on behalf of the 2nd defendant, Bank of Baroda, wherein, it had been stated that the plaintiff had requested provision of two Bank Guarantees for Rs.1,67,00,000/- and Rs.1,00,00,000/- respectively which had also been extended from time to time. The 1st defendant sought a letter dated 16.09.2020 for invocation of the Bank Guarantee for a sum of Rs.1,67,00,000/-, in accordance with the terms of the Bank Guarantee. This was also permitted. Thereafter, it was stated that the plaintiff would therefore have to pay the 2nd defendant the said sum of Rs.1,67,00,000/-. It was stated that the account of the plaintiff was slipping into non performing account category. It was stated that the plaintiff had deposited a sum of Rs.90,00,000/- and there was still outstanding towards the Bank Guarantee of a sum of Rs.48,04,655/- and Rs.13,83,429/- towards interest and other charges. It was stated that the plaintiff had not

complied with the norms applicable to the payment to be paid after the invocation of the Bank Guarantee.

16.Heard arguments advanced by Mr.D.Murthy, learned counsel for the plaintiff, Mr.R.Ramasubramaniam Raja, learned counsel for the 1st defendant and Mr.S.Pandurengan, learned counsel for the 2nd defendant.

17.For the sake of convenience, the parties would be referred as plaintiff and the defendants.

18.The plaintiff, R.Krishnamurthy and Company, Engineering Contractors, a Partnership Firm, had been awarded the contract to construct a Memorial for the former Chief Minister of Tamil Nadu, Selvi. J.Jayalalitha, at Marina PWD site in Rajaji Salai, Chennai. It is a prestigious project. The plaintiff should be aware that they had been entrusted with the responsibility of putting up a project to keep alive the name and fame of the former Chief Minister. Even before they had participated in the tender, the plaintiff should have been aware of the responsibilities and the necessity to put up the said Memorial in a time

bound manner. They must have been aware of the nature of equipments required for putting up the construction for the Memorial.

19.They were however dependent on the 1st defendant, RMD Kwikform India Pvt. Ltd., with registered office at New Delhi for supply of equipments both for sale and for hire.

20.A Work Order dated 07.08.2019 had been issued by the plaintiff to the 1st defendant. Under the Work Order, the plaintiff had agreed to purchase certain equipments and had agreed to take on hire certain other equipments. With respect to the purchase of equipments, the plaintiff had to pay an advance of 30 per cent. With respect to the hire of equipments, the plaintiff had to pay one month's hire in advance and also issue post dated cheques for the remaining period. The plaintiff had also agreed to give two Bank Guarantees, one for a sum of Rs.1,67,00,000/- and an other for a sum of Rs.1,00,00,000/-. It was stated that the Bank Guarantee shall be returned back to the plaintiff on complete return of all the hired equipments to the 1st defendant.

21.It had been the contention of the learned counsel for the plaintiff that the Bank Guarantee for a sum of Rs.1,67,00,000/- was only with respect to the equipments purchased and not with respect to the equipments taken on hire. It is the further contention, that the second Bank Guarantee for a sum of Rs.1,00,00,000/- alone was for the equipments taken on hire.

22.These contentions have been strongly disputed by the learned counsel for the 1st defendant. At the time of institution of the suit, and when the interim application was moved, it was specifically pointed out by the learned counsel for the plaintiff that the plaintiff was due and payable towards the hire charges only a sum of Rs.76,33,347/- which had been demanded by the 1st defendant by E-mail dated 25.08.2020. Since there was a threat to invoke the Bank Guarantee, the plaintiff had filed the suit seeking the reliefs as stated above.

23.It is seen from the counter of the 1st defendant that the plaintiff had made a part payment of Rs.40,00,000/- on 29.08.2020 and had promised to pay the balance of Rs.36,33,347/- on or before 10.09.2020 and had also issued e-mails dated 07.09.2020, 09.09.2020 and 15.09.2020 agreeing to pay the balance of Rs.36,33,347/- and also

agreeing to extend the Bank Guarantee for Rs.1,67,00,000/- which was to expire on 18.09.2020.

24.These facts have not been pleaded in the plaint for the reasons best known to the plaintiff. It was specifically stated in the counter that the amount demanded namely, Rs.76,33,347/- was the balance hire charges for the original four months period under the Work Order and it was further stated that for the extended period, the plaintiff is due and payable an amount of Rs.3,58,92,649/-.

25.It is thus seen that there is a dispute even with respect to the amounts due and payable to the plaintiff by the 1st defendant. A prima facie case in favour of one or the other cannot be drawn by the Court.

26.When notice was directed by order dated 16.09.2020, notice through e-mail was also permitted. In the reply to the counter affidavit to the extent possible the Court had perused the same, it had not been mentioned whether notice through e-mail was actually sent to the 1st defendant. At any rate, since the Bank Guarantee for Rs.1,67,00,000/- was to expire on 18.09.2020, and the same had not been extended by the plaintiff, the 1st defendant was well within their rights to invoke the said

Bank Guarantee. The plaintiff had not mentioned that the amount stated as due and payable namely, Rs.76,33,347/- was only for the initial four months' period under the Work Order and further amounts were due towards hire charges. It is to be mentioned that a categorical statement had been made in the counter that the 1st defendant were always ready to negotiate the payment of hire charges for the lock down period owing to Covid – 19 pandemic.

