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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.723 OF 2022
WITH
INTERIM APPLICATION NO.19912 OF 2022
WITH
INTERIM APPLICATION NO.19909 OF 2022**

Nagaland Mini Tool Room & Training ...Appellants
Centre Dimapur & Anr.

V/s.

Pandit Rupla Patil & Anr. ...Respondents

Mr. D.S. Mhaispurkar for Appellants/Applicants.

Mr. Venkatesh Shastry for Respondent No.1.

**CORAM: MADHAV J. JAMDAR, J.
DATE: 23rd NOVEMBER, 2022**

P.C.:

1. Heard Mr. Mhaispurkar, learned Advocate appearing for Appellants and Mr. Shastry, learned Advocate appearing for Respondent no. 1.

2. By the present Second Appeal, challenge is to the legality and validity of the judgment and decree dated 8th December 2021 passed by the learned District Judge-13, Pune in Regular Civil Appeal No. 453 of 2017. Appellants are the original

Defendant nos. 1 and 2 and Respondent no. 1 is the original Plaintiff.

3. Plaintiff filed suit for compensation of Rs.1.00 Crore alleging breach of contract and for other reliefs. It is admitted position that the contract was issued to the Plaintiff by Defendant nos.1 and 2.

4. Mr. Mhaispurkar, learned Advocate appearing for the Appellants relied on Purchase Order dated 8th September 2006, which is at Exhibit 84. According to him, Clause no.1 of the Purchase Order specifically states that the training at supplier's place is very important term of contract and same has not been complied with. To substantiate his contention, he has relied on letter dated 20th August 2008 sent by Plaintiff to Defendant no. 2 and also letter dated 30th January 2009 sent by Defendant no.1 to the Plaintiff. He also relied on the reasoning of the learned trial Court more particularly set out in paragraphs 13 and 14 of the judgment. He submitted that the Appellate Court passed the decree without taking into consideration letter dated 20th August 2008 at Exhibit 88 and letter dated 30th January 2009 at Exhibit 96. He submitted that substantial question of law in this Second Appeal is that "Whether decree can be passed in favour of Respondent No.1 when breach is committed by Respondent no.1- Plaintiff?".

5. He submitted that another substantial question of law involved in the appeal is "Whether the plaint discloses any cause of action for recovery of amount towards machines supplied by the Plaintiff and whether cause of action survives at the time of hearing of the appeal?".

6. He submitted that Interim Application No.19912 of 2022 has been filed in this Second Appeal praying that Appellants i.e. Defendant nos. 1 and 2 be permitted to file written statement.

7. He submitted that finding of the learned appellate Court that there is no document to show that the training was not imparted by the Plaintiff is perverse.

8. He lastly submitted that the lower appellate Court has granted interest of 10% from the date of filing of suit till its realisation, when there was no specific prayer in the plaint seeking interim relief.

9. The factual position on record shows the following aspects:

- (i) The Appellants placed with Respondent no.1- Plaintiff three purchase orders dated 8th September 2006 for the supply of CNC Lathe, CNC milling machine and upright drill machine. The Appellant sought bank guarantee for an amount of Rs.72,50,000/- (Rupees Seventy Two Lakhs Fifty Thousand only) as said amount

representing 80% of total cost of purchased machinery was paid by the Appellants to Respondent no. 1 as advance.

- (ii) It appears that certain machineries were supplied by Respondent no.1 to the Appellants. However, dispute started between the Appellants and Respondent no.1 resulting into filing of Special Civil Suit No. 277 of 2009 as there was threat of encashment of bank guarantee. Initially the suit was filed seeking following reliefs:

