SUPREME COURT OF INDIA

Gangotri Enterprises Ltd.

Vs.

Union of India & Ors.

C.A.No.4814 of 2016

(J.Chelameswar and Abhay Manohar Sapre,JJ.,)

05.05.2016

JUDGMENT

Abhay Manohar Sapre, J.

SLP(Civil)No.27052 of 2012

1. Leave granted.

2. This appeal is filed against the final judgment and order dated 23.07.2012 of the High Court of Uttar Pradesh Judicature at Allahabad in F.A.F.O. No. 2930 of 2012 whereby the High Court dismissed the appeal filed by the appellant herein and upheld the order of District Judge which had refused to grant an interim injunction restraining encashing of the Bank Guarantee by the respondents herein.

3. In order to appreciate the issue involved in this appeal, which lies in a narrow compass, it is necessary to set out the relevant facts in brief infra.

4. The respondents, i.e., North Central Railway invited tender for doing "earth work in embankment and cutting including provision of machine crushed/blended material blanketing layer and construction of RCC Box type minor bridges at CH-84700M to 114100M", in connection with laying down of Agra-Etawah new BG Rail Line. The appellant-a Limited Company applied for the said tender and its tender being the lowest one was accepted by the respondents on 14.03.2005 and accordingly the letter of acceptance was issued in appellant's favour. The contract agreement No. CE(C) 'North' ALD/A-E/Contract/EW-III dated 22.08.2005 was then signed between the parties. The total value of the contract was Rs.14,62,46,742/-, the date of commencement of work was 14.03.2005 and the date of completion of work was 13.03.2007. As the work could not be completed within the prescribed time, on the request of the appellant-Company, the period of completion of work was extended twice by the respondents, firstly, from 14.03.2007 to 31.12.2007 and again upto 30.09.2008 without levy of penalty and with price variation clause benefit.

5. On 14.07.2006, the appellant-Company was granted another work by the respondents-North Central Railway vide letter No.74-W/4/1/347/WA/ANVR/SERd./TCR for construction of New Station Building (G+2) circulating area, various service buildings, construction of platform shelters with RCC Column and beam, Underground and Overhead water storage tanks, water supply pipeline network and other misc. works in connection with the Development of New Passenger Terminal at Anand Vihar (East Delhi) [hereinafter referred to as "Anand Vihar works"]. In connection with the grant of the Anand Vihar works, the appellant-Company submitted a Bank/Performance Guarantee bearing No. 12/2006 dated 04.08.2006 from its banker Indian Mercantile Co-operative Bank Ltd., Cantt. Road, Lucknow (hereinafter referred to as 'Bank') for a sum of Rs.1,32,78,820/-.

6. Since the work relating to contract dated 22.08.2005 could not be completed within the prescribed time/extended time by the appellant due to non-availability of site because of the agitation of the farmers and non-supply of the specification or drawing of most of the small bridges by the respondents, as complained by the appellant, the Agra-Etawah contract dated 22.08.2005 was terminated by the respondents vide its letter dated 30.04.2009. After inviting fresh tenders, the rest of the work was allocated by the respondents to another Company, namely, M/s Hanu Infrastructure Pvt. Ltd. Kasganj, Kashiram Nagar for approximately Rs. 11 Crores on 10.06.2011 without giving any information to the appellant-Company.

7. On 30.09.2010, the appellant got the completion certification from the respondents for the Anand Vihar works with a defect liability period of six months, which also came to an end on 30.03.2011. Thus the appellant became entitled to seek the release of the Bank/Performance Guarantee No. 12/2006 submitted by it for the said work from the respondents.

8. On 27.06.2011, the appellant, therefore, wrote a letter to the respondents-North Central Railway for return of the Bank/Performance Guarantee No. 12/2006.

9. On 10.06.2011, the North Central Railway issued an internal circular to all concerned departments of the Railways for withholding of dues of the appellant-Company stating therein that the contract of the appellant-Company dated 22.08.2005 or the New Agra-Etawah BG Line was cancelled and the same had caused the respondents a loss of Rs.5,58,16,036.33. The said circular came to the knowledge of the appellant on 18.07.2011.

