IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2022

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.18666 of 2020
and WMP No.23161 of 2020

Jara Infra Tech Ltd.
Rep. by its
Administrative Manager,
Mr.V.Vimal Kumar ... Petitioner

Vs.

1. The Chief General Manager,
The National Small Industries Corporation Ltd.,
Guindy Industrial Estate,
Ekkaduthangal,
Chennai - 600 032.

2. The Chief Manager,
Punjab National Bank,
Taylors Road Branch,
No.44, Taylors Rd.,
Telecom Quarters,
Kilpauk, Chennai - 600 010. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Mandamus forbearing the 1st respondent from insisting upon the 2nd respondent to foreclose the Bank guarantee 10921LG000417, 10921LG 000419, 10921LG 000120 and also grant 90 days for foreclose of three Bank Guarantee.

For Petitioner : Mr. M.C.Swamy
For Respondents : Mr.Ajay Kumar Gnanam - R1
No appearance - R2

O R D E R

The petitioner is a Technology Company and seeks a Mandamus forbearing the 1st respondent/National Small Industries Corporation Limited (NSICL)/R1 from invoking the bank guarantees drawn on the Punjab National Bank (PNB)/R2.

2. The petitioner is a Small Scale Industry and is engaged in erection, installation and commissioning of electrical works.

It entered into an agreement with NSICL on 08.09.2017 in terms of which, the latter agreed to act as a financier and provide financial assistance to the petitioner for the procurement of raw materials from canalized/Government Agencies and as against purchase orders, sale and release orders placed upon them by Government Departments and canalised Agencies.

3. R1 has been specifically constituted to provide aid, assistance and succor for SSI units who do not have the wherewithal for obtaining banking facilities by themselves. As per contract terms, R1 directed the petitioner to furnish bank guarantees and the following three bank guarantees were furnished by the petitioner:

S.No.	B.G.No.	Date of issue of the Original BG	Stamp Paper No. of Original B.G.	Validity Period	Claim up to	Amount (In lakhs)
1	1092ILG000417	11.09.2017	BM247666	10.12.2020	10.12.2021	50.00
2	1092ILG000419	15.06.2019	BD956414	14.12.2020	14.12.2021	50.00
3.	1092ILG000120	21.05.2020	BZ234200	20.0.2021	20.02.2022	50.00

4. The terms of the agreement as relevant to decide the issue arising in this writ petition are extracted below.

(a) The role of R1 and the transaction in question are set out in the preamble to the agreement as below:

> Whereas the Corporation acts as a Financier and as Agent and gives financial assistance to Small Scale Industrial Units which are otherwise not in a position to procure the raw material from the canalized/Government Agencies and other against their purchase orders, sale note(s), and release order(s) placed upon them by a Government Department, canalized agency and others to lift the raw material at a time especially where such Small Scale Industrial Units do not have the sufficient banking facilities;
>
> Whereas the Borrower submitted its application for procurement of raw material namely TMT Steel Bar, Cement, Blue Metal, Ready-mixed Concrete, Sand, Bricks, Paver Blocks, Shuttering material, Tiles, Paint, Sanitary ware, Concrete Chemical Solution, Steel Structurals & Other allied materials and Inverter, UPS & Power converters, Process control

systems & equipments, Circuit Breakers & Components, Electrical conduits & fittings, Cables & Wires, Electrical fittings & Components, Solar & Renewable energy products, Control equipments, Electrical panels & Distribution, Transformer & Transformers' parts and Other allied materials to the Corporation.'

(b) The scope of the agreement as set out in Clauses 1, 2,5 & 6 are as below:

Now this Agreement witnesseth as follows:

1. That the Borrower hereby authorizes the Corporation to procure and supply such quantities of the above said material from the supplier as may be communicated in the indent of the Borrower placed with the Corporation from time to time and agrees to deliver to the Corporation letter of authority in its favour in such form as may be required to enable it to act as a Financier and Agent and Attorney for procurement and supply of the material referred to above against the respective indent/indents.

