IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
18~09~2019	03~10~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

C.S.No.681 of 2001

M/s. Vijay Tanks & Vessels Ltd.,
rep.by its Chairman & Managing Director
L.S.Subramanian
National Highway No.8, Sankarda
Baroda 391350. ... Plaintiff

Vs.

M/s. Southern Petrochemicals Industries
Corporation Limited,
rep.by its Managing Director,
88, Mount Road, Guindy
Chennai 600032. ... Defendant

Civil suit filed under Order IV Rule 1 of O.S.Rules Read with Order VII Rule 1 of C.P.C. to direct the defendant to pay a sum of Rs.1,03,99,295.45 along with interest @ 12% p.a. on Rs.84,54,714.41 from the date of plaint till date of realisation with costs.

For Plaintiff : Mr.K. Harishankar

For Defendant : Mr.AR.L.Sundaresan

Senior Counsel for
M/s.M.Arvind Subramanian

JUDGMENT

This suit has been filed by the plaintiff to direct the defendant to pay a sum of Rs.1,03,99,295.45 along with interest @ 12% p.a. on Rs.84,54,714.41 from the date of plaint till date of realisation with costs.

2. The averments made in the plaint are as follows:

2(a) The plaintiff is a company incorporated under the Companies Act, 1956, participated in the tender called for by the Defendant for design, supply, erection, testing and commissioning of Ammonia Storage and handling facilities at Tuticorin, and was awarded the work on 12.9.1979. The Plaintiff provided two bank guarantees issued by the Syndicate Bank, Ghatkopar Branch, viz.,

a) Bank Guarantee No.11 of 1980 dated 6.5.1980 for Rs.33,65,200/-

b) Bank Guarantee No.93 of 1981 dated 3.9.1981 for Rs.50 lakhs towards advance payment paid by the defendant to the Plaintiff.

Despite completion of the contract in full by the Plaintiff, the payments due to the Plaintiff by the Defendant were not made, which resulted in dispute between the parties. At that time on 23.09.1982 the Defendant tried to invoke the bank guarantee. Hence the Plaintiff filed suit in C.S.No.31 of 1983 under section 20 of the Arbitration Act, 1940 before this Court. Aggrieved by the decision in the said suit, the Plaintiff has filed O.S.A.No.100 and 101 of 1983. In the above appeals, based on a compromise Memo entered into between the parties, on 31.8.1983, an order was passed in terms of compromise. In the said compromise order it was specifically provided that a Sole Arbitrator would be appointed by the Indian Counsel of Arbitration, New Delhi from their panel. However, the direction was not strictly complied by the parties which is the result there was no arbitration.

2(b) On 15.12.1983 the Defendant filed a suit in C.S.No.659 of 1983 (Ex.P.2) against Syndicate Bank enforcing payment on both the Bank Guarantees. The above suit was decreed partly, by allowing the defendant to enforce the Bank Guarantee No.11 of 1980 but did not permit them to enforce Bank Guanttee No.93 of 1981. In the meanwhile, the Defendant also filed another suit in C.S.No.193 of 1985 (Ex.P.3)on 19.12.1984 for recovery of alleged dues from the Plaintiff. The said suit was decreed only for a sum of Rs.58.61 lakhs with interest at the rate of 9% per annum and the Counter claim made by the Plaintiff was dismissed. In view of the same, the above dispute reached finality. Therefore, the Defendant at the most was entitled for a sum of Rs.58.61 lakhs with interest @ 9% p.a. Whereas the defendant has enforced both the bank guarantees for the sum of Rs.2.20 Crores beyond the limit fixed by this Court. Such an act is illegal, improper and amounts to unjust enrichment on the part of the Defendant. Accordingly, the Plaintiff is entitled to the difference amount. Actually, the amount payable to the defendant was only Rs.1,36,23,533/- towards bank guarantee. Therefore, the defendant is liable to refund the remaining amount of Rs.84,54,714.41 together with interest 12% p.a. Hence the suit.

3. In the written statement it is contended by the defendant that according to O.S.A.No.26 of 1996 (Ex.P.5) they had invoked bank guarantees and a sum of Rs.77,23,062/- in respect of Guarantee No.11/1980 and Rs.1,43,51,701/- in respect of Guarantee No.93/1981. The amount was realised from the bank. It is his further contention that as per the above judgment if at all any amount is to be reimbursed it would be only to the bank and not to the Plaintiff. It is also contended that they have acted in accordance with the judgment of this court in O.S.A.No.26/96 (Ex.P.5). The amount due under the guarantees have been realised from the bank and not directly from the Plaintiff. They have not realised any amount in excess of the amount due and if at all the Plaintiff has any claim, it could be made only against

the Syndicate Bank and not against the Defendant. Hence, he prayed for dismissal of the suit.

