

(2005) 06 AP CK 0069

In the Andhra Pradesh High Court

Case No : CCCA No's. 4 and 117 of 2001

Shaik Muneeruddin

APPELLANT

Vs

Karnataka Power Corporation Limited and Another

RESPONDENT

Date of Decision : 22-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34

Citation : AIR 2005 AP 498 : (2005) 5 ALD 832 : (2005) 6 ALT 685 : (2006) 3 BC 54 : (2006) 2 CTLJ 55

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : S. Malla Rao, in CCC No. 4 of 2001 and Vilas V. Afzulpurkar, in CCCA No. 117 of 2001, for the Appellant; S. Malla Rao, in CCCA No. 117 of 2001, Vilas V. Afzulpurkar, in CCCA No. 4 of 2001, E. Ajay Reddy, in CCCA No. 4 and for Respondent No. 1 in CCCA No. 117 of 2001., for the Respondent

Judgement

V. Eswaraiah, J.—The appellant in CCCA No. 117 of 2001 is the plaintiff in the suit filed by him in O.S. No.718 of 1991 on the file of the II-Additional Senior Civil Judge, City Civil Court, Hyderabad and the appellant in C.C.C.A. No. 4 of 2001 is the second defendant. The parties herein are referred to as they are arrayed in the suit.

2. The plaintiff filed the suit for recovery of Rs. 3,85,500/- with future interest at the rate of 18% per annum from the date of the suit till the date of realization from the first defendant bank. The contractor was impleaded as second defendant as per the orders in C.R.P. No. 2633 of 1993 dated 26-7-1994. The second defendant entered into an agreement with the plaintiff-Karnataka State Power Corporation Limited on 6-2-1988 for purchase and lifting the coal mill rejects from Raichur Thermal Power Station Coal Mill Reject Yard. The second defendant agreed to purchase the coal mill rejects at the rate of Rs. 175/- per Metric Tonne for a period of one year. As per the contract awarded to the second defendant, he has to collect the coal mill rejects at Raichur Thermal Power Station, Shaktinagar lying in the coal rejects yard on as is where is basis. The

approximate readily available quantity of coal mill rejects is 5,000 Metric Tones and 60 Metric Tonnes per day. As per the terms and conditions of the tender, the contractor has to deposit a sum of Rs. 5,00,000/- towards the security with the plaintiff Corporation immediately after the acceptance of the tender and start lifting the readily available coal rejects. From out of the security deposit, Rs. 2,00,000/- has to be deposited before executing agreement in the form of F.D.R., and the remaining Rs. 3,00,000/- by way of bank guarantee issued by any nationalized bank. The security deposit so deposited shall be held by the plaintiff Corporation till the end of the contract and returned to the contractor within 45 days from the date of completion of the work and satisfactory fulfilment of the conditions of the contract. Accordingly, the second defendant furnished bank guarantee No. 2/1988 dated 5-2-1988 for a sum of Rs. 3,00,000/- towards security deposit issued by the first defendant bank. The first defendant bank accepted the said bank guarantee in lieu of cash deposit required from the second defendant contractor for the due fulfillment by him of the terms and conditions of the tender for the purchase of coal mill rejects at Raichur Thermal Power Station, Shaktinagar and letter of intent dated 30-1-1988 issued by the defendant bank for purchase of the coal mill rejects at Raichur Thermal Power Station during the period commencing from 6-2-1988 and ending on 5-2-1989 or the extended period if any. The first defendant bank also undertook to pay to the plaintiff Corporation the said amount not exceeding Rs. 3,00,000/- against any loss or damage caused to or suffered or would be caused to or suffered by the plaintiff Corporation by reason of any breach of the said tender for the purchase of coal mill rejects of any term or condition of the said tender. The first defendant bank undertook to pay the said amount due and payable under the guarantee without any demur merely on a demand from the plaintiff Corporation, stating that the amount claimed is due by way of loss or damage caused to or suffered or would be caused to or suffered by the Corporation by reason of any breach of the said tender or any of the terms and conditions contained in the said tender or by reason of the said tender failure to perform the said tender. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under the said bank guarantee. It is further agreed that the said bank guarantee will be in force till all the dues of the Corporation under or by virtue of the said tender have been fully paid and its claims satisfied or discharged or till 23-3-1989 of the Corporation certified that the terms and conditions of the said tender have been fully and properly carried out by the second defendant contractor.

