

PATNA HIGH COURT

Dena Bank

Vs

Fertilizer Corpn. of India Ltd

A.F.O.D. No. 55 of 1982

(S.B. Sinha, J.)

23.11.1989

JUDGMENT

S.B. Sinha, J.

1. This first appeal arises out of a judgment and decree dated 23.12.1981 passed by Shri D. Kisku, Subordinate Judge, Ist Court, Dhanbad in Money Suit No. 28 of 1979, whereby and whereunder the said learned Court decreed the plaintiffs-respondents suit.
2. The facts of the case lie in a very narrow compass.
3. The plaintiff invited tender for painting of equipments, structures, piping, flooring, foundation etc. for Sindiri Modernisation Project in Sindiri. M/s Bharat Painters, a partnership firm submitted tender. The said Bharat Painters was impleaded in the suit as defendant No. 2. The defendant-respondents No. 3 to 7 were the partners of the firm of defendant No. 2. In relation to the aforementioned contract, a bank guarantee was furnished by the defendant No. 2 on 14.11.1977 for a sum of Rs. 88,000/- in favor of the plaintiff. In pursuance whereof, the plaintiff-corporation advanced 10 per cent value of the order to be received by the defendant No. 2 and an initial advance to the extent of Rs. 88,000/- was made by the plaintiff to the defendant No. 2 against the aforementioned bank guarantee on 16.11.1977.
4. The plaintiff alleged that the said defendant No. 2 and/or its partners have committed various acts of omissions and commissions and as a result whereof the said bank guarantee has become enforceable.
5. The plaintiff issued a notice upon the appellant-Bank to pay the amount covered by the aforementioned bank guarantee but the appellant failed and/or neglected to do so. The appellant, therefore, filed the aforementioned suit for recovery of a sum of Rs. 1,05,505.00 being the principal of Rs. 88,000 aforementioned together with the interest thereupon. The learned Court below, by reason of the impugned judgment has passed a decree only as against the appellant for a sum of Rs. 88,000/-, and, further directed that the plaintiffs would be entitled to interest at the rate of 6 per cent per annum from 16.11.1977 till the date of payment of that sum to the

defendant No. 2 to 30th March, 1979 for withholding the money of the plaintiffs.

6. Mr. A.N. Deo, the learned counsel appearing on behalf of the appellant, firstly, submitted that the suit was barred by limitation. According to the learned counsel, the bank guarantee had been made on 14.11.1977, and the suit could have been filed only within a period of six months during which the aforementioned bank guarantee was in force.

7. It is, however, admitted that the said bank guarantee was revalidated till 1.9.1979 whereas the suit was filed on 30th March, 1979.

8. Mr. Deo, further submitted that in any event, suffered loss or damages by the plaintiff was a condition precedent for enforcing the bank guarantee, and, as in the instant case, the plaintiff did not allege that it has suffered any loss or damage because of any acts of omissions and commissions on the part of defendant No. 2 and/or its partners; the said bank guarantee could not have been enforced as against the appellant.

9. Mr. V.M.K. Sinha, the learned counsel appearing on behalf of the respondent, on the other hand, drew my attention to Clause 22 of the aforementioned bank guarantee dated 14.11.1977 which was marked as Ext. 1.

10. The learned counsel further submitted that in terms of Clauses 1 and 2 of the aforementioned deed of bank guarantee dated 14.11.1977, the appellant bound itself to pay the amount guaranteed to the plaintiff without any demur whatsoever, and, in this view of the matter, the objection raised by Sri Deo has no substance.

11. In view of the rival contentions of the parties, the following questions arise for consideration of this appeal :-

(A) Whether the suit filed by the plaintiff-respondent was barred by limitation ?

(B) Whether the suit was maintainable at the instance of the plaintiff although, it did not plead and prove any breach of contract on the part of the defendant No. 2 ?

