

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

CIVIL MISCELLANEOUS APPEAL NOS.1027 AND 1028 OF 2019

COMMON JUDGMENT:

(Per Sri Justice M.S.Ramachandra Rao)

1. These two Appeals arise out of two separate orders dt.02.11.2019 passed by the XXIV Additional Chief Judge-cum-Judge, Commercial Court, City Civil Court, Hyderabad in I.A.Nos.723 and 724 of 2019 in COS No.42 of 2019 on his file.

The relief prayed in the suit

2. The said suit had been filed by M/s. Siemens Limited (1st respondent in the appeals) against the appellant, M/s. Meenakshi Energy Limited and respondents 2 to 4 for the following reliefs:

(a) Declare the action of defendant No.1 of issuing letter dt.18.10.2019 to defendant No.2 to invoke Bank Guarantee dt.22.02.2017, bearing BG No.003GT02170510009 as fraudulent, illegal and void;

(b) Declare the action of defendant No.1 of issuing letter dt.18.10.2019 to defendant No.2 to invoke Bank Guarantee dt.11.08.2017, bearing BG No.003GT02172230034 as fraudulent, illegal and void;

(c) Consequently grant a decree of permanent injunction restraining defendant No.1 from invoking/enforcing the Bank Guarantee dt.22.02.2017, bearing BG No.003GT02170510009;

(d) Consequently grant a decree of permanent injunction restraining defendant No.1 from invoking/enforcing the Bank Guarantee dt.11.08.2017, bearing BG No.003GT02172230034;

(e) Award costs of the suit.

The case of the plaintiff/1st respondent

3. The case of the 1st respondent/plaintiff in COS No.42 of 2019 is that there were two Tripartite Agreements dt.17.01.2017, one for erection and another for supply, between the appellant, the 1st respondent and the 3rd respondent, wherein the 1st respondent was appointed as sub-contractor to carry out erection and supply of balance of plant equipments/systems scope at the appellant's thermal power plant situated in Nellore District in Andhra Pradesh.

4. The 1st respondent furnished a Bank Guarantee dt.22.02.2017 bearing BG No.003GT02170510009 and another Bank Guarantee No.003GT02172230034 dt.11.08.2017.

5. It is the contention of the 1st respondent that the appellant fraudulently, through letters dt.18.10.2019 addressed to the 2nd respondent Bank, invoked both Bank Guarantees and that the 1st respondent was informed about the same by the 2nd respondent Bank by sending copies of the letters addressed by the appellant to the 1st respondent.

6. It is alleged by the 1st respondent that the appellant, by playing fraud on the 1st respondent, had issued the said letters. According to the 1st respondent, the appellant and respondents 1 and 3 had conducted a

meeting on 16.05.2018 in Chennai wherein the parties present had signed an agreement/contract in the form of minutes of the meeting; as per the said minutes of the meeting, the appellant induced the 1st respondent to believe and agreed to return the balance retention of Rs.2.00 Crore and also to return the above Performance Bank Guarantees of Rs.10,90,00,000/- and Rs.9,40,00,000/- respectively; that this was to be done on 15.06.2018, but the appellant did not return the same. It is contended that multiple communications were exchanged between the 1st respondent and the appellant for return of the said Bank Guarantees.

7. It is further contended that the 3rd respondent, who is the 'Contractor' in the Tripartite Agreements, failed to make timely payments to the 1st respondent for the work completed by the 1st respondent in accordance with the tripartite agreements.

8. It is contended that as per the minutes of the meeting dt.18.07.2017, the parties had agreed that the appellant, in its capacity as the 'owner' under the Tripartite Agreements, would make payments to the 1st respondent subject to completion of the project by the 1st respondent; thereafter, as per the minutes of the meeting dt.16.05.2018, the appellant made a request to the 1st respondent to complete as much of the project as possible and demobilize from the project site by 15.06.2018 as there was delay of the project beyond 31.12.2017; that it was agreed in the same meeting that 15.06.2018 shall be the deemed end date for completion of all of the 1st respondent's obligations (except

warranty obligations); that the total amount payable to the 1st respondent under the said Agreements is Rs.5.70 Crore, but not only was the amount not paid to the 1st respondent, but the appellant was attempting to invoke the Bank Guarantees fraudulently and illegally and therefore, it should be restrained from encashing the Bank Guarantees.

