

SUPREME COURT OF INDIA

Adani Agri Fresh Ltd

Vs.

Mahaboob Sharif & Ors

C.A.No.14015of 2015

(Jagdish Singh Khehar and R.Banumathi, JJ.)

02.12.2015

JUDGMENT

Jagdish Singh Khehar, J

1. Leave granted.

2 The appellant - M/s Adani Agri Fresh Ltd. (hereinafter referred to as 'M/s AAFL') is a supplier of fruit and vegetables. It entered into a contractual agreement with M/s RMS Fruits and Company (hereinafter referred to as 'M/s RMSFC'), a wholesale dealer in fruits, whose proprietor is one Mahaboob Sharif (respondent No.1 herein). For securing payment in lieu of the products supplied by the appellant to respondent No.1 - M/s RMSFC, the appellant required respondent No.1 to furnish bank guarantees, whereby the appellant would be entitled to recover the proceeds of the products, transported by it to M/s RMSFC. Three such registered bank guarantees constitute the basis of the controversy in hand. The said bank guarantees were executed by the State Bank of Mysore on 24.12.2010, 09.02.2011 and 10.02.2011. The terms of the bank guarantees being identical, reference to one will be sufficient for all intents and purposes. Relevant clauses of the first bank guarantee are being extracted hereunder:

“Now The Guarantor hereby Irrevocably and Unconditionally Guarantees as agreement, if any entered between the parties and waiving all rights of objection and defense arising there from, that the Guarantor shall pay any amount up to the maximum amount of guarantee mentioned herein below, upon the AAFL first demand to the AAFL in the event that the whole seller fails to perform its understanding under any agreement or terms and conditions contained in the consignment order and/or sale invoice, or by any reason of whole seller failure to make the reimbursement thereof to the AAFL, in time.

1. The Guarantee shall come into effect upon offer of delivery by the transport agent of AAFL to whole seller at the invoiced address, to the whole seller account any consignment and/or sale order after the date of execution of this guarantee deed.
2. The Guarantor shall immediately pay at Gurgaon, Haryana(India) favouring M/s.Adani Agri Fresh Limited at the request of AAFL, without any demur and without any recourse merely on demand standing that the amount demanded is due and payable by the whole seller to AAFL.
3. Notwithstanding any dispute or difference at any time subsisting between whole seller and yourself concerning the supply of product mentioned above or otherwise, however and notwithstanding any suit or other proceedings that may have been instituted by either party, a sum of Rs.15,00,000/- or such lower sums or sums as may demand in writing if the said whole seller fails to pay to you the amounts due as per your record. We irrevocably agree that a certificate issued by AAFL that the said sum or any part thereof if payable to you shall be accepted by us as a conclusive evidence and binding on us by such amount having become payable to you and that immediately, such a certificate is furnished by you duly signed by any of your official of Senior Manager or above grade payment of such demand shall be made to you by us.
4. The guarantee shall not be impaired or discharged by any changes that may hereafter take place in your constitution or in the constitution of whole seller. This guarantees shall be in addition to and without prejudice to any other securities or remedies, which AAFL may now have or hereafter possess and you shall be under no obligation to marshal in our favour any such security or any funds or assets that you may be entitled.
5. We, the guarantor hereby waive the necessity of the AAFL demanding the said debt from the whole seller before presenting us with the demand.
6. AAFL shall have the fullest liberty under the guarantee deed to extend, from time totime of the performance by the whole seller and that the guarantor also waives any right of notice etc., in this regard.
7. Notwithstanding anything contained herein:
 - a) Our liability under this bank guarantee shall not exceed Rs.15,00,000/- (Rupees Fifteen Lakhs only);
 - b)This bank guarantee shall be in full force until 23.12.2011.
 - c) We are liable to pay the guaranteed amount or any part thereof under this bank guarantee only and only if the AAFL seves upon us a written claim, either by

way registered letter, courier, fax copy of delivered by hand by an authorized agent of the AAFL and make demand there under on or before 23.12.2011.

d) We further undertake and agree that this guarantee shall not be revoked during its currency except with your previous consent in writing. Signature and seal of the guarantor"

(Emphasis is ours)

