

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Sugato Majumdar

CS/254/2007

SKIPPER LIMITED

VS

PUNJAB NATIONAL BANK AND ANR.

For the Plaintiff : Mr. Satadeep Bhattacharyya, Adv.
Mr. Uttam Sharma, Adv.
Ms. Vrinda Kedia, Adv.

Hearing concluded on : 27/02/2024

Judgment on : 05/03/2024

Sugato Majumdar, J.:

The instant suit is filed by the Plaintiff praying for perpetual injunction restraining the Defendant No. 2 from invoking or receiving any payment in respect of the bank guarantee, subject matter of the suit; perpetual injunction restraining the Defendant No. 1 from making any payment to the Defendant No. 2 in respect of the said bank guarantee; mandatory injunction upon the Defendant No. 1 to cancel the said bank guarantee along with other prayers.

The original Plaintiff was M/s Skipper Steel Limited which now M/s Skipper Limited, is engaged any business of manufacture and sale of three legged tubular hybrid towers made of iron. The Defendant No. 2, Bharat Sanchar Nigam Ltd. in short BSNL, required such towers. Accordingly a tender enquiry dated 11/04/2007 for supply of the towers, was issued by the BSNL. The Plaintiff duly submitted its bid. The tender notice contained various terms and conditions. In terms of tender conditions the Plaintiff furnished a bank guarantee which was issued by the original Defendant No. 1, namely, Oriental Bank of Commerce. The later was subsequently merged with the present Defendant No. 1 Punjab National Bank Limited. The bank guarantee was for the sum of Rs.11,22,950/- bearing no.05440030507. Bids were opened on 15th May 2007 and the Plaintiff was a successful bidder. In terms of letter dated 12th July 2007, BSNL intimated the Plaintiff to attend the Price Negotiation Committee meeting. Subsequently, in course of meetings, held by the parties, the Plaintiff was informed by the Defendant No. 2, namely, BSNL ladder cable tray and antenna holders would have to be fixed in the towers, to be supplied by the Plaintiff. This was an additional feature of the said towers which was not included in the tender terms. Tender conditions did not include ladder cable tray and antenna holders. The Plaintiff by letter dated 25th July, 2007 required the bill of materials of Defendant No. 2 to ascertain particulars of the aforesaid imposition of the Defendant no. 2 before taking any definite stand. The Defendant forwarded the Plaintiff a copy of its bill of material. It transpired from the bill of materials that ladder cable tray and the antenna holders, if manufactured in accordance with bill of materials of the Defendant no. 2, would rise up the weight of the towers substantially resulting in additional manufacturing costs. In those circumstances, the offer of the Plaintiff in the form of quoted price which was based on the tender terms, no longer appear to

be apposite. This was communicated by the Plaintiff to the Defendant no. 2 in terms of the letter dated 30th July, 2007.

It is the case of the Plaintiff that the Defendant no. 2 altered the terms and conditions of the tender by including additional specifications of ladder cable tray and antenna holders which did not find place in the notice of tender. The Defendant no. 2 issued an advance purchase order dated 22nd September, 2007. The Defendant no. 2 accepted the Plaintiff's contention that supply of antenna holders are beyond the tender terms, yet insisted upon supplied of these additional items; the Defendant no. 2 also threatened the Plaintiff to invoke the bank guarantee furnished by the Plaintiff. In terms of the advance purchase order the Plaintiff is required to convey its unconditional and unequivocal acceptance and performance security deposit in the prescribed format within specified period failing which the advance purchase order would be treated as cancelled. The advance purchase order read with the Defendant no. 2's bill of materials is not an acceptance of the Plaintiffs bid but is a counter offer by the Defendant no. 2 which the Plaintiff would be required to accept. Ultimately, in terms of letter dated 12th October, 2007, the Plaintiff informed the Defendant no. 2 that the former should not proceed further in the matter and its bid should be treated as cancelled. Consequently, it is requested to the Defendant no.2 that the bank guarantee be returned and/or cancelled. According to the Plaintiff, bank guarantee can be invoked only in certain contingencies as contemplated therein. Therefore, a special equity works in favour of the Plaintiff for cancellation of the bank guarantee. Accordingly, the Plaintiff filed the instant suit praying for perpetual injunction, restraining the Defendant no. 2 from invoking or receiving any payment in respect of the bank guarantee; perpetual injunction restraining the Defendant no. 1 from making any payment to Defendant no. 2 in respect of the bank

guarantee; mandatory injunction upon the Defendant no. 1 to cancel the bank guarantee along with other prayers.

Summons were served upon the Defendants. Defendant no. 1 entered into appearance on 12.08.2008. The Defendant no. 2 did not make any appearance after lapse of 15 years no written statement was filed. Accordingly, the suit was treated as undefended suit.

Oral and documentary evidences are adduced on behalf of the Plaintiff. Tender document is Ext. B. Uncontroverted evidence, in this case is that the Plaintiff made offer pursuant to the tender. The original tender was for 60M TTH Towers. Offer of the Plaintiff was accepted subject to meeting with Price Negotiation Committee. After submission of the bid and acceptance of the offer the Defendant no. 2 added ladder cable tray and antenna holders. Addition of new items demands cost reconstruction and substantially changed the items contemplated in the tender documents. Pleadings and evidence of the Plaintiff, uncontroverted, shows that the parties had *consensus ad idem* in respect of 60M TTH Towers only without ladder cable tray and antenna holders being associated. This is substantial change in the original contract. The original offer got modified. The Plaintiff offered price in respect of certain items namely 60M TTH Towers. New added items demand reconsideration of price as the same was not contemplated in the original contract. It is not a case that the parties decided to or agreed to fall back on the original terms. Once the new terms offered by the Defendant No.2 was not accepted by the Plaintiff there remained no contract. Observations made by the Supreme Court of India in **BSNL v. BPL Mobile Cellular Ltd., [(2008) 13 SCC 597]** are relevant. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express

agreement or by necessary implication which would negate the application of the doctrine of “acceptance sub silentio”. In **Suresh Kumar Wadhwa v. State of M.P., [(2017) 16 SCC 757]** it was observed by the Supreme Court of India:

“**26.** Equally well-settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally “alter” the terms and conditions of the contract and nor they have a right to “add” any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, which adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply with such additional terms/conditions.”

In the instant case, before performance is due, terms were changed and it was refused. So, there was no contract. This being so, the bank guarantee furnished in connection with the tender documents cannot be invoked.

Bank guarantee which is a Ext., is for supply of 60M TTH Towers with SERC design vide Tender No. MM/10-20A/2006-07/60M Towers. The bank guarantee is payable in case, (a) fails or refuses to execute the contract form, if required, or (b) fails or refuses to furnish the performance security, in accordance with the instructions to

bidders. Since, there was no formation of contract performance guarantee lost its significance and furnishing bank guarantee become redundant. Therefore, the bank guarantee cannot be encashed by the Defendant no. 2. Since there is no contract or agreement, encashment of the bank guarantee would be tantamount to unjust enrichment.

In nutshell, the instant suit succeeds.

Let there be a decree mandatory injunction to the Defendant no. 1 to deliver to the Plaintiff the aforesaid bank guarantee bearing no. 05440030507 for an amount of Rs.11,22,950/- dated 07.05.2007 issued by Oriental Bank of Commerce. Till such delivery, let there be injunction restraining the Defendant no. 2 from invoking or encashing the aforesaid bank guarantee and restraining the Defendant no. 1 from making any payment in respect of the bank guarantee.

The instant suit is disposed of along with pending applications, if any.

Let the decree be drawn up.

(Sugato Majumdar, J.)