9. It is contended that the 4th respondent, along with consortium of lenders, financed the appellant's thermal power plant in Nellore District, Andhra Pradesh to the tune of Rs.3,462.17 Crore; and it had written letter dt.02.04.2018 to the 2nd respondent Bank informing the 2nd respondent that they represent the consortium of lenders; and by the said letter, the 4th respondent informed assignment of Bank Guarantees furnished in favour of the appellant by virtue of the 4th respondent being the financier of the appellant's project.

10. It is contended that if the Bank Guarantees are encashed, it would be impossible to retrieve the same and there are proceedings pending before the National Company Law Tribunal (NCLT), Hyderabad Bench against the appellant and there is no assurance as to who would be managing the appellant company. It is also contended that there is a proceeding against the appellant company under the Insolvency and Bankruptcy Code as well.

I.A.No.723 of 2019 and I.A.No.724 of 2019 fled by 1st respondent

11. Along with the suit, the 1st respondent filed (i) I.A.No.723 of 2019 to restrain the appellant from invoking the Bank Guarantee dt.11.08.2017 till the disposal of the suit and (ii) another I.A.No.724 of

2019 to restrain the appellant from invoking the Bank Guarantee dt.22.02.2017 till the disposal of the suit. The value of the Bank Guarantee dt.11.08.2017 is Rs.10.90 Crore and the value of the Bank Guarantee dt.22.02.2017 is Rs.9,41,66,068/-.

The stand of the appellant/1st defendant

12. The appellant filed counter-affidavits in both the I.A.s opposing grant of any interim relief to the 1st respondent.

13. The appellant denied that it was fraudulently invoking the two Bank Guarantees referred to above and contended that they were being invoked as there was non-performance on the part of the 1st respondent of its part of the contract.

14. It denied that there was any agreement in the meeting held on 16.05.2018 in Chennai for return of the Bank Guarantees and retention of Rs.9.40 Crore.

15. It is contended that in the minutes of the meeting dt.16.05.2018, it was only recorded that the 1st respondent made a request to return the Bank Guarantees and the last line in the minutes of the said meeting showed that the issue would be further discussed with the appellant and resolved in a meeting planned around 25.05.2018. It is contended that there is no decision taken to return the Bank Guarantees and on the contrary, there was to be further discussion on this issue in the meeting to be held on 25.05.2018.

16. It was contended that in the meeting which occurred on 18.07.2017 between the parties, the 1st respondent had agreed to perform its part of the contract by way of completion of ordering, manufacturing dispatches of all the urgently required supplies and erections at the said site and item-wise deadlines for supply of several items were mentioned in the minutes of the meeting dt.18.07.2018.

17. Reference is also made by the appellant to an e-mail dt.16.03.2018 which it had sent to the 1st respondent specifically stating that the appellant will not be able to release the Performance Bank Guarantees at this stage as it constituted security for performance of all obligations of the 1st respondent under the sub-contract. It thus contended that there was no agreement to return the Bank Guarantees to the 1st respondent at all by the appellant.

18. It also denied that there was any delay in payments and it is contended that payment would be released only if the 1st respondent's part of the contract is performed in its true perspective. It is contended that the 1st respondent failed to perform its part of the contract in terms of the Tripartite Agreements and the Bank Guarantees were thus rightfully invoked by the appellant.

19. It is also contended that the 4th respondent, in its letter dt.02.05.2018 addressed to the 2nd respondent, only stated that if the Bank Guarantees were invoked by the appellant, the entire money under the two Bank Guarantees should be credited to the trust account maintained by the consortium of banks and financial institutions i.e., the

lenders of the appellant. It is also stated that the appellant, in its letter of invocation, had requested the 2nd respondent Bank to credit the entire money covered by the two Bank Guarantees to the sub TRA account. Reference is also made to a similar letter dt.19.10.2019 addressed by the appellant to the 2nd respondent. It denied that there were any oppression and mismanagement proceedings pending against the appellant before the NCLT.

