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Harcharan Dass Gupta Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Oct-16-2006

Reported in : AIR2007Delhi75; 2009(93)DRJ822

Judge : Mukundakam Sharma and; Hima Kohli, JJ.

Acts : Indian Contract Act, 1872 - Sections 17, 18 and 19; Code of Civil Procedure (CPC) - Order 39, Rules 1, 2 and 4

Appeal No. : FAO(OS) No. 195/2005

Appellant : Harcharan Dass Gupta

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Anil Sapra, Adv. for R-1

Advocate for Pet/Ap. : A.S. Chandhiok, Sr. Adv.,; Geetika Panwar,; Amrita and Vibh

Disposition : Appeal dismissed

Judgement :

Mukundakam Sharma, J.

1. This appeal is directed against the order dated 4th July, 2005 passed by the learned Single Judge in is No.8460/2004, filed by the appellant herein under Order

XXXIX Rules 1 & 2 CPC and is No.1586/2005, filed by respondent No.1 herein under Order XXXIX Rule 4 CPC, arising out of CS(OS) No.1435/2004. The appellant herein filed a Suit against the Delhi Development Authority, respondent No.1 herein, and the Oriental Bank of Commerce, respondent No.2 herein, seeking for a decree of declaration that the contract awarded by respondent No.1 herein in favor of the appellant under letter dated 7th August, 2003 is null and void and also for a decree of permanent injunction restraining the Delhi Development Authority from invoking and encashing the bank guarantees as mentioned in the plaint and also for a decree of permanent injunction restraining the Oriental Bank of Commerce from releasing any amount payable under the subject bank guarantees.

2. In order to appreciate the contention of the counsel appearing for the parties, it would be necessary to deal with the relevant facts leading to filing of the aforesaid Suit. The appellant was awarded a contract for construction of 400 dwelling units by respondent No.1 under the aforesaid letter dated 7th August, 2003. In terms of the agreement between the parties, the appellant furnished performance bank guarantee in the sum of Rs.25 lacs on 1st November, 2003 and also furnished various bank guarantees having identical terms, totalling to Rs.48 lacs, towards mobilisation advance received by the appellant from the Delhi Development Authority. After obtaining the mobilisation advance totalling to Rs.48 lacs from respondent No.1, the appellant did not take steps for execution of the contract contending inter alias that the contract in respect of which the aforesaid bank guarantees were furnished by the appellant were obtained by fraud and that without informing and giving vital information to the appellant about an existing nallah at the project site, the appellant was induced and coerced to execute the aforesaid work. The contention raised is that the main contract, which has been awarded in favor of the appellant by respondent No.1, is void due to non-disclosure of the material facts. It is contended that respondent No.1 has played fraud by not bringing to the knowledge and information of the appellant about an existing nallah at the project site, which information is a basic fundamental of the contract between the parties. The stand of the appellant is that it was neither informed nor was aware of the existence of a nallah at the site in question and that it was only when the appellant got possession of the land after the work was

awarded and inspected the site, did the appellant discover the existence of a nallah, which was also not shown in the site plan.

3. The basis on which the aforesaid plaint was filed was that neither the appellant was aware of the existence of a nallah nor the same was indicated by the respondent No.1 in its site plan and that the appellant could discover about the existence of the nallah only after the work was awarded to it and the site was handed over to it. The interim application, which was filed by the appellant was for an order restraining the respondent No.1 from encashing the bank guarantees, was considered and heard by the learned Single Judged and on consideration of the records and for the reasons stated in the order, the application was dismissed.

4. Being aggrieved by the said order the present appeal is filed on which we have heard the learned Counsel appearing for the parties, who have taken us through the relevant documents on which reliance was placed and reference was made during the course of arguments.

5. The Suit was filed on the ground that the award of contract by respondent No.1 in favor of the appellant was void due to non-disclosure of the material facts and the fraud played on the appellant by respondent No.1 by not informing it and not bringing to its knowledge the existence of a nallah at the project site. A restraint order was also sought for by the appellant on the encashment and enforcement of the bank guarantees on the ground that fraud was played by respondent No.1 on the appellant in the aforesaid manner.

6. So far as the law with regard to encashment of the bank guarantee is concerned, it is now a well settled law by various decisions rendered by the Supreme Court and by this Court. In this connection we may refer to two recent decisions of the Supreme Court in State Bank of India and Anr. v. Mula Sahkari Sakhar Karkhana Ltd. reported in (2006) 6 SCC 283 and in BSES Ltd.(now Reliance Energy Ltd.) v. Fenner India Ltd. and Anr. reported in : AIR 2006 SC1148 , where almost all the cases, which have been disposed of by the Supreme Court on the issue of law relating to encashment of bank guarantee, have been referred to. In the case of BSES Ltd. (supra), the Supreme Court has reiterated the earlier principle laid down by it that to the rule that a bank guarantee must be honoured in

accordance with its terms, there are, however, two exceptions. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit, but with a condition that the fraud must be of an egregious nature as to vitiate the entire underlying transaction. The Supreme Court held that the second exception to the general rule of non-intervention is when there are 'special equities' in favor of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction was not granted.

