IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 58 OF 2016

ENGINEERS COMBINE, A REGISTERED PARTNERSHIP. ... Appellant

Versus

UNION BANK OF INDIA, REP. BY SENIOR BRANCH MANAGER, MARGAO AND ANR. ... Respondent

Mr. Jagannath Jayant Mulgaonkar, Advocate for the appellant.

Mr. Pavithran A. V., Advocate for the respondent no.1.

Mr. Ashwin D. Bhobe, Advocate for the respondent no.2.

Coram:- F. M. REIS, J.

Date:- 2nd February, 2017

ORAL ORDER

Heard Mr. J. J. Mulgaonkar, learned counsel appearing for the appellant, Mr. Pavithran A.V., learned counsel appearing for the respondent no.1 and Mr. A. D. Bhobe, learned counsel appearing for the respondent no.2.

2. The above appeal challenges the judgment passed by the learned Lower Appellate Court whereby the suit filed by the

appellant came to be dismissed.

3. Briefly, it is the case of the appellant that the appellant has executed an agreement in the year 2004 with the respondent no.2 for a construction of a bridge at Kushavati river at Sanguem Taluka. It is further the contention of the appellant that after the execution of the said agreement, the appellant was entitled for the refund of 10% of the retention money which was held by the respondent no.2 and there was a bank guarantee in lieu of such amount. It is further the case of the appellant that such retention money works out to a sum of Rs.15,00,000/- and odd which the appellant recovered from the respondent no.2 and that there was a bank guarantee in terms thereof. It is further the contention of the appellant that such bank guarantee was issued somewhere in April, 2005 which was to be in force for a period of one year during the defect period which according to the appellant was encashed on 15.02.2007. It is further the case of the appellant that the respondent no.2 invoked the bank guarantee somewhere in February, 2007 and as such according to him as the bank guarantee itself had lapsed on 15.02.2006, the respondent no.2

was not entitled to invoke the bank guarantee. The respondent no.2 however dispute the said contention and pointed out that the bank guarantee had to be invoked during the whole defect period which would end on 15.02.2007. It is further pointed out that in terms of the bank guarantee, the respondent no.2 claimed a sum of Rs.7,00,000/- and odd payable by the appellant. It is further pointed out that as there were defects which occurred during the defect period, the respondent no.2 was entitled to invoke the bank guarantee. The respondent no.1 was impleaded in the suit as the appellant had inter alia prayed for an injunction to restrain the respondent no.1 from allowing the respondent no.2 to encash the bank guarantee. It appears that during the pendency of the suit, the respondent no.2 encashed the bank guarantee as in the meanwhile the suit came to be dismissed for default. Thereafter the suit was restored and the matter proceeded for trial and ultimately the learned Judge by judgment and decree dated 09.05.2014 partly decreed the suit and came to the conclusion that the demand of such amount was not in terms of the agreement and consequently, directed to refund the money to be paid by the respondent no.1 to the appellant. Being aggrieved by the said judgment, the respondent no.1 filed the appeal before the learned Lower Appellate Court which came to be allowed by judgment and decree dated 20.10.2015 whereby the judgment of the Trial Court was set aside and the suit filed by the appellant came to be dismissed.

4. Mr. Mulgaonkar, learned counsel appearing for the appellant has proposed the following substantial question of law which according to him arises in the present appeal for consideration.

> "Whether the learned Trial Court and the First Appellate Court committed concurrent errors by ignoring the fact that the bank guarantee was to operate only for the first year of the defect liability period which ended on 15.01.2006 as per the contract and consequently, the letter dated 13.02.2007 was after the validity of the bank guarantee had lapsed and therefore the demand for payment and the payment made pursuant thereto was illegal ?

5. In support of the above substantial question of law, Mr. Mulgaonkar, learned counsel appearing for the appellant has taken me through the bank guarantee to point out that the bank guarantee was in force for one year of the defect period and as such according to him such period has elapsed on 15.02.2006. It is further pointed out that there was no agreement between the parties whereby the bank guarantee had to be in force during the entire defect period and in any event, according to him the bank guarantee had to be given only for a period of one year during the defect period and as such the encashment of the bank guarantee by the respondent no.2 cannot be sustained. It is further submitted that though the bank guarantee provides that it would be valid up to 15.02.2007 but however, according to the learned counsel the recitals of the bank guarantee clearly stipulate that it would be valid for one year of the defect period and the date mentioned as 15.02.2007 is absolutely a typing mistake and as such the respondent no.2 was not entitled to encash such bank guarantee based on such mistake. It is further pointed out that the learned Trial Judge has rightly come to the conclusion that