20. It is contended that the 1st respondent lodged a false complaint with Gurugram Police Station against the appellant without any valid reason and no evidence is filed by the 1st respondent to support its plea of fraud.

21. It is alleged that there is collusion between the 1st respondent and the 2nd respondent and reference is made to an e-mail dt.19.10.2019 exchanged between the parties, wherein the 1st respondent was advised to get a Court order restraining invocation of the Bank Guarantees. It is contended that the 1st respondent had neither *prima facie* case nor balance of convenience and no irreparable loss or hardship would be caused to the 1st respondent.

The proceedings in the Court below and it's order dt.2.11.2019 in IAs 723 and 724 of 2019

22. Before the Court below, the 1st respondent marked Exs.P1 to P43 while the appellant marked Exs.R1 to R32.

23. It was also informed by the appellant to the Court below that the Bank Guarantees had already been invoked by the appellant by issuing letters to the 2nd respondent Bank on 18.10.2019 (marked as Exs.P14 and P15).

24. By separate orders dt.02.11.2019, the Court below allowed both I.A.Nos.723 and 724 of 2019 and issued ad interim injunctions restraining the appellant from *continuing the process of invocation of the Bank Guarantees* till further orders on condition that the 1st respondent shall keep the Bank Guarantees alive.

25. The Court below in its separate orders referred to the contentions of the parties and the documents filed by them and observed that in applications of this nature, *prima facie* case is essentially to be decided as to the existence of a triable issue. It referred to the minutes of the meeting dt.16.05.2018 (Ex.P9) and concluded that the said exhibit showed that the issue of return of Bank Guarantees was to be further discussed and resolved in a future meeting to be held around 25.05.2018. It also noted that under Ex.P9, parties have agreed that the appellant would return balance retention amount of Rs.2.00 Crore, Performance Bank Guarantee of Rs.10.90 Crore and also Retention Bank Guarantee of Rs.9.40 Crore to the 1st respondent and that the 1st respondent would furnish a fresh Bank Guarantee for the value of the total retention; but the 1st respondent did not place any record to show that it had furnished a fresh Bank Guarantee in terms of the agreement under Ex.P9.

26. It then concluded that Ex.P9 indicates that there was an agreement between the parties to terminate the contract on certain terms and conditions and it was agreed under Ex.P9 that the Bank Guarantees would be returned.

27. That apart, after referring to certain cases cited by the parties relating to grant of injunctions restraining invocation of Bank Guarantees, *the Court below also considered the terms of both Bank Guarantees and noticed that they were irrevocable Bank Guarantees and that the letter of invocation of the said Bank Guarantees under Ex.P39 was proper.*

It then referred to other documents and came to the conclusion that there was a *bonafide* dispute regarding the authority of the appellant to invoke the Bank Guarantees.

It observed that though *invocation of Bank Guarantees does not amount to fraud*, while deciding an application for ad interim injunction, the Court should consider the consequences of the order and if such injunction is not granted, the amount would go to one of the creditors of the appellant.

It then held that the balance of convenience is also in favour of the 1st respondent and that the 1st respondent had entered into a contract and had performed a part of it and Ex.P9 shows that the contract could not be executed within time and the appellant was also willing to come out of the contract and had requested the 1st respondent to demobilize itself out of the work site by 15.06.2018.

According to the Court below, though the reasons for the delay in execution of the contract can be ascertained only after trial, if the injunction applications are dismissed, the appellant would not realize the amount, but it would be paid to other creditors of the appellant since as per the invocation letter issued by the appellant, the amount should be deposited in the account of the 4th respondent, one of its creditors. It further went on to hold that if the 4th respondent takes the money, it would be distributed among the creditors of the appellant and the 1st respondent's money would be utilized for payments of debts of the appellant and it would be very difficult for the 1st respondent to realize the money from the 4th respondent and other lenders of the appellant. It also thus concluded that irreparable loss would be caused to the 1st respondent if the injunction applications are not allowed.

It also observed that if the claim of the 1st respondent is not proved, the appellant can invoke the Bank Guarantees after disposal of the suit.