4. Based on the above pleading, the following issues have been framed :

1. Whether the suit is legally sustainable?

2. Whether the Plaintiff is entitled to get a decree for a sum of Rs.1,03,99,295.41 with 12% interest on the alleged principle amount Rs.84,54,714.41?

3. Whether the defendant was entitled to recover Rs.58.61 lakhs with interest at 9% per annum from the plaintiff in the bank guarantee given as per the decree passed by this Court in C.S.No.193 of 1995 dated 30.08.1987?

4. Whether the defendant is bound to return the alleged excess amount recovered?

5. To what relief the parties are entitled?

5. On the side of the Plaintiff P.W.1 was examined and Ex.P.1 to Ex.P.14 were marked. On the side of the defendants, D.W.1 was examined and Ex.D.1 has been marked.

Witnesses examined on the side of the plaintiff:

P.W.1. - Mr.J. Venkatesan (P.W.1)

Witnesses examined on the side of the defendant

D.W.1 – Mr.Eva Dhurairaj (DW1)

Exhibits produced on the side of the plaintiff:

S.No.	Date	Description of documents	Exhibit
1.	30.10.2010	Certified copy of Board Resolution authorising P.W.1	P-1
2.	31.08.1995	True copy of the Judgment in C.S.NO.659 of 1983	P-2
3.	30.08.1997	True copy of the Judgment in C.S.No.193 of 1985	P-3
4.	19.12.2002	True copy of the Judgment in O.S.A.Nos.1 and 25 of 1998	P-4
5.	28.06.1999	True copy of the Judgment in O.S.A.No.26 of 1996	P-5
6.	19.07.2001	Office copy of the legal notice sent by the plaintiff to the defendant	P-6
7.	28.08.2001	Original reply sent by the defendant to the plaintiff	P-7
8.	12.09.2001	Office copy of the rejoinder sent by the plaintiff to the defendant.	P-8
9.	18.11.2010	Original receipt issued by the Syndicate Bank	P-9
10	20.05.2002	Notarized copy of the letter from Syndicate Bank's counsel regarding the settlement entered into with the plaintiff.	P-10
11	23.11.2010	Letter written by the Defendant's counsel to the Plaintiff's counsel for production of the compromise between the Plaintiff and Syndicate bank on 21.03.2002	P-11
12	21.03.2002	Consent terms recorded in O.A.Nos.1667 of 2000 and 305 of 2001 between the plaintiff and Syndicate Bank.	P-12
13	22.05.2002	Certified copy of the Order in O.A.No.305 of 2001	P-13
14	22.05.2002	Certified copy of the order in O.A.No.1667 of 2000	P-14

Exhibits produced on the side of the defendant:

S.No.	Date	Description of documents	Exhibit
1.	28.12.2011	Fresh authorisation letter	D-1

6. Learned counsel appearing for the Plaintiff submitted that two bank guarantees were provided by the plaintiff during the subsistence of contract, one is performance guarantee for a sum of Rs.33,65,200/- in Bank Guarantee No.11 of 1980 and another Bank Guarantee No.93 of 1981 for a sum of Rs.50 lakhs towards advance paid by the Defendant. It is the contention that the Defendant has filed a suit in C.S.No.193 of 1985 (Ex.P.3) for enforcing claims for the alleged dues from the plaintiff. The above suit the court has decreed a sum of Rs.58.61 lakhs with interest @ 9% and the defendant are entitled to decree amount towards the bank guarantee, any excess amount realised from the bank guarantee is liable to be reimbursed. It is his contention that a sum of Rs.2.20 Crores was realised on the basis of the orders of this Court in C.S.No.659 of 1983 (Ex.P.2). Thereafter, the bank has initiated DRT proceedings against the plaintiff and collected another sum of Rs.1,50,00,000/- as evident from the document. It is his further contention that the defendant has obtained

the orders of the Court against the bank without making the plaintiff as a party and realised the bank guarantee for a sum of Rs.2.20 crores. It is his contention that as per the decree and judgment of this Court the defendant was at the most was entitled a sum of Rs.58.61 lakhs with interest of 9% towards the entire claim in respect of the contract awarded to the plaintiff. Such being the position, the plaintiff is certainly entitled to recover the remaining suit amount with interest. Hence, prayed for decree and judgment.

