

B.E. Billimoria and Co. Ltd. Vs. Unit Construction Co. Pvt. Ltd. and anr.

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Court : Kolkata

Decided On : May-12-2010

Judge : Ashim Kumar Banerjee and; Kalidas Mukherjee, JJ.

Acts : Code of Civil Procedure (CPC) - Section 9 - Order 39, Rule 4

Appeal No. : F.M.A. 627 of 2010

Appellant : B.E. Billimoria and Co. Ltd.

Respondent : Unit Construction Co. Pvt. Ltd. and anr.

Advocate for Def. : Abhrajit Mitra,; Jishnu Chowdhury and; Sonia Sharma,

Advocate for Pet/Ap. : Siddhartha Mitra, Sr. Adv.,; S. Chowdhury,; S.S. Bose

Judgement :

1. We have disposed of the other appeal, being FMA 628 of 2010, between the same parties today. The instant appeal relates to an order dated April 12, 2010 whereby the learned District Judge, Alipore, extended an ad interim order without considering the objection filed by the appellant under Order 39 Rule 4 of the Code of Civil Procedure. The learned Judge, however, did not assign any reason. The order impugned is quoted below:

Heard both sides. The suit is transferred to the Ld. 14th Court of Addl. District Judge, Alipore for disposal along with the petition Under Order 39 Rule 4 of C.P.C.

Fix. 12.05.2010 for appearance before the transferee Court.

Interim order stands extended till the date fixed.

2. The parties entered into a contract, which incorporated an Arbitration Clause. The respondents executed bank guarantees as and by way of co-lateral security not only as performance guarantee but also for payment of outstanding sums, if payable by the respondents to the appellant. The appellant, by a letter dated January 5, 2010 appearing at page 131 of the paper book, threatened to invoke the bank guarantees in case the respondents failed to make payment to the subcontractors who were pestering for payments. From the letter it appears that there were some difficulty, the respondents were facing with their sub-contractors with regard to payment of bills.

3. Being aggrieved by the said letter the respondents approached the learned District Judge, Alipore, challenging the authority and propriety of the appellant, encashing the bank guarantee which was furnished by the respondents for some other purpose not related to the subject controversy. The agreement stipulated an Arbitration Clause as well as a forum selection Clause whereby Delhi Courts would have exclusive jurisdiction over the controversy, if any, between the parties under the agreement. The respondents, however, approached the Alipore Court on a different pretext. According to them, the meetings were held between the parties at New Alipore. The letter of threat was received at New Alipore. Hence, the subject controversy arose within the jurisdiction of the Alipore Court and as such forum selection Clause would have no application.

4. The learned District Judge passed an ex parte ad interim order on January 11, 2010 restraining encashment of the bank guarantee by the appellant. Upon receipt of notice, the appellant approached the learned District Judge for vacating the interim order by filing application under Order 39 Rule 4 of the Code of Civil Procedure. The appellant now contends that the learned Judge, without hearing the said application, time to time extended the interim order. Last of such orders was passed on April 12, 2010, which compelled the appellant to approach this Court. We are told the application under Section 9 along with application under Order 39 Rule 4 of the Civil Procedure Code filed by the appellant is fixed for

hearing today before the Court below.

5. Mr. Siddhartha Mitra, learned Senior Counsel, appearing for the appellant, contends that when the ex parte ad interim order was passed the appellant had option either to challenge the said order in appeal or to approach the Court below for vacating the said ex parte ad interim order under Order 39 Rule 4. The appellant availed the second option. Hence, the learned Judge should have disposed of the same at an early date not later than 30 days from the date of passing of the original order. In this regard he relies upon a Supreme Court Decision in the case of A. Venkatasubbiah Naidu v. S. Chellappan and Ors. reported in : (2000) 7 SCC 695.

6. Mr. Mitra further contends that because of the forum selection clause the learned District Judge, Alipore did not have jurisdiction to entertain the said application. He relies upon the decision reported in : AIR 1989 SC 1239 as well as : (2002) 9 SCC 613 in this regard.

7. On merits, Mr. Mitra further contends that the entire litigation was premature. There was no invocation of the bank guarantee by the appellant, the appellant even did not decide to invoke the bank guarantee. The threat contained in the letter dated January 5, 2010 was given by the respondents cautioning them to the extent that in case they did not settle their dispute with sub-contractors they might face such a situation where the bank guarantee might be invoked by the appellant. Hence, the litigation initiated by the respondents was premature.

