IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-17451-2021
Reserved on: 31.03.2022
Date of Decision: 06.04.2022

M/s GB Tools and Forgings Limited
. . . . Petitioner

Vs.

Bank of India
. . . . Respondent

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CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MR JUSTICE JASJIT SINGH BEDI

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Present: - Mr.Aalok Jagga, Advocate, for the petitioner.

Mr.G.S. Anand, Advocate, for the respondent.

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M.S. RAMACHANDRA RAO, J.

The Background facts

The petitioner is a company incorporated under the Companies Act, 1956 and is an export oriented business unit.

It availed working capital in the shape of Export Packing Credit and Foreign Bill Exchange amounting to Rs.15.50 crore and also a Bank Guarantee and Letter of Credit facilities for Rs.80 lakh from the respondent.

The Export Credit Guarantee Corporation of India [for short 'the ECGC'] provided risk cover management to various Bankers including the respondent, which were extending credit facilities to the exporters such as the petitioner, and as per the arrangement among them, if the amount is not recoverable from an export consignment for any of the perils insured, and loss is caused to the Bank, it is reimbursed by the ECGC to the Bank.

Then, the Bank would continue recovery mechanism against the exporters and recovery if any, would be shared between the ECGC and the Bank.

In terms of the said arrangement, petitioner was regularly making payment of premium to the ECGC to provide the risk and cover to the Bank.

Events in 2015

Certain consignments of the petitioner got struck up in the Foreign Market and did not yield requisite amounts, and on 31.03.2015, the respondent-Bank declared the petitioner's account as NPA.

The respondent-Bank then issued a notice on 17.6.2015 (P1) under Section 13(2) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 [for short 'the SARFAESI Act'] claiming Rs.16,77,67,509.94 from the petitioner.

Petitioner made several requests for restructuring of the loan account from time to time.

Events in 2018

On 31.03.2018, the petitioner attempted to settle the account by making an OTS offer, which was however rejected on 03.04.2018 by the Bank.

Events in 2019

In 2019, the respondent came out with an OTS claim BOI/OTS/2019.

Petitioner submitted request letters on 26.06.2019 and 27.06.2019 requesting the Bank to consider settlement under the said OTS scheme but, since the Bank was not considering it, petitioner filed *CWP-5766-2020* in this High Court seeking consideration of its request.

The said Writ Petition came to be disposed of on 02.03.2020 and a direction was given to the respondent to decide petitioner's representations on or before 15.03.2020.

However, the request of the petitioner was rejected by the Bank on 16.03.2020.

<u>Events after the OTS-2020 policy was framed by the Bank</u>

Thereafter on 25.08.2020, the respondent-Bank came out with another OTS Policy titled Bank of India OTS Policy-2020.

Under this scheme, Clause G provided an *'incentive for payment of full OTS amount'* in the following manner: -

(i) *Incentive of 5% of OTS amount will be allowed if full OTS is paid within 30 days from the date of acceptance of the OTS.*

(ii) Incentive of 2.5% of OTS amount will be allowed if full OTS is paid within 90 days from the date of acceptance of the OTS.

On 05.01.2021, the petitioner had enquired from the respondent the reasonable amount to be paid for OTS for the facilities offered to the petitioner.

In reply thereto, on 07.01.2021, the Bank replied that a total of Rs.14,96,24,804.78 plus uncharged interest is the due amount and keeping in mind the aid figure, the petitioner may submit it's OTS proposal.

Petitioner, vide Annexure P-11 letter dt.26.02.2021 gave consent for OTS for full and final consideration of Rs.4.71 crore.

The OTS sanction dt.23.3.2021

In response thereto, Vide Annexure P-12 dt. 23.03.2021, the respondent wrote to the petitioner that its application under the OTS Scheme of 2020 has been accepted by the competent authority for a sum of Rs.4.71 crores; application money of Rs.74.82 lakh should be provided by the petitioner which will be appropriated upon acceptance of the OTS towards payment of OTS amount; out of this amount, Rs.73 lakh already kept in the petitioner's CD account will be appropriated; 10% of the OTS amount will have to be deposited by the petitioner as upfront money within 30 days from 23.03.2021 i.e. within 21.04.2021 including the amount deposited by the petitioner along with the application; the balance amount has to be paid within 6 months from the date of acceptance of the said letter together with interest @ 1 year MCLR + 2%, failing which the OTS sanction will be rendered infructuous.

