

CASE NO.:
Appeal (civil) 1502-1503 of 2003

PETITIONER:
DAEWOO MOTORS INDIA LTD.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 20/02/2003

BENCH:
SYED SHAH MOHAMMED QUADRI & ASHOK BHAN

JUDGMENT:
JUDGMENT

2003 (2) SCR 276

The following Order of the Court was delivered : Leave is granted.

These appeals arise from a common judgement of the High Court at Delhi in Civil Miscellaneous No. 6714 of 2002 in Civil Writ Petition No. 2002 of 2002 dated July, 16, 2002.

The controversy in these appeals relates to the encashment of the bank guarantee by the Union of India, the first respondent. As an import policy during the period 1995-1996, the first respondent introduced an "Export Promotion Capital Goods (E.P.C.G.) Scheme. The Scheme envisaged exemption from custom duty on the imported goods, plants and equipment, etc., subject to the conditions incorporated in Exemption Notification No. 111/95-CUS dated 5th June, 1995 which was issued under Section 25(1) of the Customs Act, 1962. The appellant in the appeals arising out of S.L.P. (C) Nos. 14657-14658 of 2002, M/s. Daewoo Motors India Limited, availed the Scheme which, inter alia, provided that upon importing plants and equipment, it should fulfil the export obligation equivalent to six times the CIF value of the goods which had been imported on FOB basis, or alternatively four times the CIF value of the goods imported on net foreign exchange basis within a period of eight months. The period was divided into different blocks. Agreeing to fulfil the export obligation, the appellant obtained various import licences in respect of which bank guarantees were furnished by it from various banks, one of them being the Times Bank Limited, now H.D.F.C. Bank Limited, which is the appellant in the appeal arising out of S.L.P. (C) No. 15022 of 2002. It appears that in respect of CIF value of Rupees one hundred crore and more, period to fulfil the export obligation was extended. But later, the Deputy Director General of Foreign Trade, by communication dated February 25, 2002, revoked the export obligation extension period and invoked various bank guarantees.

The appellant-company filed writ petition in the High Court at Delhi challenging the validity of the said order invoking the bank guarantee. The High Court took the view that as the writ petition involved disputed questions of fact and as the subject-matter related to encashment of bank guarantee, it would not be appropriate to exercise extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution. It also observed that the order impugned before the High Court was an appealable order and in that view also, the writ petition ought not to be entertained. The writ petition was, thus, dismissed on July 16, 2002. It is against the correctness of this order that the present appeals have been preferred.

Insofar as the CIF value of the licences exceeding Rupees one hundred crores are concerned, this court granted stay of encashment of bank guarantee but in respect of the licences having CIF value of less than Rupees one hundred crore, the first respondent was at liberty to encash the

bank guarantee. In the present appeals, we are concerned only with the licences where the CIF value exceeds Rupees one hundred crore.

Mr. S.K. Chowdhary, learned counsel appearing for the appellant company contends that in respect of the licences of CIF value exceeding Rupees one hundred crores, the period for compliance of the export obligation was extended and as such the first respondent cannot be permitted to encash the bank guarantee when ample time is available to the appellant-company to discharge the export obligation. It was pleaded that in view of the critical financial position of the company, there have been negotiations to sell the assets altogether and if, at this stage, the bank guarantees are allowed to be encashed, the company would be put to great hardships and irreparable loss.

Mr. P. Chidambaram, learned senior counsel appearing for the appellant-Bank, has argued that having regard to the wording of the bank guarantee furnished by the bank to the first respondent, it is a conditional guarantee and as there is enough time to fulfil the export obligation, the bank guarantee cannot be encashed, except by an arbitrary action of the first respondent.

Mr. Soli J. Sorabjee, the learned Attorney General appearing for the first respondent, on the other hand, submits that the extension of time has been revoked, thus, the very foundation on which the company is resting its defence is not available to it. He contends that the Bank has no locus, no cause of action has accrued to it to file the appeal and/or to contest the invocation of the bank guarantee.

The short point that arises for our consideration is, whether the impugned order of the High Court dismissing the writ petition of the appellant-company warrants any interference in exercise of the jurisdiction of this Court under Article 136 of the Constitution.

