IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2016

PRONOUNCED ON : 02.12.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1386 of 2010
and
M.P.Nos.1 of 2010 and 1 of 2015

M/s.Malabar Cements Ltd.,
Rep. By its Legal Officer,
Prakash Joseph,
Walayar and Post,
Palakkad District,
Kerala State. ... Appellant

Vs

1.M/s.Crescent Mines and Minerals,
by its Proprietor,
A.Mohammed Feroz,
No.15, 3rd Cross,
Paramasivapuram,
Lalgudi,
Trichy District.

2.City Union Bank Ltd.,
represented by its Branch Manager,
Palakkad. ... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 06.07.2010 of the Subordinate Court, Ariyalur in A.S.No.100/2009 thereby reversing the judgment and decree dated 09.11.2009, of the Principal District Munsif Court, Ariyalur in O.S.No.13 of 2007.

For Appellant : Mr.AR.L.Sundaresan for Mr.T.Sai Krishnan

For R.1 : Mr.V.P.Sengotuvel

For R.2 : Mr.R.S.Varadarajan

JUDGMENT

The first defendant in the suit is the appellant herein. The plaintiff M/s.Cresent Mines and Minerals is the first respondent herein. The suit is for a permanent injunction restraining the first defendant from invoking the bank guarantee furnished by the plaintiff through the City Union Bank, the second defendant in the suit.

2.The brief facts, relevant for this appeal, are as under:-

The plaintiff, M/s.Cresent Mines and Minerals leased out 11.09 acres of land to the the first defendant - M/s.Malabar Cements to extract Sweetener Lime Stone. A detailed agreement with all terms and conditions was executed between the plaintiff and the the first defendant on 23.12.2005. One of the condition is that, the plaintiff has to provide infrastructure facilities like motorable approach road construction of laboratory building provisions of power connection, installation of weigh bridge of 50 metric tones capacity etc., in the leased out property within a period of three months after execution of the lease agreement. To provide the above infrastructure facilities, the first defendant advanced Rs.32 lakhs to the plaintiff, on the specific terms that, this amount will be adjusted towards the running bill every month @ Rs.1 lakh if the first defendant extract minimum 5000 metric tons of lime stone in a month. A Bank Guarantee to that effect was also executed on 06.01.2006.

3.The case of the plaintiff is that, as agreed, it has provided all the infrastructure facilities to the first defendant within the time stipulated and handed over the facilities to the first defendant on 07.04.2006 along with the leasehold land. While so, since, the conditions imposed in the bank guarantee have been fulfilled, the first defendant can no more entitle to invoke the bank guarantee. Hence, the suit seeking injunction restraining the first defendant from invoking the Bank Guarantee.

4.The first defendant however, denied the claim of the plaintiff, on the ground that it is a public sector company, wholly owned by Kerala Government and it is engaging in manufacturing and sale of cement. For manufacturing of cement, it invited tender for Lime Stone from mine owners. Since, the plaintiff has quoted the least tender amount, his offer was accepted and work order was issued.

5.As per the agreement and concurrence of the plaintiff, the first defendant engaged one M/s.Asia Mining and Technological Services, Trichy for extracting lime stones and loading them into the trucks and they started extracting lime stones for nearly 8 months by September 2006. The first defendant company was having nearly 70,000 tonnes of lime stone at their end, so they suspended extraction of lime stones temporarily and the same was communicated to the plaintiff and thereafter, due to rainfall and other logistic reasons, the first defendant was not able to extract further lime stones in the suit land.

6.Under these circumstances, only Rs.5 lakhs out of Rs.32 lakhs could be recovered by adjusting towards the running bill upto September 2006. The remaining Rs.27 lakhs is yet to be recovered from the plaintiff which has to be adjusted on the monthly off taken for more than 5,000 metric tones. While so, the first defendant has found that there was suppression of material facts regarding the availability of lime stones in the suit property. More particularly, at the time of agreement, the total quantity projected to be available was Rs.13.75 lakhs of metric tones of lime stones whereas, as per the revised mining plan, given by the subsequent Expert, it was only 4.67 metric tones available for extraction. Since, there is breach and fraud committed by the plaintiff, they cannot restrain the first defendant from invoking the Bank Guarantee.

7.The trial Court after considering the evidence let in by both the parties has held that the plaintiff, as per the terms and conditions has furnished infrastructure facilities and had handed over it to the first defendant. However, for certain reasons, the first defendant has prematurely terminated the contract. Referring the judgment of Hon'ble Supreme Court regarding invoking the bank guarantee, the trial Court has held that the Courts cannot grant injunction restraining the first defendant from realising the Bank Guarantee except in case of established fraud or encashment resulting in irretrievable harm or injustice for the guarantor.