Clause-vi of the said letter is important and the said clause states as under: -

> *"Our approval of OTS is provisional and is subject to approval of ECGC, otherwise our approval of OTS will be null and void and entire contractual dues will be payable by you to the Bank (i.e. Ledger outstanding plus upto date uncharged interest, legal expenses, other charges etc.) as if no OTS was agreed to and recovery action will be initiated as per Bank's norms." (emphasis supplied)*

On 31.03.2021, the petitioner accepted the terms and conditions of the OTS by signing on the letter dt. 23.03.2021 of the respondent.

Petitioner also addressed a letter on 24.03.2021, quoting in particular to Clause-vi of the said letter dt.23.3.2021, and asked the respondent to explain what will be the *modus operandi* of payment i.e. what will be date wise schedule of the payment under OTS. It also wanted clarity as to whether money lying in *No Lien Account* would be appropriated *before* ECGC approval or not, and the timeline of repayment would start from which date. It also stated that it was depositing Rs.2 lakh in their existing *current account* which was a *No Lien Account* to make up the balance due towards the application money of Rs.74.82 lakh. It also reminded the Bank of incentive for early payment under the OTS Scheme and stated that *it is entitled to incentive of 5% of the OTS amount if it is able to make payment within 30 days* or incentive of 2.5% of OTS amount if payment is made after 30 days, but before 90 days.

On 30.03.2021, the respondent replied to the petitioner stating that its approval of OTS is *'provisional'* and is subject to approval of ECGC, and so *the application and any money deposited in No Lien Account will be appropriated towards payment of OTS only upon receipt of approval from ECGC.* It also stated that the benefit of incentive of 5% will be allowed if OTS amount is paid within 30 days from the date of acceptance of the OTS.

<u>ECGC approval of the OTS communicated to petitioner on 22.6.2021</u>

On 22.06.2021, petitioner was informed by the respondent-Bank vide Annexure P-20 letter that the ECGC had given its approval for OTS; that all other terms of the approval for OTS would be the same as per sanction letter dt. 23.03.2021 and accepted by the petitioner; and that the amount kept under the *No Lien Account* "will be appropriated *now* under OTS".

Thereafter, the petitioner wrote Annexure P-22 letter on 08.07.2021 to the respondent-Bank stating that it has paid Rs.4,47,45,000/- to the respondent, and *after availing 5% incentive of Rs.23.55 lakh under the OTS scheme,* the total of Rs.4.71 crore has to be treated as having been paid.

Thus the petitioner treated the OTS as having come into effect from the date of communication by the Bank of the ECGC approval i.e 22.6.2021. It believed that therefore it is entitled to the 5% incentive of Rs.23,55,000/- for payment within 30 days, since it paid Rs.4,47,45,000/- within 30 days (by 8.7.2021) from 22.6.2021. It therefore adjusted the 5% OTS making a total of Rs.4.71 Cr towards the OTS.

According to the petitioner vide letters dt. 16.7.2021, 29.07.2021, 03.08.2021 and 13.08.2021, petitioner requested the Bank to release title deeds and claimed that the Bank official informed that the matter is under consideration.

Thereafter it filed the instant Writ Petition.

Contention of the petitioner

Petitioner contends that the Bank is treating the commencement of time period to make OTS payment as 31.03.2021 i.e. the date when ECGC approval was not even received, which is impermissible. Petitioner contends that the Bank cannot treat 31.03.2021 as the date of commencement of the OTS because there was no ECGC approval on that date, which was the condition precedent to the OTS becoming operative. Petitioner contends that it is from 22.6.2021 that the 30 day period commences for determining whether the petitioner is entitled to the 5% incentive.

