IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5172 OF 2024

Ratnagiri Gas and Power Pvt. Ltd. … Petitioner

vs.

Office of the Assistant Commissioner of Customs, Dapoli Division …Respondent

Mr. Ashish Kamat, Senior Advocate a/w. Mr. Akash Menon, Pulkitesh Dutt Tiwari, Kalash Bakliwal for the petitioner.
Mr. Jitendra B. Mishra a/w. Mr. Ashutosh Mishra, Mr. Rupesh Dubey for respondent no. 1.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
DATED: 5 April, 2024

P.C.

1. We have heard Mr. Kamat, learned senior counsel for the petitioner and Mr. Mishra, learned counsel for respondent no. 1.

2. This petition under Article 226 of the Constitution of India is filed praying for the following substantive reliefs :

> "A. Issue a writ of mandamus or certiorari or any other order, writ or direction restraining respondent nos. 1 and 3, its officers and any one claiming through or under respondent no. 1 and 3 from invoking and encashing the Bank Guarantee bearing No: 120126IBGF00167 (annexed hereto as Exhibit 'B') dated 30 March, 2012 for an amount of INR 80 crore, issued by the respondent no. 3 for and behalf of the petitioner in favour of the respondent no. 1.
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> B. Issue a writ of mandamus directing respondent no. 2 to renew the Bank Guarantee bearing No: 120126IBGF00167 (annexed hereto as Exhibit 'B') dated 30th March, 2012 for an amount of INR 80 Crore, at its cost and expense."

3. Mr. Kamat has drawn our attention to the Order-in-Original dated 24 March, 2023 passed by the Assistant Commissioner of Customs, Contract Cell (Import-1), NCH, Mumbai and the subsequent order dated 28 August, 2023 passed by the Appellate Authority, namely, Commissioner of Customs (Appeals), Zone-1, NCH, Mumbai, who set aside the Order-in-Original dated 24 March, 2023 and remanded the proceedings to the Original Authority on the issues as discussed in the said order.

4. As noted from the prayers, the controversy which is brought by the petitioner before the Court is on a question whether there is any obligation/liability of the petitioner to extend the Bank Guarantee which was furnished by the petitioner in regard to the imports in question. The relevant averments as to in what circumstances the bank guarantee came to be furnished by the petitioner are found in paragraph 22 of the petition, which reads thus:

> "22. The above matter was taken up by the Ministry of Power, Government of India ("**MoP**") with the Cabinet Committee on Economic Affairs (**"CCEA"**) to consider the possibility of amendment to the said Notification 21/2002. RGPPL requested for the said amendment and stated that in view of the special circumstances of the case, it undertakes to submit a bank guarantee of Rs.80 crore (Rs.45 crore towards duty liability and Rs.35 crores towards interest liability) till the CCEA/GOI approval is received and the matter is resolved. Pursuant to the above, the petitioner issued the bank guarantee dated 30 March, 2012 bearing guarantee no. 120126IBGF00167 for an amount of INR 80 crores, which was last amended on 3 April, 2023, thereby extending its expiry date to 20 March, 2024 and extending its claim expiry date 20 September, 2024. It was agreed that in case requisite approval is not granted by CCEA, RGPPL will pay duty and other charges as applicable for the goods imported by it."

5. It appears that subsequent thereto, the petitioner business in question was demerged, which was taken over by respondent no. 2- Konkan LNG Limited (for short **"KLL"**) in pursuance of an order dated 28 February, 2018 passed by the National Company Law Appellate Tribunal, which approved the scheme of merger between the parties.

6. It appears to be not in dispute that in view of the proceedings on the customs duty payable on the imports in question as undertaken by the petitioner at the relevant time were pending, the bank guarantee which was furnished by the petitioner was extended from time to time. The bank guarantee was renewed on 3 April, 2023 which was valid upto 27 March, 2024, however, for a liability period of further six months.