3. It is stated that since the contractor has failed to comply with the contract within the stipulated period, guarantee was extended till 12-5-1989 from 23-3-1989. The contractor has failed to complete the work within the extended period also and therefore, the plaintiff Corporation gave a telex message on 13-12-1989 to the defendant bank to extend the bank guarantee time till 31-3-1990 and if the bank guarantee is not extended within 31-12-1989, the bank guarantee of Rs. 3,00,000/- given towards the security deposit may be

credited to the account of the plaintiff Corporation. As the Head Office of the bank did not accept to extend the bank guarantee period upto 31-3-1990, the plaintiff Corporation requested the bank to credit the amount of Rs. 3,00,000/- in its account by the telex messages dated 13-12-1989 and 27-12-1989 i.e., within the validity period of bank guarantee. Though the bank guarantee was invoked, the said amount was not credited. In the meanwhile, the second defendant contractor has filed a suit in O.S. No. 112 of 1990 on the file of the Vacation Judge, Raichur and obtained ex parte injunction, restraining the plaintiff Corporation from encashing the bank guarantee. The said suit was later transferred to the Court of Munsif at Raichur. The said injunction was made absolute therefore, the bank could not pay the amount covered by the said bank guarantee. Accordingly, the plaintiff filed the said suit on 12-8-1991 for recovery of bank guarantee amount of Rs. 3,00,000/- with subsequent interest at the rate of 18% per annum i.e., for a sum of Rs. 3,85,500/- and future interest.

4. Separate written statements have been filed by the first defendant bank and the second defendant contractor. It is stated by the first defendant bank that as the contractor filed the suit in O.S. No. 112 of 1990 on the file of the District Munsif, Raichur and obtained interim injunction against the plaintiff not to invoke the bank guarantee and the said interim injunction was later made absolute and in view of the said embargo of the injunction order obtained by the contractor, the plaintiff is not entitled to claim the said amount and interest, therefore, the suit filed for recovery of the bank guarantee is not maintainable.

5. The second defendant filed a separate written statement, stating that the plaintiff has not established that any damage has been caused or suffered by it by reason of breach of terms and conditions of the contract and he has been agitating that he has not committed any breach of terms and conditions mentioned in the agreement. According to Term No. 2 of the agreement, the plaintiff has a right to claim the amount by way of damage or loss suffered by it by reason of breach of any of the terms and conditions contained in the said contract and unless it is so established, the plaintiff is not entitled to ask for the amount under bank guarantee No. 2 of 1988. The plaintiff has not sustained any damage or loss and therefore the bank guarantee amount is not liable to be encashed. It is further stated that for any breach of the terms and conditions, the penalty to the extent of 5% of the cost of uncleared coal mill reject can only be levied and collected, but the plaintiff cannot encash the bank guarantee.

6. On the aforesaid pleadings, the issues that have been considered by the trial Court are as to (i) whether the plaintiff is entitled to the suit claim and (ii) to what relief.

7. The trial Court based on the oral and documentary evidence held that the plaintiff is entitled to recover the suit amount, but not entitled to any interest as prayed for in the suit and accordingly, decreed the suit partly for an amount of Rs. 3,00,000/- alone.

