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.1396 of 2010
and
M.P.No.1 of 2010

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.State Bank of India,
represented by its Branch Manager,
Palakkad, Kerala. ... 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.96/2009 thereby confirming the judgment and decree dated 09.11.2009, of the Principal District Munsif Court, Ariyalur in O.S.No.37 of 2007.

For Appellants	:	Mr.AR.L.Sundaresan for Mr.Saikrishnan
For R.1	:	Mr.V.P.Sengottuvel
For R.2	:	Not ready in notice

JUDGMENT

The plaintiff in the suit is the appellant herein. The first defendant/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 State Bank of India, the second defendant in the suit.

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

The first defendant, M/s.Cresent Mines and Minerals leased out 11.09 acres of land to the the plaintiff - 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 shall make a deposit of Rs.50 lakhs by way of Bank Guarantee to the first defendant as a security against any premature termination of the agreement by the plaintiff during the tenure of the agreement. Forfeiting of Bank Guarantee by the first defendant shall be only if the monthly off-take of lime stone by the plaintiff is less than 5000 metric tones for a period of six consecutive months or if there is any premature termination of the agreement by the plaintiff during the tenure of the agreement.

3.The case of the the plaintiff is 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. The plaintiff 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 plaintiff 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 plaintiff was not able to extract further lime stones in the suit land.

4.Meanwhile, the plaintiff 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 the first defendant, injunction restraining the first defendant from invoking the Bank Guarantee on the ground of fraud and misrepresentation is inevitable.

5.The case of the first defendant is that, as agreed, it has provided all the infrastructure facilities to the plaintiff within the time stipulated and handed over the facilities to the plaintiff on 07.04.2006 along with the leasehold land. While so, the plaintiff stopped extracting lime stones on the pretext that they have excessive stock of over 70,000 metric tones and they will not carry the operation till October 2006. Later had invented the story of fraud and misrepresentation.

6.The trial Court after considering the evidence let in by both parties has held that the subsequent revised mining plan was given to the plaintiff and they were fully aware of it. Therefore, the plaintiffs are not entitled for the relief of injunction against invoking the bank guarantee.

7.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 plaintiff 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 on the ground of fraud which allegation proved to be false. With this finding, the First Appellate Court dismissed the appeal, confirming the judgment of the trial Court.

8.The aggrieved plaintiff 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 failing to grant injunction restraining the encashment of Bank Guarantee when fraud had been pleaded and proved ?"

9.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 clause relevant for deciding this lis is extracted below.

> 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 Party is 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."

10.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 ground for suspending the work was suppression of facts about the availability of lime stones, which was projected to be 13.75 lakhs metric tonnes whereas, it was only 4.67 lakhs metric tones.

11.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"

12.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	1242225MT
Mineable Reserves as per approved plan	688282 MT
Recoverable Reserves (70%)	481797 MT
Depleted Reserves	14745 MT

Geological reserves as per approved mining plan	1242225MT
Available Recoverable Reserves as on 1.1.2005	467052 MT

Say 467000 MT

13.In clause 6 of the agreement, the appellant company has furnished bank guarantee for Rs.50 lakhs and started its mining operation during the month of September 2006. It was not in a position to lift any further minerals, in view of excessive stock held at their company at Walayar. However, under Clause 6 of the agreement, if the plaintiff fails to lift quantity of atleast 5000 metric tones for 6 consecutive months, or if there is any premature termination of agreement, the first defendant namely M/s.Crescent Mines and Minerals will be entitled to invoke the bank guarantee of Rs.50 lakhs. The appellant has written a letter to the first defendant about the excessive stock available with them the intervening monsoon and other logistics difficulties as a reason for stopping the extraction of minerals. While so, after exchange of notice, it has struck the appellant that the earlier mining plan has been revised and modified wherein, the available reserves is less than what was projected in the earlier mining plan. So taking advantage of that, the appellant has projected a case of fraud and misrepresentation and has come out with the plea that the modified mining plan been placed before them, they would have never entered into the agreement with the above terms on 14.05.2005 at all.

