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Court : Delhi

Decided On : Sep-16-1987

Reported in : [1991]70CompCas271(Delhi); 33(1987)DLT237; 1987RLR599

Judge : Yogeshwar Dayal and; G.C. Jain, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 38; [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1; [Indian Contract Act, 1872](#) - Sections 126

Appeal No. : First Appeal No. 64 of 1986

Appellant : Sahibabad Steels Pvt. Ltd.

Respondent : Engineering Projects (India) Ltd. and ors.

Advocate for Pet/Ap. : D.D. Thakur,; S.P. Aggarwal,; E.C. Aggarwal,;

Judgement :

G.C. Jain, J.

(1) This appeal is directed against the judgment of a learned single Judge of this Court dated February 6, 1986 dismissing plaintiff/ appellant's application for grant of temporary injunction.

(2) National Thermal Power Corporation (for short NTPC) had entrusted to Engineering Projects (India) Limited (for short EPI) the turnkey project for setting

up of a Coal Handling Plant for Badarpur Thermal Power Station On January 11, 1984 Epi issued a Letter of Indent to have pretender tie up with M/s. Sahibabad Steels Pvt. Ltd. (for short SSL), the plaintiff, for civil works, structural fabrication and erection work at a lump sum cost of Rs. 3.70 crores. The terms and conditions for this work was to be on back- to-back basis, as agreed between Epi and NTPC. After some negotiations and correspondence Ssl submitted its offer vide its letter dated August 6, 1984. It agreed to execute the said work on a lump sum cost of Rs. 3.89 crores. Its offer was accepted by Epi by its letter dated August 27, 1984. This acceptance was, however, subject to the approval of NTPC. In case the approval was not received, any expenditure incurred by Ssl in the preparatory work was to be on its own account and Epi was to be indemnified against any claim whatsoever. A formal agreement was executed on December 7, 1984. It was made effective from August 27, 1984. Clause 5.0 of this agreement provides :-

'THIS Sub-contract is subject to the approval of Ntpc for SSL's association with Epi for this project. In such an eventuality of not being approved by Ntpc this agreement shall cease to have effect whatsoever and the amounts/moneys drawn by Ssl on account of advance and/or otherwise shall be paid back/refunded to Epi, (3) For the due performance of the agreement the plaintiff was required to furnish a bank guarantee in the sum of Rs. 38,90,000.00 . The performance bank guarantee for the said amount was executed by Indian Overseas Bank In favor of Epi on September 18, 1984.

(4) Epi started executing the work under the contract apparently in the hope that Epi would obtain the requisite approval from NTPC. Epi did make efforts to obtain the approval in term. of clause 5.0 of the agreement. Ntpc, ultimately, by its letter dated February 5, 1985 informed Epi as under :- 'We wish to inform you that we have no objection to your employing M/s. S.S.L. for the purpose of supply of labour and general tools & tackles provided they fulfill all necessary statutory Labour Act requirements.'

(5) It is clear from this letter that Ntpc did not accord approval for the entire civil, engineering and structural works required for the Coal Handling Plant, as was envisaged in the agreement between Epi and SSL. Epi sent a copy of this letter to

Ssl on March 13/15, 1985.

(6) In spite of this information Ssl continued executing some work under the contract. Epi, however, complained that the Ssl was neglecting to execute the work. Ultimately alleging that Ssl had defaulted, breached the terms of the contract and had failed to perform its obligations under the contract, it called upon the Indian Overseas Bank to pay Rs. 38,90,000.00 , the guarantee amount.

(7) Feeling aggrieved Ssl, on September 16, 1985, brought a suit seeking a decree for declaration that there was no contract or agreement between Ssl and Epi and for permanent injunction restraining Epi from encashing the bank guarantee in question and restraining Indian Overseas Bank from paying to Epi the amount of the said guarantee. It was pleaded that the contract with Epi was not a concluded contract. It was subject to approval by NTPC. Ntpc did not accord approval and therefore the contract ceased to have any effect. The contract between Ssl and Epi being invalid the bank guarantee was absolutely without consideration and unenforceable.

(8) In those proceedings Ssl brought an application under Order 39 Rule I of the Code of Civil Procedure seeking temporary injunction in terms of the permanent injunction claimed in the suit. The temporary injunction was claimed on the same allegations. It was also alleged that the balance of convenience was in favor of Ssl and it would suffer irreparable loss and hardship if temporary injunction was not granted.

(9) This application was resisted by EPI. It was averred that the contract between Ssl and Epi was a concluded contract. It was reiterated 'that a valid contract came into existence since not only Ntpc communicated its consent to the association of the plaintiff with the project but also because the plaintiff and the answering defendant continued the work under the agreement and the plaintiff took benefit of the monies under the contract. In these circumstances, the plaintiff cannot be allowed to resile from the obligations and play a fraud on the answering defendant by way of abuse of the process of law.'