12. Re question-A.

Clause 12 of the aforementioned bank guarantee reads as follows :-

"Notwithstanding anything, stated above, the Bank liability to the Corporation under the deed is limited to Rs. 88,000/- (Rupees Eightyeight Thousand) only and the Guarantee will remain valid up to the 14th May, 1978 provided that unless a suit or action to enforce a claim under this deed is filed by the Corporation against the Bank within three months of the said date of expiry of this deed as provided in clause thereof, all the rights of the Corporation under this deed will be forfeited and the Bank shall be relieved and discharged from all liabilities under this deed."

13. As noticed hereinbefore, the bank guarantee was revalidated till 1.11.1979 (Ext. 1/A). In

terms of Clause 12 of the aforementioned bank guarantee, suit could have been filed by the plaintiff within three months from the aforementioned date. In this view of the matter, as the suit was instituted on 30th March, 1979, the same was obviously within the period stipulated under Clause 12 of the aforementioned deed of bank guarantee, and as such the same cannot be said to be barred under the law of limitation.

14. Re contention-B.

Sections 124 and 126 of the Contract Act read as follows :-

Section 124

"A contract by which one party promises to save the other from loss caused to him by the conduct of the promiser himself, or by the conduct of any other person, is called a "contract of indemnity".

Section 126

"A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called "surety"; the person in respect of whose default the guarantee is given is called the "Principal debtor", and the person to whom the guarantee is called the "creditor". A guarantee may be either oral or written."

15. A contract of guarantee as is well known is a tripartite agreement. It is also now well known that in a commercial transaction of this nature, the principal always pay advance sum on the basis of guarantee furnished by the bankers. The bankers are bound in terms of the covenants of the said deed of guarantee to perform its part of agreement without any demur whatsoever.

16. Clauses 1 and 2 of the aforementioned deed of bank guarantee dated 14.11.1977 (Ext. 1/A) reads as follows :-

Clause-I

"In pursuance of the said agreement and in consideration of the premises the Bank hereby unconditionally guarantee to the Corporation proper utilisation by the Company for the fabrication and/or painting of equipments, structures, piping, floors, foundations as specified in the said order of the said advance payment and agrees and undertakes subject to the provisions of Clause 10 hereof that if the Company shall fail to utilise the said advance payment made by the Corporation for the fabrication and/or painting of equipments, structures, piping, floors and foundations of the items specified in the said order in the manner provided in the order and then the Bank shall on demand pay from time to time to the Corporation on account of the losses and damages suffered by the Corporation and/or costs, charges and expenses incurred by the Corporation by reasons of failure on the part of the Company to fulfil their obligations as aforesaid and further agrees and undertakes to indemnify the Corporation against all losses and damages which may be suffered by the Corporation and/or costs, charges and expenses which may be

incurred by the Corporation by reason of such failure on the part of the Company to fulfill their obligations as aforesaid.

"Clause-2"

"The Bank hereby agrees that the decision of the Corporation as to failure on the part of the Company to fulfill their obligations as aforesaid and/or as to the amount payable by the Bank to the Corporation hereunder shall be final, conclusive and binding on the Bank."

From a perusal of the aforementioned terms and conditions and covenants which were agreed to by and between the parties to the contract, it is evident that the Bank was required to pay the amount in question without any demur whatsoever.

17. In view of unequivocal undertaking on the part of the appellant-Bank to pay the amount of guarantee as and when it was called upon to do so without any demur whatsoever the same disentitled the appellant to raise a contention that no breach of contract was committed by the contractor namely defendant No. 2.

18. In this connection reference may be made in *Prasanjit Mohatha v. The United Commercial Bank*¹, and in *Taxmaco Ltd. v. State Bank of India*²,

19. In this view of matter, in my opinion, there is no merit in this appeal, which is dismissed accordingly. However, in the facts and circumstances of the case, there will be no order as to costs.

Appeal dismissed.

Cases Referred.

¹ AIR 1979 Pat 151

² AIR 1979 Cal 44