

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.02.2020

Pronounced on: 13.02.2020

Coram::

The Honourable Dr.Justice G.Jayachandran

C.S.No.274 of 2014
& O.A.No.589 of 2014

M/s.Vadim Infrastructure Private Limited.
(formerly M/s.VolTech Infrastructure Pvt. Ltd.,
Represented by its Director R.Rajamanickam,
Having its Office at 18 & 19, T.V.Nagar,
Near DLF Park, Mount Poonamalee Road,
Mugalaivakkam, Chennai – 600 089. ... Plaintiff

Amended as per order dated 12.06.2018 in A.No.4085 of 2018 in
C.S.No.274 of 2014.

/versus/

1. M/s.Sunil HiTech Engineers Ltd.,
No.97, East High Court Road,
Ramdaspethi, Nagpur 440 110 rep. by its
Chairman & Managing Director.
 2. Bank of Baroda,
International Business Branch,
No.45, Moore Street, 1st Floor,
Chennai – 600 001, rep. by its
Asst. General Manager
- ... Defendants

Prayer: Complaint is filed under Order IV Rule 1 of Original Side Rule read
with Order VII Rule 1 of C.P.C.

a. Declare the invocation of the Bank Guarantee by the defendant as illegal and consequently direct the 1st defendant to pay at Rs.1,19,38,641/- (One Crore Nineteen Lakhs Thirty Eight Thousand Six Hundred and Forty One only) with future interest at 16% from 16.02.2014 to till the payment in full to the plaintiff.

b. Mandatory directing the 1st defendant to permit the plaintiff to complete the work awarded within the extended period by giving the site and not to allot the said contract work to any third parties.

c. Permanent injunction, restraining the 1st defendant from using the material supplied by the plaintiff as per the letter of award dated 01.12.2010 and the amended letter of award dated 05.06.2012, including the cost of the additional materials supplied, without effecting payments and without terminating the existing contract.

d. Direct the defendants to pay cost of the proceedings and pass such other order/relief, as this Hon'ble Court may deem fit and proper.

For Plaintiff : Mr.Sharath Chandran

For D1 : No appearance

For D2 : *set exparte*

J U D G M E N T

The suit filed for declaration to declare the invocation of the Bank Guarantee by the 1st defendant and consequently to direct the 1st defendant to pay a sum of Rs.1,19,38,641/- (One Crore Nineteen Lakhs Thirty Eight Thousand Six Hundred and Forty One only) with future interest at 16% p.a.

2. The plaintiff has also prayed for mandatory direction, directing the 1st defendant to permit the plaintiff to complete the work awarded within the extended period and permanent injunction restraining the 1st defendant from using the material supplied.

3. The case of the plaintiff is that, it is a company incorporated under the Companies Act, 1956, engaged in manufacturing and supply of Electrical and Instrumentation. In response to the advertisements of the 1st defendant, inviting offer of supply E-Bop equipment and erection at IX250 MW Parli site at Parle, the plaintiff entered into an agreement with the 1st defendant for supply of E-Bop equipments to the 1st defendant's on going project. The 1st defendant issued letter of award on 01.12.2010 for erection, testing and

commissioning of E-Bop equipment and amended letter of award for supply for the enhanced value of materials to be supplied was issued by the 1st defendant on 05.06.2012

4. The plaintiff gave a contract performance security in the form of Bank Guarantee equivalent to 10% of the total contract value and same was renewed and kept valid as per the instructions of the 1st defendant. Initially, the period contract was 12 months, from the date of receipt of drawing approval. Accordingly, the plaintiff effected supply and stocked the materials at the site of the 1st defendant. It was agreed by the defendant that on supply of materials, the plaintiff will pay pro-rata. The bank guarantee dated 10.08.2012 for the value of Rs.1,11,74,490/- (One Crore Eleven Lakhs Seventy Four Thousand Four Hundred and Ninety only) was executed by the plaintiff, which was in force till 30.08.2013. The plaintiff has earnestly completed his part of contract in effecting supply of material. There is no breach on the part of the plaintiff on any of the contractual terms. The defendant sought for additional supply of materials and unilaterally extended the period of completion of the contract upon to February – 2014 and in consonance with the extension of contractual period, requested the plaintiff to extend

