

PETITIONER:
HINDUSTAN STEEL WORKERS CONSTRUCTION LTD.

Vs.

RESPONDENT:
G.S. ATWAL & CO. (ENGINEERS) PVT. LTD.

DATE OF JUDGMENT 13/09/1995

BENCH:
VERMA, JAGDISH SARAN (J)
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VERMA, JAGDISH SARAN (J)
PARIPOORNAN, K.S. (J)

CITATION:
1996 AIR 131 1995 SCC (6) 76
JT 1995 (7) 26 1995 SCALE (5) 352

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Paripoornan, J.

Special leave granted.

2. The appellant herein was the respondent in Matter No.1268 of 1984, an application filed by the respondent in this appeal under Section 41 of the Arbitration Act. The appellant and the respondent entered into 11 contracts dated 21.8.1979 whereby the respondent herein was to construct 11 schools in Nalut, Libya at a cost of LD 2,437,525.000. The United Commercial Bank, Calcutta (hereinafter referred to as 'Bank') gave two Bank Guarantees to the appellant on behalf of the respondent. The first is dated 16.8.1979 for a sum of Rs. 6.50 lacs (No. 350/79) renewed on 4.5.1982, 10.5.1983 and 3.5.1984 whereby the original date expiring on 15.5.1982 was extended from time to time. The other Bank Guarantee is for a sum of Rs.32.50 lacs (No.399/79) dated 10.10.1979, renewed on 10.6.1981, 9.7.1982, 22.2.1983 and 7.7.1983, whereby the date of expiry, 10.7.1981, was extended from time to time. The Bank renewed the Guarantees on the instructions of the respondent.

3. It is seen that disputes arose between the appellant and respondent regarding the performance of the contract resulting in a reference to arbitration. It is further seen that the reference is still pending. While so, the respondent prayed to court for the issue of a grant of injunction to restrain the appellant from encashing the Bank Guarantees aforesaid. By an order dated 29.8.1988 a learned single Judge of the Calcutta High Court restrained the appellant by an order of injunction from encashing the Bank Guarantees, bearing No.350/79 dated 16.8.1979 (Rs.6.50 lacs) and No. 399/79 dated 10.10.1979 (Rs.32.50 lacs), furnished by the Bank to the appellant. The learned single Judge took the view that as against the agreement between the respondent and the Bank, that the Guarantee No.399/79 will be for only mobilisation advance, the bank had issued the

Mobilisation Advance-cum-Performance guarantee in favour of the appellant in a standard form, which is unjustified. The learned single Judge also took the view that Guarantee No.350/79 dated 16.8.1979 is a Performance Guarantee and before invoking the same the appellant should assess the quantum of loss and damages and should mention the ascertained figure in the letter of invocation and, if it is not so done, the Guarantee could not be invoked. The appellant has come up in appeal from the aforesaid order after obtaining special leave.

4. We heard counsel. The Bank Guarantee No.350/79 dated 16.8.1979 for Rs.6.50 lacs is available at pages 36 to 39 of the paper book (Volume I), and Bank Guarantee No.399/79 dated 10.10.1979 for Rs.32.50 lacs is available at pages 40 to 45 of the paper book (Volume I). There is slight variation in some of the clauses of the above said two Guarantees. Substantially the the two Bank Guarantees are of same import. We will only quote clauses 1,4 and 5, appearing at pages 41 and 42 of the paper book (Volume I), of the Bank Guarantee No. 399/79 dated 10.10.1979:-

"1. In consideration of the Creditor M/s. Hindustan Steelworks Construction Limited, Calcutta, agreeing to make to the "DEBTOR: M/s. G.S.Atwal & Co. (ENGINEERS) P. LTD. at Calcutta, a Mobilisation Advance of Rs.32.50 (Rupees thirty two lakhs and fifty thousand only) upto a maximum of the value of the contracts under the said Agreements, against Bank Guarantee in favour of Creditor by the United Commercial Bank, Calcutta. SURETY United Commercial Bank, Calcutta hereby guarantees that the contractor will duly perform the services in accordance with the said terms and conditions under the above said Agreements, failing which the Surety does unconditionally and irrevocably agree and undertake to pay to the Creditor (Principal) on demand such amount or amounts as the Surety may be called upon to pay to the aggregate of Rs.32.50 (Rupees thirty two lakhs and fifty thousand only)."