7. Learned Senior Counsel appearing for the Defendant would vehemently contended the bank guarantees are realised only as per the orders of this Court in O.S.A.No.26 of 1996 (Ex.P.5). The appeal filed as against the decree and judgment in C.S.No.659 of 1983 (Ex.P.2). It is his contention that if only the decreed amount in C.S.No.193 of 1985 (Ex.P.3) realised from the plaintiff the question of paying excess would arise by the defendant only to the bank and not to the plaintiff herein. The judgment of this Court clearly indicate that any amount realised by the defendant in pursuant to the decree in C.S.No.193 of 1985 (Ex.P.3) excess amount has to be paid only to the bank and not to the plaintiff. It is his further contention that the decree

and judgment of this Court clearly indicate that only if any amount is paid by the plaintiff to the defendant, the defendant must re-imburse the same to the Bank to the extent of the money paid by the plaintiff. Such being the position, the suit cannot lie against the defendant. Hence, it is his contention that as the bank has not made as a party in this case, the Plaintiff is not entitled to any amount. Hence, prayed for dismissal of the suit.

Issues 1 to 5

8. The following are the admitted facts:

On 12.09.1979 a contract was awarded to the plaintiff for a sum of Rs.3,36,52,000/- and Bank Guarantee No.11 of 1980 was given by the plaintiff for a sum of Rs.33,65,200/- as Performance Guarantee issued by Syndicate Bank. Similarly Bank Guarantee No.93 of 1981 for a sum of Rs.50 lakhs towards advance paid by the defendant given by the Syndicate Bank. The defendant in fact has issued a letter for invocation both the Bank Guarantees on 23.09.1982. However, the plaintiff herein has filed a suit in C.S.No.31 of 1983 under Section 20 of the Arbitration Act, 1940. The above suit was dismissed, against which O.S.A.No.100 & 101 of 1983 were filed. In the above appeals a memo of compromise entered and a consent order was passed whereby the Plaintiff has agreed to pay a sum of Rs.29,66,000/- to the Defendant within a month subject to the decision of arbitration. However, compromise decree has not been complied with by the parties.

9. In the meanwhile, the defendant has filed a suit in C.S.No.659 of 1983 (Ex.P.2) against the Syndicate Bank to enforce the bank guarantee wherein the present plaintiff was not made as a party. However, Single Bench of this Court has decreed the suit in respect of Performance Guarantee alone to the extent of Rs.29,65,000/-, as against which O.S.A.No.26 of 1996 (Ex.P.5) was filed in the year 1996. The Bank also filed Cross Objection No.94 of 1998. The above appeal was disposed on 28.06.1999 holding that the bank being the guarantors they are bound to

honour the bank guarantee. It is relevant to note that during the pendency of this proceedings, the defendant herein has filed suit C.S.No.193 of 1985 (Ex.P.3) for recovery of sum of Rs.79,85,180.16 bank wherein the present plaintiff has not made as a party. In the above suit the defendant namely the present plaintiff has also raised a counter claim. It is relevant to note that the above suit in C.S.No.193 of 1985 (Ex.P.3) filed on 19.12.1982 was disposed on 30.08.1997. The above suit mainly filed for recovery of amount on the basis that the amount payable to the entire contract is only Rs.3,07,14,377.87. As against the said amount payable to the Plaintiff, the Defendant has actually made a payment to the tune of Rs.3,86,49,558.02. Therefore, according to them, the Defendant namely the present plaintiff has to refund the sum of Rs.79,35,180.16.

10. In the above suit, after full trial this court has passed a decree and judgment dated 30.08.1997. This court decreed the suit for a sum of Rs.58.61 lakhs with interest at the rate of 9% p.a. In the above suit the entire lis was in respect of the payments made by the Plaintiff towards the contract awarded to the plaintiff. The above

decree and judgment also challenged before the Division Bench of this Court in O.S.A.No.1 of 1998 and 25 of 1998. In para 27 of the above judgment This Court has taken note of the bank guarantees and one of the bank guarantees was given towards payment of Rs.50 lakhs advance. Since the amount has been realised, the remaining amount alone to be paid to the plaintiff herein.

11. It is admitted fact that after O.S.A.No.26 of 1996 (Ex.P.5)was disposed of, bank guarantee was invoked and a sum of Rs.2.20 crores was recovered from the Syndicate Bank by the Defendant. Thereafter, the bank has proceeded against the present plaintiff for recovery of excess amount realised in the bank guarantee and proceeded against them before the Debt Recovery Tribunal at Mumbai in O.A.No.1667 of 2000 (Ex.P.14) and 305 of 2001 (Ex.P.13) . The above proceedings have been closed after the plaintiff has paid Rs.1.50 crores. To substantiate the same Ex.Ps.9, 10 and 11 marked before this Court to show that a sum of Rs.1.5 crores has been paid to the bank by the Plaintiff. Ex.P.9 and 11 make it very clear that the bank has filed the proceedings to recover the excess amount paid by them under the bank guarantee realised by the defendant herein. It is

