

Delhi High Court

Afro-Asian Agro Products ... vs Pyrites, Phosphate & Chemicals ... on 1 January, 1800

Author: S Pandit

Bench: S Pandit

JUDGMENT S.D. Pandit, J.

1. Afro-Asian Agro Products Singapore Ltd., petitioner in Suit No. 1636/95, has filed this application under XXXIX Rules 1 & 2 of the Code of Civil Procedure.

2. The original Suit No. 1636/95 is filed by the applicant/Petitioner under Section 20 of the Arbitration Act, 1940. It is the case of the petitioner that on or around 25.1.1995 respondent No. 1, Pyrites Phosphate and Chemicals Ltd., floated a global tender for supply of 2,00,000 M.T. of urea with certain specifications. The bidders were permitted to offer the quantities they could supply and the price at which they could do the same. Petitioner is a company registered in Singapore and had participated in pursuance of the said advertisement given by respondent No. 1 and gave a tender and offered to supply 25,000 M.T. of urea at the rate of US \$ 199 per M.T. The said offer given by the petitioner was accepted by respondent No. 1 and a contract had been executed between the petitioner and respondent No. 1 bearing No. PPC/UREA/95/1/33 on 2.2.1995. As per the terms of the said contract the petitioner was to supply urea before 28.2.1995. Petitioner was also asked to furnish a Performance Guarantee Bond for an amount of 2 per cent of the contract amount and, accordingly, petitioner had given Guarantee Bond being No. 57 through respondent No. 2, Indian Bank for a sum of U.S. \$ 99,500.

3. It is further allegation of the petitioner that after the said contract was entered into between him and respondent No. 1 respondent No. 1 had awarded contracts for supply of urea to other parties at different rates which were higher than the rates contracted with the petitioner. It is the claim of the petitioner that the rates quoted by him were as per the prevailing international rates at that time but on account of respondent No. 1 accepting higher rates from other parties the urea prices in the international market went up. Due to this increase in prices of urea in international market manufactures who had earlier agreed to supply urea to the petitioner at the prices offered by him to respondent No. 1 refused to fulfill their obligation and, therefore, he could not get the goods from the manufacturers and, consequently, he could not comply with the contract in question. It is further claimed that his manufacturers had backed out on account of the conduct of respondent No. 1. It is further alleged that respondent No. 1 and Minerals and Metals Trading Corporation are the biggest purchasers of urea in international market and because of making purchases of large quantities by them the prices are indirectly controlled by them. It is his further allegation that though he had sought for extension of time for fulfillment of the contract by giving him time till the end of May 1995 the respondent No. 1 has threatened to liquidate the Guarantee Bond executed through respondent No. 2 Indian Bank. Thus, according to the petitioner, there are disputes between the parties and, therefore, as per the terms of the original contract an Arbitrator should be appointed for deciding the disputes between the petitioner and respondent No. 1.

4. It has been further alleged by the petitioner in this application that respondent No. 1 has played fraud by accepting higher rates from other contractors subsequent to the contract between the

petitioner and respondent No. 1 and because of the said fraud played by respondent No. 1 and because of respondent No. 1 not allowing the extension of time for fulfilling the contract in question the respondent No. 1 should not be permitted to liquidate the bank guarantee. He, therefore, sought an ad-interim injunction against respondent No. 1 from liquidating the Guarantee Bond executed by respondent No. 2 and to restrain the respondent No. 2 from making payment of the Guarantee Bond to respondent No. 1.

5. On the said application I was pleased to pass ex parte order of ad-interim injunction by my order dated 17.7.1995 with a show cause notice to respondent No. 1 as well as respondent No. 2. Only respondent No. 1 has contested the claim of the petitioner by filing his reply to this application.

