(2017) 09 CAL CK 0027

In the Calcutta High Court

Case No : 54 of 2010

Birla Corporation Limited — APPELLANT

Vs

South Eastern Coalfields Limited & Ors. — RESPONDENT

Date of Decision : 08-09-2017

Acts Referred:

Limitation Act, 1963, Section 14 - Exclusion of time of proceeding bona fide in court without jurisdiction

Citation : (2017) 09 CAL CK 0027

Hon'ble Judges : Arijit Banerjee

Bench : SINGLE BENCH

Advocate : Ranjan Bachawat, Shuvashish Sengupta, Sanjay Ginodia, Manoj Kumar Tiwari, Aarti Goyal (Agarwal)

Judgement

1. The plaintiff has filed the present suit claiming various reliefs but at the time of hearing, has pressed only prayer (d) of the plaint, and in my opinion rightly so, which is a decree for Rs.1,40,52,595/-. The said amount comprises a sum of Rs.48,33,223/- on account of alleged wrongful invocation of a Bank Guarantee by the defendant nos. 1 and 2 furnished in their favour by the plaintiff and interest on the said sum at the rate of 18 per cent per annum from 3 August, 1999 till 8 March, 2010 i.e. from the date when the defendant no. 1 received payment under the Bank Guarantee till the date of filing of the suit.

2. The suit has been heard as an undefended suit in view of the failure of the defendant nos. 1 and 2 to file written statement even within the extended time period. The defendant no. 3 is the Bank issuing the guarantee. No relief is claimed against the defendant no. 3.

3. The material facts of the case as pleaded by the plaintiff are as follows.

4. At all material times, the plaintiff was and still is engaged in, inter alia, the business of manufacture and sale of cement. The plaintiff requires coal for operating its cement manufacturing units.

5. Till October 1998, as per the requirements of the defendant Coal Companies (in short ''the defendants''), the plaintiff lifted coal from them by making cash deposit. By a notice dated 21 October, 1998, the defendant no. 1 issued modified Guidelines for Financial Coverage and Payment for Coal Supplies to Cement Plants with effect from 1 November, 1998 whereby the requirement of cash deposit was replaced with the requirement of furnishing a Bank Guarantee for 100 per cent of the value of the quantity of coal programme in a month. The guidelines provided that if the purchaser failed to make payment for the goods supplied within forty eight hours of presentation of bills, the Bank Guarantee would be invoked.

6. Pursuant to the modified guidelines, the plaintiff furnished a Bank Guarantee for 100 per cent of the quantity of coal programme in one month i.e. Rs.3,42,55,500 whereupon the defendant no. 1 refunded the cash security deposit after adjusting all its claims.

7. On 19 May, 1999, the defendant no. 1 made a demand for Rs.41.05 lakhs on account of 10 per cent premium sought to be imposed by the defendants on the coal supplied by them. Such claim was challenged by all major consumers of coal who obtain supplies from the defendants by filing writ petitions before the Jabalpur High Court. Such writ petitions were dismissed.

8. By a letter dated 7 June, 1999, the defendant no. 1 called upon the plaintiff to pay a sum of Rs.41.05 towards 10 per cent premium for the period 31 March, 1992 till 30 April, 1994 together with interest at the rate of 18.25 per cent. The amount so claimed was subsequently increased to Rs.50,12,790.81/-.

9. In view of the defendants threatening to invoke the Bank Guarantee for Rs.3,42,55,500/-, the plaintiff paid the claim of the defendants amounting to Rs.50,12,790.81/- on 1 July, 1999. Upon such payment, by its letter dated 6 July, 1999, the defendant no. 1 informed the defendant no. 3 to defer encashment of the Bank Guarantee.

10. On 3 August, 1999 the defendant no. 1 invoked the said Bank Guarantee for a sum of Rs.48,33,223/- on account of its alleged claim for interest on the amount of Rs.50,12,790.81/-.

11. In identical circumstances, Gujarat Ambuja Cements Limited filed a writ application in this Court being W.P. No. 1652 of 1999 challenging invocation of the Bank Guarantee by the defendants for recovery interest on the premium. The learned Single Judge allowed the writ petition by a judgment and order dated 17 August, 1999. The appeal preferred by the Coal Companies being APOT No. 672 of 1999 was dismissed by the Hon''ble Division Bench. By a judgment and order dated 14 October, 1999, it was held that the invocation of the Bank Guarantee and consequential appropriation of the proceeds thereof were bad and legal. The Special Leave Petition preferred against the judgment and order of the Hon''ble Division Bench was dismissed.