10. On 30.11.2011, the respondents through their accounts department wrote a letter to the Bank which had furnished Bank Guarantee No.12/2006 for and on behalf of the appellant for the encashment of the said Bank Guarantee.

11. On 02.12.2011, the final bill for the Anand Vihar works were cleared by the respondents and the payment for the same was released by the respondents.

12. Since the disputes had arisen between the parties in relation to and arising out of the contract dated 22.08.2005, the appellant invoked Clause 36 read with Clause 64 of the

General Conditions of Contract (in short "GCC") which provided for the settlement of dispute by arbitration.

13. After initiation of the arbitration, the appellant, on 04.01.2012, moved an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") before the District Judge, Allahabad bearing Arbitration Suit No. 411 of 2011 seeking injunction on encashment of the Bank Guarantee deposited by it in the Anand Vihar works, against the respondents. It was inter alia alleged in the application that the respondents-North Central Railway have no right to encash the Bank Guarantee No.12/2006 furnished by the appellant in relation to dispute arising out of another contract dated 22.08.2005. It was alleged that firstly, Bank Guarantee was not furnished by the appellant in relation to contract dated 22.08.2005 but was furnished in performance of another contract dated 14.07.2006 (Anand Vihar works) which is a separate contract and has nothing to do with the contract dated 22.08.2005. Secondly, it was alleged that so far as the contract dated 14.07.2006 (Anand Vihar works) is concerned, the work was completed well within time and also to the satisfaction of the respondents and for which Completion Certificate was also given to the appellant by the respondents on 30.09.2010. Thirdly, it was alleged that since the Bank Guarantee in question was in the nature of performance Guarantee for due execution of contract dated 14.07.2006 (Anand Vihar works) and the same having been performed by the appellant to the satisfaction of the respondents, the appellant-Company was entitled to get its Bank Guarantee No.12/2006 released from the respondents. It was further alleged that in these circumstances, the respondents have no right to encash the Bank Guarantee in relation to any dues arising out of other contract with the appellant. It was also alleged that in any event, so long as the disputes arising out of the contract dated 22.08.2005 are not finally decided by the arbitrator and liabilities of the parties are not ascertained as to, who has to pay how much sum by way of damages and whether any one is at all liable to pay, there is no sum "due" or "payable" either by the appellant to the respondents or/and vice versa and hence the respondents cannot invoke Clause 62(1) of GCC for realization of any money/sum by encashing the Bank Guarantee from the appellant.

14. The respondents resisted the petition and inter alia contended that Clause 62(1) of GCC empowers the respondents to make recovery of any dues from the appellant. It was contended that since the respondents have a claim/dues for payment of a sum of money against the appellant (contractor), they (respondents) would be entitled to exercise their right of recovery given to them under Clause 62(1) even if such claim is not for a "sum due" and "sum payable" and is a claim for "damages" though disputed by the appellant and remains to be adjudicated upon in a court of law or by the arbitrator. It was contended that the respondents were, therefore, entitled to encash the Bank Guarantee in question in relation to dues/claim made by the respondents against the appellant.

15. By order dated 04.01.2012, the District Judge allowed the application made by the appellant and restrained the respondents from encashing Bank Guarantee till appointment of arbitrator or constitution of Arbitral Tribunal. It may be mentioned here that the respondents did not file any appeal against this order, which attained finality.

16. By letters dated 20.01.2012 and 29.01.2012, the appellant then requested the respondents for return of its Bank Guarantee.

17. On 13.03.2012, an arbitration Tribunal was constituted as per Clause 32 read with Clause 64 of the contract between the parties which comprised of Shri Arun Kumar, CCE/NCR/ALD, Shri A.K. Bijalwan FA&CAO/F&B /NCR/ALD and Shri R. Rajamani Former CCRS & Member/Arbitrator to look into the claims and the counter claims of the parties. The arbitration proceedings are pending.