6. It is the contention of respondent No. 1 that the allegations of fraud made by the petitioner against him are not at all bona fide and genuine. It contended that there was no secrecy about accepting the contracts from other suppliers at higher rate. Petitioner himself had admitted 2,00,000 M.T. of Urea, petitioner had filled tender for supply of only 25,000 M.T. Consequently, the supply of remaining quantity was to be contracted with other contractors who had given their tenders. Though the rates quoted by them were higher than the rates quoted by the petitioner, there was no malafide on the part of respondent No. 1 in accepting the same. Thus, it is contended that there is no fraud played by respondent No. 1 against the petitioner. It is further contended that the failure of the petitioner to fulfill the contract was not due to any action on the part of respondent No. 1 and petitioner alone was responsible for the failure to fulfill the said contract. Respondent No. 1 had given sufficient opportunity to the petitioner to fulfill his part of the contract. Even though the original time to fulfill the contract was up to 28.2.1995 at the request of the petitioner it was extended to 15.3.1995. Then again at the request of the petitioner it was extended from 15.3.1995 to 15.4.1995 and the extension of time took place on the third occasion by extending the time from 15.4.1995 to 30.4.1995. As the petitioner failed to supply the goods within the extended period, respondent No. 1 had no alternative but to proceed further to exercise the right to invoke the Performance Guarantee Bond and that right was exercised by the respondent No. 1 only on 18.5.1995. Thus, it is contended on behalf of respondent No. 1 that there are no bonafides on the part of the petitioner and petitioner is not entitled to get the equitable relief of an ad-interim injunction to restrain him from invoking the Performance Guarantee Bond and that his application be rejected by vacating the ex parte order passed in his favor.

7. Admittedly, in the instant case respondent No. 2 Indian Bank has furnished a Performance Guarantee Bond for the contract in question and respondent No. 1 wants to enforce the same on account of failure of the petitioner to fulfill his part of the contract. Petitioner has come before the court to restrain respondent No. 1 from enforcing the said Performance Guarantee Bond on certain allegations. As regards petitioner's claim on allegations, I would discuss later on, but I feel that it would be appropriate and proper to consider and bear in mind the legal aspect or the legal position regarding the bank guarantees and the injunctions is respect of the same.

8. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers Pvt. Ltd. the following principles are laid down :

"Commitments of banks must be honoured free from interference by the court and irrevocable commitment either in the form of a confirmed bank guarantee or irrevocable letter of credit cannot be interfered with. In order to restrain the operation of either irrevocable letter of credit or of the confirmed letter of credit or of bank guarantee there must be serious dispute and there should be good prima facie case or fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantee would be negated and the fabric of the trading operations would be jeopardised."

Then in the case of General Electrical Technical Services v. Punj Sons (P) Ltd. and another the following principles are laid down :

"Banks must honour the bank guarantee free from interference by the courts otherwise the trust in commerce, internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice the court should interfere. In concurring opinion of one of us (K. Jagan Nath Shetty J.) has observed :

Where it is a traditional bond or Performance Guarantee the obligation of the bank appears to be the same. If the documentary credits are irrevocable and independent the bank must pay when demand is made. Since the bank pledges its own credit involving its reputation it has no defense except in case of fraud. Bank's obligation, of course, should not be extended to protect the unscrupulous party, i.e. the party which is responsible for fraud but the bank must be sure of its ground before declining to pay. The nature of fraud that the court talks about is "fraud" of an "egregious nature as to vitiate the entire underlying transaction." It is a fraud of beneficiary and not fraud of somebody else."

10. Then in the latest case of State Trading Corporation of India Ltd. v. Jain sons Clothing Corporation and another (1995 (5) J.T. 403) the following principles are laid down :

"The grant of injunction is a discretionary power in equity jurisdiction. The Contract of Guarantee is trilateral which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned there in the bank guarantee becomes enforceable. The subsequent dispute in the performance of the contract does not give rise to cause nor is the court justified on that basis to issue an injunction from enforcing the contract, i.e. bank guarantee. The parties are not left with no remedy in the event of the dispute in the main contract ends in the parties favor he/it is entitled to damages or other consequential reliefs. It is settled law that the court before issuing the injunction under Order XXXIX Rules 1 and 2, CPC should prima facie be satisfied that there is a triable issue, strong prima facie case of fraud or irretrievable injury or balance of convenience is in favor of issuing injunction to prevent irreparable injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract unless there is a specific plea of fraud or special equities in favor of the Petitioner. He must necessarily plead and produce all necessary evidence in proof of fraud in the execution of contract of guarantee but not the contract

either the original contract or any of the subsequent event that may happen as a ground of fraud."

