BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:**31.07.2024**

CORAM:

**THE HONOURABLE MR.JUSTICE S.SOUNTHAR**

**S.A.NO.1811 OF 2003**

The Ganga Nagar Sugar Mills Limited,
(Rajasthan), Jaipur, represented by its
General Manager,
Nehru Sankar Bhavan 4th Floor,
Bhawani Singh Road,
P.B.No.98,
Jaipur -302 001. :Ist Defendant/Ist Respondent/ Appellant

.vs.

1.M/s.Cethar Vessels Limited,
a Limited Company having its
Executive Director,
Tillai Nagar,
Trichy. :Plaintiff/Appellant/Respondent

2.The Canara Bank,
represented by its Branch Manager,
Tiruchirappalli. :Second Defendant/Second Respondent/Respondent

**PRAYER:** Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.13 of 1993, dated 28.02.1997, on the file of Additional District Judge, Tiruchirappalli reversing the judgment and decree made in O.S.No. 58 of 1992, dated 9.11.1992, on the file of Principal Sub-Judge, Tiruchirappalli.

For Appellant :Ms.V.Janaki Devi
for Mr.V.M.Balamohan Thampi

For Respondents 1 and 2 : No appearance

**JUDGMENT**
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This Second Appeal is directed against the judgment and decree made in A.S.No.13 of 1993, dated 28.02.1997, on the file of Additional District Judge, Tiruchirappalli reversing the judgment and decree made in O.S.No.58 of 1992, dated 9.11.1992, on the file of Principal Sub-Judge, Tiruchirappalli.

2.The first defendant in the suit is the appellant. The first respondent herein filed a suit for injunction restraining the first defendant from enforcing the bank guarantee furnished by the second defendant-Bank. The suit was dimissed by the trial Court. Aggrieved by the same, the plaintiff preferred an appeal and the First Appellate Court reversed the findings of the trial Court and allowed the appeal by granting permanent injunction. Aggrieved by the same, the first defendant has come forward by way of this Second Appeal.

3.According to the first respondent/Plaintiff, the plaintiff entered into an agreement with the first defendant for supply of certain specified boilers on certain terms. The Plaintiff submitted his bid for supply of boilers and as per the tender conditions, the plaintiff furnished bank guarantee for a sum of Rs.90,000/- in favour of the first defendant. The offer made by the plaintiff was extended at the request of the first defendant, as they failed to scrutinize the bid and express their acceptance. Subsequently, the first defendant sent a letter to the plaintiff intimating the acceptance of the bid submitted by the plaintiff. Since there was escalation of prices due to the delay in completing the transaction on the part of the first defendant, the plaintiff was not willing to supply the boilers at the original price quoted in his bid. The plaintiff demanded from the first defendant an additional amount and the first defendant sent a reply disputing the escalation of prices and refused to accept the demand for additional amount. It was also claimed by the plaintiff that the first defendant failed to issue a letter of indent and hence, he was not legally bound to fulfil the contract for supply of boilers. It was asserted by the plaintiff that there was no concluded agreement between the plaintiff and first defendant, as the bid submitted by the plaintiff was not accepted by the first defendant when it was in force. It was also claimed that the first defendant did not suffer from any loss and he has not filed any suit for recovery of damages. It was also claimed by it, the inability to act in accordance with the bid conditions was fully justified in law and on facts. It was further claimed by the plaintiff that the first defendant addressed a letter to the second defendant Bank invoking bank guarantee and at this stage, the plaintiff was constrained to fie the suit for the above said reliefs.

4.The first defendant filed a written statement and contended that the bid submitted by the plaintiff was accepted by the first defendant well within the time and before the lapse of offer. Therefore, it was contended by the first defendant that there was a concluded agreement betyween the plaintiff and first defendant for supply of specified boilers on terms and conditions mentioned in the agreement itself. It was specifically claimed by the first defendant that the offer to the plaintiff was in force till 31.10.1991 and hence, its offer was accepted before its lapse. The plaintif did not make any demand revision of fair price before the acceptance of the offer. The allegation in the plaint as if there was no concluded contract between the parties, was denied specifically. It was also claimed by the first defendant that the letter of indent will be issued only after the completion of formalities and plaintiff failed to co-operate for the completiton of formalities. It was also claimed by the first defendant that the question of liability of the other things would not arise in case of invoking bank guarantee. It was also stated that once the bank gurarantee is given and invoked, it has to be honoured and there cannot be any objection for enforcing the bank guarantee. The plaintiff had committed breach of all the conditions given in the bank guarantee. Hence the first defendant was justified in enforcing the bank guarantee. It was also claimed that the bank guarantee is a contract between the first and second defendants and the plaintiff has no right to seek injunction against invoking bank guarantee. On these pleadings, the first defendant sought for dismissal of the suit.

5.The second defendant-bank filed a written statement expressing its willingness to act in accordance with the order passed by the Court.

6.On these pleadings, the parties went for trial. On the side of the plaintiff, one witness was examined as P.W.1 and 9 documents were marked as Ex.A1 to Ex.A9. On behalf of defendants,the first defendant was examined as D.W.1 and 17 documents were marked as Ex.B1 to Ex.B17

7.The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that there was a concluded agreement between the parties and the first defendant was justified in invoking bank guarantee and consequently, dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.13 of 1993, on the fle of District Court, Tiruchirappalli. The First Appellate Court reversed the findings of the trial Court and allowed the appeal only on the ground that the first defendant failed to establish the actual loss sustained by it and hence invoking bank guarantee would amount to unjust enrichment. Aggrieved by the allowing of the appeal by the First Appellate Court, the first defendant has come forward with the present Second Appeal.

