National Thermal Powercorporation Ltd vs M/S Flowmore Private Ltd.And Anr on 8 May, 1995

Equivalent citations: 1996 AIR 445, 1995 SCC (4) 515, AIR 1996 SUPREME COURT 445, 1995 (4) SCC 515, 1995 AIR SCW 4306, (1996) 1 LS 39, (1995) 26 ALL LR 322, (1995) 3 COMLJ 23, (1995) 5 JT 590 (SC), 1995 (2) ALL LR 322, 1995 (2) ARBI LR 184, (1995) 2 BANKCAS 221, (1995) 59 DLT 333, (1995) 2 SCJ 263, (1995) 2 ARBILR 184, (1996) BANKJ 368, (1995) 3 CIVLJ 488, (1995) 84 COMCAS 97

Author: Jagdish Saran Verma

Bench: Jagdish Saran Verma

PETITIONER:
NATIONAL THERMAL POWERCORPORATION LTD.

Vs.

RESPONDENT:
M/S FLOWMORE PRIVATE LTD.AND ANR.

DATE OF JUDGMENT08/05/1995

BENCH:
MANOHAR SUJATA V. (J)
BENCH:
MANOHAR SUJATA V. (J)
VERMA, JAGDISH SARAN (J)

CITATION:
1996 AIR 445 1995 SCC (4) 515
JT 1995 (5) 591 1995 SCALE (3)545

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T Mrs. Sujata V. Manohar, J.

Leave granted.

The appellant had entered into a contract with respondent No.1 on 18.1.80 under which respondent No.1 had agreed to supply to the appellant pumps together with butterfly valves, motors etc. The terms of the contract also contained an arbitration clause.

In connection with various payments made or to be made under this contract, the first-respondent furnished to the appellant, inter alia, five bank guarantees in favour of the appellant issued by the Canara Bank which are the subject- matter of dispute before us. These are:

> (1) a bank guarantee dated 27.2.80 for Rs.11,54,290/-, (2) a bank guarantee dated 26.7.86 for Rs.85,000/-, (3) a bank guarantee dated 26.7.86 for Rs.2,53,250/-, (4) a bank guarantee dated 26.7.86 for Rs.63,411.42 and (5) a bank guarantee dated 26.7.86 for Rs.3,79,875/-.

While the first two bank guarantees are performance guarantees, the other three bank guarantees are to secure the advances given by the appellant to the first-respondent to be adjusted against payments to be made under the contract. All these bank guarantees are payable on demand. Clause 1 of the bank guarantee dated 26.7.86 for Rs.85,000/- is as follows:-

> "In consideration of the Owner having agreed to accept from the contractor First Pump with Cast Iron Impeller temporarily in lieu of Stainless Steel Impeller (to be replaced by the Contractor with Stainless Steel Impeller by 31.12.86. We, Canara Bank, having our Head Office at Bangalore-560 002 and Branch at f-19, Connaught Circus, New Delhi (hereinafter referred to as the "Bank" which expression shall unless repugnant to the context or meaning thereof (include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Owner immediately on demand any or, all moneys payable by the Contractor to the extent of Rs.85,000/- (Rupees Eighty five thousand only) at any time upto 31.12.1986 without any reference to the Contractors. Any such demand made by the owner shall be conclusive and binding notwithstanding any difference between the owner and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. The Bank agrees that the Guarantee hereinafter contained shall continue to be enforceable till the sum due to the Owner or till the Owner discharges this Guarantee."

(Underlining Ours) The other four bank guarantees do not contain such an express clause to the effect that the demand made by the beneficiary shall be binding. They all, however, provide that the Canara Bank "do hereby guarantee and undertake to pay the owner on demand any and all monies payable by the contractor by reason of any breach" of the terms of the contract.

There were disputes between the parties in respect of the supply of pumps under the contract. The appellant by its letter dated 15th of March, 1990 addressed to the first- respondent demanded from the first-respondent payment of a sum of Rs.13,22,466.80, being the net recovery which the

appellant was entitled to make from the first-respondent as per the particulars set out in that letter. The appellant called upon the first-respondent to pay the said amount on or before 25.3.90 failing which they would invoke the above bank guarantees without any further notice.

On 11.6.90 the first-respondent invoked the arbitration clause under the contract and appointed his Arbitrator. The appellant thereafter also appointed its Arbitrator. The Institute of Engineers, India appointed a third Arbitrator. The disputes between the parties were referred to arbitration. In view of the arbitration proceedings the appellant did not realise the bank guarantees while the first-respondent kept the bank guarantees alive by renewing them from time to time. The time for making the award expired in January 1992. As the appellant declined to extend the time for making the award, an application under Section 28 of the Arbitration Act for extending the time for making the award is filed by the first-respondent and is pending before the Delhi High Court.

The bank guarantees were about to expire on 31st March, 1993. Hence the appellant by its letters all dated 22.3.93 addressed to the Canara Bank invoked the bank guarantees for Rs.11,54,290/- and Rs.85,000/-. The appellant also partially invoked the bank guarantee for Rs.3,79,875/- by demanding from the Canara Bank payment of a sum of Rs.2,30,910/- under the said bank guarantee. In respect of the remaining two bank guarantees and the balance amount under the partially invoked bank guarantee the appellant called upon the Canara Bank to extend the validity period of the bank guarantees by a further period of six months failing which its letters should be treated as invocation of the guarantees in question and it demanded payment of those guarantee amounts also. As the Canara Bank objected to partial invocation of the bank guarantee for Rs.3,79,875/-, the appellant by its letter dated 26th of March, 1993 invoked the bank guarantee for Rs.3,79,875/- also in full.