11. Bearing the above principles of law in mind. I proceed to consider the facts of the case before me.

12. It is an admitted fact that on or around 25.1.1995 respondent No. 1 had floated a global tender for supply of 2,00,000 M.T. of Urea with certain specifications. The bidders were permitted to offer quantities they could supply and the prices at which they could do the same. The petitioner has, after admitting the above facts in para 5 of the plaint, has stated in paras 6 & 7 that he had given for supply of 25,000 M.T. of Urea @ U.S. 199 per M.T. and he was given the Contract bearing No. PPC/UREA/95/133 on 2.2.1995 to supply 25,000 M.T. @ US \$ 199 per M.T. He has further stated that the said contract was to be fulfilled on or before 28.2.1995. In para No. 8 he has also admitted that as per the contract between the parties he had furnished the Performance Guarantee Bond for an amount equivalent to 2 per cent of the contract amount by giving the Performance Guarantee Bond bearing No. 57/95 for a sum of US \$ 99,500 through respondent No. 2. It is also an admitted fact that the petitioner has not performed the said contract by supply the Urea agreed by him to supply not only before 28.2.1995 but also till 30.4.1995. The respondent No. 1 had, therefore, called upon on respondent No. 2 on 18.5.1995 to make Payment as per the Performance Guarantee Bond and because of the same Petitioner has come before the court.

13. The Performance Guarantee Bond furnished by respondent No. 2 is as under :

"This is certify that at the question of the Sellers. We, Indian Bank, Bharat Buildings, '3' Raffles Place, Singapore 0104 are holding in trust in favor of the buyers, an amount of US \$ 99,500 to pay to the buyers in equivalent Rupees immediately on demand without demur or reference if the sellers fail to perform all or any of their obligations under the said contract. The decision of the buyers duly communicated in writing to the Bank that the sellers have failed to perform their obligations under the contract shall not be questioned and shall be final and conclusive (irrespective of the stand that may be taken by or on behalf of the sellers). The said amount of US \$ 99,500 on demand will accordingly be paid forthwith in Indian Rupees @ TT selling US \$ (market rate of exchange) as on the date of enforcement of the guarantee without any condition or proof.

The above terms of Performance Guarantee Bond clearly show that the Bank is to pay the amount of Guarantee on demand by defendant No. 1 without any condition or proof of non-performance.

14. The petitioner has alleged in his plaint that the non-performance of the said contract was on account of the fraud played by respondent No. 1 and that fraud, according to him, was played by respondent No. 1 by awarding contracts for supply of urea to other parties at a higher rate than the rate contracted with the petitioner. Because of the said contracts entered into by respondent No. 1 with other contractors the prices of urea in the international market went up and because of that the manufacturer who had promised to supply him Urea refused to supply the same at a rate lower than the rate offered by respondent No. 1 to other parties. But the Petitioner himself has clearly pleaded in para No. 5 of the plaint that respondent No. 1 had floated a global tender for supply of 2,00,000 M.T. of Urea. Thus, respondent No. 1 had made it quite clear by the said advertisement that requirement of respondent No. 1 was of 2,00,000 M.T. of Urea. When these fact are admitted by the

petitioner himself it is quite obvious that respondent No. 1 will have to go for the purchase of the remaining 1,75,000 M.T. of Urea from other contractors/manufacturers. It must be remembered that it is not the case of the petitioner that thought he had offered to supply 2,00,000 M.T. of Urea the respondent No. 1 had given him contract for supply of only 25,000 M.T. of Urea and, subsequently, had entered into contracts with others for supply of Urea at a rate higher than what was, offered to him. Had it been such a case then there was some force in his submission that by entering into contracts with others at a higher rate respondent No. 1 had played fraud on him. It must be also further mentioned here that it is not the case of the petitioner also that there were offers to respondent No. 1 to supply the Urea at a lower rate than the rate supplied by the petitioner and in spite of such offer of supplies at a lower rate the respondent No. 1 had fraudulently entered into contract with the persons who had quoted higher rate than the petitioner.