7. The petitioner is apprehending that the department may invoke the bank guarantee for fulfillment of the duty amount, which, according to the petitioner, is not the liability of the petitioner and it would be the liability of respondent no. 2. Such a issue was also raised before the Appellate Authority. The Appellate Authority has noticed the same in paragraphs 7 and 8 of its order dated 28 August, 2023 and while remanding the proceedings to the Original Authority, it was left to the Original Authority to take a view in the matter in this regard. The relevant observations of the Appellate Authority are required to be noted, which reads thus:

> "7. At the time of personal hearing before me, the Authorized Representative requested to redeem the Bank Guarantee of Rs.80 crores deposited with the department. The recorded findings of the impugned order manifest that the appellant has not raised this issue before the OA but first time, this issue has been raised before me. I find fresh issue needs to be discussed by the OA before any final conclusion.
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> 8. In light of the above observations, I hold that the interest of justice would be served by setting aside the impugned order and remanding the matter back to the Original Authority with the direction to ascertain the facts as per the scheme of demerger sanctioned by the NCLAT and pass a Speaking Order including request of the appellant to redeem Bank Guarantee of Rs.80 crore in favour of them.
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> 10. Accordingly, the Order in Original No. 357/AC/NSKR/Contract Cell/2022-23 dated 24.3.2023 is set aside and the matter is remanded to the Original Authority with direction as discussed above. The appellant should be given the opportunity of making submissions and personal hearing by the original authority in compliance of the principles of natural justice."

8. It is on the above conspectus the petitioner is before the Court making the prayers as noted by us hereinabove contending that a prejudice would be caused to the petitioner in the event respondent no. 1 invokes the bank guarantee furnished by the petitioner.

9. In our opinion, the jurisdiction of this Court under Article 226 of the Constitution is limited. We cannot delve on any issue in regard to the terms and conditions of the demerger and the *inter se* liability between the petitioner and respondent no. 2-KLL on the demerged business, including on the issues of the *inter se* liability on the imports in question, for which the bank guarantee was furnished. Equally there cannot be an exercise of jurisdiction to injunct the invocation of the bank guarantee, as it is a settled principle of law

that the bank guarantee constitutes an independent contract between the bank and the party in whose favour the bank guarantee is furnished. An injunction restraining the invocation of the bank guarantee can be granted in appropriate proceedings dealing with such contractual issues. Such reliefs can be granted applying the well-settled principles which need to weigh with the Court in injuncting the invocation of a bank guarantee. Certainly in the present facts, it is difficult for a writ court to consider the issues on invocation of bank guarantee and to record a finding of fact in that regard inter se between the petitioner and KLL.

10. Be that as it may, insofar the present proceedings are concerned, it appears that the adjudication proceedings now stands remanded to the Original Authority/ Assistant Commissioner, who is seized of the matter in pursuance of the order passed by the Appellate Authority, and who is now called upon to decide on the remanded issues including on the issue of the party required to furnish the bank guarantee. In such circumstances, in our opinion, it would be appropriate that in this regard we keep open all contentions of the parties, to be urged before the Assistant Commissioner/Original Authority, before whom the proceedings are pending including on the issue of extension of bank guarantee either by the petitioner or respondent no. 2-KLL. We may also observe that unless the Assistant Commissioner so decides, the bank guarantee needs to be renewed for a

reasonable time. We have accordingly requested Mr. Kamat to take instructions as to whether for a reasonable period the bank guarantee can be extended by the petitioner. Mr. Kamat has fairly stated that the bank guarantee can be extended for a period of one month. If this be so, in our opinion, it would be appropriate that the petitioner extends the bank guarantee for such period and in the meantime, the Assistant Commissioner shall decide the issues on the obligation of the appropriate party who would be required to furnish/extend the bank guarantee. This after hearing the petitioner, the departmental representative and respondent no. 2-KLL.

11. In view of the above discussion, we dispose of this petition by the following order:

ORDER

(i) Let the bank guarantee in question be extended by the petitioner for a period of one month from today;

(ii) The Assistant Commissioner/Original Authority shall hear the parties, namely, petitioner and respondent no. 2 on the issue of furnishing/extension of bank guarantee and after considering the rival contentions, pass an appropriate order in accordance with law. Let such decision be taken within a period of four weeks from today.

(iii) All contentions of the parties in that regard are expressly kept open.

(iv) Our aforesaid directions would not preclude the Assistant Commissioner from deciding the entire proceedings in remand, if he so feels appropriate.

(v) As the imports in question are of the year 2012, the issues ought not be delayed any further.

12. Petition stands disposed of in the aforesaid terms. No costs.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI , J.)**