8.At the time of admission, this Court formulated the following two substantial questions of law, by order, dated 06.07.2007:

*1.Whether the Lower Appellate Court is right in decreeing the suit on the ground of unjust enrichment in the absence of pleading or proof?*

*2.Whether the non-performance of the contract by the Plaintiff would not confer a right on the appellant to invoke the Bank Guarantee?*

9.The learned counsel for the appellant submitted that the right to invoke bank guarantee is based on the agreement between the parties and the question of unjust enrichment is alien to the right to invoke bank guarantee. In support of her contention, the learned counsel for the appellant relied on the judgment in the case of ***Dwarikesh Sugar Industries Limited .vs. Prem Heavy Engineering Works(P)Limited and another reported in AIR 1997 Supreme Court 2477***.The learned counsel submitted that bid submitted by the plaintiff was accepted by the first defendant when the same was in force and hence, there was a concluded contract between the plaintiff and first defendant for supply of specified boilers by the plaintiff to the first defendant. However, the plaintiff failed to fulfil the obligations under the agreement leading to invoking of bank guarantee by the first defendent. The learned counsel submitted that the First Appellate Court ought not have decreed the suit on the ground that the first defendant failed to establish the actual loss suffered by him and consequently, sought for allowing of the Second Appeal.

10.Though the contesting first respondent is served and the learned counsel has also entered appearance, there is no representation for the first respondent, inspite of several opportunities. It is seen from the records that there was no representation for the first respondent on 23.07.2024, 26.07.2024 and also today.

11.Ex.B6 is the letter written by the plaintiff to the first defendant. A perusal of the same would suggest that the original offer made by the plaintiff was extended till 31.10.1991. Ex.B7 is the letter by the first defendant to the plaintiff, dated 27.09.1991.A perusal of the same would establish that the offer to the plaintiff was accepted by the first defendant on 27.09.1991.Therefore Ex.B6 and Ex.B7 would establish that the offer made to the plaintiff was accepted during its valididty and therefore, there is a concluded contract between the plaintiff and first defendant for supply of specified boilers to the first defendant by the plaintiff. The bank guarantee furnished by the second defendant was marked as Ex.B10. The same would establish the bank guarantee remain in force on 31.3.1992. Ex.B12 is the letter addressed by the first defendant to the second defendant on 10.01.1992 invoking bank guarantee. The above documents would establish that the bank guarantee was invoked by the first defendant, when it was in force. The First Appellate Court allowed the appeal and granted the decree in favour of the plaintiff mainly on the ground that the first defendant failed to establish the damage suffered by it and allowing the first defendant to invoke bank guarantee would amount to unjust enrichment.The learned counsel vehemently contended that the doctrine of unjust enrichment is alien to the cases where the parties are governed by a contract of bank guarantee. In this regard, she relied on the decisison rendered by the Apex Court in **Dwarikesh Sugar Industries Limited Case,** cited supra.

12.In the above mentioned decision, while considering the jurisdiction of the Court to grant injunction in cases involving bank guarantee, the Honourable Apex Court observed as follows:

*''29.....................Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial Court, in its order refusing to grant injunction, the Court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee, the applicability of the principle of undue enrichment has no application.''*

13.The scope of liability of the second defendant to pay the amount under bank guarantee is governed by the terms and conditions of the bank guarantee which is marked as Ex.B10. The relevant clause in the bank guarantee reads as follows:

*''The conditions of this obligation are:*

*1.......................*

*2.If the bidder, having been notified of the acceptance of its bid by the Purchaser during the period of bid validity*

*a) fails or refuses to execute the Contract Form, if required; or*

*b) fails or refuses to furnish the Performance Security and /or Timely Delivery and commissioning Security in accordance with the conditions of the bid documents.*

*We undertake to pay to the buyer upto the above amount upon receipt of its first written demand, without the Project Management Consultant having to substantiates its demand, provided that in its demand the buyer will note that the amount claimed by it is due to it owing to the occurrence of condition or conditions.''*

14.A perusal of the above clause of the bank guarantee would suggest that in case of demand by the first defendant certifying that the plaintiff failed to perform its obligations as mentioned in Clause-2 (a) and (b) and the amount claimed by it was due from the first plaintiff is sufficient. Therefore, the relationship between the first defendant and second defendant is governed by the terms and conditions mentioned in the bank guarantee and the second defendant cannot go beyond the terms of the agreement and investigate whether the amount demanded by the first defendant is correct or not. The law laid down in the above decision would squarely applicable to the facts of the present case in view of the terms and conditions mentioned in Ex.B10. Therefore, the First Appellate Court ought not have gone into the question whether the first defendant has established the actual loss suffered by him and proceeded to hold that invoking bank guarantee would amount to unjust encrichment. Therefore, both the questions of law formulated at the time of admission are answered in favour of the appellant and against the first respondent.

15.In the result, the Second Appeal is allowed by setting aside the judgment and decree of the First Appellate Court and the judgment and decree passed by the trial Court is restored. No costs.

**31.07.2024**

Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn

To

1.The Additional District Judge,
Tiruchirappalli.

2.The Principal Sub-Judge,
Tiruchirappalli.

3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

**S.SOUNTHAR, J.**

vsn

**JUDGMENT MADE IN**
**S.A.NO.1811 OF 2003**

**31.07.2024**