to be noted that two bank guarantees to tune of Rs.83,65,200/- have given, one for the performance guarantee and another for to cover the advance payment of Rs.50 lakhs, after the dispute arose between the parties the defendant also filed suit against the bank alone to enforce the guarantees and got the decree in their favour. Besides they have also filed C.S.193 of 1985 (Ex.P.3) against the defendant for recovery of a sum of Rs.75,36,000/-. The plaint pleadings and judgment in C.S.193 of 1985 (Ex.P.3) clearly indicate that only the amount claimed by the defendants was actually the subject matter of the dispute in respect of the contract between the parties including Bank Guarantees. After full trial this Court has decreed only a sum of Rs.58.61 lakhs with 9% p.a. from 19.12.1984 to 6.9.1999. It is the admitted case that on 6.9.1999 i.e., after the judgment in O.S.A.No.26 of 1996 (Ex.P.5) the Bank Guarantees were invoked by the defendant totally a sum of Rs.2,20,78,247.41 wherein they are actually entitled to recover only a sum of Rs.58,61,000/- with interest @ 9% p.a.. It is relevant to note that the judgment in C.S.No.193 of 1985 (Ex.P.3)were delivered on 39.09.1997 much prior to the date of invocation of the bank guarantee which was invoked on 9.5.1999. Despite the decree and judgment in their favour and appeals were pending in O.S.A.No.1 and 25 of 1998, the plaintiff has not made as a party either in the suit filed by the Defendant for enforcement of bank guarantee in C.S.No.669 of 1983 or in O.S.A.No.26 of 1996 (Ex.P.5). However, the bank guarantees have been invoked. The appeal filed against the C.S.No.193 of 1985 (Ex.P.3) disposed on 19.12.2002 wherein this court has modified the decree to only Rs.8.61 lakhs taking note of the fact that bank guarantee for a sum of Rs.50 lakhs has already realised and decreed the suit only for Rs.8.61 lakhs with interest @ 9% p.a. from the date of the plaint.

12. It is well settled that the issuance of bank guarantee on autonomous contract and imposes an absolute obligation on the bank to fulfill the terms of payment in the bank guarantee. It is the contract between the bank and beneficiary of the guarantee. The bank guarantee given only for performance contract for a sum of Rs.33 lakhs and also another bank guarantee for Rs.50 lakhs. When the dispute arose between the parties the entire liability was subject matter in the suit C.S.No.193 of 1985 (Ex.P.3) wherein the defendant himself claimed a sum of Rs.79,35,180/- in respect of the entire contract awarded to the plaintiff. Such being the position the bank

guarantee if at all could have invoked it should have been only for the amount actually entitled by the Defendant. Admittedly, the suit in C.S.No.193 of 1985 (Ex.P.3) decreed for a sum of Rs.58,61,000/- with interest @ 9%. That amount is calculated, total amount payable to the defendant as on 6.9.1999 comes around 1,36,23,533/- whereas the bank guarantee has been enforced for a sum of Rs.2,20,78,247.41 which is excess other than the entitlement of the plaintiff. Such being the position this Court is of the view that if such excess amount is not returned to the plaintiff it will amounts to unjust enrichment on the part of the defendant. Much emphasis has been placed by the learned senior counsel on the judgment of the Division Bench in O.S.A.No.26 of 1996 (Ex.P.5).

13. On perusal of the above judgment the Division Bench has held that if any amount paid in pursuant to the decision arrived in C.S.No.193 of 1985 (Ex.P.3) to the defendant herein, the same should be reimbursed to the Bank. The entire order of the Division Bench when carefully read without any ambiguity it will lead to only a conclusion that since the bank guarantee has already invoked and the amount has realised, any amount paid as per decreee in C.S.No.193

of 1985 (Ex.P.3) by the present defendant the same should be returned to the bank by the defendant. Judgment of the Division Bench was to the effect that the defendant is not entitled to excess amount. Therefore, the contention of the learned Senior Counsel that only when the amount is paid by the Judgment Debtor in C.S.No.193 of 1985 (Ex.P.3) the amount should be returned to the Bank and not to the Plaintiff cannot be countenanced. In this case the Plaintiff has established that bank has already filed recovery proceedings and recovered a sum of Rs.1.50 crores from the plaintiff herein and the documents are also filed as discussed above. Therefore, at the most only the differential amount has to be paid only to the plaintiff and not to the bank. Admittedly the bank has already realised the money from the plaintiff and in fact the defendant has realised the amount to the tune of Rs.2,20,78,247.41 which is in fact excess to their entitlement as per the decree in C.S.No.193 of 1985. Such being the position the differential amount claimed by the plaintiff is certainly to be refunded to the plaintiff with interest. Accordingly, the issues are answered against the defendant.

14. In the result the suit is decreed for a sum of

Rs.1,03,99,295.41 with subsequent interest @ 6% from the date of suit till the date of realisation with costs.

03.10.2019

Index :Yes/No
Internet :Yes
Speaking/Non-speaking order
ggs

N. SATHISH KUMAR, J.

ggs

judgment in
C.S.No.681 of 2001

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