- "(a) It may be declared that the Defendant no.1 and Defendant no.2 make the breach of the contract and committed a fraud with the Plaintiff and not entitled to encash the Bank Guarantee.
- (b) The Defendant no.1 and Defendant no.2 may kindly be restrained from encashment of the bank guarantee.
- (c) The Defendant no.3 may kindly be restrained from releasing of any amount against the bank guarantee bearing No. 42/29 dated 21.03.2007.
- (d) The Defendant no.1 and Defendant no.2 may kindly be directed to give compensation of Rs.1 Crore to the Plaintiff for the breach of contract and loss suffered to the Plaintiff.
- (e) The Defendant no.1 and No. 2 may be directed to release the balance payment of the machineries already supplied.
- (f) The Defendant no.1 and no.2 may kindly be

directed to inspect and to lift the balance two CNC milling Machines and also to attend the training for the operation, maintenance and E & C at the premises of Plaintiff by making the payment and issue 'C' forms, as early as possible."

(iii) The cause of action as set out in the un-amended plaint is as follows :

"19. The cause of action to file the present suit firstly arose on 08.09.2006 when the Defendants have placed an order with the Plaintiff for the supply of the machines, it again arose on 21.03.2007 when the bank guarantee was furnished by the Plaintiff and it again arose on 29.09.2008 when the bank guarantee was extended, and it lastly arose on 30 January 2009 when the Defendant no. 1 and 2 threatened the Plaintiff to encash the bank guarantee. Thus the cause of action is continuing one and is arising thereafter day to day."

(iv) It appears that the said bank guarantee was encashed by Defendant nos.1 and 2 and therefore the plaint was amended. The relevant portion of amended para 14(a) reads as under:

"14 (a) It is submitted that the Plaintiff by three different contracts had agreed to supply total 7 machineries to the defendant no.2. The plaintiff states that **the plaintiff has supplied 5 machineries out of 7 machineries to the defendant nos. 2 and as per agreement has installed the said machinery and also imparted training to the defendant no.2.** The plaintiff has also

manufactured remaining two machineries of 3rd agreement and said machinery are laying in workshop of plaintiff. **As stated above paras the defendant no. 2 intentionally avoided to pay remaining amount of supplied machineries and issued 'C' form to the plaintiff.** And this act of defendant created fear in the mind of plaintiff that after supply of remaining machineries the defendant no.2 would not release balance payment and therefore, plaintiff did not supply remaining machinery. **It is submitted that the Plaintiff has not breached the contract and plaintiff was and is always ready and willing to perform his part. However, the defendants by not making payment and non-signing training report have breached the contract.** Hence, act of defendant nos. 1 and 2 did not have right to invoke bank guarantee. In spite of this being a position, the defendant nos. 1 and 2 illegally invoked bank guarantee furnished by the plaintiff. It is admitted that as per terms and conditions of extended bank guarantee, it is necessary to initiate action or suit. However, the defendants at the time of invoking bank guarantee did not follow the above condition and other conditions. In spite of this being a position the defendant no. 3 has paid amount of bank guarantee to the defendant no.2.

Now it is revealed that the defendant nos. 1 and 2 for the purpose of invoking bank guarantee had filed police complaint against the defendant no. 3's officers and under pressure the defendant no.3 had made payment to the defendant no. 2."

(v) The admitted position on record show that total cost of the machines which were to be supplied by Respondent no.1 to Appellants was to the tune of Rs.72,50,000/- and which has been paid by Appellants to Respondent no.1 and for ensuring performance of contract, the Appellants have given bank guarantee of said amount of Rs.72,50,000/-.

(vi) The entire transaction was with respect to 7 machines. Admittedly only 5 machines were supplied. As far as the cost of 3 machines, which was about Rs.10,00,000/- has been paid by Appellants to Respondent no.1. The cost of balance 2 machines was Rs.36,69,846/- and the said cost has not been paid. Therefore, the present dispute is concerning only said payment of Rs.36,69,846/- for supply of two machines.

The dispute is further narrowed down as admittedly said two machines were supplied by Respondent no.1 to the Appellants

and only dispute is whether the training at supplier's place was imparted or not.