28. Assailing the same, these Appeals are filed.

The consideration by this Court

29. It is firstly the contention of the learned counsel for the appellant that even prior to the suit being filed, the appellant had already invoked the Bank Guarantees under Ex.P39 addressed by it to the 2nd respondent Bank on 18.10.2019 and the applications for interim injunction should therefore be dismissed by the Court as infructuous as the suit was filed

on 21.10.2019 long after the invocation of the two Bank Guarantees in question.

30. We find considerable force in the said submission.

31. When the relief sought in both the interlocutory applications was to restrain the appellant from invoking both the Bank Guarantees, and when both the Bank Guarantees were already invoked even prior to the filing of the suit, the Court below could not have granted any relief to the 1st respondent in both the applications in the nature of ad interim injunction restraining the appellant from “continuing the process of invocation of Bank Guarantees till further orders”. It is not for the Court below to modify the prayer in the interim applications and restrain the appellant from “continuing the process of invocation” when the Bank Guarantees had already been invoked by it.

32. We are also of the *prima facie* view that the last sentence in Ex.P9 indicates clearly that the issue of return of Bank Guarantees would be further discussed in a future meeting to be held on 25.05.2018. Thus it cannot be said that the appellant had unequivocally agreed to return the two Bank Guarantees in the said meeting.

33. Clause 2 of both the Bank Guarantees states:

“2. The Bank shall effect the payments to MEL under this guarantee, without further proof or conditions and without any delay, reservation, contest, recourse protest or demur and without any enquiry to EDAC or the SUB CONTRACTOR, without reference to the SUB CONTRACTOR, immediately upon MEL’s written request indicating the amount demanded by MEL stating therein that the Sub Contractor has failed to perform its obligations as per the above mentioned

agreement. Any such demand made by MEL on the BANK shall be conclusive and binding notwithstanding any differences between MEL, EDAC, the SUB CONTRACTOR or any other person or any dispute pending before any court, tribunal or any other authority.”

34. In the letters dt.18.10.2019 (Ex.P39) addressed to the 2nd respondent, the appellant stated that the 1st respondent had failed to perform it's obligations as the agreements.

35. In our opinion once the Court below had found that the Bank Guarantees furnished by the 1st respondent to the appellant are irrevocable, that they were rightly invoked under Ex.P39 and such invocation does not amount to fraud, the Court below ought to have rejected both the applications and denied relief to the 1st respondent.

36. The law relating to invocation of Bank Guarantees is well settled. In **Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co.¹**, the Supreme Court had summarized the principles for grant or refusal to grant an injunction restraining the enforcement of a Bank Guarantee or letter of credit in the following manner:

“14. (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 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

¹ (2007) 8 SCC 110

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.”

37. This decision has been reiterated in **Adani Agri Fresh Limited Vs. Mahaboob Sharif and others**².

38. In **Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd.**³, the Supreme Court had also held that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction, that there must be factual foundation in support of the allegation of fraud and mere allegation of breach of contract cannot be said to be enough to justify grant of an injunction.

39. Having perused the contents of the plaint filed by the 1st respondent in the instant case, we are of the opinion that the allegations therein do not constitute *prima facie* a plea of egregious fraud and at best amount to an alleged breach of contract by the appellant. As pointed out already even the Court below had observed that *invocation of Bank Guarantees does not amount to fraud.*

40. It cannot also be said that by mere invocation of Bank Guarantees, any irretrievable harm or injustice would be caused to the 1st respondent. Even if the amount covered by the Bank Guarantees is paid to the 4th

² (2016) 14 SCC 517

³ (2007) 6 SCC 470

respondent, which is one of the creditors of the appellant, if the 1st respondent were to succeed in the suit or in the arbitration proceedings, it can still recover the amount from the 4th respondent, which is a public sector financial institution.

41. Therefore, both the appeals are allowed; orders dt.02.11.2019 in I.A.Nos.723 and 724 of 2019 in COS No.42 of 2019 on the file of the XXIV Additional Chief Judge-cum-Judge, Commercial Court, City Civil Court, Hyderabad are set aside and both I.A.Nos.723 and 724 of 2019 in COS No.42 of 2019 are dismissed. No costs.

42. Pending miscellaneous petitions, if any, shall also stand dismissed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date:06-01-2020

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