8.Also taking note of the counter suit filed by the first defendant, seeking injunction, against the mine owner to restrain him from invoking the Bank Guarantee for Rs.50 lakhs for non performance of the contract, the trial Court dismissed the suit on the ground that the suit filed for permanent injunction not to invoke the bank guarantee is a subject matter of performance of contract. Whether it is a conditional or unconditional contract can be decided only in a suit for declaration questioning the validity of termination of contract. So relief for a bare injunction not to invoke the bank guarantee is not maintainable.

9.The First Appellate Court on re-appreciation of facts, has held that there is no suppression of material facts regarding the availability of lime stone and the plaintiff has completed his part of contract namely, establishment of infrastructure facilities in the suit property, the first defendant has made use of the infrastructure facilities and has extracted lime stone for 6 months and thereafter, breached the contract, on his own, for some reasons. After committing the breach, he cannot invoke the bank guarantee. With this finding, the First Appellate Court has allowed the appeal reversed the dismissal judgment of the trial Court.

10.The aggrieved first defendant has preferred the present Second Appeal before this Court. While admitting this Second Appeal, this Court has formulated the following substantial question of law:-

> "Whether or not the Lower Appellate Court erred in granting an injunction restraining the encashment of Bank Guarantee when there is no plea of fraud and when there are no circumstances warranting an order of injunction ?"

11.Before adverting to the discussion on the substantial question of law, it is pertinent to understand the sequence of events involved in this case. M/s.Malabar Cements Limited which is the appellant herein, is a cement manufacturing company wholly owned by the Kerala Government. The first respondent M/s.Crescent Mines and Minerals is the mine owner. It is a proprietary concern owned by one Mr.Mohammed Feroz. He had the mining lease from the Government of Tamil Nadu to mine lime stones over an extent of 3.10 (11.09 acres) hectares in Alanthuraiyar Kattalai Village in Perambalur District. Pursuant to this mining licence, he has entered into an agreement with M/s.Malabar Cements Ltd., on 14.05.2005 to lease out the land for mining the lime stones. In the said lease agreement, the following relevant terms and conditions for deciding this lis are extracted below.

> "4.0 - It is hereby further agreed that the First Party will release an interest free advance of Rs.32 lakhs (Rupees Thirty Two Lakhs only) to the Second Party against submission of Bank Guarantee for equivalent amount by the second party and the second party shall develop the necessary infrastructure facilities in the leased out areas viz., motorable approach road, construction of laboratory building, provision of power connection, installation of weigh bridge of 50MT capacity at the site etc. The second party has agreed to complete

> the said development activities within a minimum period of three months from the date of receipt of advance of Rs.32 lakhs from the First Party.
>
> 4.1 - If the Second Party fails to undertake the development of the necessary infrastructure facilities in the leased mining area as mentioned above within a period of three months from the date of receipt of advance of Rs.32 lakhs not fulfilling the obligations, then it is agreed by the second party that the Bank Guarantee submitted by them will be invoked by the First party
>
> 6.0- It is further agreed that the First Party shall make a deposit of Rs.50 lakhs (Rupees fifty lakhs only) by way of Bank Guarantee to the second party as a security against any premature termination of the agreement by the First Party during the tenure of the agreement. Forfeiting of Bank Guarantee by the second party shall be only if the monthly off-take of limestone by the First Partyis less than 5,000 MT for a period of six consecutive months or if there is any premature termination of the agreement by the First Party during the tenure of the agreement. However, forfeiting of deposit shall not be resorted to, if the above minimum quantity of material is not lifted by the First Party due to reasons beyond their control such as dispute arising on the ownership right of Mines or lease conditions indicated, Governmental Legislations / Regulations preventing lifting of minerals or preventing interstate movement of the material by any order of the Govt., of Tamil Nadu or any such genuine reasons."



12.Pursuant to Clause 4 referred to above, Ex.A.2 a bank guarantee was executed on 06.01.2006 for Rs.32 lakhs. It is mentioned in the bank guarantee that "We, City Union Bank, T.B Road, Palakkad (Bankers) do hereby undertake that in fulfilment of the obligations of the contract as mentioned under clause 4.1 of the deed of agreement dated 14.05.2005 on demand, from the lessee, pay to the lessee a sum amounting to a maximum of Rs.32,00,000/- (Rupees thirty two lakhs only) in the event of lessor fails to do the following things in the leased area within a period of 12 months.

a) Improvement of existing approach roads.

b) Power connection to site including electricity Board deposit.

c) Construction of laboratory building at site measuring approximately 300 sq.ft

d) installation of 50 Tonn weigh bridge."