According to the petitioner, there was a contingent agreement between the parties and the contingency was the ECGC approval, and that was why in the OTS sanction letter dt. 23.03.2021, the Bank itself stated that its approval of OTS is only *'provisional'* and was subject to approval of ECGC, and '*otherwise its approval of OTS would be null and void*'.

According to the petitioner, since the Bank itself had taken a stand that the OTS will be operational *upon* ECGC approval, the date of OTS cannot be treated as 31.03.2021, but it is to be treated as 22.06.2021 because it is only on that date, the contingency to make the OTS operational occurred i.e. ECGC approved it.

It also placed reliance on the letter dt 30.03.2021 (P16) addressed by the Bank to the petitioner wherein the Bank stated that the money deposited in the *No Lien Account* by petitioner would be appropriated towards payment of OTS *only on receipt of approval from ECGC*, and reiteration of the same in its subsequent letter dt.22.6.2021 (P20) by stating that the ECGC had given its approval of OTS and the amount kept under *No Lien Account* would be appropriated *now* under the OTS.

Petitioner contends that this means that prior to 22.06.2021, the Bank did not even appropriate the amount paid by the petitioner towards OTS, and so the Bank itself never treated the OTS to become operative till the ECGC approval was received on 22.06.2021. It contended that since the OTS acceptance by the Bank was *conditional*, *it did not become conclusive and come into effect* till the ECGC approval was given on 22.06.2021.

Stand taken by the respondent in its reply

In the reply filed by the respondent, the Bank contended that the petitioner was not eligible for the 5% incentive since the OTS of Rs.471 lakh was sanctioned against the outstanding of Rs.1496.25 lakhs as on 22.03.2021,and the letter dt. 23.03.2021 (P12) was accepted by the petitioner by signing on it on the same day.

It stated that the ECGC had settled a claim of Rs.634.24 lakh with the Bank and it was mandatory for the Bank to obtain approval of the ECGC for the OTS by submitting copy of the OTS proposal along with the Bank's approval; that ECGC advices the Bank about its claim amount to be appropriated in the account after getting their share of recovery under OTS; and the Bank would then appropriate their share of ECGC claim amount along with OTS amount. It pointed out that the petitioner gave post dated cheques, one for Rs.16 lakh on 06.04.2021 along with other cheques for September 2021, and this indicated that the petitioner was aware that the six months for payment under OTS commenced from 31.03.2021, which is the date of acceptance of OTS.

It is stated that the petitioners have deposited Rs.356.45 lakh on 08.07.2021, which was beyond the 30 day period from 30.03.2021, the date of acceptance of the OTS and so the petitioner was not entitled to claim the 5% incentive.

It also relied on letters dt. 12.07.2021, 22.07.2021 and 19.08.2021 addressed to the petitioner, denying the eligibility of the petitioner to claim the 5% incentive on the ground that the OTS amount was not deposited within 30 days from 31.3.2021, which according to it was the date on which the OTS payments were to commence.

It alleged that these letters had been suppressed by the petitioner. It, therefore, prayed that the writ petition be dismissed.

<u>Consideration of the Court</u>

From the rival contentions, the question to be decided is:

> "*what is the date of commencement of the OTS i.e. is it 31.03.2018, the date on which the petitioner accepted the OTS, or 26.06.2021, the date on which the ECGC granted approval for the OTS, for deciding the eligibility of the petitioner to claim the 5% incentive?".*

Petitioner contents that it deposited Rs. 356.45 lakh through RTGS on 08.07.2021 and a sum of Rs. 91 lakh was lying to the credit of their current account which was authorized by the petitioner to be appropriated towards the OTS as part payment, and it had paid thus, Rs.,47,45,000/- and the sum of Rs.23,55,000/- is the 5% eligible of rebate/incentive to which it is entitled to for early payment within 30 days of the entire balance OTS payment because it had paid the same *within 30 days month from the date of approval of the OTS by the ECGC*.