2. That for the purpose of procurement of the material, the Corporation is authorized to make payment to concerned supplier, place order with canalized/Government Agencies and others for and on behalf of the Borrower as its is the actual user(s) of the material mentioned in the indent(s) and if necessary also to open letter of credit and make remittances of payment towards goods and make arrangements for the movement of the material so procured as well as clearance of the goods and storage thereof undertakes to repay or reimburse the amount(s) so debited to its account(s) with interest at the rate of 10.50 per cent per annum or at such other rates as the Corporation may charge as its discretion depending upon the variation in its tending rates, within a maximum period of 90 days from the date of debit of such amount(s). In case the payment is not received within the stipulated period of 90 days, the Borrower agrees that such repayment of or reimbursement of the amount debited to its accounts will be made on or before the expiry of 90 days from the date of delivery of the material to the Borrower or date of payment by Corporation whichever is earlier.

....

5. The Borrower agrees to pay to the Corporation processing and administrative charges at-NIL-per cent of the amount of advance/limit granted to the Borrower.

6. That the raw material assistance under this Agreement shall be granted by the Corporation to the Borrower subject to furnishing of the following securities by the Borrower:

A Bank Guarantee executed by a National/Approved Bank to the satisfaction of the Corporation. The Corporation shall be entitled to invoke and encash the said Bank Guarantee.

That the borrower hereby furnish the Bank Guarantee of the Nationalized Bank covering entire raw material assistance and requested the Corporation to waive the charge over hypothecated good/assets as the same are charged to the Bank. The Corporation has accordingly considered the request of the borrower and waived the creation of charge over the hypothecated good.

*(This waiver clause shall only be applicable where the goods are charged to the Banks under credit facility granted by the Bank).

5. The petitioner was regular in repayments till the Covid-19 Pandemic descended upon the world. The Agreement inter se the parties had specifically provided that the bank guarantees would be liable to be invoked, if the dues of the petitioner exceeding the sum total of the guarantees themselves. The guarantees in this case amounted cumulatively to a sum of Rs.1,50,00,000/-.

6. The petitioner, though admittedly defaulting in repayment of the principal, had been making payments towards interest and this is borne out from the accounts filed by R1, that reveals that taking into account the interest payable for the month of September 2020, the closing balance of petitioner was a debit of a sum of Rs.1,50,03,106.20.

7. R1 immediately put the petitioner to notice of the fact that the dues have exceeded the cumulative sum of the bank guarantees and called upon the petitioner to remit 5% of the bank guarantee value immediately, such that the outstanding value was brought within the permissible limit.

8. The petitioner does not appear to have replied to the notices. However, some attempts were made to effect small repayments even thereafter, though from November 2020, the petitioner has, admittedly, not made repayments. As a result, and admittedly, the dues would have, as on date, exceeded far beyond the amount guaranteed by the Bank.

9. The petitioner has obtained interim protection from this Court on 11.12.2020 by virtue of which, the guarantees have not been invoked thus far. It is relevant to note that the interim protection was only for a period of three weeks, effective till 11.01.2021 and has not been extended thereafter. Notwithstanding this, there has been no action taken by the respondents to invoke the bank guarantees.

10. The petitioner would plead that in view of the strenuous difficulties in business as well as the crunch in liquidity, it has admittedly defaulted but ought to have been granted the benefit of the Directive of Reserve Bank of India which had issued instructions to all financial institutions to the effect that there be a moratorium on collection of arrears to enable the borrower tide over the difficulties caused by the pandemic.

11. A copy of the Directive titled 'Emergency Credit Line Guarantee Scheme' (ECLGS) as on 20.10.2021 is circulated, as per which, Scheduled Commercial Banks, Financial Institutions as defined in Section 45-I(c)(i) of the Reserve Bank of India Act, 1934 and Non Banking Financial Companies were required to assess the eligibility of the borrowers for the benefits set out under the aforesaid scheme.

12. There has been some discussion as to whether the above Scheme would be applicable to R1. Though learned counsel for R1 would submit that it is not a Member Lending Institution (MLI), to which the aforesaid Scheme applies, this submission does not appear to be correct as the Certificate of Incorporation downloaded from its website and placed before the Court by petitioner, does reflect that R1 is a Non-Banking Financial Company.