"4. On account of non-fulfilment of the Contractual obligations by the Associate, the Surety shall, on simple demand from the Creditor, pay at Calcutta within 48 hours to the Creditor the sum under Clause 1 above, without demur and without requiring the Creditor to invoke any legal remedy that may be available to them to compel the Surety to pay the same, even if Associate consider such demand of the creditor unjustified."

"5. The Surety further agrees and declares that the Creditors shall be the Sole Judge of and as to whether the said Associate has committed any breach of any of terms and conditions of the said contract and the extent of loss, damages, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Creditor

(Principal) on account thereof and the decision of the Creditor (Principal) that the said Associate has committed such breach as and as to the amount or amounts of loss, damages, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Creditor (Principal) from time to time shall be final and binding on us."

(emphasis supplied)

5. It is common ground that at the request of the respondent the Bank has furnished Bank Guarantees to the appellant. The respondent is the beneficiary. In the dispute pending for adjudication in arbitration, between the appellant and the respondent, the Bank is not a party. The principles to be borne in mind by the Court in the matter of grant of injunction against enforcement of a Bank Guarantee/Irrevocable Letter of Credit have been laid down in a catena of decisions of this Court. We have referred to the said principle in *Larsen & Toubro Ltd. vs. Maharashtra State Electricity Board and ors.*, Civil Appeal No...../95 (arising out of SLP (C) No. 18378 of 1994), which was heard along with this appeal. It is unnecessary to restate the said principles. Suffice it to say that in the case of confirmed Bank Guarantees/Irrevocable Letters of Credit, the Court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud.

6. On a perusal of the relevant clauses of the Guarantees, it is evident that the Bank has unconditionally and irrevocably agreed and undertaken to pay to the appellant on demand the sums specified therein. It is further seen that the amount should be paid without demur and without requiring the creditor (the appellant) to invoke any legal remedy and it is further specifically provided that the appellant shall be the sole judge of and as to whether the respondent, a party to the contract, has committed any breach and the extent of the loss and damages etc. caused to the appellant. It is stated that the decision of the appellant as to the outstanding amount due will be final and binding. A look at the particulars contained at page 83 of the paper book (Volume I) shows that the appellant has put forward a plea that LD 36,986 is due to it on account of security deposit and LD 11,37,627 is the balance due, to be recovered by the appellant. One Libyan Dinar is equivalent to Rs.27/- approximately and so the amount due will be approximately Rs.6.50 lacs and Rs.32.50 lacs respectively, which are covered by the Guarantees. We are of the view that the Guarantees furnished by the Bank to the appellant are unconditional and the appellant is the sole judge regarding the question as to whether any breach of contract has occurred and, if so, the amount of loss to be recovered by the appellant from the respondent. The entire dispute is pending before the Arbitrator. Whether and if so, what is the amount due to the appellant is to be adjudicated in the arbitration proceeding. The order of the learned single Judge proceeds on the basis that the amounts claimed were not or cannot be said to be due and the Bank has violated the understanding between the respondent and the Bank in giving unconditional Guarantees to the appellant. The reasoning of the learned single Judge to hold that the Bank had issued a Guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the Bank, cannot be a reason to hold that the appellant is in any way fettered in invoking the unconditional Bank Guarantee.

Similarly, the reasoning of the learned Single Judge that before invoking the Performance Guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional Guarantee. As stated, the claim of the appellant, regarding the balance to be recovered on account of security deposit and other outstanding advances, is not less than the amount covered by the Bank Guarantees. In this view of the matter, we hold that the learned Judge acted illegally and without jurisdiction, in affirming the interim order of injunction against the appellant restraining it from enforcing the Bank Guarantees till disposal of the Arbitration proceedings. The order dated 29th of August, 1988, passed by the learned single Judge, is set aside and this appeal is allowed. There shall be no order as to costs.