On 26th March, 1993 the first-respondent filed a petition before the Delhi High Court under Section 41 of the Arbitration Act seeking an injunction to restrain the present appellant from invoking the guarantees and the Canara Bank from remitting the amounts under the bank guarantees to the appellant. A Learned Single Judge of Delhi High Court by his order dated 20.10.94 granted an injunction restraining the appellant from encashing the bank guarantees. An appeal filed by the first-respondent before the Division Bench of the Delhi High Court was dismissed by the Delhi High Court on the ground that an appeal was not maintainable against an order passed in exercise of power under Section 41 of the Arbitration Act read with the second Schedule.

The present appeals are filed from these judgments and orders of the Delhi High Court. The question of jurisdiction of the Division Bench of the Delhi High Court to entertain an appeal from an order of a Single Judge of the High Court granting an injunction under Section 41 of the Arbitration Act, need not detain us when we are examining the order of the learned Single Judge under Article 136 of the Constitution of India, an appeal from that order having been dismissed. On merit, the order of injunction issued by a learned Single Judge of the Delhi High Court cannot be sustained. In the case of Svenska Handelsbanken v. M/s Indian Charge Chrome and Ors. (1994 (1) SCC 502), a Bench of three Judges of this Court has, while dealing with performance guarantees and guarantees against advances, observed that looking to the obligation assumed by the bank under such guarantees or letters of credit, the bank cannot be prevented by the Party at whose instance the

guarantee or letter of credit, was issued, from honouring the credit guaranteed. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud or irretrievable injustice. Fraud must be of an "egregious nature" so as to vitiate the entire underlying transaction. While irretrievable injustice. Fraud must be of an "egregious nature" so as to vitiate the entire underlying transaction. While irretrievable injustice should be of the kind arising in an irretrievable situation which was referred to in the U.S. case of Itek Corporation v. The First National Bank of Boston etc. (566 Fed. Supp. 1210). The irreparable harm should not be speculative. It should be genuine and immediate as well as irreversible - a kind of situation which existed in the case of Itek Corporation (supra) where, on account of the revolution in Iran the American Government had cancelled all export contracts to Iran and had blocked all Iranian assets within the jurisdiction of the United States. Fifty two Americans had been taken hostages in Iran. In this situation the Court felt that the plaintiff had no remedy at all and the harm to him would be irreparable. This kind of a situation is not a likely situation. This Court in the case of Svenska Handelsbanken (supra) has cited with approval the observations of this Court in the case of U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd. (1988 (1) SCR 1124) to the effect that the Court should not lightly interfere with a performance bond or guarantee unless there is fraud of the beneficiary and not somebody else.

In the present case Mr. Nariman, learned counsel for the first-respondent has attempted to justify the order of injunction issued by the Delhi High Court on two grounds; (1) that the bank guarantees were not invoked in terms of the bank guarantees in question, except for the bank guarantee of Rs.85,000/- which, he conceded, was invoked in terms of that bank guarantee. (2) After the arbitration clause was invoked on 11th of June, 1990 and the Arbitrators were appointed by the parties in September and December, 1990, the parties had proceeded on the basis that the bank guarantees would not be invoked until the arbitration was over and award made. Hence by its own conduct the appellant had precluded itself from invoking the bank guarantees.

Both these submissions cannot be accepted. It is true that the bank guarantee of Rs.85,000/- contains an express term to the effect that any demand made by the owner shall be conclusive and binding on the bank notwithstanding any difference between the Owner and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. Nevertheless, this express term merely reiterates the nature of a bank guarantee which is payable on demand being made by the beneficiary of the bank guarantee. A bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The bank is not concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee. All the three bank guarantees which have been invoked are payable on demand. There is, therefore, no merit in the submission that the bank guarantees have not been properly invoked.

The second submission relates to the conduct of parties. Learned counsel for the first-respondent has relied upon the fact that the first-respondent kept all the bank guarantees alive by renewing them from time to time during the pendency of arbitration and on the fact that the appellant did not invoke the bank guarantees while the arbitration was in progress. Neither of these two circumstances can lead to the conclusion that the bank guarantees cannot be invoked while the

arbitration is pending. The bank guarantees are unconditional and payable on demand. The circumstances pointed out by learned counsel for the first-respondent do not constitute a bar on the right of the appellant to encash the bank guarantees. In the present case there is also no circumstance pointed out which would result in any irretrievable injustice to the first- respondent of the kind referred to in the case of Itek Corporation (supra) if the bank guarantees are realised.

In the premises, the Delhi High Court was not justified in issuing an order of injunction to restrain the realisation of the bank guarantees by the appellant. The appeals are, therefore, allowed. The order of the Delhi High Court dated 20.10.94 is set aside and the order of injunction is vacated. The first-respondent shall pay to the appellant the costs of the appeals.