18. On 21.03.2012, the Deputy Chief General Manager/Const./SE Rd/NDLS wrote to the Branch Manager of the Indian Mercantile Cooperative Bank for extension of Bank Guarantee, which was valid upto13.01.2012. On the request of the respondents, the Bank extended the period of Bank Guarantee for another six months, i.e., upto 13.07.2012.

19. On 04.04.2012, the respondents through their accounts office wrote a letter to the Branch Manager of the Bank to encash the said Bank Guarantee in their favour.

20. Since the respondents went on insisting for encashment of the Bank Guarantee again and again saying that order dated 04.01.2012 passed by District Judge no longer survives as its life was only upto the date of constitution of arbitral Tribunal and hence the respondents became entitled to encash the Bank Guarantee, the appellant again filed a petition under Section 9 of the Act bearing Arbitration Suit No. 216 of 2012 before the District Judge, Allahabad seeking injunction against the respondents from encashing the Bank Guarantee.

21. By order dated 12.07.2012, the District Judge dismissed the petition and declined to grant injunction to the appellant. This time, the District Judge accepted the stand taken by the respondents and held that Clause 62(1) empowers the respondents to recover any dues/claim from the appellant and hence the respondents were within their rights to invoke the bank Guarantee and recover the dues relating to other contract.

22. Aggrieved by the said order, the appellant preferred an appeal bearing F.A.F.O. No. 2930 of 2012 before the High Court.

23. By impugned judgment dated 23.07.2012, the High Court concurred with the view taken by the District Judge and dismissed the appellant's appeal.

24. Challenging the said judgment, the appellant has filed this appeal by way of special leave.

25. Heard Mr. B. Adinarayan Rao, learned senior counsel for the appellant and Mr. Atul Chitaley, learned senior counsel for the respondents.

26. Mr. B. Adinarayan Rao, learned senior counsel appearing for the appellant (Contractor) while assailing the legality and correctness of the impugned order reiterated the same submissions, which were urged by the appellant before the two Courts below in support of

the application filed by the appellant under Section 9 of the Act. His submission was that since the Bank Guarantee in question was in the nature of performance guarantee furnished by the appellant for due performance of one contract (Anand Vihar works) dated 14.07.2006 and the same having been admittedly performed by the appellant to the satisfaction of the respondents (North Central Railway), as is clear from the completion certificate dated 30.09.2010 issued by the respondents in appellant's favour, the purpose for which the Bank Guarantee had been furnished was over as soon as the Satisfaction Certification was issued by the respondents in appellant's favour. Learned counsel, therefore, contended that the appellant became entitled to claim release of the Bank Guarantee in their favour on and after 30.09.2010 without any fetters on their rights.

27. In the second place, learned counsel urged that the respondents (North Central Railway) had no right to take recourse to Clause 62 of GCC for encashing the Bank Guarantee in question because firstly, the arbitration proceedings which arose out of another contract dated 22.08.2005 were still pending for final adjudication of the liability, if any, and secondly, so long as the liability as to how much sum was payable and if so by whom it was payable was not finally determined in accordance with law in the arbitration proceedings by the arbitrators, there was no "sum due" and nor any "sum payable" in praesanti by the appellant to the respondents and vice versa in connection with another contract.

28. In the third place, learned counsel contended that the District Judge, in the first instance, having rightly granted the injunction to the appellant vide order dated 4.01.2012 and no appeal having been filed against this order by the respondents, the said order had become final and was binding on the parties. It was, therefore, urged that when the appellant moved the second application for grant of injunction after the matter was referred to arbitration because of insistence on the part of the respondents to encash the bank guarantee, the District Judge should have extended the life of first order dated 04.01.2012 instead of again going into the merits of the case.

29. Lastly, learned counsel urged that in the light of this legal position arising in the case, the appellant had made out a prima facie case for grant of injunction against the respondents (North Central Railway) from encashing the bank guarantee in question.

