Gujarat Maritime Board vs L&T; Infrastructure Development ... on 28 September, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4502, 2016 (10) SCC 46, 2017 (1) AJR 672, AIR 2016 SC (CIVIL) 2923, (2016) 2 CLR 918 (SC), (2016) 4 BANKCAS 378, (2017) 120 ALL LR 228, (2016) 7 MAD LJ 388, (2017) 2 ANDHLD 137, (2016) 9 SCALE 419, (2016) 167 ALLINDCAS 129 (SC), (2017) 123 CUT LT 321, (2016) 2 WLC(SC)CVL 708, (2017) 2 MAD LW 82

Bench: Rohinton Fali Nariman, Kurian Joseph

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9821 OF 2016
(Arising out of S.L.P.(C) No. 7874 of 2016)

GUJARAT MARITIME BOARD ... APPELLANT (S)

VERSUS

L&T INFRASTRUCTURE DEVELOPMENT
PROJECTS LTD. AND ANOTHER ... RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

Leave granted.

Whether the High Court is justified in exercising its discretionary jurisdiction under Article 226 of

the Constitution of India for restraining the appellant from invoking an unconditional bank guarantee executed by the first respondent, is the main issue arising for consideration in this case. The appellant invited bids for development of Sutrapada Port. In the process, a Letter of Intent (hereinafter referred to as 'LoI') was issued to the first respondent on 06.02.2008. The relevant conditions of LoI are extracted below:

> 1.7 The Lead Promoter shall submit a detailed project report within 12 months of issue of this Letter of Intent (LOI) and present it to Gujarat Maritime Board for their approval.
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> 1.8 The Lead Promoter shall obtain all environment clearances and coastal regulation zone (CRZ) clearances and effective financial closure and all such other clearances and permissions within 18 months or issue of this Letter of Intent 1.9 A Performance Guarantee/Bank Guarantee of Rs 5 Crores (Rupees Five crores only) shall be submitted to Gujarat Maritime Board within 4 weeks of issue of this Letter of Intent in the Performa annexed herewith.

(Annexure1). This performance/bank guarantee is against the submission of Detailed Project Report within 12 months and obtaining environment clearance, coastal regulation zone clearance and effecting financial closure within 18 months as mentioned in para 1.7 and 1.8 above, failing which Gujarat Maritime Board/Government shall cancel this Letter of Intent and bank guarantee shall be forfeited." On 07.05.2010, the first respondent requested for change of location from Sutrapada to Kachchigarh and the bank guarantee was extended. At the instance of the first respondent, the Yes Bank Limited furnished a bank guarantee to the appellant on 26.11.2011 for an amount of Rs.5 crores. The relevant conditions read as follows:

> " We, YES BANK Ltd. do hereby guarantee and undertake to pay to GMB an amount not exceeding Rs 5,00,00,000/- (Rupees Five Crores only) as against breach by the Lead Promoter for the development of Kachchigarh Port. The decision of GMB as to any breach having been committed and loss/damages caused or suffered shall be absolute and binding on us.
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> We, YES BANK Ltd, do hereby undertake to without any reference to the Lead Promoter or any other person and irrespective of the fact whether any dispute is pending between GMB and the Lead Promoter or any court of Tribunal or arbitrator relating thereto, pay the amount due and payable under this guarantee without any demur, merely on demand from GMB stating that the said Lead Promoter's failure to perform the covenants of the same. Any such written demand made by GMB on the Bank shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee. However, Bank's liability under this guarantee shall be restricted to an amount not exceeding Rs 5,00,00,000/- (Rupees Five Crores only)." It appears, the first respondent could not proceed with the work even at Kachchigarh, and on such intimation, the appellant by letter dated 10.03.2015, cancelled the LoI issued to the first respondent. The communication

dated 10.03.2015 cancelling the LoI to the extent relevant, reads as follows:

"This is with reference to your above mentioned letter informing GMB about your inability to develop a port at Kachchigarh due to presence of corals not seeking any further extension of the LOI.

In this regard, it is hereby informed that your admission on failure in taking up the Project is in breach of the conditions set out in the Letter of Intent dated 6.2.2008. At your request, the proposal for cancellation of Letter of Intent issued to M/s. L&T Ltd. for development of Kachchigarh port was laid before the Board and was further submitted to GOG for its decision in the matter. After much deliberations, the Government of Gujarat has vide its letter dated February 23, 2015 accorded its approval to (a) cancel the Letter of Intent to M/s L&T Ltd. for development of Kachchigarh port and (b) forfeit the Bank Guarantee worth Rs.5 crores submitted by the Company.

In view of the above direction of the Government, the Letter of Intent dated 06.02.2008 issued to you for development of Kachchigarh port (earlier Sutrapada port) is hereby cancelled. Further, the issuing Bank of the Bank Guarantee has been informed about GMB's claim on the Bank Guarantee." xxx xxx xxx xxx" On the same day, the appellant also invoked the bank guarantee furnished by the Yes Bank Limited at the instance of the first respondent. The communication reads as follows:

"This is with reference to the above mentioned Performance Bank Guarantee issued by your bank on behalf of M/s L&T Infrastructure Development Projects Ltd.("the Company") towards securing the fulfilment of conditions set out in the Letter of Intent ("LOI") dated 15.07.2010 and having its validity till March 31, 2015 worth Rs.5,00,00,000/- (Rupees Five crore only) submitted to Gujarat Maritime Board (GMB).

Whereas, in view of breach of the conditions set out in the LOI by the Company, the Gujarat Maritime Board/Government intends to exercise its right in accordance with Clause 1.9 and has decided to cancel the Letter of Intent and forfeit the above Bank Guarantee.