12. Relying on the decision of Gujarat Ambuja Cements Limited case, the plaintiff filed a writ petition before this Court being W.P. No. 1062 of 2001. By a judgment and order dated 23 August 2001, the learned Single Judge held that the benefit of the judgment in the Gujarat Ambuja Cements Limited case would have to be granted to all persons similarly situated and that the invocation of the Bank Guarantee and consequential appropriation of the proceeds thereof by the defendants was illegal. The learned Judge directed the defendants to refund to the plaintiff the amount of Rs.48,33,223/-. The Coal Companies preferred an appeal against the learned Single Judge''s order. The plaintiff also preferred an appeal to the extent that the learned Single Judge did not direct the Coal Companies to pay interest on the amount to be refunded.

13. Both the said appeals were disposed of by a common judgment and order dated 13 January, 2010 whereby the Hon''ble Division Bench while upholding the case of the plaintiff held, that prima facie it was of the view that such relief could not be granted in writ proceedings. The Hon''ble Court directed the defendants to deposit the sum of Rs.48,33,223/- in a fixed deposit and to keep the original Fixed Deposit Receipt in respect thereof with the Registrar, Original Side of this Hon''ble Court. The Hon''ble Division Bench also granted liberty to the plaintiff to file an appropriate civil suit in respect of its claim within eight weeks from the date of the judgment and order observing that if the plaintiff did so, it would be entitled to the benefit of Section 14 of the Limitation Act.

14. The instant suit has been filed pursuant to such liberty and within the time period specified.

15. The General Manager (Purchase) of the plaintiff company has deposed on its behalf and has been able to prove the statements in the plaint and the plaintiff''s claim to my satisfaction.

16. In any event, the plaintiff''s claim has been adjudicated by this Court in its writ jurisdiction and it has been held that invocation of the Bank Guarantee by the defendants was wrongful. The Bank Guarantee could not be invoked for recovering the alleged claim of the defendants on account of interest on delayed payment of premium. It was on the basis of a concession made on behalf of the plaintiff before the Hon''ble Division Bench, that the issue of refund of the money appropriated by the defendants by invoking the Bank Guarantee was relegated to a civil suit.

17. Apart from the fact that the learned Single Judge and the Hon''ble Division Bench in the writ proceedings found the invocation of the Bank Guarantee to be wrongful, I have considered the facts of the case and applied my mind independently. I have no doubt that the invocation of the Bank Guarantee cannot be sustained and accordingly the appropriation of the proceeds of the Bank Guarantee to the extent indicated above was illegal. The Bank Guarantee was furnished as security for value of the coal to be supplied by the defendants to the plaintiff and in my opinion, could not be invoked for recovering any alleged claim

of the defendants on account of premium and far less, interest on delayed payment of premium. Further, the claim for interest is in the nature of a claim for damages. Till adjudication of the question of liability and quantum by a competent Court, the defendants could not seek to recover such claim unilaterally by encashing the Bank Guarantee. In this connection, one may refer to the well-known decision of the Hon''ble Apex Court in the Union of India vs. Raman Iron Foundry reported in (1974) 2 SCC 231 and also to the decision of this Court in Shri Surendra Kumar Ray Chowdhury vs. The Collector of Calcutta & Ors., (1985) 1 CLJ 332.

18. In view of the aforesaid this suit succeeds in principle. There will be a decree for Rs.48,33,223/- in favour of the plaintiff against the defendant nos. 1 and 2. However, I think 18 per cent per annum is too high a rate of interest. Given the present market scenario and having regard to the rate of interest generally applicable to commercial transactions presently, I direct the defendant nos. 1 and 2 to pay interest on the decreetal amount of Rs.48,33,223/- at the rate of 12 per cent per annum from 3 August, 1999 till 8 March, 2010. The plaintiff shall also be entitled to interest pendente lite at the rate of 12 per cent per annum, i.e. from the date of institution of the suit till the date of judgment and decree. The plaintiff shall also be entitled to interest at the rate of 12 per cent per annum from the date of the judgment till the date of payment of the decreetal dues since the plaintiff''s claim arises out of a commercial transaction.

19. The Registrar, Original Side is directed to encash the Fixed Deposit Receipt held by him and make over the proceeds thereof to the plaintiff within two weeks from the date of communication of this judgment to him in pro tanto satisfaction of the plaintiff''s decreetal dues. Any balance dues would be recoverable by the plaintiff from the defendant nos. 1 and 2.

20. C.S. No. 54 of 2010 is accordingly disposed of. Let the decree be drawn up expeditiously.

21. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance with necessary formalities.