When the Bank communicated on 23.03.2021 the OTS proposal of Rs.4.71 crores, it specifically stated in *Clause-vi* thereof that its approval of the OTS offer of the petitioner is *'provisional'* and is subject to approval of the ECGC, and *otherwise its approval of OTS will be null and void.*

May be making the OTS *subject to the approval of the ECGC* is as per the Reserve Bank guidelines as is contended by the counsel for the respondent, but the use of the word *'provisional'* indicates that without such approval of the ECGC, the OTS was not operative. This view is further fortified by the statement in the letter Annexure –P12 dt.23.3.2021 of the Bank itself to the effect that *otherwise its approval of OTS will be null and void.* In the subsequent letter Annexure P16 dt.30.3.2021 by stating that 'any money deposited in the no- lien account will be appropriated towards payment of OTS *only on receipt of approval by ECGC*' and by stating in the Annexure P20 letter dt.22.6.2021 that ECGC approval was given, and so it was '*now*' going to appropriate the amount in the no-lien account of the petitioner, the Bank confirmed it's position unequivocally that its approval of OTS on 23.3.2021 is *'provisional' i.e* that such approval is *not final* and that it is only *tentative* and might be changed later.

Counsel for the respondents cited the decision of the Supreme Court in ***Mrs. Chandnee Vidya Vati Madden Vs. Dr. C.L. Katial and***

others[1], where in an agreement to sell as house built on lease-hold plot granted by the Government, there was a clause stating that the vendor shall obtain the permission of the Government for the transaction of the sale within two months of the agreement, failing which purchaser can extend the date or treat the agreement as cancelled. Within the stipulated time necessary permission was not forthcoming and time was extend by another month. Thereafter, though the vendor made an application to the authorities for the necessary permission, she withdrew the same subsequently. The vendee then filed suit for specific performance which was contested by the vendor on the ground that the contract was not enforceable being of a contingent nature, contingency not having been fulfilled.

The trial Court dismissed the suit, but its decision was reversed by the High Court in appeal. The High Court held that the agreement was a complete contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded, but that the trial Court was in error in holding that the agreement was inchoate, and so decree for specific performance of contract could not be granted.

The Supreme Court upheld the said view and held that so far as parties to the contract are concerned, they had agreed to bind themselves by the terms of the documents executed between them, and under the agreement, the vendor had to make necessary application for permission to the Chief Commissioner, that though she made such application but later

[1] **1964 AIR (SC) 978**

she withdrew, and this amounted to the defendant willfully refusing to perform her part of the contract. The Supreme Court, therefore, directed the vendor to make an application to the Chief Commissioner for sanction, and within one month of receipt of such sanction, she should convey to the parties in the suit by way of a registered sale deed.

This decision cannot be of any assistance to the respondent because the question which was decided in the said case i.e. *that the contract was a contingent contract or not when one of the parties to the contract failed for perform his obligation under it*, does not arise for consideration in the instant case.

This is because unlike in the said case before the Supreme Court, the contingency of the ECGC giving approval did materialize in the instant case, and so the question was only '*whether the OTS commenced on 31.03.2021* when the OTS was accepted by the petitioner by signing on the letter dt. 23.03.2021*, or it commenced after approval by the ECGC of the OTS on 22.6.2021*?'.

When the Bank itself did not make any appropriation of the amounts available with it belonging to the petitioner until after 22.06.2021 and treated the OTS as only *'provisional'* and *not final* till then, the OTS cannot be said to have commenced on 31.03.2021 and has to be taken as having commenced only on 22.06.2021.

Accordingly, the Writ Petition is allowed; the petitioner is held entitled to 5% incentive for making payment of the OTS within 30 days from the date it came into operation i.e 22.6.2021; the respondent-Bank is directed to issue *No Objection Certificate* to the petitioner by treating the petitioner as having deposited the entire settlement amount; and the respondent is also directed to close the loan account of the petitioner and release title deeds of the secured assets within 2 weeks from the date of receipt of copy of this order. No Costs.

(M.S. RAMACHANDRA RAO)
JUDGE

06.04.2022
Vivek

(JASJIT SINGH BEDI)
JUDGE

1. Whether speaking/reasoned? Yes/No
2. Whether reportable? Yes/No