I, undersigned hereby put my claim to forfeit the Bank Guarantee no. 005GM07113300001 dated November 26, 2011 worth Rs. Five crores issued by your bank and to reimburse the amount of the Bank Guarantee in the account of Gujarat Maritime Board, Gandhinagar.

It is requested to issue Demand Draft in the name of Vice Chairman & Chief Executive Officer, Gujarat Maritime Board payable at Gandhinagar at the earliest." The first respondent filed a writ petition before the High Court challenging the cancellation of the LoI and the invocation of the bank guarantee. The following are the two main reliefs:

> " That this Hon'ble Court be pleased to issue an appropriate writ, order or direction and be pleased to quash and set aside the decision dated 23.02.2015 of the respondent no. 2 and the consequential decision of the respondent no. 1 communicated vide letter of 10.03.2015, to approve the request of the petitioner to cancel the LoI issued to the petitioner, with the condition of forfeiting the Bank Guarantee worth Rs 5 crores, and further command the respondent no. 1 to cancel the LoI dated 06.02.2008 and return the Bank Guarantee to the petitioner;

That this Hon'ble Court may be pleased to issue appropriate writ, order or direction directing the respondent no. 1 not to encash the Bank Guarantee No. 005GM07113300001 dated 26.11.2011(extended from time to time) and command the respondent no. 1 to withdraw the letter dated 10.03.2015 addressed to Yes Bank invoking the aforesaid Bank Guarantee." By the impugned judgment, the writ petition was allowed. Paragraphs-24, 25 and 26 of the impugned judgment which deal with the contentions are extracted below:

> "24. Learned counsel for the GMB however, would place much reliance on the tender conditions in which the tenderer agreed that the bidder had made a complete and careful examination to determine the difficulties in matters incidental to the performance of its obligations under the Concession Agreement and to specify the nature and extent of all difficulties and hazards. Counsel would therefore, contend that any difficulty or even impossibility in obtaining environmental clearances cannot be a defence of the petitioner to avoid forfeiture of the security deposit. We are unable to read such condition in such a rigid manner. If the contract had frustrated on account of impossibility, we have serious doubt whether GMB could forfeit security deposit citing the reason that whatever be the reason, the petitioner failed to perform its obligations and, therefore, must be visited with the penalty of forfeiture. However, there is an additional reason why we must reject such a contention. We may recall, the initial project was for construction of port at Sutrapada. On account of the respondents not being able to make the land available for such project, the same had to be shelved. Only as an alternative, the petitioner suggested Kachchigarh as a site where the port could be developed. Surely, the petitioner was not expected to carry out complete environmental assessment before coming up with such an alternative suggestion nor GMB understood the offer of the petitioner as to one which will irrespective of environment concerns, be accepted. When there was a fundamental shift in the initial project envisaged in the letter of intent, the contention that whatever be the difficulties in executing the contract, forfeiture must follow, need to be viewed in the background of such material changes.
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> 25. The contention that having given unconditional bank guarantee, the petitioner cannot avoid encashment thereof, can also not be accepted. The parameters for avoiding the payment of a bank guarantee by the bank giving such guarantee cannot be applied in the present case. The question in the present case is not so much as to allowing the authorities to encash the bank guarantee as much as the authority of the GMB to retain such amount even if it was so allowed to be encashed. If the decision of

> GMB to cancel the contract and to award the penalty of forfeiture of Rs 5 crores on the petitioner itself is found to be erroneous and therefore, set aside, the question of allowing GMB to encash the bank guarantee would simply not arise.
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> 26. In the result, petition is allowed. Impugned communication dated 10.3.2015 is set aside. The respondents shall not encash the bank guarantee in question." Heard Shri Mukul Rohatgi, learned Attorney General for India, and Shri Tushar Mehta, learned Additional Solicitor General, appearing for the appellant and Shri Gopal Jain, learned Senior Counsel appearing for the first respondent.

Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "... if the contract had frustrated on account of impossibility..." but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved. Recently, this Court in Joshi Technologies International Inc. v. Union of India and others[1], where one of us (R.F. Nariman, J.) is a member, has surveyed the entire legal position on exercise of writ jurisdiction in contractual matters. The paragraphs which deal with the situation relevant to the case under appeal, read as follows:

> "68. The Court thereafter summarised the legal position in the following manner: (ABL International Ltd. Case (2004) 3 SCC 553) "27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:
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> (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
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> (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
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> (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case,

has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks. [(1998) 8 SCC 1]) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

> 69.1. The Court may not examine the issue unless the action has some public law character attached to it.
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> 69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
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> 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination. 69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
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> 70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness. 70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discrimination. 70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc. 70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business. 70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages." It is contended on behalf of the first respondent that the invocation of Bank Guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of Bank Guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contact and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the bank.

An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Limited v. Coal Tar Refining Company[2], at paragraph -14:

> "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:
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> (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
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> (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
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> (iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.
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> (iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned." Guarantee given by the bank to the appellant contains only the condition that in case of breach by the lead promoter, viz., the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the bank should honour it ... "without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant on the bank shall be ... "conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 06.02.2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc., are not within the purview of an inquiry under Article 226 of the Constitution of India.

Between the bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the bank is bound to honour the payment under the guarantee. Therefore, the appeal is allowed and the impugned judgment is set aside. However, we make it clear that this judgment will not stand in the way of the first respondent working out its grievances in appropriate proceedings as permitted under law.

.....J. (KURIAN JOSEPH) .....J. (ROHINTON FALI NARIMAN) New Delhi;

September 28, 2016.

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[1] (2015) 7 SCC 728
[2] (2007) 8 SCC 110

REPORTABLE