A perusal of the terms of the bank guarantee reveals, that the same was an unconditional guarantee, and that, the guarantor expressly waived off rights of any objection and defence, irrespective of the disputed positions adopted by the contracting parties, or even, the validity and legal effects of the contractual agreement. Under the bank guarantees, the appellant - M/s AAFL would first make a demand/claim for the payment in lieu of fruits transported to respondent No.1, and in case respondent No.1 failed to reimburse the consideration, the appellant had the right to make a demand from the guarantor, for the above payment. Actually the above stated claim of consideration from M/s RMSFC in the first instance, was also unnecessary, in view of paragraph 5 of the bank guarantee extracted above, which clearly provides that it would not be necessary for M/s AAFL for demanding the consideration from the wholesaler - M/s RMSFC, before presenting the demand to the guarantor - State Bank of Mysore. The aforesaid demand in terms of the bank guarantee was to be made on the basis of a demand/claim at the hands of M/s AAFL indicating the despatch of goods, and the amount payable in lieu thereof. Thereupon, the guarantor was to make the payment of the amount claimed, immediately without any demur, and without any recourse. On the receipt of such a certificate of the outstanding amount(s), the bank guarantee(s) would stand invoked forthwith, notwithstanding any suit or proceedings, that may have been instituted by one or the other party, with reference to the contractual obligations.

3.It is the case of the appellant, that the appellant issued an "Outstanding Certificate" seeking payment, on account of despatch of fruit to M/s RMSFC. The outstanding debt indicated therein was, for a sum of Rs.62,32,328/- (Rupees sixty two lakhs thirty two thousand three hundred and twenty eight only). Consequent upon the aforesaid demand being not honored by respondent No.1, the bank guarantee was sought to be invoked, through the aforesaid

"Outstanding Certificate" dated 31.05.2011, which is being extracted hereunder:

"Outstanding Certificate

This is to certify that M/s. R.M.S. Fruit & Co., Mysore has the outstanding debit balance of Rs.62,32,328/- (Sixty Two Lakhs Thirty Two Thousand Three Hundred Twenty Eight Only) in our books towards supply of Fruit to them during last year.

Thanking you,

Yours truly,

For Adani Agrifresh Limited Sd/-
Authorized Signatory"

4. In order to wriggle out the aforesaid bank guarantee(s), respondent No.1 - M/s RMSFC, filed O.S.No.991 of 2011 before the Civil Judge (Junior Division), Mysore with inter alia the following prayer:

"Wherefore the plaintiff humbly prays this Hon'ble Court be pleased to pass a judgment and decree in favour of the plaintiff and against the defendants for permanent injunction, restraining 1st and 2nd defendant's bank for paying any schedule guarantee amount to the 3rd defendant, until and unless the claim of plaintiff and 3rd defendant is settled amicably or through court of law. Or in the alternative restraining the 3rd defendant from receiving the said amount from the 1st and 2nd defendant bank until and unless the matter has been settled amicably or through court between plaintiff and 3rd defendant with court cost and such other appropriate reliefs as the Hon'ble Court deems fit to grant in the circumstances of the case in the interest of justice and equity.

SCHEDULE

Guarantee amount available in State Bank of Mysore, Shivarampet Branch, Vinoba Road, Mysore guarantee no.3/10-11 date of issue 24.12.2010 and date of expiry 23.12.2011 and extension guarantee No.04/2010-2011 (Original guarantee No.04/2009-10) and renewed period from 10.02.2011 to 09.02.2012 and another guarantee No.05/2010-11 and date of issue 09.02.2011 and date of expiry 08.12.2011."

5. The trial court passed the following interim order after entertaining the above-said suit, on 10.08.2011:

"ORDER

IA No.2 filed by the applicant/plaintiff under Order XXXIX Rule 1 and 2 r/w Section 151 of the CPC, is hereby allowed, conditionally.

The defendants 1 and 2 banks are hereby restrained from making payment of schedule amount to the 3rd defendant till the disposal of the suit either amicably or judiciously between the plaintiff and the 3rd defendant subject to following conditions:

(1) The Plaintiff shall extend the Bank guarantee executed through the defendants 1 and 2 in favour of the 3rd defendant for every six months, till disposal of the

suit; after expiry of the period under the Guarantee No.5/10-11 from the period 10.2.2011 to 9.2.2012.

(2) In case, the plaintiff fails in this suit, the plaintiff shall compensate the defendant No.3 by paying interest at the rate of 18% p.a. on the total value of goods to the 3rd defendant from the date of suit till the disposal of the suit. No order as to costs."

6. The aforesaid order was affirmed, by the Additional Senior Civil Judge, Mysore, on a challenge raised thereto, on 13.09.2011. Even the High Court of Karnataka, where the appellant preferred W.P.No.4654 of 2012, did not interfere with the interim order. The order passed by the High Court on 16.12.2013, dismissing the above-mentioned writ petition, is subject matter of challenge at the hands of the appellant before this Court.