8. Aggrieved by the said judgment and decree of the trial Court, the contractor filed C.C.C.A. No. 4 of 2001 to set aside the judgment and decree of the trial Court in decreeing the suit even for an amount of Rs. 3,00,000/-, contending that as per Clauses 27 and 28 of Ex.B2 if the second defendant failed to lift the quantities accumulated and available till the end of the period of one year of the contract, then only, he is liable to be penalized to the extent of 5% of the cost of the uncleared coal on intimation by the Divisional Engineer of the plaintiff, but in the instant case, no damages or penalties have been levied and therefore, the plaintiff is not entitled to encash the said bank guarantee. It is further, stated that in the absence of any loss or damage caused to or suffered by the plaintiff, the plaintiff is not entitled to encash the said bank guarantee of Rs. 3,00,000/-.

9. The plaintiff Corporation filed C.C.C.A. No. 117 of 2001 insofar as the judgment and decree went against it in not awarding the interest as prayed for in the suit, contending that the first defendant bank acted in connivance and collusion with the second defendant contractor and withheld the bank guarantee amount contrary to the terms of the bank guarantee and therefore, the bank is liable to pay interest to the plaintiff. It is further contended that the bank guarantee would not contain any clause as to the interest and it is provided that without demur the bank would pay the amount covered by the bank guarantee when the demand is made by the plaintiff. If the beneficiary of a bank guarantee having made a demand and the first defendant bank having avoided or delayed the payment against the said demand, the bank cannot escape the liability to pay interest to the beneficiary. It is further stated that even under the Interest Act as well as u/s 34 of the Civil Procedure Code, the plaintiff is entitled to the interest and therefore, the judgment and decree of the trial Court needs to be modified by awarding interest.

10. The points that arises for consideration are as to:

(i) Whether the plaintiff is entitled to invoke the bank guarantee in the absence of any determination of loss or damage caused to it?

(ii) Whether the plaintiff is entitled to the interest on the delayed payment of the bank guarantee amount?

11. A careful reading of the bank guarantee which is marked as Ex.A3 goes to show that the bank guarantee for a sum of Rs. 3,00,000/- was given towards the security deposit in lieu of the cash deposit for the fulfilment of the terms and conditions of the tender for purchase of the coal mill rejects at Raichur Thermal Power Station by the contractor. The said bank guarantee is not only given towards the security deposit for the fulfilment of the terms and conditions of the said contract, but also authorizes the plaintiff Corporation to recover the existing bank guarantee of Rs. 3,00,000/- towards any loss or damage caused to or suffered or would be caused to or suffered by the Corporation by reason of any breach of the said tender for the purchase of coal mill rejects of any term or condition of the said tender. The bank guarantee further provides that the bank

has undertaken to pay the said amount without any demur. The plaintiff Corporation is entitled to invoke the bank guarantee for two reasons. The bank guarantee can be invoke for the reason of non-fulfilment of the terms and conditions in the tender by the contractor and also for the reason on the demand from the Corporation towards the loss or damage suffered by it. The demand made by the plaintiff is not towards the loss or damage suffered by it, but because of the reason of non-fulfilment of the terms and conditions of the contract. Therefore, I am of the opinion that the trial Court rightly held based on the oral and documentary evidence particularly Exs.A11 to A22 that the contractor has failed to fulfil the terms of the contract. The perusal of the aforesaid documents goes to show that as against the full quantity requires to be lifted, he has lifted about half of the quantity alone and there was a shortfall in respect of about half of the quantity. Therefore, it cannot be said that the contractor did not fail to fulfil the terms and conditions of the contract. The second defendant contractor mainly relied on Clauses 27 and 28 of the contract in support of his contention that the plaintiff is entitled to the damages of 5% of the cost of the uncleared coal mill rejects towards penalty. There are two parts of the terms and conditions of the tender. Clause 5 of first part relating to information of the tenders for the purchase of coal mill rejects required to be given security deposit of Rs. 5,00,000/-, out of which, the contractor is entitled to give bank guarantee for a sum of Rs. 3,00,000/- towards security deposit for the fulfilment of the terms and conditions of the contract, which is liable to be returned only after 45 days from the date of completion of the work and satisfactory fulfilment of the terms and conditions of the contract.