8. With regard to the order of restraint Mr. Mitra contends that in any event a litigant cannot be restrained by such an order from invoking the bank guarantee as the bank guarantee being an independent contract cannot be questioned in an application under Section 9. Moreover, the bank, being not a party to the litigation, cannot be restrained from adhering to the terms of the bank guarantee. He relies on the following decisions reported in 74 Comp. Cases 192; 1990 (1) CLT 200; : (1996) 1 SCC 735 and : AIR 1996 SC 2268, in this regard.

9. Opposing the appeal Mr. Abhrajit Mitra, learned Counsel appearing for the respondents, contends that the learned Judge, on being prima facie satisfied with

the case made out by the respondents, passed an ex parte ad interim order by making it returnable on the next date. The appellant appeared before the learned Judge and filed written objection to the same and the learned Judge fixed both the applications for hearing today. According to Mr. Mitra, the bank guarantee was given for a different purpose other than the purpose for which the appellant threatened to invoke the same. When such invocation was not in terms of the bank guarantee, such invocation itself is bad and could not have any support of law. He relies on two unreported decisions, the first one in the case of Basic Tele Services Ltd. v. Union of India of a Single Bench of Delhi High Court and the second one in the case of Wires and Cables India Pvt. Ltd. v. Voltamp Transformers Pvt. Ltd. and Anr. of a Single Bench of Gujarat High Court.

10. Mr. Mitra further contends that the ad interim order was passed on January 11, 2010 whereas the present appeal was filed by the appellant on May 4, 2010, hence there was no urgency for which the appellant could approach this Court. Mr. Mitra is also critical about the conduct of the appellant by saying that the way this Court has been approached, is unusual. According to him, the appellant filed a Memorandum of Appeal without being backed by an application for stay and thereafter the respondent was served with a copy of the paper book and the matter was mentioned for hearing of the appeal. Mr. Mitra contends that in the Memorandum of Appeal there was no pleading with regard to the urgency for which this Court is troubled. According to him, the balance of convenience lies in favour of the respondents in having the appeal dismissed coupled with a direction upon the Court below to have expeditious disposal of the Section 9 proceedings. In this regard he has relied upon the decision of this Court reported in : AIR 1988 Cal 25. Mr. Mitra has also referred two decisions one by the Apex Court reported in : (1999) 8 SCC 436 and the other being a Division Bench decision of our Court reported in 2009 (4) CHN 22.

11. We have considered the rival contentions of the parties. We are of the view that the appellant should have come up before us not only against the impugned order but also against the original order too. It is true that the original order was limited till February 12, 2010, which was extended from time to time. However, in fitness of things the said order should have been assailed before us to enable us

to deal with the same. Be that as it may, today when the matter is fixed before the Court below and when the appellant has come up with a limited grievance that their application under Order 39 Rule 4 was not being heard, we feel that the Court below should go into the controversy and decide the matter finally.

12. Mr. Siddhartha Mitra insists that we should vacate the interim order, specially, because of the reason that one of the bank guarantees would be expiring on May 14, 2010. Mr. Abhrajit Mitra, on instruction, undertakes before this Court that such bank guarantee would be kept renewed so that there would not be any further complication in the matter.

13. At this juncture, Mr. Soumitra Dutta, learned Advocate-on-Record for the appellant, on instruction, contends that the appellant has not yet decided to invoke the bank guarantees and in case they do so they would keep the respondents informed at least seven days ahead.

14. In such circumstances there is no point in sending the matter before Court below for being heard afresh.

15. The Title Suit, being T.S. No. 84 of 2010, is disposed of accordingly by treating the same as on day's list by consent of parties.

16. The ad interim order passed on January 11, 2010 is vacated on the undertaking of the respondent, Unit Construction Pvt. Ltd., to keep the bank guarantees renewed from time to time coupled with further undertaking by the appellant to keep the respondents informed about their intention to invoke bank guarantees seven days ahead.

17. We abundantly make it clear that in view of the changed circumstances after concession being made by the parties, the plea of jurisdiction, taken by the appellant with regard to the competency of the Alipore Court, is not gone into by this Court and is kept open in case occasion so arises in future.

18. The appeal is disposed of without any order as to costs.

19. Urgent xerox certified copy of this order, if applied for, be given to the parties, on priority basis.

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