13. The law is very clear on the entitlement, or otherwise, of a defaulter, for protection from this Court. In Adani Agrifresh Vs. Mahaboob Sharif and others (Civil Appeal No.14015 of 2015 dated 02.12.2015), the Hon'ble Supreme Court has reiterated the settled proposition that there should be no intervention whatsoever by the Court on the invocation of bank guarantees as invariably such guarantee, wherein the guarantor expressly waives right of objection and defence. Thus, irrespective of disputes/rival positions adopted by the contracting parties, it is incumbent upon the Bank to honour the guarantee.

14. The Court makes reference to the earlier judgment in the case of UP Co-operative Federation Limited Vs. Singh Consultants and Engineers (P) Limited (1988 1 SCC 174) to the effect that the restraining of the operation of an irrevocable

Letter of Credit/Confirmed Letter of Credit or a bank guarantee is the exception and not the rule.

15. Such intervention can only be where there is a serious dispute touching upon the prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. It is only in such exceptional circumstances that the Court will interfere in the invocation of a bank guarantee, as otherwise, the fabric of trading operations would be seriously jeopardised.

16. They also refer to the judgment in Vinitec Electronics Private Limited Vs. HCL Info System Limited (2008 1 SCC 544) also reiterating the aforesaid proposition categorically, at paragraphs 25 & 26, that it is only in the presence of fraud of an egregious nature that would vitiate the underlying transaction, that the Court would even consider intervening in a bank guarantee. Applying the settled ratio, the Court in Adani Agrifresh (Supra) also rejected the plea for interference with the commercial bank guarantee.

17. A learned Single Judge of this Court in Slar Machines and Methods Vs. Branch Manager, National Small Industries Corporation Limited and another (W.P.22925 of 2015 decision dated 21.01.2020) reiterated the same proposition as aforesaid concluding that the contract between the petitioner and R1 is a commercial contract in respect of which, there can be resort only to arbitration as provided.

18. In light of the settled position as aforesaid, the mandamus as sought for cannot be granted. The prayer is rejected, though with a caveat. All the decisions as aforesaid have been rendered in times of normalcy, when commercial transactions were being conducted with some measure of regularity and along expected lines. The present times however, are exceptional, and in my view, the difficulties faced by the petitioner must not be brushed away.

19. No doubt, the petitioner is a defaulter. However an offer has been made by the learned counsel for the petitioner on its behalf, to the effect that the petitioner is now in a position to settle the outstanding arrears immediately, given a chance.

20. Thus, and to balance the interests of both sides, the mandamus as sought for is rejected but the petitioner is permitted to remit 50% of the outstanding, i.e., principal and the interest, within a period of four (4) weeks from today. If the aforesaid direction stands complied, he shall be given another four (4) weeks to remit the balances.

21. It is made clear that default in the first limb of the relief granted as aforesaid, will result in immediate vacation of this order and the invocation of the bank guarantees will come into operation forthwith. So too, in case of default in regard to compliance with the second limb of the relief as granted above.

22. The petitioner shall not attempt to delay repayment citing disputes in quantification and disputes on the aforesaid count, if at all, shall be resolved by arbitration only after the admitted outstanding of the principal with interest computed upto the date of payment, are settled.

23. Dismissed with liberty as aforesaid. Connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Chief General Manager,
The National Small Industries Corporation Ltd.,
Guindy Industrial Estate,
Ekkaduthangal,
Chennai - 600 032.

2. The Chief Manager,
Punjab National Bank,
Taylors Road Branch,
No.44, Taylors Rd., Telecom Quarters,
Kilpauk, Chennai - 600 010.

+1cc to Mr. M.C.Swamy, Advocate, S.R.No.25810
+1cc to Mr.Ajay Kumar Gnanam, Advocate, S.R.No.26103

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and WMP No.23161 of 2020

SJ(CO)
CT 26/04/2022