
(2013) 05 DEL CK 0023

In the Delhi High Court

Case No : Regular First Appeal (OS) 6 of 2013 and CM Application 733 of 2013

Axis Bank Limited

APPELLANT

Vs

Videsh Sanchar Nigam Ltd. and Another

RESPONDENT

Date of Decision : 16-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2
Contract Act, 1872 — Section 133

Citation : (2013) 201 DLT 60

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Sandeep Sethi, with Ms. Parul Singh, for the Appellant; Rishi Aggarwalla with Mr. Arnav Kumar and Ms. Manasi, for the Respondent

Judgement

S. Ravindra Bhat, J.—Issue notice. Mr. Rishi Aggarwalla, Advocate accepts notice on behalf of first respondent - Videsh Sanchar Nigam Ltd. (name of which was changed to Tata Communications Ltd.). It is stated that the other respondent, i.e., M/s. Srishti Videocorp Ltd. at whose behest the bank guarantee was issued, is facing winding up proceedings and have been served in the suit. However, at the stage when the suit was decided, it was not represented. In any event, in view of the orders that this Court proposes to make, it is not necessary to hear the said respondent/defendant. Furthermore, no relief was claimed against the said respondent. The defendant - earlier known as UTI Bank Ltd. - had on 20.07.1996 issued a guarantee, the beneficiary of which was the first respondent, i.e., Tata Communications Ltd., limited to the extent of Rs. 4.2 crores. It was issued at the instance of the second respondent, in respect of an agreement between that party and the first respondent, for the use of Intelsat Satellite IS-704 at 66 Degrees East with a guaranteed 36 Mhz bandwidth transponder for ten years effective from 1.4.1995. The plaintiff, i.e., the Tata Communications Ltd. partially invoked the bank guarantee by its letter dated 7.2.1997 (Ex. PW-1/6) to the extent of Rs. 1,62,43,650/- which was honoured by the appellant. It appears that the plaintiff subsequently issued another letter

invoking the balance amount on 12.7.1997 (Ex. PW-1/12). The appellant bank refused to honour its demand. The plaintiff consequently filed the suit.

2. The main defence of the appellant was that there could be no repeated invocation of the bank guarantee. Another defence is such is its not being liable to pay the amount in view of subsequent agreement arrived at between the parties on 31.7.1996 as was also specifically contended in the written statement. The parties went to trial, therefore, on the following issues:-

1. Whether the agreement dated 31.7.1996 entered into between the plaintiff and defendant no. 2 is valid and binding qua defendant no. 1? OPP.

2. Whether the invocation by the plaintiff of the amount of Rs. 1,62,43,650/- qua defendant no. 1, by its letter dated 7th February 1997 addressed to defendant no. 1 extinguishes the full liability of defendant no. 1 under the Bank Guarantee No. 23/96-97 dated 20th July, 1996? OPD.

3. Whether the plaintiff is entitled to receive from defendant nos. 1 and 2, jointly and severally, remaining sums of Rs. 2,57,56,350/- plus interest accruing thereon @ 24% per annum from 12th July, 1997? OPP.

3. The parties led evidence by way of affidavits; the witnesses were also cross-examined. After considering the submissions, the learned Single Judge was of the opinion that the defence of the appellant that repeated or successive invocation was impermissible was not tenable. To arrive at this conclusion he relied upon the ruling reported as Emaar MGF Construction Pvt. Ltd. Vs. Delhi Development Authority and Others, and thereafter proceeded, on the basis of the terms of the guarantee, to straightaway decree the suit.

4. The appellant contends that the learned Single Judge was duty bound to answer and return findings in respect of each issue struck. For this purpose, he relies upon Order-XIV Rule- 2 of the CPC. In addition it is argued that once the appellant (contesting defendant) had disputed its liability, since there were substantial differences between the original agreement which formed the basis of the bank guarantee, i.e., entered into between the two defendants on 4.4.1995 and the subsequent agreement dated 31.7.1996, the bank was entitled to submit that it was not liable in view of Section 133 of the Indian Contract Act.

5. Learned counsel for the respondent/plaintiff submitted that the bank never disputed its liability when it in fact paid up the demand of Rs. 1,62,43,650/-. It was submitted that even the second demand, which was not honoured, was not disputed on this ground but that the bank raised certain other grounds. In view of these circumstances, the learned Single Judge's findings were justified and did not call for any interference.

6. The appellant's written statement, inter alia, disputed its liability contending as follows:-

The said bank guarantee dated 20.7.1996 is neither applicable nor valid in

respect of the said subsequent agreement dated 31.7.1996. The said superseded agreement was not brought to the knowledge of the answering Defendant either by the Plaintiff or by the Defendant No. 2 at any point of time before the filing of the suit. The answering Defendant learnt of the supersession of the agreement dated 4.4.1995 only on perusal of the plaint filed by the Plaintiff. Therefore, there is no contract between the Plaintiff and the Defendants in respect of agreement dated 31.7.1996 entered into between the Plaintiff and the Defendant No. 2.

7. As far as the previous payment towards the earlier demand goes, the bank alleged as follows:-

The Defendant No. 1 submits that it was not liable to pay the said amount to the Plaintiff and the same has been obtained from the Defendant No. 1 fraudulently and by misrepresentation. Therefore, the Defendant No. 1 is entitled to get refund of the said amount from the Plaintiff/Defendant No. 2. The Defendant No. 1 reserves its right to take appropriate steps for recovery of the said amount from the Plaintiff and the Defendant No. 2, as the case may be.

8. Section 133 of the Indian Contract Act reads as follows:-

133. Discharge of surety by variance in terms of contract-Any variance made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

9. The appellant's submissions in this Court's opinion are well founded. The defence that it took in the suit forms the basis of the issues struck by the Court. However, at the time when the impugned judgment was made, the learned Single Judge proceeded to decide only one issue, i.e., whether repeated invocations of bank guarantee was permissible in law. He concluded that such course of action was legal and justified. However, as to whether the appellant's contentions were well founded or untenable, especially when it could avoid its liability in view of the subsequent agreement or whether the subsequent agreement did not bring about any material change in the contractual relationship of the parties, i.e., defendant nos. 1&2 was a matter that had to be decided in view of issue nos. 1&2. The Court did not address itself to those in the impugned judgment.

10. Having regard to the fact that the parties led evidence and apparently arguments were to be addressed on the issue, this Court is of the opinion that the impugned judgment cannot be sustained. It is, therefore, set aside. Parties are directed to appear before the learned Single Judge, according to the roster allocation on 27.05.2013. We request the learned Single Judge to assign expeditious date for the final hearing of the case and decision on all the issues framed during the trial. The appeal is allowed in the above terms. There shall be no order as to costs.