13. On 07.04.2006, M/s.Crescent Mines and Minerals has handed over the infrastructure facilities to M/s.Malabar Cements vide Ex.A.5. On 19.09.2006, vide Ex.B.7, M/s.Malabar Cements has intimated M/s.Crescent Mines and Minerals that they have decided to suspend all the lime stones upto 31.10.2006, in view of sufficient possession of sweetener lime stones at present at Walayar. It is admitted fact that from the month of September 2006, extraction has come to an end and it is specifically admitted by the appellant company that they have nearly 70,000 metric tones of lime stones of stock in their factory which will be sufficient for their next 8 months production. Several other reasons were also attributed for their inability to carry out the extraction work at the suit land and one of the another ground for suspending the work was attributed to suppression of facts that the availability of lime stones was projected to be 13.75 lakhs metric tonnes whereas, it was only 4.67 lakhs metric tones. To substantiate this allegation, the appellant relied upon two mining reports. First mining report by Mr.P.Chandrasekaran which is marked as Ex.B.1 this report is dated 23.01.2003. The mineable and recoverable reserves as per Ex.B.1 - report is as under:-

"This is arrived at after deducting the reserves locked up in the safety zone and also in bench formation.

| | |
|---|---|
| Total Geological Reserves | = 1242225.00MT |
| (b) Deduct Reserves Last in Safety Zone alround | = -34695.00MT |
| | = 1207530.00 MT |
| (c) Deduct Reserves Last in Bench Formation | = - 519247.00 MT |
| Total Mineable Reserves | = 688282.50 MT |

Recoverable Reserves:As the recovery of lime stone is 70% and Waste of 30% as rejects, the rejects have to be eliminated from the mineable reserves.

| | | |
|---|---|---|
| Mineable reserves as above | = | 688282.50 MT |
| Recovery of lime stone at 70% | | |
| deduct waste at 30% | = | 206484.75 MT |
| | | ------------------ |
| Recoverable Reserves Say 481800MT | | 481797.75 MT” |

14.Subsequent to this report, due to partial mechanized mining instead of manual mining during the year 2004-2005, there had been an over exploitation of mineral. Nearly 14,745 metric tones were mined which is excess by 7,680 metric tonnes as against the proposed mining as per the approved mining plan. Hence, the Indian Bureau of Mines (IBM) during its inspection, in November 2004, advised the mine owner (M/s.Crescent Mines and Minerals) to submit a modified mining plan. As a result, one Mr.Krishna Moorthy, had inspected the mine and submitted his modified mining plan Ex.A.13 on 18.03.2005. According to this modified mining plan (Ex.A.13), the Re-assessed Geological/Minable/Recovarable Reserves as on 01.01.2005 is as under:-

| | |
|---|---|
| Geological reserves as per approved mining plan | 1242225 MT |
| Mineable Reserves as per approved plan | 688282 MT |
| Recoverable Reserves (70%) | 481797 MT |
| Depleted Reserves | 14745 MT |
| Available Recoverable Reserves as on 1.1.2005 | 467052 MT |

Say 467000 MT

15.Under the above said circumstances, the mine owner has filed a suit for injunction restraining the appellant company from invoking the bank guarantee furnished by them for establishing certain infrastructure facilities whereas, the appellant company has filed a counter suit seeking injunction restraining the mine owner from invoking the bank guarantee of Rs.50 lakhs furnished by them for the purpose of their contract, as per clause 6 of the agreement which has been already extracted above.

16.Further, the First Appellate Court has gone into the agreement clauses and held that bank guarantee furnished by the first respondent is a conditional guarantee. It depends upon the fulfillment of condition extracted in the terms of bank guarantee. Since, the first respondent herein has fulfilled those conditions mentioned in the bank guarantee, the appellant herein cannot invoke it and being a conditional bank guarantee, the Civil Court can grant injunction and accordingly granted injunction restraining the appellant from invoking the bank guarantee (Ex.A.1) furnished by the first respondent through the second respondent Bank.