the validity of the Bank Guarantee upon 28.02.2014. The plaintiff, without knowing the fraudulent intention of the 1st defendant extended the validity of the Bank Guarantee till 28.02.2014. However, within a week from extension for the Bank Guarantee, the 1st defendant has invoked the bank guarantee without any fault on the part of the plaintiff and without issuing any notice for termination. The 1st defendant has fraudulently and falsely alleged violation of contract for invoking the bank guarantee. The 1st defendant has not mentioned which provision of the contractual terms and conditions being violated by the plaintiff for encashment of the Bank Guarantee. The 2nd defendant, who is bound to safeguard its customers wilfully allowed the 1st defendant to encash the Bank Guarantee and permitted the 1st defendant to make unlawful gain. The 2nd defendant, by allowing the 1st defendant to cash the Bank Guarantee without any breach of termination of the existing contract has committed dereliction of duty and deficiency of service.

5. The 1st defendant, after getting the bank guarantee extended, failed to give the site for completion of the contract but invoked the bank guarantee to encash Rs.1,11,74,490/-. Therefore, alleging fraud on the part of the 1st defendant and dereliction of duty on

the part of the 2nd defendant, the present suit is filed for the following reliefs:-

a. Declare the invocation of the Bank Guarantee by the defendant as illegal and consequently direct the 1st defendant to pay at Rs.1,19,38,641/- (One Crore Nineteen Lakhs Thirty Eight Thousand Six Hundred and Forty One only) with future interest at 16% from 16.02.2014 to till the payment in full to the plaintiff.

b. Mandatory directing the 1st defendant to permit the plaintiff to complete the work awarded within the extended period by giving the site and not to allot the said contract work to any third parties.

c. Permanent injunction, restraining the 1st defendant from using the material supplied by the plaintiff as per the letter of award dated 01.12.2010 and the amended letter of award dated 05.06.2012, including the cost of the additional materials supplied, without effecting payments and without terminating the existing contract.

d. Direct the defendants to pay cost of the proceedings and pass such other order/relief, as this Hon'ble Court may deem fit and proper.

6. The 1st defendant has entered appearance and filed written statement, alleging that, no part of cause of action as arisen within the Original Civil Jurisdiction of this Court as a consequence the plaint has to be rejected under Order VII Rule 11 of C.P.C., That apart, the defendant has accused the plaintiff stating that, the entire project of the defendant suffered due to inadequate planning and inexperience in executing the project by the plaintiff. The plaintiff was unable to execute the project of such a big magnitude since it did not have necessary wherewithal and expertise to complete E-Bop scope of the project. The plaintiff has not fulfilled the scope of work order particularly supply of E-Bop. The plaintiff not supplied materials in the standard quantity as per billing breakup.

7. Despite several reminders, the plaintiff has not replied for not submitting the invoice and not fulfilling his part of the contract. The plaintiff has committed breach of contract, which resulted not only causing immense loss to the 1st defendant but also jeopardized the completion of the entire project. Therefore, the letter of termination dated 14.09.2019 was issued to the plaintiff for the breach of contractual terms and conditions as a consequence, the 2nd defendant permitted the

encashment of the Bank Guarantee. Hence, the suit has to be dismissed.

8. Based on the pleadings, the following issues were framed by this Court on 17.08.2017.

(i). Whether this Court have territorial jurisdiction to entertain the present suit since no cause of action arisen within the jurisdiction of this Court?

(ii). Whether the plaintiff committed breach of contract/award dated 01.12.2010 and amended letter of award dated 05.06.2012?

(iii). Whether the plaintiff complied with all terms and conditions of the contract/award dated 01.12.2010 and other contracts more particularly with regard to supply of materials?

(iv). Whether the unauthorised invocation of the bank guarantee on 14.09.2013 is unauthorised and illegal?

(v). Whether the plaintiff is entitled to a sum of Rs.1,19,38,641/- with future interest at 16% from 16.02.2014 till the date of payment?