30. In reply, learned counsel for the respondents (North Central railway) supported the impugned order and contended that no case is made out to interfere in the impugned order and hence it be upheld.

31. Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submissions of the learned senior counsel for the appellant.

32. In our considered opinion, it may not be necessary for us to go into more details of the issue because, in our view, the controversy involved in this case remains no more res integra and stands decided by this Court in the case of *Union of India vs. Raman Iron Foundry*[1], Since the issue stands already decided by this Court and hence it is necessary to examine the

facts of the case and law laid down therein in detail and then apply the same to the facts of the case at hand.

33. The facts of the case of Union of India (DGS&D) (supra) were that the respondent (Raman Iron Foundry) entered into a contract with the Union of India (DGS&D)-the appellant for supply of certain quantity of "Foam compound". The contract, apart from several other conditions, contained two clauses, namely, Clauses 18 and 24. Clause 24 provided that in the event of any dispute arising between the parties in connection with the contract, the same shall be decided by means of Arbitration. Clause 18 with which we are concerned provided for "recovery of sums due" which reads as under :

> "18. Recovery of sums due — whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due."

34. The performance of the contract ran into difficulties and dispute arose between the parties giving rise to claims by either parties against the other. The respondent contended that the appellant committed a breach of the contract and was, therefore, liable to pay to the respondent a sum of Rs. 2,35,800/- by way of damages suffered by the respondent by reason of the breach of the contract whereas the appellant, on the other hand, said that it was the respondent who committed the breach of the contract and was, therefore, liable to pay to the appellant by way of damages a sum of Rs. 2,28,900/-. In the meantime, the appellant through Assistant Director of Supplies sent a letter to the respondent calling upon the respondent to make payment to them a sum of Rs. 2,28,900/- and threatened that if the said amount is not paid, it will be recovered from several respondents' pending bills in respect of other contracts.

35. The respondent, therefore, filed an application under Section 20 of the Indian Arbitration Act 1940 in Delhi High Court against the appellant for filing the arbitration agreement. The respondent also made an application for an interim injunction restraining the appellant from recovering the amount of damages claimed by it from several pending bills of the respondent. The learned Single Judge dismissed the injunction application on the ground that it could not be proved that there were any pending bills but at the same time allowed the application made under Section 20 of the Indian Arbitration Act and referred the matter to arbitration as per Clause 24 of GCC. This is how the claim/counter claim of the parties became the subject matter of the arbitration proceedings.

36. Pending arbitration proceedings, the appellant made attempt to recover the said amount from the respondent and hence the respondent again made another interlocutory application under Section 41 read with second schedule to the Indian Arbitration Act, 1940 and prayed for status quo in the case. The appellant resisted the application. It was contended that Clause 18 empowers the appellant to make recovery of any amount from the respondent. The learned Single Judge allowed the respondent's application. He took the view that Clause 18 did not authorize the appellant to appropriate the amounts of any pending bills of the respondent towards satisfaction of its claim for damages against the respondent unless such claim for damages was either admitted by the respondent or adjudicated upon by the arbitrator or suit in civil court. Accordingly, the injunction, as prayed for, was granted to the respondent against the appellant. It is this issue, which was carried by the Union of India to this Court.

37. The questions, which fell for consideration before this Court, were - first, what is the true interpretation of Clause 18; second what is the meaning of the words "sum due" and “may become due” under the contract or any other contract with the purchaser occurring in Clause 18; third, whether Clause 18 empowered the Union of India to make recovery of amount claimed by it by way of damages (liquidated or unliquidated) for breach of contract pending arbitration proceedings from the contractor and lastly, whether in such case, contractor is entitled to claim injunction against the Union of India from making recovery of such sum.