17.Whether there was any fraud on the part of the first respondent while entering into the mining agreement, is a substantial issue in the suit in O.S.No.37 of 2007 filed by the first defendant company which is the subject matter of S.A.No.1396 of 2010 pending before this Court. That aspect has to be dealt separately because, the bank guarantee - Ex.A.2 which is a subject matter of this suit, is an independent agreement. It pertains to providing infrastructure facitilies to the appellant and it is connected with off take of mineral every month only for the purpose of adjusting the money advanced by the appellant. Except for that purpose, it has no other relevance to the continuation of the contract or termination of the contract.

18.It is not the case of the appellant that there is a breach of undertaking in providing infrastructure facilities as per Clause 4.1 of the agreement. Ex.A.1 clearly indicates that the bank guarantee furnished by the first respondent for Rs.32 lakhs can be invoked only when there is non-fulfillment of the obligations mentioned in Clause 4 of the agreement. For no other reason, the appellant can invoke bank guarantee furnished by the first respondent. It is not necessary that there must be a plea of fraud and only on a plea of fraud, the Court can interfere by way of injunction. In case of conditional guarantee, if the condition is fulfilled, then also the adverse party cannot invoke the bank guarantee. This view is well fortified in Kunjanamma v. Kerala Fisheries Corporation (1987 (62) Company case 320) where it was held that, when party seeks injunction from encashing the bank guarantee, what has to be looked into are the terms of bank guarantee alone, as the contract was separate and distinct one and was not dependent on the other independent contract; and that no dispute raised under the main agreement could be a reason for non payment of the amount under the bank guarantee which was a autonomous and independent contract and has effect according to its own terms.

19.In this context, it is relevant to quote the judgment in Hindustan Construction Co. Ltd., v. State of Bihar (AIR 1999 SC 3710) wherein, in paragraph No.8, it has been held as follows:-

> "8.What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute

> that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad."

20.As pointed out by the learned counsel appearing for the first respondent, the mining lease was granted for a period of 10 years whereas, the bank guarantee furnished by the mine owner is for a period of one year, in connection with the loan of Rs.32 lakhs received by him on condition that he will provide all the infrastructure facilities mentioned in the terms of contract.

21.When admittedly, the infrastructure facilities have been provided and handed over to the appellant company, within the time stipulated and the appellant company has made use of the infrastructure facilities and started extracting mine and in fact for 5 months, they have extracted more than 5000 metric tonnes per month and has adjusted Rs.1 lakh each month, towards the price of minerals extracted. Therefore, when the terms of bank guarantee independent of the main contract to be fulfilled and when terms has been fulfilled by the first respondent, under equity, the first respondent is entitled for an injunction restraining the appellant from invoking the bank guarantee or else, he will be put at loss for no fault. Whether there was any mis representation or fraud, in respect of reserve availability, is entirely different matter for consideration and it is subject matter of the connected second appeal in S.A.No.1396 of 2010 and it cannot have a bearing in the Bank Guarantee given by the first respondent for entirely different purpose and reason.

22.Since, the bank guarantee has been issued for an independent purpose and that purpose having been served and fulfilled, the appellant cannot invoke the bank guarantee. In view of all the above stated reasons, the second appeal deserves to be dismissed.

23.In the result, the second appeal is dismissed and the judgment and decree passed by the First Appellate Court is confirmed. There shall be no order as to costs. Consequently, connected miscellaneous petition in M.P.No.1 of 2010 is closed.

24.M.P.No.1 of 2015 has been filed by the first respondent to receive documents viz., (i) proceedings of 1st respondent in MCL/LO/2010 dated 04.11.2010 and the documents enclosed therewith, (2) the proceedings of Principal Accountant General (Economic and Revenue Sector Audit) in No.Au/Admn./ERSA/RTI/15-16/D.129 dated 13.08.2005, as documents on the side of the petitioner/ plaintiff as Exs.A.14 & A.15 in this Second Appeal.

25.The said miscellaneous petition cannot be entertained since, the documents which are sought to be received as additional documents are subsequent to the filing of the suit. Further, one of the document found in the enclosure is the mining report of Mr.Krishna Moorthy, which had already been marked as Ex.A.13. The second document which is sought to be produced is subsequent to the filing of the suit and it relates to the internal communication of the company which has no relevance to decide the issue. Hence, M.P.No.1 of 2015 is dismissed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Subordinate Judge,
Ariyalur.

2.The Principal District Munsif,
Ariyalur.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras.



+1cc to Mr.K.S.Natarajan, Advocate, S.R.No.71459



KS(CO)
CA(05/01/2017)