15. It is the contention of the petitioner that because of the purchasing of Urea at higher rates by the defendant No. 1 the manufactures who had agreed to supply Urea to him were not willing to supply the same at agreed price. Thought the petitioner has made (his allegation, as a matter of fact, petitioner has not produced any document to show that any manufacturer had agreed to sell to him urea at a rate lower than the rate quoted by him while giving his tender for the contract with defendant No. 1. He has produced one latter from M/s. McDaniel Company Inc. of U.S.A. dated 1.3.1995 which is at 25 of the documents produced by him. But if that letter is read then it would be quite clear that that letter is not addressed only to the petitioner M/s. Afro-Asian Agro Products, but is addressed to M/s. Bhawani Stores Pvt. Ltd. and the petitioner Afro-Asian Agro Products Pvt. Ltd. Apart from this if the said letter is carefully read then it would be quite clear that the said manufacturer has stated "word prices have risen substantially of late due to increase in further demand. However, MMTC agents are now offering prices in the area of 245.20 USD/MT CNF India and in these circumstances it becomes difficult to negotiate price terms which will work with those which you have offered." The above contents of the said letter clearly show that prices offered by the petitioner and M/s. Bhawani Stores were below the word prices and the said manufacturer was not ready to negotiate with the petitioner and M/s. Bhawani Stores in view of the lower price price quoted by them. The letter in question does not show that the said manufacturer was backing out or was not willing to supply urea at an earlier agreed rate. The letter also indicates prima face that the petitioner must have approached the said manufacturer after entering into contract with the defendant No. 1 because this letter dated 1.3.1995 is in response to the letter sent by the petitioner and that letter of the petitioner was a fax letter, as mentioned in the said letter.

16. It is also further alleged by the petitioner that thought he had asked for extention of time for fulfillment of the contract inquestion, defendant No. 1 had not given the extension of time and even in case of earlier extensions they were not granted promptly and this conduct on the part of defendant No. 1 is also indicative of fraud played by defendant No. 1. Admittedly, petitioner was to fulfill his contract on or before 28.2.1995. He sought first extention of time by two weeks and he was granted extention of time till 15.3.1995. He again sought extension of time on month and he was granted extension of time by one month from 15.3.1995 to 15.4.1995 and the third extension on his request was given to him from 15.4.1995 to 30.4.1995. When admittedly three extensions were granted to the petitioner for fulfilling the contract it could not lie in the mouth of the petitioner to say that he ought to have been given further extension of time to fulfill the contract, even after

passing of 60 days from the last date of fulfilling the contract. There is no material on record to hold that there was inordinate delay in giving extension of time. It must be remembered that Urea is required for agricultural operations and Urea is to be distributed by the Central Government to various State Governments after receiving the same from defendant No. 1 and other Government of India Undertakings and this supply of Urea must go in the hands of the agriculturists well in advance and, particularly, before or during the month of June. For that purpose, it was necessary for the completion of the contract before the end of April 1995. Similarly, when the petitioner was not in a position to fulfill his contract even though three extensions totalling 60 days were granted to him, if the defendant No. 1 thought that there was no propriety in granting further extension of time then that conduct of defendant No. 1 could not be said to be fraudulent or imprudent. The last extension sought by the petitioner was as per the letter dated 3.5.1995. The said letter has been placed on record by the petitioner at page 26 of the documents. This letter shows that he had sought extension of time three days after period for fulfillment of the contract had elapsed. Apart from this in the said letter it is stated that petitioner was seeking extension of time as he had firm arrangement for the supply of goods as per the letter annexed to the latter dated 3.5.1995. But if the said annexure at page 27 of the document is carefully gone through it would be seen that it is not addressed to the petitioner but is addressed to M/s. Bhawani Stores Ltd. When the letter furnished by the petitioner is not addressed to him the defendant No. 1 was quite justified in not considering his claim for extension of time.

17. Therefore, in view of the above facts on record, the claim of the petitioner that defendant No. 1 has played fraud could not be accepted even prima facie. It must be remembered that fraud must be prima facie proved by the petitioner, who is seeking revocation of the bank guarantee and fraud cannot be found merely on suspicion and even mere pleading of fraud is not enough. There must be material and prima facie evidence to support the same. In the case of *Svenska Handelsbaken v. Indian charge chrome* (1991 (1) SCC 502), it has been observed as under :

"Again it appears that the High Court found a strong prima facie case against defendant No. 4 merely on reading the plaint. Pleadings make only allegations or averments of fact. Mere pleadings do not make prima facie a case of fraud. The material and evidence is to show it. No material whatsoever is referred by the High Court.