It is too well-settled a proposition to admit of detailed reasoning that for encashment of bank guarantee, the bank cannot have any valid resistance, except, of course, in a case of fraud. The clause in the bank guarantee, on which Mr. Chidambaram relies, reads as under:

"We Times Bank Ltd., PTI Building, Parliament Street, New Delhi-110001 do hereby unconditionally and irrevocably agree to pay the President of India on Demand without any demur or protest the amount due and payable under the above said bond not exceeding Rs. 4,80,000 Rupees Four crore eighty lac only by way of loss or damage caused or suffered by the President of India by reason of non-fulfilment of the export obligation under the above said Notification or by reason of any breach of any of the terms and conditions of the above said bond by M/s. DAEWOO MOTORS INDIA LIMITED."

He has emphasised on the words "by reason of non-fulfilment of the export obligation under the above said Notification" and argued that as there is no case of default or non-fulfilment of the export obligation as there is ample time, at any rate till 2004, so the first respondent is not entitled to invoke the bank guarantee. We are afraid, we cannot accede to the contention of the learned senior counsel. The words quoted above, cannot be read in isolation by dissociating them from the context in which they have been used. A reading of the bank guarantee as a whole and the above extracted paragraphs in particular leaves us in no speck of doubt that those words only qualify the preceding words, "loss or damage caused or suffered by the President of India", and do not constitute a condition precedent for the first respondent to invoke the bank guarantee, much less they give any cause of action to the bank to contest the encashment of the bank guarantee on the ground of there being no non-fulfilment of the export obligation.

Further, it would be appropriate to read here the following clauses of the bank guarantee.

"We Times Bank Ltd. PTI Building, Parliament Street, New Delhi, 110001 further agree that the demand made by the President of India any money so demanded notwithstanding any dispute raised by M/s. Daewoo Motors India Ltd. in any proceeding before any Court or Tribunal;

We Times Bank Ltd., PTI Building, Parliament Street, New Delhi-110001 further agree that the demand made by the President of India shall be conclusive as regards the amount due and payable by us under these presents as out of liability under these presents are absolute and unequivocal."

From a perusal of the above clauses, it is abundantly clear that the bank guarantee furnished by the bank is an unconditional and absolute bank guarantee. The bank has rendered itself liable to pay the cash on demand by the President of India "notwithstanding any dispute raised by M/s. Daewoo Motors India Limited in any proceeding before any Court or Tribunal". It is worth noticing that the clause in the bank guarantee specifically provides that the demand made by the President of India shall be conclusive as regards the amount due and payable by the bank under this guarantee and the liability under the guarantee is absolute and unequivocal. In the face of the clear averments, it is trite to contend that the bank guarantee is a conditional bank guarantee. Therefore, the bank has no case to resist the encashment of the bank guarantee. Inasmuch as we have held that the bank guarantee is an unconditional bank guarantee, the case M/s. Hindustan Construction Company Limited, v. State of Bihar and Ors., reported in [1999] 8 SCC 436 is of no avail to the appellant.

It is true that the bank guarantee has to be read in conjunction with the terms of the contract but when the bank itself is in absolute terms, the agreement between the company and the first respondent would be of no avail to the bank.

Insofar as the contention of the appellant-company is concerned, firstly, the order extending the export obligation period has been revoked. Even assuming that the revocation is not a valid revocation, the fact remains that the plant of the appellant-company has been closed down; the entire production of the appellant-company has come to an end. It is also on record that public notices have been issued for auctioning the plant of the appellant-company by the company itself. In such circumstances, when there is no apparent possibility of the fulfilment of the export obligation, the appellant-company cannot seek refuge under the extended period. In our considered view, when it becomes apparent on the facts and circumstances of the case that there is no chance of the appellant fulfilling its export obligation, the action of the first respondent in invoking the bank guarantee cannot be said to be premature and unjustified, much less arbitrary and illegal so as to warrant any interference by this Court.

For the above-mentioned reasons, the appeals fail. They are, accordingly, dismissed. In the facts and circumstances of the case, we make no order as to costs.