IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.81 OF 2015
IN
SUMMARY SUIT NO.382 OF 2015

The Fertilisers & Chemicals Travancore Ltd. ….Plaintiff

V/s.

IDBI Bank Limited ....Defendant

Ms. Ginny Rautray i/b. Mr. Ashok Singh for the plaintiff.
Mr. Pandit Girinkumar Navinchandra for the defendant.

CORAM : K.R.SHRIRAM,J
DATE : 25th APRIL, 2016

P.C.:-

1 The plaintiff is seeking a summary decree against the defendant in the sum of Rs.2,34,42,192/-.

2 The plaintiff – The Fertilisers & Chemicals Travancore Ltd. (FACT) had entered into a contract with a company by the name M/s. Ardeshir B. Cursetjee & Sons Limited (ABCL) on 19th February, 1997 for the transportation of Liquid Ammonia Gas from the plaintiff's Ammonia storage tank at Willington Island to its production divisions. The contract was for a period of 10 years. As per the terms of the contact, ABCL had to provide Bank guarantee for a sum of Rs.2 crores towards security and for due and faithful performance of the contract.

At the request of the ABCL, the defendant furnished Bank guarantee which was to remain in full force and effect during the period of the contract that would be taken for the performance of the contract and that it shall continue to be enforceable till all the dues of FACT under or by virtue of the contract have been fully paid and its claim satisfied or discharged or till FACT certifies that the terms and conditions of the contract have been fully and properly carried out by the Contractor and accordingly discharges this guarantee or for a period of 3 years from the date of the guarantee whichever is earlier.

3 Various disputes arose between the plaintiff and ABCL. Parties referred their disputes to Justice K.T. Thomas (retired), Former Judge of the Supreme Court of India. When the disputes arose between ABCL and FACT, FACT invoked the Bank guarantee. Against the invocation ABCL approached Trial Court in Cochin for stay, which was rejected and against that order appeal was filed in the High Court of Kerala at Cochin. The High Court of Kerala was pleased to stay the invocation of the Bank guarantee. Until 20th October, 2014 under the orders of the Kerala High Court the Bank guarantee was kept alive.

4 The Learned Arbitrator published his award dated 1st January, 2014. In the arbitration issue no.12 was as under :-

> *"12. Is the respondent entitled to encash the Bank guarantee on the facts and circumstances of the case?*

5 This issue has been answered as under :-

> "*In the light of the situation emerging in this award the Bank guarantee furnished by ABC to FACT would become unenforceable. I therefore, hold that FACT is not entitled to encash the Bank guarantee furnished by ABC pursuant to the contract dated 19.2.1997. This issues is found accordingly."*

6 The ABCL was also awarded a sum of Rs.172 crores by the Learned Arbitrator and FACT was awarded a sum of Rs.27,98,28,545/-.

7 After the award was published, ABCL by its letter dated 14th October, 2014 called upon the defendant not to renew the Bank guarantee. The plaintiff has challenged the award before the Kerala High Court under Section 34 of the Arbitration and Conciliation Act, 1996, which is still pending. The plaintiff has not moved the Kerala High Court for an order directing the defendant to keep the Bank guarantee alive.

8 In view of the award where it is stated that the Bank guarantee furnished by the defendant has become unenforceable and the plaintiff is not entitled to encash the Bank guarantee and in view of the letter dated 14th October, 2014 from ABCL, the defendant has informed the plaintiff that they are not entitled to encash the Bank guarantee.

9 The Apex Court in ***M/s. Mechelec Engineers & Manufactures vs. M/s. Basic Equipment Corporation***[1] in paragraph 8 has stated as under :-

> *"8. In* ***Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee****, Das J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions :*
>
> *(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*
>
> *(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*
>
> *(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.*

1. (1976) 4 SCC 687

> *(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.*
>
> *(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."*

10 In view of the fact that the Learned Arbitrator has held that the Bank guarantee is unenforceable and plaintiff is not entitled to encash the Bank guarantee and this portion has not been set aside in the Section 34 challenge by the plaintiff, in my view, I cannot hold that the defence raised by the IDBI Bank is moonshine or misconceived. In my view they have a fair and reasonable defence.

11 In the circumstances, the summons for judgment is dismissed and unconditional leave to defend is granted. The suit is transferred to the list of Commercial Causes.

12 The defendant to file their written statement within six weeks from today. Within two weeks thereafter both the plaintiff and the defendant to file their respective affidavit of documents together with compilation of documents. Within one week thereafter the

parties to take inspection of the documents filed by the other side and one week after taking inspection parties to file their respective statement of admission and denial with reasons for denial.

13 Stand over to 25th July, 2016 for issues.

(K.R.SHRIRAM,J)