7. As a proposition of law, learned counsel for the appellant has placed vehement reliance on a number of judgments of this Court, we would refer to only two of them, which would suffice the purpose. In this behalf, reference may first be made to U.P.Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd¹, where-from our attention was invited to the following observations :

"27. Our attention was also drawn to the judgment of the learned Single Judge of the Madras High Court in *Arul Murugan Traders v. Rashtriya Chemicals and Fertilizers Ltd.Bombay and another*², where the learned Single Judge expressed the opinion that there was no absolute rule prohibiting grant of interim injunction relating to Bank guarantees and in exceptional case courts would not interfere with the machinery of irrevocable obligations assumed by banks, and that the plaintiff must establish a prima facie case, meaning thereby that there is a bona fide contention between the parties or serious question to be tried, and further the balance of convenience was also a relevant factor. If the element of fraud exists, then courts step in to prevent one of the parties to the contract from deriving unjust enrichment by invoking bank guarantee. In that case the learned Single Judge came to the conclusion that the suit involved serious questions to be tried and particularly relating to the plea of fraud, which was a significant factor to be taken into account and claim for interdicting the enforcement of bank guarantee should have been allowed.

28. I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

XXX XXX XXX

43. The argument for the respondent is attractive but it seems to overlook the basic nature of the case. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to UPCOF Ltd. If under law, the bank cannot be prevented by SCE(P) Ltd from honouring the credit guarantees, the UPCOF Ltd. also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to UPCOF Ltd. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the SCE(P) Ltd. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

XXX XXX XXX

54. The Court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie case of fraud. As Sir John Donaldson M.R. said in *Bolivinter oil SA v. Chase Manhattan Bank & ors*³. at 352:

”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 by the bank to have it discharged.”

55. From the above discussion, what appears to me is this: The sound banking system may, however require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud. In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated February 20, 1987 must be set aside and the order of learned Civil Judge, Lucknow dated August 8, 1986 restored."

(Emphasis is ours)

8. Reliance was also placed on *Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd*⁴., The following observations have been recorded in the above judgment:

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un-conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corporation vs. Sumac International Ltd., this Court observed that :

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Limited vs. Fenner India Ltd. this Court held :

10. There are, however, two exceptions to this rule. 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. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so

many judgments of this Court, that in *U.P. State Sugar Corpn. V. Sumac International Ltd*⁵. (hereinafter 'U.P. State Sugar Corpn') this Court, Correctly declare that the law was 'settled'.

13. In *Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company*, this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :

"14...(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 realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.

(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.

14. In *Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd and anr.*, this Court observed :

"If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury. What is relevant are the terms incorporated in the guarantee

executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.

xxx xxx xxx

24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any "special equities" in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centers around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellants own words is to the following effect:

"That despite the respondent, HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent, HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from the Oriental Bank of Commerce vide letter of invocation dated 16.12.2003."

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any "irretrievable injury" or "irretrievable injustice". There is no plea of any special equities by the appellant in its favour. So far as the plea of "irretrievable injustice" is concerned the appellant in its petition merely stated:

"That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant."

(Emphasis is ours)

9. Based on the judgments rendered by this Court more particularly, the judgments referred to hereinabove, it was the vehement contention of the learned counsel for the appellant, that the terms and conditions of a "Deed of Guarantee" could not be enjoined from being given effect to, on the basis of the principle adopted in determining "prima facie case", "balance of convenience" and "irreparable loss", which are the usual parameters on the basis whereof injunctions are granted. Insofar as the injunction of an unconditional bank guarantee is concerned, it was submitted, that the same could be granted only if the court was satisfied about the commission of a flagrant fraud, at the hands of one or the other contracting parties, or alternatively if the Court was satisfied that an irreparable injury or some irretrievable injustice would be caused to the concerned party.

10. Insofar as the present controversy is concerned, the defence of respondent No.1 is entirely based on a communication dated 14.01.2011, stated to have been addressed by the appellant to respondent No.1. The aforesaid communication, which constitutes the basis of the defence of respondent No.1, is extracted hereunder:

"ADANI
AGRIFRESH LIMITED
14th January, 2011

To
Mr.Mahaboob Shariff,
M/s R.M.S.Fruits & Co.,
1875, Anesarui Street,
Behind Deveraja Market,
Mysore 50 001

Sub : Settlement of amount

Sir,

We inform you that, our settlement talk held at Mysore, regarding destroyed and damage of 8(eight)Loads of Apples supplied to you, four firm agreed to receive 1/4th value of total value. Hence, you are directed to send the amount in installments as agreed after we supplying Apple load as earlier.