10. The learned trial Court dismissed the suit mainly on the ground that although delivery of said two machines is proved, it is not proved that training was imparted to the concerned personnel of Defendant nos.1 and 2 and therefore as there is breach of contract, suit was dismissed.

11. The learned Appellate Court on appreciation of evidence on record, arrived at finding that the training has been imparted to the officials of Defendants and therefore there is no breach of contract. In view of this finding the appellate Court has granted relief of payment of Rs.36,69,846/- alongwith interest at 10% per annum from the date of filing of suit till its realisation.

12. As far as imparting the training is concerned, the appellate Court has discussed the evidence of PW 2- Ashit Bhowmik. On the basis of said evidence, the appellate Court recorded finding of fact that from 29th September 2008 to 2nd October 2008, training was imparted to the officials of Defendant no. 1 and the same was supported by email at Exhibit 103. The learned appellate Court also took into consideration that this is the case where written statement has not been filed by Defendant nos.1 and 2 and therefore averments made in the plaint have remained uncontroverted. It is also important to note that the

Defendant nos. 1 and 2 did not cross examine the Plaintiff's witness and cross-examination was conducted by Defendant no.3-Bank, which has issued and encashed the Bank Guarantee. Perusal of the cross- examination conducted by Defendant no.3-Bank shows that nothing has been extracted which will have impact on the findings recorded by the learned Trial Court.

13. It is significant to note that the letter dated 20th August 2008 (Exhibit 88) on which the Appellant i.e. original Defendant nos. 1 and 2 have relied, clearly state that the machines had already been installed and started by team sent earlier and that training was not effective due to lack of communication and same would be carried out again.

14. PW-2- Ashit Bhowmik has specifically stated that thereafter the training was imparted between 29th September 2008 to 2nd October 2008, which has been done after said letter dated 20th August 2008. In the email dated 14th December 2008, which is at Exhibit 103, it is specifically stated by PW-2 that the officials of Defendant nos.1 and 2 refused to sign on the paper after completion of training.

15. Reliance of Mr. Mhaispurkar, learned Advocate appearing for the Appellants on letter dated 30th January 2009 (Exhibit 96) is totally misconceived. Contents of said letter are not reliable. Said letter dated 30th January 2009 mentions that the

commissioning of said 2 CNC lathes and training is yet to be completed. The same is contrary to letter dated 20th August 2008 of Respondent No.1 which specifically mentions that the machines have been installed and started. In the email dated 14th December 2008, it is specifically mentioned that although training was completed, officials of Defendant nos.1 and 2 refused to sign on paper acknowledging completion of the training. Thus, no reliance can be placed on said letter dated 30th January 2009.

16. The learned First appellate Court has taken into consideration the fact that there is no cross-examination of Plaintiff's witness by the Defendant nos. 1 and 2. It is significant to note that the Plaintiff's witness has been cross-examined by Advocate of Defendant no. 3 i.e. Bank, who has given the bank guarantee. The fact that whether there is training imparted at site cannot be in the special knowledge of Defendant no. 3-Bank. In any case, nothing has been extracted in the said cross-examination, which will have impact on the evidence of PW-2 as well as documentary evidence being email at Exhibit 103.

17. This is the case where there is no written statement filed by Defendant nos. 1 and 2 as well as there is no cross-examination conducted by these Defendants of both the

witnesses examined on behalf of the Plaintiff. The learned First Appellate Court after appreciation of evidence on record has recorded finding of fact that the training has been imparted. Mr. Mhaispurkar, learned Counsel of the Appellants has failed to show any material to demonstrate that the said finding is without considering any evidence on record. As far as the findings recorded in paragraphs 13 and 14 of the learned trial Court, it is significant to note that the oral evidence of PW-2 and email at Exhibit 103 is not taken into consideration while discussing the said aspect of training. Therefore, the finding of the learned Trial Court is recorded without taking into consideration the evidence on record.

