IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO.22964 OF 2019
WITH
CIVIL APPLICATION (STAMP) NO.22965 OF 2019
IN
APPEAL FROM ORDER (STAMP) NO.22964 OF 2019

Shree Anukul Industries Pvt. Ltd. …Appellant
vs.
Maharashtra Jeevan Pradhikaran & Anr. …Respondents

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Mr. Bernardo Reis, i/b. Mr. Viraj Kandpile, for the Appellant.

Mr. Ajit R. Pitale, for Respondent No.1.

Mr. S.R. Shetty, for Respondent No.2.

Mr. Ulhas Balvant Wad – Executive Engineer of Respondent No.1 present in person.

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CORAM : S.C. GUPTE, J.

DATED : 14 AUGUST 2019

P.C. :

. Heard learned Counsel for the parties.

2. This appeal from order challenges an order passed by the City Civil Court at Greater Mumbai on a notice of motion in a commercial suit filed by the Appellant (original plaintiff) seeking *inter alia* a perpetual injunction against invocation of a bank guarantee. The bank guarantee was issued at the instance of the plaintiff to secure its obligations under an engineering and construction contract commissioned by Respondent No.1. It is not in dispute that this contract

has been determined by Respondent No.1. Pursuant to determination of the contract, which determination is attributed to a breach purportedly committed by the plaintiff, Respondent No.1 proposes to encash the bank guarantee submitted by the plaintiff. The plaintiff seeks to restrain invocation of the bank guarantee stating *inter alia* that the bank guarantee has been vitiated by a fraud.

3. The City Civil Court, in its impugned order, has duly considered the plaintiff's case of fraud. What was alleged by the plaintiff before the Court was that there was a clause of excise duty exemption contained in the tender notice issued by Respondent No.1. It was submitted that on 1 July 2017, the Goods and Services Tax Act was introduced as a central legislation. It was submitted that after introduction of GST, a meeting was held between the parties, in which it was agreed that the contractor would be compensated for actual tax difference for deduction of GST after taking into account the input tax credit and excluding such credit on items like MS pipes, coating, valves, MS specials, etc. It was the case of the plaintiff that despite this assurance and the plaintiff's payment of tax, no reimbursement was made in favour of the plaintiff. On the other hand, it was argued on behalf of Respondent No.1 that the work was not completed by the plaintiff within time. It was submitted that only 40% of the work was completed and, in the premises, the contract was terminated by Respondent No.1. Under the relevant clause of the contract, Respondent No.1 was entitled to deduct the amount due from the contractor from any money due to the contractor under the contract and even encash the performance bank guarantee submitted by the contractor as a security.

On these pleadings, the City Civil Court considered whether a case of fraud was made out. The Court held that at the very outset, the contractor could have made it clear that till the issue of GST was resolved, it would not proceed with the execution of the contract work. The Court observed that the issue of payment of any amount towards GST could not be attributed as a fraud on the part of Respondent No.1. The Court observed that payment of GST liability was the outcome of a subsequent legislation and it could not be said that Respondent No.1 had played a fraud on the plaintiff Company. The Court noted that even otherwise, the Respondent had attempted to resolve the issue. The Court, in the premises, concluded that it was apparent that there was nothing on record to show that any fraud was committed by Respondent No.1 and, in the premises, the latter could not be prevented from invoking the bank guarantee at this stage.

4. The observations of the trial court, so far as the case of fraud alleged by the plaintiff is concerned, are beyond reproach. It is a perfectly legitimate and reasonable view on the pleadings of the parties. In the premises, Respondent No.1 could not be restrained from invoking the bank guarantee.

5. It is, however, apparent from the letter of invocation, purportedly issued by Respondent No.1, that there was no statement made in it that the amount claimed under the guarantee was due by way of loss or damage caused to or that would be caused to, or suffered by, Respondent No.1 by reason of any breach on the part of the plaintiff contractor of any term or condition of the agreement or by reason of the

plaintiff contractor's failure to perform the agreement. Upon this being pointed out, on instructions of the Executive Engineer of Respondent No.1, who is present in Court, learned Counsel for Respondent No.1 states that his client shall not press the invocation made on 15 May 2019 and shall issue a fresh invocation letter to Karnataka Bank, Borivali Branch, Respondent No.2 herein, for encashment of the bank guarantee. Learned Counsel for Respondent No.1 also states that as and when such invocation is made, a notice of such invocation shall be sent to the Appellant. The statements are accepted.

6. It is made clear that whilst considering this appeal from order, this Court has not applied its mind to the contractual disputes between the parties, which are urged in support of the plaintiff's case against invocation of the bank guarantee.

7. In view of the disposal of the appeal from order, the civil application does not survive and the same is also disposed of.

(S.C. GUPTE, J.)