7. The Supreme Court in its various decisions has categorically stated that one of the aforesaid exceptions must be present and available in the facts of the case so as to give power to the Civil Court to grant an injunction. In the absence of any of the aforesaid factors, the Supreme Court held that no injunction could be granted. The aforesaid summary of law relating to invocation of bank guarantee has been arrived at by the Supreme Court after appreciating various decisions.

8. When a request is made for grant of an injunction restraining encashment of a bank guarantee, the Court is to apply the principles which have been authoritatively laid down by the Supreme Court. In Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Anr. reported in 1997 (2) ALR 350, while summarizing the said principles, the Supreme Court also held that in order to make out a case of fraud, the petitioner has to establish that the said fraud is an established fraud. In respect of the second exception to the rule of granting injunction in case of a bank guarantee, it was stated that resulting irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds and the same shall have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution.

9. In U.P. State Sugar Corporation v. Sumac International Ltd. reported in : AIR 1997 SC1644 , Supreme Court held that fraud must be of an egregious nature such as to vitiate the entire underlying transaction. The Supreme Court quoted with approval its earlier decision in U.P.Cooperative Federation Ltd. v. Singh Consultants reported in (1998) 1 SCC 174 which stated that the Bank which gives

the guarantees is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligations or not, nor with the question whether the supplier is in default or not. In Singh Consultants case (supra) the Supreme Court while explaining the kind of fraud that might absolve a bank from honouring its guarantee quoted the following passage from the judgment of Bolivinter Oil SA v. Chase Manhatan Bank reported in (1984) 1 All E.R. 351:

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application for the bank to have it charged.

10. On the question of irretrievable injury which is the second exception of the rule against grant of injunction when unconditional bank guarantees are sought to be realised, it is held by the Supreme Court in the case of U.P. State Sugar Corporation case (supra) that the irretrievable injury must be of the kind which was the subject matter of the decision in ITEK Corporation Case. The Supreme Court in the said case discussed the nature of the case in ITEK Corporation and observed thus:

On the question of irretrievable injury which is the second exception to the rule against grant of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation Case. In that case an exporter in US entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favor of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in

relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, thereforee, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

11. In Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr. reported in : AIR 1996 SC2268 , it was held by the Supreme Court that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. It was also held in the said case that in the case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and the not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given to the beneficiary.

12. That there are disputes between the parties or for that matter allegations of breach of the contract and/or a plea that no amount is due and payable by the petitioner to the respondent are all matters relating to the main agreement and have no relation and relevance in so far as the agreement of bank guarantees is concerned. That there are serious disputes between the parties which might even go to the root of the contract and that there are breaches committed by the beneficiary, are not matters which could come within the ambit of the special equities resulting into irretrievable injury. In this connection, reference may be made to the observation made by the Supreme Court in paragraph 23 in the

decision of Hindustan Steel Works case (supra):

We are, thereforee, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud had not been pleaded and the relief for injunction was sought by the contractor/respondent No.1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, thereforee, not right in restraining the appellant from enforcing the bank guarantees.

13. In the light of the principles laid down by the Supreme Court in the above mentioned cases, we proceed to decide the present case.

14. In the present case, the subject contract, which was a contract for construction of 400 dwelling units given by respondent No.1 in favor of the appellant, was a contract independent of the contract of the bank guarantee. Bank guarantee is an independent contract between the bank/respondent No.2 and DDA/respondent No.1. The bank has issued the said guarantees on behalf of and at the request of the appellant, but the same is distinctly a separate contract than the contract entered into between the appellant and respondent No.1.

15. Peculiarly, in the present case none of the aforesaid factors namely, fraud and irretrievable injury, is alleged in respect of the bank guarantee. What is alleged is that the main contract itself was obtained by fraud. The learned Single Judge proceeded to consider as to whether or not there is fraud played by respondent No.1 while awarding the contract in favor of the appellant and also while entering

into the contract between the aforesaid two parties. On consideration of the records, it is clearly held that no such fraud was played at all and that the contract was entered into by the parties after being fully aware of the terms and conditions as also being fully informed about the entire situation.

16. Mr.Chandhiok, the learned senior counsel appearing for the appellant, has vehemently submitted before us that the main contract entered into between the appellant and the respondent No.1 was/is vitiated by fraud. According to him the aforesaid aspect was not addressed to and answered by the learned Single Judge at all. The second contention which was raised by him was that the Explanationn which is appended to Section 17 of the Indian Contract Act, 1872 cannot dilute the concept of fraud as stated in the said Section. In order to buttress the contention he has also referred to the provisions of Section 18 and the Explanationn appended to Section 19 before us.

17. In the light of these submissions, we may examine the facts of the present case in order to arrive at a just and reasonable decision.