Sincerely Yours,

Sd/-
Authorised Signatory Seal"

In addition to the relying on the above communication (dated 14.01.2011), it was the vehement contention of the learned counsel representing respondent No.1 that respondent No.1 - M/s RMSFC had tendered and enclosed photographs depicting rotten and damaged apples, which were allegedly despatched by the appellant to respondent No.1. It was the submission of the learned counsel for respondent No.1, that the veracity of the aforesaid photographs, was not disputed by the appellant, before the trial court.

11. It is not possible for us to determine the veracity or truthfulness of the defence raised by respondent No.1. The aforesaid shall emerge only on the culmination of the proceedings initiated by respondent No.1 before the Civil Court. At the present juncture, we are only concerned with the injunction of the three bank guarantees, referred to hereinabove, the invocation whereof was injunctioned, not only by the trial court, but also by the appellate court, and the same was thereafter maintained even by the High Court.

12. During the course of hearing, learned counsel for the appellant candidly submitted, that the communication dated 14.01.2011 relied upon by respondent No.1 in its defence, is a fabricated and doctored document, which was never executed by the appellant. The position adopted by the rival parties lead us to record the following conclusions. Firstly, that the concerned bank guarantees, are clearly unconditional. This is apparent from the extracts thereof, reproduced above. Secondly, the veracity and truthfulness of defence of respondent No.1 - M/S RMSFC, based on the communication dated 14.01.2011, cannot be opined on at the present juncture, and will have to await the final outcome of the civil suit filed by M/s RMSFC at Mysore. Thirdly, M/s RMSFC has not levelled any allegations of the commission of a flagrant fraud by M/s AAFL, for engineering the invocation of the bank guarantees executed by the State Bank of Mysore. Fourthly, no submissions have been advanced on behalf of M/s RMSFC to establish, that the invocation of the bank guarantees would lead to an irreparable injury or some irretrievable injustice. The instant eventuality is therefore ruled out.

13. In deciding the present controversy we will therefore have to adopt the principles laid down by this Court in U.P.Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (supra), and in Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.(supra). Having given our thoughtful consideration to the law laid down by this Court, in respect of grant/refusal of an injunction of an unconditional bank guarantee, and keeping in mind the terms and conditions, more particularly of the contractual conditions extracted and narrated above, we are satisfied that the courts below were not justified in injunctioning the invocation of the three bank guarantees, executed by the State Bank of Mysore, at the instance of M/s RMSFC. We accordingly hereby direct respondent Nos.2 and 3 - the State Bank of Mysore to honour the same forthwith.

14. While accepting the claim raised by the appellant as has been recorded by us in our conclusions hereinabove, it is also imperative for us to record, that we had required the learned counsel representing the appellant, to obtain instructions from the appellant, whether or not the appellant was truthful in describing the communication dated 14.01.2011 as

fabricated and doctored. In case, the appellant had accepted it to be genuine, we would have permitted the bank guarantees to be invoked, for the reimbursement of 1/4th of the total value of the goods, in consonance with the communication dated 14.01.2011. Having obtained instructions, learned counsel for the appellant states, that the express and specific stance of the appellant, that the communication dated 14.01.2011 (extracted above) is actually fabricated and doctored, and was never sent or executed by the appellant - M/s AAFL to respondent No.1 - M/s RMSFC. In view of the position adopted by the appellant on express instructions, we consider it just and appropriate to further record, that in case the statement made to this Court on behalf of the appellant is not found to be correct, on the culmination of the proceedings initiated by respondent No.1, it shall be open to respondent No.1 - M/s RMSFC to initiate civil and criminal proceedings against the appellant, as may be permissible in accordance with law.

15. We are satisfied in granting liberty to respondent No.1 – M/s RMSFC, to suitably amend the plaint, so as to mould the relief in order to claim whatsoever is due to respondent No.1, under the contractual obligations with the appellant, in consonance with law.

16. The appeal is disposed of in the above terms.

Judgment Referred.

¹(1988) 1 SCC 0174

²A.I.R. 1986 Mad. 0161

³(1984)1 All E.R.351

⁴(2008)1 SCC 0544

⁵(1997)1 SCC 0568