14.The First Appellate Court has disbelieved the plaintiff case and had rejected the plea on two grounds; (i) It is inferred from the evidence that the appellant company was aware of the modified mining plan and they were able to produce the copy of the modified mining plan during trial. The possession of the modified mining plan is impossible, unless they were put to know about it by the first defendant. The next ground is that, even assuming that there is modified mining plan, it does not have any impact on the available reserve for extraction, the minimum guarantee or expectation to lift is 5000 metric tones per month whereas, the available reserve is more and above that.

15.The learned Senior Counsel appearing for the appellant pointing out the relevant clauses in the agreement and the bank guarantee more particularly, Clause 6 in Ex.A.1 - mining plan of Mr.P.Chandrasekaran dated 22.01.2003 and Ex.B.1 the modified mining plan of Mr.P.N.Krishnamurthy dated 23.03.2005, Ex.A.13, submitted that there had been an over exploitation of minerals in the mining site between 2004-2005. It has led to repletion of mineral. Had it been brought to the notice of the appellant company, they would have either withdrawn from contract or re-visited the terms and conditions of the contract in the light of Mr.P.N.Krishnamurthy's report dated 23.03.2005, which is earlier to the agreement Ex.A.1.

16.For this purpose, it is pertinent to compare two mining reports and to ascertain whether there is any substantial difference in the availability of recoverable reserves. The difference in these two reports in respect of recoverable reserves is hardly 20,000 metric tones for the entire period of lease. In is highly doubtful that the second report was not brought to the notice of the appellant. Even assuming that it was not known to the appellant, there is no substantial difference in the available recoverable reserves. The appellant referring total geological reserves available in the entire 3.10 hectares mentioned in the first report and the recoverable reserves mentioned in the second mining report attempts to show as if there is vast difference between what was projected as available reserves and what is actually found to be available after the second mining report. That itself is factually wrong and misleading. A person who alleges fraud and misrepresentation should come with clean hands and have really suffered by the said fraud or, should anticipate sufferance due to the alleged fault. In this case, the appellant neither suffered nor anticipate any loss due to the second mining report because last 6 months of mining, he could not lift more than 5000 metric tones continuously and the available recoverable reserves even according to the second mining plan is more than 4,67,000 metric tones, it is only an fake apprehension of the appellant that due to suppression of the second mining plan, there is vast reduction in recoverable resource. From their own letter and written statement, it could be seen that the plea of fraud is only an after though and the reason for continuing the mining operation was excessive stock and in-capacity to lift lime stones due to other logistics reasons. For these reasons, the appellant alone is responsible and not the first respondent.

(Emphasis applied)

17.When the fraud alleged to prevent invoking bank guarantee, is proved to be false and fake, the Civil Court cannot come to the rescue of the plaintiff. Therefore, the Second appeal is liable to be dismissed for the proof of fraud alleged.

18.Before concluding this judgment, this Court is of the opinion that it is useful to extract paragraph No.11.2 of the judgment in N.Ajay Kumar v. Oil and Natural Gas Corporation Limited (2010 (3) MWN (Civil) 92):-

"11.2.The Hon'ble Apex Court in U.P.Cooperative Federation Ltd., case, after referring to the concept of prima facie case for injunction regarding the invocation of Bank guarantee held by this Court in Arul Murugan Traders v. Rashtriya Chemicals and Fertilizers Ltd., AIR 1986 Mad 161, has elaborated the concept of prima facie case to fraud and special equity and irretrievable injustice when it relates to the invocation of Bank guarantee. The operative portion of the judgment is as follows:

"27. Our attention was also drawn to the judgment of the learned Single Judge of the Madras High Court in Arul Murugan v. Rashtriya Chemicals and Fertilizers Ltd., AIR 1986 Madras 161 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 cases Courts would 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 negatived and the fabric of trading operation will get jeopardised.""

19.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 is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Subordinate Court,
Ariyalur.

2.The Principal District Munsif Court,
Ariyalur.

Copy To

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

+1cc to Mr.K.S.Natarajan, Advocate, S.R.No.71460

Second Appeal No.1396 of 2010

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