27.The contention of the plaintiff that the Bank Guarantee of Rs.1,67,00,000/- was only towards sale of the equipments and not for the hire charges for the equipments is an issue which can be decided only during the course of trial. It is settled position in law that the Courts cannot prevent invocation of a Bank Guarantee, unless fraud is alleged or unless it would lead to irretrievable loss or damage. The plaintiff has not alleged fraud as required in the pleadings under Order VI Rule 4 of the Code of Civil Procedure. On the other hand, they have stated that they have a continuing relation with the 1st defendant.

28.In (2016) 10 SCC 46, *Gujarat Maritime Board V. Larsen &*

Toubro Infrastructure Development Projects Limited, the Hon'ble Supreme Court has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under:—

“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 realise 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 realisation 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.”

29.The substantial circumstance which hindered progress in the construction of the Memorial was the out break of the Covid – 19 pandemic. The 1st defendant have stated that they are prepared to negotiate the hire charges payable during the lock down period. The plaintiff had not disclosed that they had paid a sum of Rs.40,00,000/- out of the Rs.76,33,347/- and that they had promised to pay the balance on or before 10.09.2020 or atleast on or before 15.09.2020.

30.Without disclosing those facts, the suit had been filed and application seeking injunction was brought before this Court on 16.09.2020.

31.When there is a dispute regarding the amounts payable and when the 1st defendant have specifically stated that the plaintiff is due and payable a sum more than the amount furnished as Bank Guarantee, then the onus is on the plaintiff to extend the period of Bank Guarantee, even without awaiting orders of the Court, since they had so promised in their communications with the 1st defendant.

32.In view of these facts, I hold that a prima facie case has not been made out by the plaintiff and that the issues raised as to the actual amount due and payable by the plaintiff will have to be decided only on the basis of evidence.

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33.The following issues will have to be necessarily examined by both the parties:

i).The date on which order was placed on the 1st defendant for

supply of equipments under hire.

ii).The date on which the 1st defendant actually made ready the said equipments to be lent out on hire.

iii).The date on which the plaintiff actually took the materials on hire.

iv).The hire charges payable for each of the materials taken on hire.

v).The date on which the equipments taken on hire have been returned back to the 1st defendant.

34.As long as there is a dispute on each and every one of the above points, an order of interim injunction restraining the 1st defendant from invoking the Bank Guarantee cannot be granted. The plaintiff should plead all necessary facts before the Court. They have unfortunately, not done so.

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35.The following issues have still not been clarified:

i).Whether the amount of Rs.76,33,347/- reflects the balance hire charges under the Work Order for the initial period of four months or is it

the final amount due towards the hire charges.

ii).Whether the Bank Guarantee for Rs.1,67,00,000/- had been furnished with specific reference and only for purchase of equipments.

iii).Whether the Bank Guarantee of Rs.1,00,00,000/- had been furnished with specific reference and only for hiring of the equipments.

iv).The actual payments due under the hire for the equipments taken on hire.

36.When there is a dispute on these fundamental facts and there is also unnecessary withholding of all information before the Court, naturally the Court cannot come to the rescue of the plaintiff.

37.In view of these facts, the following orders are passed:-

i).The 1st defendant having already invoked the Bank Guarantee for a sum of Rs.1,67,00,000/- on 18.09.2020 is directed to maintain accounts with respect to the manner in which the said amount was adjusted.

ii).The 1st defendant is directed to place on record the Statement regarding the nature of the equipments lent out on hire and the hire charges payable for each of the equipments; the date on which the

plaintiff took the equipments on hire; the period for which the equipments were kept by the plaintiff; and, the date on which the plaintiff returned the equipments. Based on these data, the 1st defendant may prepare a Statement of Accounts with respect to the hire charges payable by the plaintiff.

iii).The plaintiff is also directed to prepare a Statement regarding the equipments taken on hire, and also furnish the dates on which they were taken on hire, and the dates on which they were returned back to the 1st defendant.

iv).The plaintiff is directed to renew the 2nd Bank Guarantee for a sum of Rs.1,00,00,000/- until further orders or till such time the plaintiff and the 1st defendant submit their respective Statements and thereafter, a decision shall be separately taken with respect to the said Bank Guarantee.

38. There shall be an order of injunction restraining the 1st defendant from invoking the Bank Guarantee for Rs.1,00,00,000/- provided the plaintiff renews the same in accordance with the rules and

regulations of the 2nd defendant bank till the Statements filed by both sides are examined by the Court and further directions are issued.

39. With respect to the statement made by the 2nd defendant regarding encashing the Bank Guarantee for Rs.1,67,00,000/- and that the plaintiff had paid back the sum of Rs.90,00,000/- and is due and payable the balance sum, the Court cannot issue any directions. It is for both the parties to work out their remedies in accordance with law, independent of the issues raised in the present suit, since the Court is not called upon to decide that issue and no relief on that ground has also being sought in the plaint.

40. With the above observations, the Original Application is partly allowed, only for the limited purpose of granting an interim injunction restraining the 1st defendant from invoking the Bank Guarantee for Rs.1,00,00,000/- provided the plaintiff renews the same. The said injunction shall be in force, till Statements as aforesaid are produced by both the plaintiff and the 1st defendant. Necessary applications, if required, are to be filed by either one of the two parties seeking further orders with respect to the said Bank Guarantee.

41.No order as to costs.

28.10.2020

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Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No



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C.V.KARTHIKEYAN, J.,

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Pre-delivery order made in
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