HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CCCA.No. 113 of 2000

JUDGMENT:

This appeal is filed against the judgment and decree dated 31.12.1999 in OS.No.1551 of 1989 passed by the II Senior Civil Judge, City Civil Court, Hyderabad.

The suit was initially filed by the plaintiff against the defendants for recovery of a sum of Rs.62,333/-. The case of the plaintiff is that they have furnished a Bank guarantee through defendant No.2 in favour of defendant No.1. The said Bank guarantee was to be operative for the contracts placed by defendant No.1 on the plaintiff. The case of the plaintiff is that while they were trying to extend the Bank guarantee and replacing it with a new guarantee, defendant No.1 wrongfully invoked the guarantee and withdrew the funds. Therefore seeking recovery of the amount that was encashed by defendant No.1, namely Rs.50,000/- and the interest thereof, the present suit was filed. The contention of the plaintiff is that defendant No.1 did not have a cause to invoke the Bank guarantee.

Defendant No.1 filed a written statement urging that in terms of the Bank guarantee; they are entitled to encash the same. According to the defendants, they are entitled to encash the same as the plaintiff failed to render account of the material that was taken by him for fabrication of the work. Therefore, they state that the invocation of the Bank guarantee is correct and lawful. Defendant No.2 is only a formal party as they are the Banker, who stood guarantee in this case. Based on the pleadings, the lower Court framed four issues which are as follows:

1. whether the plaintiff is entitled to the suit amount as prayed for in the plaint?
2. whether the plaintiff is entitled to the interest as prayed for in the plaint along with future interest and costs?
3. whether the defendant acted in a bonafide manner in invoking the bank guarantee No.63/82, dated 02.09.1982?
4. to what relief?

For the plaintiff, one witness-PW.1 was examined and Exs.A.1 to A.9 were marked. For the defendants, DW.1 was examined but no documentary evidence was let in. After trial, the suit was decreed along with costs and it is this judgment and decree that is now assailed in the present appeal.

This Court has heard Sri P.Rajasekhar, learned counsel for the appellant. Learned counsel for the respondent Sri Venkateswara Rao. G states that he has no instructions to argue in the matter for first respondent. Hence, the matter was treated as heard and reserved for judgment.

Sri P.Rajasekhar, learned counsel for the appellant, argued that the lower Court created a case for the plaintiff and that the decree passed is against the very pleadings and evidence on record. He also argued that despite lack of cross-examination, the lower Court passed the impugned judgment.

This Court notices that for the plaintiff, one witness was examined. He is the Chairman of the plaintiff's company. His evidence is to the effect that there are no pending orders during the period of the extension of the Bank guarantee and he reiterated the contents of his plaint and the exhibits. The defendants in their cross-examination have asked the plaintiff about the raw material accounting. The witness stated that there is an account for the raw material received and returned after fabrication. He states that for every piece of raw material received from defendant No.1, they have supplied the finished fabricated components to defendant No.1. But he admits that he has not filed any material to show that the acknowledgment of the receipt of the finished goods. This Court however notices that no suggestion was put to this witness about the dates or the quantities of the material not accounted for. No suggestion was put to this witness of the total quantity of material supplied and the fabricated material received. No question was put about the balance material to be accounted for. There was no cross-examination on the contents of Ex.A.7 or Ex.A.8 notice. Similarly, there was no cross-examination or questions on the contents of Ex.A.3 letter dated 10.09.1982 where the plaintiff asserted that accounts are cleared for the order and that the Bank Guarantee can be returned while lifting the materials.

For the defendants, a law officer was examined. Obviously, he is not connected with the contract and he deposed on the basis of the records. He states in his chief-examination that the plaintiff did not account for the material supplied by BHEL/defendants. As per him, the value of the material supplied is Rs.67,000/- and the value of the Bank guarantee encashed is Rs50,000/-. He further sates that the plaintiff did not supply the fabricated components or returned the left over material.

Learned counsel for the appellant, relied upon a judgment of this Court reported in ***Yallapi Rajamma v. Paditham Narayana Rao***[1] and argued that as a part of the chief-examination is not touched upon in the course of cross-examination, it is to be taken up as admitted. Therefore, he argues that the defendants have proved their case.

This Court notices that the defendants witness agrees to the following in the examination:

(a) that there is an endorsement given by the plaintiff to the defendant No.1 for supply of material.

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[1] 2018 (1) ALT 251

(b) there is an acknowledgment given to the plaintiff after the components are delivered.

(c) no document is filed to evidence supply of material by defendant No.1 to the plaintiff.

A suggestion was also put to him that they have falsely enchased the Bank guarantee. This Court is, therefore, of the opinion that there is sufficient cross-examination on issue of the material supplied and not accounted for. The case law cited is therefore not really applicable.

This Court after examination of the evidence and the pleadings on the record is of the opinion that it should invoke its powers under Order 41, Rule 33 of C.P.C and pass an order deciding the main issues as the evidence available is sufficient to decide the same . The lower Court did touch upon the conditions prescribed under Section 126 of the Indian Contract Act, 1872 (for short 'the Act) in the impugned judgment in paras 15 and 17, where the liability of the guarantor is discussed.

In the case on hand, defendant No.2 is the guarantor/surety for the plaintiff. The principal debtor and the creditor are the plaintiff and defendant No.1 respectively. It is the case of defendant No.1 that as defendant No.1 failed to account for the material, they are entitled to invoke the Bank guarantee.

Section 126 of the Act, is to the following effect:

> 126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'—A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person **<u>in case of his default</u>.** The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written. —A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person **<u>in case of his default</u>**. The person who gives the guarantee is called the 'surety'; the person **<u>in respect of whose default</u>** the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

A plain language reading of Section 126 of the Act shows that the contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person <u>in case of his default.</u> Therefore, liability of a guarantor arises only in case of default by the principal debtor. The definition of principal debtor also states that he is the person in respect of whose default the guarantee is given. Therefore, for a contract of guarantee to be invoked, the first essential point be proved is the "default" of the contractor/debtor.

The case on hand is a case of a Bank Guarantee that is already invoked and paid. The suit is filed for a decree on the ground that the invocation is wrongful. This is a case seeking refund of the amount. Therefore, defendant No.1, before invoking the Bank guarantee in question will have to show that there is a default. While it is true that as per clause-5, the defendant No.2 is not concerned with the default and the decision of defendant No.1 is final, since the matter is before the Court and the defendant is saying that it invoked the guarantee, defendant No.1 will have to prove the default of the contractor. The finality of the decision is in between D 1 and D 2 only. The letter of invocation is also a cyclostyled letter (Ex.A.2) which does not complain of any default and also requests the plaintiff to extend the Bank Guarantee while invoking the same.

The first defendant issued the contract to the plaintiff and pleads that the raw material that is issued to the plaintiff is not accounted for resulting in a claim for Rs.67,717/-. Defendant No.1 as can be noticed is a public sector undertaking. The material issued, the value thereof are all capable of proof but not a shred of paper is filed to show that the same or to prove that they have a subsisting claim against the plaintiff. The essential prerequisite required under Section 126 of the Act namely the default of the contractor/ plaintiff is not proved. Ex.A.2 contains a demand for Rs.50,000/- while the stated claim of the defendant elsewhere is Rs.67,717/-. There is no explanation for the difference in amounts.

This Court is, therefore, of the opinion that the defendant No.1 is not entitled to seek invocation of the Bank guarantee, in the absence of any proof of default.

In these circumstances, this Court states that the conclusions in the judgment and decree of the lower Court are correct and no grounds are made out to interfere with the same.

Hence, the appeal is dismissed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 16.07.2018
KLP