(vi). *Whether the defendant ought to be restrained by a decree of perpetual injunction from using the material supplied by the plaintiff as per the letter dated 01.12.2010 and the amended letter dated 05.06.2012, without effecting payments and terminating the contract?*

(vii). *To what relief both the parties entitled to?*

9. Pending trial, it was brought to the notice of this Court that 1st defendant Company was taken over by the liquidator by the orders of the NCLT, Mumbai, dated 25.06.2016 (***American Express Vs. Sunil HiTech Engineers Private Limited***). Hence, notice was sent to the Mr.Harshad Shamkant Deshpande the Interim Resolutional Professional. Till the moratorium period was in force, the suit was not taken up for trial. On 20.06.2019, this Court directed the learned counsel appearing for the 1st defendant to report about the status of the case which is pending before NCLT, Mumbai.

10. The Learned Counsel appearing for the 1st defendant filed a memo on 25.07.2019 reporting that NCLT, Mumbai, has passed an order on liquidation against the 1st defendant's Company and has appointed Mr.Avil Jerome Menezes as a liquidator, for carrying out the

liquidation process and sought time to get further instructions. Therefore, this Court, issued notice to the liquidator, who received notice but had not appeared in personal or through counsel. In the light of the above fact, the case was posted before Master for recording evidence. The plaintiff has filed proof affidavit in lieu of written statement, marked 14 documents. There is no representation on behalf of the 1st defendant and there is no cross examination.

11. The Learned Counsel appearing for the plaintiff would point out that in Ex.P.7 letter of 1st defendant dated 09.08.2013, the 1st defendant has expressed their inability to settle the claim and sought time to pay the bill, however at the same time wanted the plaintiff to continue the supply of material. After such a request and request for extension of Bank guarantee vide letter dated 05.07.2013 Ex.P.6 the defendant has fraudulently invoked the bank Guarantee and the defence taken by the defendants that there was a breach of contract is contrary to their own admission in Ex.P.7.

12. The Learned Counsel for the plaintiff would further submit that the financial impropriety of the 1st defendant has forced the plaintiff

to file police complaint on 01.10.2013 (Ex.P.14). Relying upon Ex.P.2 letter of award dated 01.12.2010 and amended Letter of award dated 05.06.2012. The learned Counsel for the plaintiff would submit that there is no breach of any terms of contract on its part for the 1st defendant to invoke the bank guarantee.

13. The reason stated by the 1st defendant in the letter dated 14.09.2013 addressed to 2nd defendant for invoking the Bank Guarantee is that the supplier failed to fulfil or default to comply the contractual scope of work and obligation. This expression is mere extraction of the terms of contract. The nature of failure to supply or default to comply the contract is not mentioned in the said letter. While so, the 2nd defendant without verifying the veracity of the said allegation, simply permitted the 1st defendant to invoke the Bank Guarantee.

14. Ex.P.7 letter of the 1st defendant dated 09.08.2013 reads as below:-

"With reference to the above, we appreciate that you have supplied additional spare feeders for LT PMCC switchboards as per the requirement of Mahagenco. However, we surprised to note that you have stopped the further supplies and stopped the work at site. In

this regard it is to intimate you that we have already taken up matter with Mahagenco vide claim No.06, dated 17.07.2013 for extra supply and compensation thereof. Being a Govt. organization such claims are not settled within short time, it takes about 3 to 9 months period after meetings with various authorities. We are already behind Mahagenco for settlement of these extra supplies and we will try to settle these claims at the earliest, for this we require your support while discussions with Mahagenco authorities.

In view of the above, you are requested to start the further supplies of HVAC, PMC & PMCC which are still not supplied and start the works at site."

15. Whereas, Ex.P.9 notice to Encashment of Original Bank Guarantee assigns no specific reason for invoking the Bank Guarantee except to say, supplier has failed to fulfil or defaulted to comply contractual scope of works, obligation under the Contract. For better appreciation, said passage in Ex.P.9 is extracted below:-

"We hereby invoke the Original Bank Guarantee bearing No.2169IGPER001412 date 10.08.2012 and its extension dated 29.08.2013 for Rs.1,11,74,490/-

issued on behalf of M/s.Voltech Infrastructure Pvt. Ltd., Chennai – 600 056 in favour of M/s.Sunil Hitech Engineers Ltd, Nagpur, which is valid upto 28.04.2014 as the supplier has failed to fulfil or defaulted to comply contractual scope of works, the obligation under the contract. (Refer original bank guarantee page No.2 paragraph No.3).