38. Justice Bhagwati (as His Lordship then was) speaking for the Bench examined the issue in great detail in the light of law laid down by English and Indian Courts. The learned Judge in his distinctive style of writing after examining the entire case law on the subject held that an expression "sum due" occurring in Clause 18 would mean a sum for which there is an existing obligation to pay in praesenti or in other words which is presently payable and due and, therefore, recovery of only such sums can be made subject matter of Clause 18 which is presently payable and due. It was held that a claim, which is neither due and nor payable, cannot be made subject matter of Clause 18. It was further held that Clause 18 does not create a lien on other sums due to the contractor or give to the purchaser a right to retain such sums until his claim against the contractor is satisfied. It was also held that a claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled in exercise of the right conferred upon it under Clause 18 to recover the amount of such claim by appropriating other sums due to contractor.

39. Their Lordships approved the view taken by Chagla C.J. in the case of *Iron and Hardware (India) Co. vs. Firm Shamlal and Bros.*[2], by observing in para 11 as under.

> “11 The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik*[3], *S. Milkha Singh v. N.K. Gopala Krishna Mudaliar*[4], *and Iron and Hardware (India) Co. v. Firm Shamlal and Bros(Supra).* Chagla, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26) In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would

it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

12. We accordingly dismiss the appeals. The appellant in each appeal will pay the costs of the respondent all throughout."

40. In our considered opinion, the case at hand being somewhat identical to this case has to be decided keeping in view the law laid down by this Court in the case of Union of India (DGS&D) (supra).

41. Coming now to the facts of the case at hand, we find that wordings of Clause 62 of the contract in question with which we are concerned is identical to that of Clause 18 of Union of India (DGS&D) (supra). Clause 62 of GCC provides for determination of contract owing to default of contractor. The relevant portion of Clause 62 reads as under:

"The amounts thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the Contractor by the Railway under this or any other contract or otherwise."

42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.

43. We have, therefore, no hesitation in holding that both the courts below erred in dismissing the appellant's application for grant of injunction. We are indeed constrained to observe that both the courts committed jurisdictional error when they failed to take note of the law laid down by this Court in Union of India (DGS&D) (supra) which governed the controversy and instead placed reliance on *Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company*[5], and U.*P. State Sugar Corporation vs. Sumac International Ltd.*[6], which laid down general principle relating to Bank Guarantee. There can be no quarrel to the proposition laid down in those cases. However, every case has to be decided with reference to the facts of the case involved therein. The case at hand was similar on facts with that of the case of Union of India (DGS&D) (supra) and hence the law laid down in that case was applicable to this case. Even in this Court, both the learned counsel did not bring to our notice the law laid down in Union of India (DGS&D) case (supra).

44. We are also of the view that the District Judge having decided the injunction application in the first instance in appellant's favour vide order dated 04.01.2012 erred in rejecting the application made by the appellant second time vide order dated 12.07.2012. It is not in dispute that the respondents despite having suffered the injunction order dated 04.01.2012 did not file any appeal against this order. Such order thus attained finality and was, therefore, binding on the parties.

45. In the light of foregoing discussion, we hold that the appellants have made out a prima facie case in their favour for grant of injunction against the respondents so also they have made out a case of balance of convenience and irreparable loss in their favour as was held by this Court in the case of Union of India (DGS&D) (supra). They are, therefore, entitled to claim injunction against the respondent in relation to encashment of Bank Guarantee no. 12/2006 dated 04.08.2006.

46. We, accordingly, allow the appeal, set aside the impugned order and in consequence allow the injunction application made by the appellant under Section 9 of the Act in Arbitration Suit no. 411/2011 in District Court, Allahabad and grant injunction in appellant's favour by restraining the respondents jointly and severally from encashing Bank Guarantee

no. 12/2006 dated 04.08.2006 furnished by the appellant in connection with Anand Vihar Works. No costs.

Judgment Referred.

[1]*(1974) 2 SCC 0231*
[2]*AIR 1954 Bom.0423*
[3]*AIR 1941 Cal 0639*
[4]*AIR 1956 Punj 0174*
[5]*AIR 2007 SC 2798*
[6]*(1997) 1 SCC 0568*