(10) Learned single Judge by his order dated February 6, 1986 held that the contract between Epi and Indian Overseas Bank was an independent autonomous one. The efficacy of that contract was not controlled by any other contract between Epi and SSL. The plea that the contract between Epi and Ssl was not a concluded contract but was a contingent contract or was brought about by practicing fraud was extraneous to the contract between the Bank and EPI. There was no plea that the guarantee contract was obtained by practicing fraud. The demand was in terms of the bank guarantee. With these observations the application was dismissed. Feeling aggrieved Ssl had brought this appeal.

(11) Mr. D.D.Thakur, learned counsel for the appellant, submitted that the appellant had a very strong prima facie case and the order of the learned single Judge dismissing his application for temporary injunction was erroneous. It was argued that the agreement between Ssl and Epi was ineffective because it was a contingent contract being subject to the approval by Ntpc which approval was never accorded. Consequently the collateral agreement i.e. the performance guarantee, could not be enforced.

(12) As noticed earlier, the acceptance letter dated August 27, 1984 stated in clear terms that the association of Ssl with Epi was subject to approval by NTPC. Same term was also contained in the agreement dated December 7, 1984. Prima facie, it is clear that the parties did not intend to be bound by the terms of the agreement until its approval was granted by the NTPC. It is not in dispute and is also clear from the letter of Ntpc dated February 5, 1985 that Ntpc has not approved the association of Ssl with Epi for the work under the agreement i.e. the execution of civil works, structural fabrication and erection work on back to back basis. Ntpc had, however, no objection to the employment of Ssl by Epi for the purpose of supply of the labour, general tools and tackles provided Ssl fulfilled all necessary statutory Labour Act requirements. In our view, it does not amount to the approval of the agreement. What is its effect on the enforceability of the performance guarantee

(13) 'A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.' (See Section 126 of the Indian

Contract Act). The contract of guarantee, as is clear from the above definition, involves three parties-a principal debtor, whose liability may be actual or prospective; a creditor, and a third party called surety who promises to discharge the debtor's liability if debtor failed to do so. Surety's liability is collateral. The guarantee, thus envisages two contracts-one between the principal debtor and the creditor and the second between the creditor and the surety. The first is called primary contract and the second the collateral contract. The guarantee, though, has its genesis in the primary contract between the principal debtor and the creditor, yet it is an autonomous and independent contract as held, and in our view, rightly, by the learned single Judge.

(14) We also agree that the surety was not concerned with the contract between the creditor and the principal debtor. He was bound to perform the obligations and pay the amount subject matter of the guarantee in terms of the guarantee. However, in our opinion, it can always be shown to the Court that the guarantee itself was unenforceable or that there was no legal or binding contract of guarantee or that the contract was void. We have carefully examined the decision of the Supreme Court in *United Commercial Bank v. Bank of India & others*, : [1981]3SCR300 and the earlier decision of the learned single Judge in *M/s. Rawla Construction Co. v. Union of India & another*, : AIR1977 Delhi205 . In these cases it was nowhere held that the plea that the guarantee itself was unenforceable was not open. Learned counsel appearing for the respondents could not show us any decision which barred the plea of unenforceability of the guarantee bond. This plea, in our view, could be raised.

(15) Every guarantee, like other simple contracts, must be supported by valuable consideration. Consideration is a necessary element of a binding contract. A promise is not binding as a contract unless it is supported by some consideration. The absence of consideration, in our opinion, would make the guarantee unenforceable.

(16) Para 1 of the performance guarantee reads as under :

'Inconsideration of the Engineering Projects (India) Ltd. (hereinafter called the 'EPI' which expression shall include its successors and assignees) having awarded to

Sahibabad Steel Private Limited (hereinafter referred to as the 'supplier' which expression shall wherever the subject or context so permits include its successors and assignees) a supply contract in terms inter alia, of the Company's letter No. Nil, dated 27th August, 1984 and the General Purchase Conditions of the company and upon the condition of supplier's furnishing security for the performance of the supplier's obligations and/or discharge of the supplier's liability under and/or in connection with the said supply contract up to a sum of Rs. 38,90,000.00 (Rupees thirty eight lakhs ninety thousand only) amount to ten per cent of the total contract value.' (17) A perusal of this para shows that the consideration for the performance guarantee in dispute was the contract awarded by Epi to SSL.

(18) Does this consideration exist in the eye of law Answer to this question depends on the further question whether the agreement between Epi and Ssl is a valid and binding agreement.