We hereby demand payment of Rs.1,11,74,490/- (Rupees One crore Eleven lakh Seventy four thousand Four hundred Ninety only) covered under the aforesaid Bank Guarantee immediately through demand draft in favour of "SUNIL HITECH ENGINEERS LTD" payable at NAGPUR. We are enclosing herewith Original Bank Guarantee with extension for your ready reference and record."

16. The 1st defendant letters dated 09.08.2013 and 14.08.2013, which are extracted above are contradictory to each other and self-destructive. It would be easily seen from letter dated 05.07.2013 (Ex.P.6), the 1st defendant has requested for extension of Bank Guarantee. The plaintiff has complied the request and extended the Bank Guarantee till 28.02.2014 thereafter, the 1st defendant has promised the plaintiff that they will pay the outstanding bill soon and sought for further supply without insisting upon the payment for the

materials already supplied. While so, within a month, had invoked the bank guarantee vide Ex.P.9 alleging violation of contract. No evidence placed by the defendant how the breach of contract committed by the plaintiff for them to invoke Bank guarantee. The invocation of the Bank Guarantee by the 1st defendant without any basis and without terminating the contract is illegal. Hence, the plaintiff is entitled for the declaration sought in prayer "A".

17. As far as the prayer "B" is concerned, being a works contract the mandatory injunction permitting the plaintiff to complete the work in the 1st defendant's company, which has now under liquidation becomes infructuous and unenforceable. Hence, the prayer "B" is rejected.

18. Insofar as, the prayer "C" to restrain the 1st defendant using the materials supplied, there is no detail about the materials supplied and available with the 1st defendant. In such circumstances, the relief in prayer "C" cannot be granted.

Issue No.1

The prayer in the suit is to declare invocation of Bank Guarantee is illegal. The bank guarantee has been executed by the plaintiff through Bank of Baroda having its Branch Office at Chennai, which falls within the territorial jurisdiction of this Court. The value of the suit is more than Rs.1 crore. Hence, the subject matter of this case is well within the pecuniary jurisdiction of this Court. The suit falls within the definition of Commercial dispute of specified value to be tried by the Commercial Division of the High Court, Madras.

Issue Nos.2, 3 & 4

Ex.P.7 and Ex.P.8 letters of the 1st defendant substantiate the plea that, without any basis and reasonable cause, the 1st defendant has invoked the bank guarantee. There is no evidence to show that the plaintiff had committed any breach of the contract dated 01.12.2010 and amended letter of award dated 05.06.2012. Contrarily, evidences indicates that the plaintiff has been complying the terms and conditions found in the contract. Hence, issue Nos.2, 3 and 4 are held against the defendants.

Issue No.5

Having proved that the 1st defendant has malafidly invoked the bank guarantee, the first defendant is liable to pay the plaintiff a sum of Rs.1,19,38,641/- (One Crore Nineteen Lakhs Thirty Eight Thousand Six Hundred and Forty One only) with interest as prayed. Hence, issue No.5 is answered in affirmative.

Issue No.6

In the absence of details regarding materials supplied by the plaintiff and available with the defendant, the restrain order of using the materials supplied by the plaintiff is declined. Furthermore, the contract is deemed to be terminated in the light of invoking the Bank Guarantee and subsequent events. Hence, issue No.6 is answered accordingly.

19. In the result, the suit is partly-allowed. The prayer "A" is allowed. The prayers "B" and "C" are dismissed. It is declared the invocation of the Bank Guarantee by the defendant as illegal and consequently direct the 1st defendant to pay at Rs.1,19,38,641/-(One Crore Nineteen Lakhs Thirty Eight Thousand Six Hundred and Forty One only) with future interest at 16% from 16.02.2014 to till the payment in full to the plaintiff.

20. Accordingly, the ***Suit is Partly-Allowed***, with costs.

Consequently, connected Application is closed.

13.02.2020

Index :Yes/No.

Internet :Yes/No.

Speaking order/Non-speaking order.