12. The question that arises for consideration as to whether the contractor has fulfilled the terms and conditions of the contract. As already stated, the trial Court clearly held that the contractor has failed to fulfil the terms and conditions of the contract, therefore, the plaintiff is entitled to invoke the bank guarantee. The second part of the tender notification relates to the conditions of the contract. Clause 27 of the second part relates to the penalty clause. The contractor is liable for penalty if he fails to lift the coal mill rejects continuously for a period of one month and the contract is liable to be terminated by the plaintiff after issuance of the notice and such termination shall be without prejudice to the recovery of the loss that may be incurred by the Corporation due to the termination of the contract. As per Clause 27(b) if the contractor fails to lift the quantities accumulated and available till the end of the period (i.e., one year from the date of starting of work) and does not fulfil any of the terms and conditions, he shall be liable to be penalized to the extent of 5% of the cost of uncleared coal mill rejects calculated as per his quoted rates. The quantity available at the end of the period shall be intimated by the Divisional Engineer (Fuels) to the contractor. Any dispute regarding the quantity shall not be entertained. As per Clause 28, the plaintiff Corporation has got right to recover losses and penalties as indicated in Clause 27 from the EMD., and security deposit or any sum payable to the contractor by the Corporation towards any of

his other contracts and shall also has right to proceed against him in any manner deemed fit for recovery of the balance amount. Therefore, I am of the opinion that the question of levying any penalty or recovery of damages as contemplated under Clauses 27 and 28 did not arise at all in the instant case as the plaintiff Corporation did not terminate any contract or levied any penalty for recovery of the said damages to invoke the bank guarantee the bank guarantee was invoked for the first reason for non-fulfilment of the terms and conditions of the contract alone. Therefore, I am of the opinion that the plaintiff is entitled to invoke the bank guarantee and the first defendant bank is not entitled to withheld or delay the payment of bank guarantee.

13. Insofar as the question of interest is concerned, it is to be noticed that though the bank guarantee was invoked on 27-12-1989, which was received by the first defendant bank on 29-12-1989 and the bank guarantee was subsisting till 31-12-1989, the bank has failed to pay the bank guarantee amount, but in the meanwhile, the second defendant contractor filed a suit and obtained injunction restraining the bank from paying the bank guarantee amount and the said injunction was vacated by order dated 14-1-1992 in Miscellaneous Appeal No. 2 of 1991 on the file of the Raichur Court which was marked as Ex.A1 and therefore, I am of the opinion that the bank is not liable to pay any interest on the said bank guarantee amount upto the month of January, 1992. Even after vacating the injunction, the bank has not paid the said bank guarantee amount, therefore, I am of the opinion that the bank is liable to pay the interest from February, 1992 till its payment.

14. Prior to filing of the suit by the plaintiff Corporation, there was an order of the Court, restraining the bank not to pay the bank guarantee amount and therefore, the bank is not liable to pay the interest claimed by the plaintiff, but the bank is liable to pay interest during the pendency of the suit from February 1992 and till realisation as per Section 34 of the Civil Procedure Code. It is stated that the lending rate of interest of the Nationalised Banks is 9% per annum to the commercial transactions and therefore, I am of the opinion that the first defendant bank is liable to pay interest at the rate of 9% per annum on the said sum of Rs. 3,00,000/- from 1-2-1992 till the payment of the said amount of Rs. 3,00,000/-.

15. Accordingly, C.C.C.A. No. 4 of 2001 filed by the second defendant is dismissed and C.C.C.A. No. 117 of 2001 filed by the plaintiff Corporation is allowed, modifying the judgment and decree of the trial Court awarding interest on the bank guarantee amount of Rs. 3,00,000/- at the rate of 9% per annum from 1-2-1992 till the date of payment by the first defendant bank to the plaintiff. No order as to costs.