the respondent no.2 has failed to establish that there was any defect in the work carried out by the appellant and as such the encashment of the bank guarantee by the respondent no.2 is not at all justified. The learned counsel has thereafter minutely taken me through the plaint to point out that there are specific averments therein to contend that the bank guarantee was to be in force up to 15.02.2006 and the encashment of the bank guarantee in February, 2007 is contrary to the terms of the bank guarantee which cannot be sustained. The learned counsel as such points out that in such circumstances, the above substantial question of law arises in the present appeal for consideration.

6. On the other hand, Mr. A. D. Bhobe, learned counsel appearing for the respondent no.2 has supported the judgment passed by the learned Lower Appellate Court. The learned counsel has taken me through the evidence of DW3 to point out that he was a consultant of the project who has categorically deposed that there were defects in the work carried out by the appellant. It is further pointed out that the bank guarantee was

given by the appellant in lieu of the retention money which could be released in favour of the appellant only after the defect period was over. It is further pointed out that as the defect period was up to 15.01.2007 and the bank guarantee was in force for a period of one month thereafter the respondent no.2 has rightly encashed the bank guarantee. The learned counsel has taken me through the bank guarantee to point out that it clearly provides that the bank guarantee had to be in force during the entire defect period and as such according to him as the defects were found in the work carried out by the appellant, the respondent no.2 had rightly invoked the bank guarantee. The learned counsel as such points out that there are no substantial questions of law arise in the present appeal for consideration.

7. The learned counsel appearing for the respondent no.1 has supported the submissions of Mr. A. D. Bhobe, learned counsel appearing for the respondent no.2.

8. I have considered the submissions of the learned counsel and I have also gone through the records. The facts clearly disclose that the bank guarantee was issued somewhere in April, 2005. It is contended for the first time by the appellant only after the bank guarantee was encashed that there was a typographical error in the date reflected in the subject bank guarantee. On perusal of the terms of the bank guarantee as found in the records, the recitals clearly stipulate that the retention money was a sum of Rs.15,65,000/- and 50% of such amount was worked out to a sum of Rs.7,82,500/-. It further provides that the defect period was of two years and that two bank guarantees would be given by the appellant in favour of the respondent no.2. Each, being of a sum of Rs.7,82,500/-. This clearly shows that the bank guarantee had to be in force and subsisting during the defect period. Apart from that, it is not disputed that the retention money could be claimed by the appellant only after the defect period had elapsed. In such circumstances, the contention of the learned counsel appearing for the appellant that there was a typographical error in the bank

guarantee in recording the date of the validity of the bank guarantee as 15.02.2007 cannot be accepted. The date therein clearly reflects the intention of the party as can be seen from the recitals in such bank guarantee. Apart from that, it was sought to be contended by Mr. Mulgaonkar, learned counsel appearing for the appellant that the respondent no.2 had not informed the appellant about such defects found during the defect period. But however, as rightly pointed out by Mr. A. D. Bhobe, learned counsel appearing for the respondent no.2 Exhibit 91 is a letter addressed to the appellant which discloses the list of defects found in the work carried out by the appellant. It is contended by Mr. Mulgaonkar, learned counsel appearing for the appellant that the appellant has not received such letter at any time. Once the document has been exhibited and the contents of the document have been established by the respondent no.2 who has examined the author of such letter, there is no material pointed out by the learned counsel appearing for the appellant to draw the conclusion that such letter was not received by the appellant. Apart from that, the evidence of DW3 clearly supports the contention of the respondent no.2 that the appellant was kept informed about the defects in the work carried out by the appellant for the respondent no.2. In such circumstances, as the agreement itself provides that the bank guarantee has to be in force for the entire period of two years, the substantial question of law as proposed by the learned counsel appearing for the appellant would not arise at all in the present appeal. The decision on such substantial question of law would require reappreciating the findings of fact arrived at by the learned Lower Appellate Court which exercise is not permissible under Section 100 of the Civil Procedure Code. In such circumstances, I find that the substantial question of law proposed by the learned counsel appearing for the appellant does not arise in the present appeal. As such, I find no merits in the above appeal which stands accordingly rejected.

F. M. REIS, J.

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