18. As far as the contention that the plaint did not disclose any cause of action, the reliefs sought in the original plaint as well as cause of action which has been mentioned in the original plaint clearly show that the plaint discloses the cause of action. As far as prayer clause 'e' of the original plaint is concerned, it has been specifically prayed that Defendant nos. 1 and 2 be directed to release balance payment of the machineries already supplied. The cause of action with respect to the said relief can be found in various paragraphs of the plaint including in amended portion at paragraphs 14(a), 18(a) and 18(b). Thus, there is no substance in the contention that the plaint did not disclose any

cause of action and no cause of action survived at the time of hearing of the appeal.

19. Mr. Mhaispurkar has relied on the judgment of this Court, reported in the matter of **Cyrus Marine Services Vs. K.A. Shivaraman**¹ (more particularly paragraphs 11 and 12) regarding cause of action. Perusal of the said paragraphs clearly show that the same are in the facts of that case. Apart from that, I have already set out hereinabove the averments regarding cause of action in the plaint and rejected the contention that the plaint did not disclose any cause of action or cause of action do not survive at the appellate stage.

20. It is to be seen that although the appellate Court in paragraph 27 has wrongly stated that there is no document to show that the training was to be imparted by the Plaintiff, however on the basis of evidence on record, finding is recorded that training was imparted to the employees of Defendant nos.1 and 2.

21. Mr. Mhaispurkar submitted that the interest of 10% has been granted by the lower appellate Court without there-being any relief sought in the plaint with respect to the same. The said contention is without any basis in view of Section 34 of the Code of Civil Procedure, 1908 ("**CPC**"). Section 34 of CPC specifically

¹ (2016) 3 Bombay C.R. 816

contemplates that where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree. The proviso to Section 34 of CPC further provides that in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

22. The reasoning of the appellate Court with respect to granting interest of 10% is to be found in paragraph 40 and same reads as under:

"40. The bank has recovered the amount of bank guarantee along with interest from the plaintiff. The transaction between the parties can be said to be commercial transaction. Considering scope of provisions of Section 34 of the Code of Civil Procedure and taking note of prevailing interest rate of 2008-2009, the Plaintiff is entitled to recover the amount along with interest @ Rs.10% p.a. from the date of filing of the suit till its realisation."

23. Therefore, there is no substance in any of the substantial question of law raised by the Appellants and therefore the Second Appeal is dismissed with costs.

Interim Application No. 19912 of 2022 :

24. The relief in the Interim Application is that the Applicant be allowed to file written statement in the suit. The reason given in the Interim Application is that there was only email communication and as far as letter through registered post which was nearly taking 20 days. Mr. Mhaispurkar submitted that the Appellants be given opportunity to file written statement. In support of said submission, he relied on the judgment of Supreme Court in the matter between **Rajinder Tiwari Vs. Kedar Nath (Deceased) through Legal Representatives and Ors.**².

25. The Applicant no.2 i.e. Appellant no. 2 is Government of Nagaland. It is admitted position that the Government of Nagaland took bank guarantee of Rs.72,50,000/- and the same was encashed. The communication through mobile and telephone is available. Therefore no cogent reasons are given for allowing the Appellants to file written statement at this stage. The position on record clearly show that the suit summons have been served on the Appellants in or about June 2009. In spite of that the Appellants failed to file written statement and even failed to cross-examine the witness of Respondent no. 1.

² (2019) 14 SCC 286

26. In any case, admittedly Plaintiff has delivered two machines to Defendant nos. 1 and 2, the cost of which is Rs. 36,69,846/- which is directed to be paid. Thus no serious prejudice is caused to the Appellants. Therefore, there is no substance in the Interim Application.

Interim Application No. 19909 of 2012 :

27. As the Second Appeal is dismissed nothing survive in the Interim Application seeking stay and same is accordingly dismissed.

BHALCHANDRA
GOPAL DUSANE

(MADHAV J. JAMDAR, J.)

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