List of Witness examined on the side of the Plaintiff:-

Mr.V.Pugalandhi (P.W.1)

List of Witness examined on the side of the Defendants :-

Nil

List of the Exhibits marked on the side of the Plaintiff:-

Sl. Nos.	Exhibits	Description of documents
1.	Ex.P.1	Original Authorisation Letter dated 12.01.2019.
2.	Ex.P.2	Photocopy of the Letter of Award dated 01.12.2010.
3.	Ex.P.3	Photocopy of the Amended Letter of Award dated 05.06.2012
4.	Ex.P.4	Photocopy of the Bank Guarantee dated 10.08.2012
5.	Ex.P.5	Photocopy of the Letter dated 09.11.2012
6.	Ex.P.6	Photocopy of the Letter-Extension of guarantee dated 05.07.2013
7.	Ex.P.7	Photocopy of the Letter dated 09.08.2013
8.	Ex.P.8	Photocopy of the Extended Bank Guarantee dated 29.08.2013
9.	Ex.P.9	Photocopy of the Letter to encash Bank Guarantee dated 14.09.2013

10.	Ex.P.10	Photocopy of the Letter Stopping encashment dated 17.09.2013
11.	Ex.P.11	Photocopy of the Letter dated 18.09.2013
12.	Ex.P.12	Photocopy of the Letter dated 20.09.2013.
13.	Ex.P.13	Photocopy of the Letter dated 23.09.2013.
14.	Ex.P.14	Photocopy of the Police Complaint dated 01.10.2013.

List of the Exhibits marked on the side of the Defendants:-

Nil

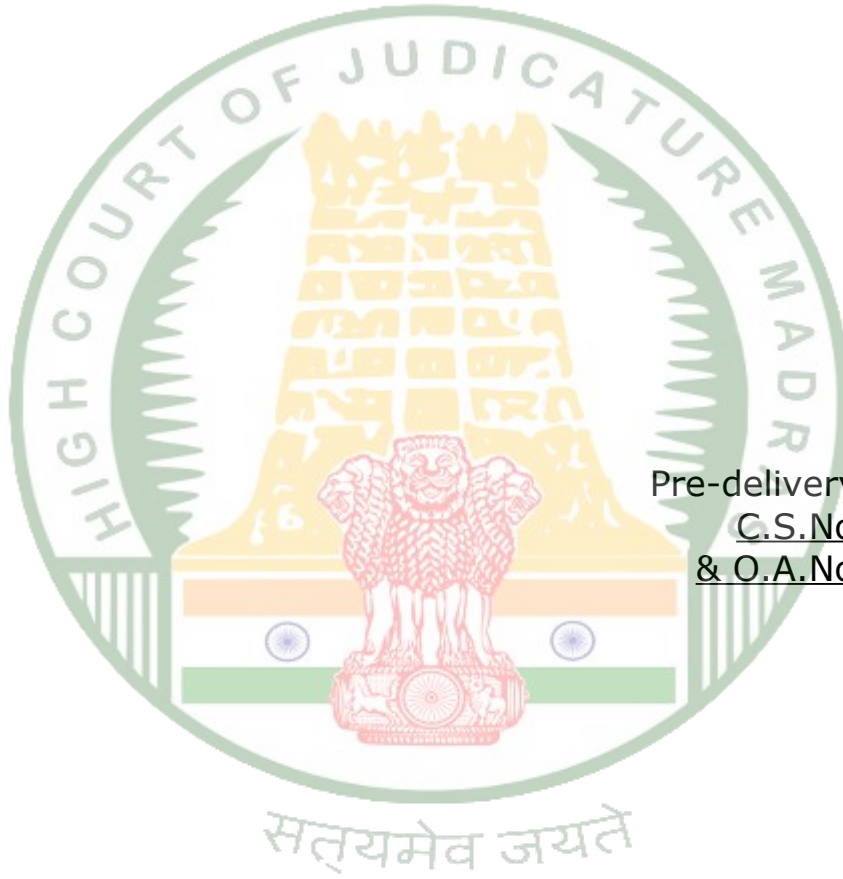


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Dr.G.Jayachandran,J.

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Pre-delivery judgment in
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