18. The tender documents which were given to all the tenderers by respondent No.1 before awarding the contract are part of the records. The appellant also obtained the said tender documents and on the basis of the same, its tender was submitted. In the said tender documents, lay out plan is attached to the soil inspection report at page 201. Existence of a nallah is clearly shown in the said lay out plan attached. Clause 27 of the tender documents also clearly requires the tenderer to inspect the work site and to study the drawing, soil inspection reports, tender documents and other conditions referred therein. Clause 1 of the Specifications and Conditions of the tender, which appears at page 130 of the paper book, requires the contractor to get acquainted with the proposed site of contract and study specifications and conditions carefully before tendering. The aforesaid documents, which are on record and part of the tender documents, clearly indicate that the appellant was informed about the existence of a nallah at the project site. The terms and conditions also require the tenderer to inspect the site before submitting its tender. It was also specifically stated in the terms of the tender that the tenderer should submit the tender only after getting acquainted with

the site. Before submitting the tender the appellant must have meticulously followed and complied with the aforesaid conditions, including inspection of the site and, thereforee, we are prima facie satisfied that the appellant had knowledge and information that there existed a nallah at the project site.

19. It is stated by respondent No.1 that the pace of the work of the appellant at the site was extremely slow for which several notices had to be issued by the said respondent to the appellant. The appellant also received mobilisation advance before filing of the aforesaid suit. thereforee, it cannot be said that the appellant received mobilisation advance without having knowledge and information about the location and situation of the project site including the existence of nallah at the site. thereforee, we are satisfied that the allegation now made by the appellant that it did not have the information about the existence of a nallah at the site is an afterthought and is a ploy to get out of the contract by hook or by crook. It is also interesting to note that not a single letter was written by the appellant to respondent No.1 prior to the receipt of the mobilisation advance that it had no knowledge regarding the site or that it had not inspected the site at all.

20. The contract was awarded to the appellant on 7th August, 2003 and site was handed over to the appellant on 1st November, 2003. When possession of the site was handed over to the appellant on the said date, it cannot be expected that they received possession of the site for starting construction work without having inspected the site. A letter was also written by the appellant to the DDA on 13th November, 2003 wherein also no mention was made by the appellant of the fact that the appellant was unaware of the existence of nallah at the site. Although, in the plaint, a stand is taken that the appellant became aware of the existence of the nallah only on 6th November, 2003 but the contemporaneous documents on or about the said date clearly belies the fact that the appellant had no knowledge about the existence of a nallah at the project site. The appellant also obtained mobilisation advance to the tune of Rs.47.47 lacs from respondent No.1 on 6th May, 2004 and it cannot be expected that the appellant had obtained the mobilisation advance without even inspecting the site in question which was handed over to it on 1st November, 2003, i.e. about six months prior to the date of release of mobilisation advance.

21. Counsel appearing for respondent No.1 relied upon the decision of the Supreme Court in Federal Bank Ltd. v. M. Jog Engineering Ltd. reported AIR 2000 SC 3167. In the said decision Supreme Court has held that bank guarantee is a separate contract, independent of the main contract between the parties. It is further held in the said decision that unless the plaintiff proves fraud in the obtaining of the said bank guarantee, no interim injunction for encashment thereof could be sought. It is also held by the Supreme Court in the decision that in order to obtain an injunction against the issuing Bank, it is necessary to prove that the Bank had knowledge of the fraud. In Hindustan Steel Works Construction Ltd. case (supra) also the Supreme Court has held to the similar effect that the bank guarantee is an independent and distinct contract between the Bank and the beneficiary and is not qualified by underlying transaction and primary contract.

22. In the present case there is not even a whisper in the entire plaint to the effect that respondent No.2 Bank had knowledge of the fraud, much less any proof having been submitted by the appellant in that regard. thereforee, we fully agree with and endorse the view taken by the learned Single judge in this matter that there was no fraud at all on the part of respondent No.1 while entering the primary contract with the appellant herein. Even otherwise, there is no fraud either alleged or proved in respect of the bank guarantee, which is an independent contract than the main contract between the parties. In our considered opinion, for establishing fraud on the part of the respondent specific pleadings will have to be there to indicate that in fact fraud had been committed by the respondent which is by nature, an established fraud. Apparently, no such pleading in respect of bank guarantees is on record and, thereforee, the first exception to the general Rule is not available to the appellant. No fraud is alleged or proved in obtaining the subject bank guarantees and, thereforee, prayer for injunction restraining encashment of bank guarantees has been rightly rejected by the learned Single Judge. There was no argument in the present case with regard to special equities, which is the other exception. The said aspect, thereforee, does not arise for our consideration. The bank guarantees furnished are unconditional and irrevocable in nature and the Bank is under an obligation to pay on demand. In such types of unconditional bank guarantee, the nature of the obligation of the Bank is absolute and not dependent on any dispute or proceeding between the party at whose

instance the bank guarantee is given and the beneficiary.

23. Since we have held that in the present case there is neither any fraud played nor misrepresentation made by respondent No.1 to the appellant, it is not necessary for us to consider and analyze the principles of law relating to the concept of fraud and misrepresentation as enunciated under Sections 17 and 18 of the Indian Contract Act.

24. In that view of the matter, the appeal has no merit and is dismissed accordingly.

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