18. In *A. L. N. Narayan Chettiar v. Offence*, whether made in Rangoon the Privy Council held that :

"Fraud like any other charge of a criminal offence, whether made in civil or criminal proceedings must be established beyond reasonable doubt. A finding as to fraud cannot be based on surmise and conjecture."

19. Therefore, from the material on record it is not possible to hold even prima facie that the petitioner has made out any case of fraud. There are also no circumstances to hold that petitioner will meet irretrievable injustice.

20. Thus, in view of the discussion above, I hold that petitioner has not proved any prima facie case for getting the ad-interim injunction sought for and the ex-parte order of ad-interim injunction

passed in favor of the plaintiff on 17.7.1995 deserves to be vacated.

21. But, before passing the final order I would like to meet one more point raised by learned counsel for defendant No. 1. According to him, petitioner's suit under Section 20 of the Arbitration Act is not maintainable and when the suit itself is not maintainable, petitioner is not entitled to claim and get any interim relief. According to him in the plaint the plaintiff has not given the particulars of the disputes which he wants to be referred to the Arbitrator and, consequently, no reference could be made to the Arbitrator and, hence, his suit is not maintainable. In support of that submission he has cited before me judgment of the learned Single Judge of this court in *M/s. Rai Bahadur Basakha Singh & Sons v. M/s. Indian Drugs & Pharmaceuticals Ltd.* and put reliance on the following headnote :

"Where an application for filing arbitration agreement does not contain the particulars of items of disputes to be referred, reference to arbitrator cannot be made. Plea that copies of notice and other document accompanying the petition contain the particulars of dispute is not available as those documents do not form part of the petition."

22. If the pleadings made by the petitioner in the plaint are considered then it would be quite clear that the petitioner has come before the court with the case that defendant No. 1 has played a fraud on him by entering into subsequent contract for purchase of Urea at higher rates and because of the conduct of the defendant No. 1 he could not fulfill his part of the contract. It is also his allegation that petitioner was denied extension of time for fulfilling the contract and that act of the defendant No. 1 is also fraudulent, when the petitioner is coming before the court with such a pleading, then, obviously, a question of dispute is pleaded by him as to whether the non-fulfilment of contract by him is on account of the fraudulent acts of defendant No. 1 or not. There is, admittedly, no dispute about the non-fulfilment of the contract. The dispute is as to whether it is on account of the alleged fraudulent conduct of defendant No. 1 or on account of pure failure on the part of the petitioner. Therefore in view of the pleadings and nature of suits before me, I am unable to hold that this suit does not contain any points of dispute so as to make a reference to the Arbitrator.

23. Learned counsel for defendant No. 1 further argued that petitioner has alleged that defendant No. 1 ought to have given him extension of time and therefore, according to him, the petitioner has come before the court for getting a decree for specific performance of the contract and the arbitrator cannot grant the specific performance and, consequently, the suit is not maintainable in law. In support of that contention he has cited before me the case of *Hari Om Properties Pvt. Ltd. v. B. Dutta* (1991 (1) Arb. LR 107), wherein it has been held that under the Specific Reliefs Act only courts can grant specific performance of a contract in accordance with that act and Award by an Arbitrator appointed under the Arbitration Act can, at best, direct specific performance. This can only be done by the court in a manner postulated by the Specific Relief Act. Arbitration Act cannot be invoked for the purpose and, consequently, the suit under Section 20 of the Arbitration Act is not tenable. But, if the averments made by the petitioner in the plaint are read, then it would be quite clear that petitioner has nowhere Sought a relief that he should be permitted to perform his part of the contract. He has also not sought any ad-interim injunction against defendant No. 1 in order to restrain defendant No. 1 from not giving the contract for supply of Urea which he had agreed to

supply. No doubt he has pleaded that defendant No. 1 was not justified in not giving extension of time for performance of the contract, but merely because he has pleaded that it could not be said that he seeks the specific performance of the agreement in question. That pleading is made by him in order to support the alleged acts of fraud by defendant No. 1.

24.1. thus hold that both the cases cited by defendant No. 1 are not applicable to the facts before me.

25. Thus, in view of the discussion above, IA. 7357/95 filed by the plaintiff under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, praying for grant of ad-interim injunction, is rejected. The order dated 17.7.1995 granted ad-interim injunction is revoked and set aside. Costs of this application to be the costs in the cause.