(19) A contract is an agreement giving rise to obligations which are enforced or recognised by law. Generally speaking an agreement is made when one party accepts an offer made by the other. In the present case Ssl by its letter dated August 6, 1984 offered to execute civil works, structural fabrication and erection work relating to project in question at a lump sum price of Rs, 3.89 crores. Epi accepted this offer by its letter dated August 27, 1984. However, in 'order to convert a proposal into a promise the acceptance must be absolute and unqualified.' (See Section 7 of the Contract Act). The acceptance by Epi, in our view, was not an unqualified acceptance. It says 'that this Letter of Intent is subject to the approval of the client for your association with us for this project.' The acceptance was thus conditional on the approval of NTPC. Consequently, no concluded contract came into existence till the approval was accorded by NTPC. Similarly, formal agree- ment dated December 7, 1984 was not a concluded contract because it also contained a term that the said contract was subject to approval by NTPC. The approval, as noticed earlier, was not accorded by NTPC. The result is that no Valid or enforceable agreement between Epi and Ssl came into existence. Consequence is that, prima facie, there was no valid consideration for the guarantee in suit

(20) Mr. Jagdeep Kishore, learned counsel appearing for Epi submitted that Ssl, even after having been informed about the non-approval or partial approval by Ntpc, continued to execute the work. Epi on its part asked Ssl to expedite the execution of the work and also made payments. This conduct amounted to waiver of the term regarding the approval by NTPC.

(21) To constitute waiver there must be clear and unequivocal promise or representation or assurance, express or implied, that Epi would not insist on the term regarding approval by NTPC. There was admittedly no express promise or representation or assurance in this behalf. To prove implied promise Epi relied on four letters. First letter is dated April 19, 1985 sent by Epi to SSL. Epi complained that except for earth work, no other activity had been started by Ssl was asked to mobilise resources at-full scale as per the schedule. The second letter is dated May 24, 1985 sent by Epi to SSL. In this letter also the complaint was regarding the slow progress. Ssl was requested to increase resource mobilisation. The third letter was sent by Epi to Ssl on June 29, 1985 rejecting the correctness of the reasons given by Ssl for the delay in execution of the work. It was pointed out that the main reasons were lack of finances, organisation, required man-power, required inputs and resources and lack of seriousness about the site problems. Last letter is dated August 9, 1985 again written by Epi to SSL. In this letter Epi complained that Ssl had neglected and was still neglecting to execute the work: with due diligence and expedition and the progress was far from satisfactory.

(22) It cannot be disputed that these letters had been sent by Epi to Ssl after the receipt of the letter from Ntpc refusing approval though allowing association of Ssl for the purpose of supply of labour, general tools and tackles only. It is also clear from the letters that Epi, inspired of this letter from Ntpc, was requesting Ssl to expedite the execution of the work. This conduct of Epi, however, has to be examined in the light of the letters sent to it by SSL. The first such letter was dated July 29, 1985. Ssl complained that it had been trying to impress upon certain fundamental contractual issues in their various meetings but the same were being side-tracked by EPI. It was further stated that the question of mobilisation of further resources was linked with the fundamental contractual issue, namely, approval of the agreement by the NTPC. Epi was requested to clarify and

regularise the contractual status to enable Ssl to proceed further with the work. The second letter was dated August 21, 1985. In this letter again Epi was informed that the agreement was subject to the approval by NTPC. It was further stated, 'it will thus be observed that in the absence of NTPC's approval and your furnishing us the papers for ostentation of labour license as per NTPC's and statutory requirement, the work had been carried on merely on good faith since no unequivocal contract has come into existence vide clause 5 of the agreement nor the requirement of NTPC's limited approval has been fulfilled'. These letters show that Ssl was insisting on the clarification regarding the approval by Ntpc all this time. It was executing the work pending this clarification in the hope that Epi may obtain approval. There is nothing on the record to show that Bpi clarified the position at any time. In the circumstances, it is difficult to come to any prima facie conclusion that this term had been waived.

(23) The impugned order is a discretionary order. Generally, appellate court would be slow in interfering with such an order. However in the present case, learned single Judge did not take into consideration the question of validity of the contract of guarantee itself which resulted into an error, justifying interference.

(24) In our opinion, there is serious question to be tried in the suit. Material available on the record does not show that the appellant/plaintiff has no prospect of succeeding in its claim for permanent injunction at the trial. The claim is neither frivolous nor vexatious. The balance of convenience is also in favor of the appellant. For the amount paid by Epi there was another bank guarantee which has since been enforced. The interest of the respondent/ defendant will be fully safeguarded by directing the appellant to keep the bank guarantee alive during the operation of the temporary injunction.

(25) For these reasons we accept the appeal, set aside the impugned order and instead grant a temporary injunction restraining the respondent No. 1 from encashing the bank guarantee in question till the disposal of the suit. It is subject to the condition that the appellant would keep the bank guarantee alive during the operation of the temporary injunction. Parties are, however, left to bear their own costs.

(26) It is made clear that the observations made in this judgment are only for the disposal of this appeal and would have no bearing on the final decision in the suit.

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