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Delhi High Court

Case No: I.A. 8096/91 in S. No. 1984/91

M/s. Seemax Construction (P) Ltd.		APPELLANT
	Vs	
State Bank of India and another		RESPONDENT

Date of Decision: Dec. 12, 1991

Citation: AIR 1992 Delhi 197

Hon'ble Judges: Y.K. Sabharwal, J

Bench: Single Bench

Advocate: Mr. Vinay Bhasin, for the Appellant; Mr. Arun Jaitley and Ms. F.M. Kapur, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. In the suit plaintiff has sought a decree declaring that two letters dated 3rd July 1991 issued by defendant No. 2 invoking the bank guarantees mentioned in the said letters are illegal, inoperative and void. plaintiff has also sought a decree for permanent injunction against defendant No. I State Bank of India from making payment to defendant No. 2 of Rs. 5 lakhs and Rs. 4,38,000/ -being the amounts of the two bank guarantees. The plaintiff has further prayed that defendant No. 2 shall be restrained from receiving the said amounts from defendant No. 1. By this application filed under 0. 39, Rr. 1 and 2 read with S. 151, C.P.C. plaintiff prays that pending the decision of the suit defendant No. 1 be restrained from making payments and defendant No. 2 be restrained from receiving the said payments of the said bank guarantees. Briefly, the facts pleaded in the plain t are as under:-

2. The plaintiff is a private limited company engaged in the construction of civil works. Defendant No. 2 by notice advertised for pre-qualification of bidders for construction of a complex at Bikaner. The bid of the plaintiff being the lowest was accepted. Communication of the award of the contract was sent by defendant No. 2 to plaintiff by telegram dated 14-8-90 received by plaintiff on 16th August, 1990. As

per the terms and conditions of the bid documents the bidders were required to deposit the earnest money of Rs. 1,50,000/- along with the tender. The plaintiff deposited that amount. As per the other terms of the bid document the success ful bidders bid security was to be discharged upon the bidder''s executing a contract and furnishing the performance guarantee. The plaintiff was required to furnish the performance guarantee in the sum of Rs. 5 lakhs within 15 days after the supplier''s receipt of notification of the award of the contract. The plaintiff by its letter dated 22nd August 1990 wrote to defendant No. 2 to release the earnest money of Rs. 1,50,0001 - as bid of the plaintiff was accepted in view of the terms of the bid document. In response to that letter defendant No. 2 by letter dated 31st August 1990 required the plaintiff to submit the performance security so as to enable defendant No. 2 to release the earnest money. Defendant No. 2 also called upon the plaintiff to visit the office of defendant No. 2 at Pune to sign the main contract agreement. With letter dated 6th September 1990 defendant No. 2 sent a pro forma of performance security of Rs. 5 lakhs and also required the plaintiff to sign the agreement. The. plaintiff got a performance guarantee prepared for a sum of Rs. 5 lakhs from defendant No. I on 30th October 1990. The said guarantee was valid up to 16th February 1992. The plaintiff, however, did not handover the guarantee to defendant No. 2 as agreement between the parties was not executed till then. It was a pre-condition of the terms agreed between plaintiff and defendant No. 2 that on execution of the agreement the plaintiff w as required to furnish a performance guarantee for Rs. 5 lakhs. The plaintiff wanted that the agreement should be signed simultaneously along with the handing over of the performance, guarantee. The Managing Director of, the plaintiff company visited the office of defendant No. 2 at Pune on 5th November 1990. In the meeting held on 5th November 1990 the agreement which was prepared by defendant No. 2 was finalised and the plaintiff signed the same on 5th November 1990 itself. Defendant No. 2, however, did not sign the said agreement and informed the plaintiff that they would be signing it but each and every page is to be signed by the concerned officer and that would take some time and, as such, defendant No. 2 would send copy of the agreement to the plaintiff in due course. On the said representations of defendant, No. 2, the plaintiff was made to handover the performance guarantee of Rs. 5 lakhs. The performance guarantee could have been made operative and effective only when defendant No. 2 had also signed the agreement and not otherwise. After handing over the performance guarantee the plaintiff found substantial change in the attitude of defendant No. 2 which started creating hurdles in the smooth functioning of the plaintiff in. carrying out its project. Number of bills of the plaintiff were unnecessarily delayed. Number of objections were raised on the work being done by the plaintiff. Defendant No. 2 did not send the copy of the signed agreement in spite of the fact that the plaintiff had signed the same on 5th November 1990. On or about Ist/2nd April 1991 the plaintiff received from defendant No. 2 an unsigned copy of the agreement requiring the plaintiff to sign the same. In this agreement defendant No. 2 substantially changed the terms of the finalised agreement to the

detriment of the plaintiff. plaintiff immediately pointed out that after lapse of five months defendant No. 2 could not unilaterally alter the terms of the agreement and insisted that the agreement which was signed by the plaintiff on 5th November 1990 should be executed and implemented. Since the plaintiff refused to sign the revised agreement the officials of defendant No. 2 got offended and started creating obstacles in execution of the work as well as in releasing the payments of the bills of the plaintiff. Defendant No. 2 committed fraud on the plaintiff and fraudulently procured the performance guarantee dated 30th October 1990 after assuring the plaintiff that agreement as signed by plaintiff on 5th November 1990 would also be signed by defendant No. 2 and implemented in to taking advantage of the fact that the plaintiff had already handed over the performance guarantee to defendant No. 2 on 5th November 1990, defendant No. 2 started threatening the plaintiff that it would invoke the said performance guarantee in case the plaintiff does not sign the revised agreement on dotted lines. Since the revised agreement was totally prejudicially to the interest of the plaintiff, it refused to succumb to the pressurizing tactics of defendant No. 2. Defendant No. 2 fraudulently invoked the performance guarantee by letter dated 3-7-91 which was received by defendant No. I on 10th July 1991. plaintiff came to know about the invocation of the said guarantee from the letter dated 10-7-91 received by it from defendant No. 1. The invocation letter is not in accordance with the terms of the performance guarantee and is inoperative and defendant No. I cannot make the payment of the amount of performance guarantee to defendant No. 2. Statement in the letter of invocation that the plaintiff has become defaulter under the terms of the contract is totally false as defendant No. 2 was aware that no contract had been executed between the plaintiff and defendant No. 2 Assuming that the plaintiff was required to complete the work within 12 months from the date of telegram dated 14th August 1990, still, as on 3rd July 1991, the plaintiff could not be a defaulter as there was still further time left for completion of the work. The bank guarantee had been obtained by defendant No. 2 by fraud and the invocation of the bank guarantee had been fraudulently made and the invocation was also not in terms of the bank guarantee. The bank was, accordingly, not liable to honour the said bank guarantee.

3. The facts as noticed herein before relate to furnishing of bank guarantee of Rs. 5 lakhs pertaining to work at Bikaner. The plaintiff has pleaded that apart from the said Performance guarantee it had also submitted another performance guarantee for a sum of Rs. 4,38,000/ - issued by defendant No. I in respect of another contract awarded at Shri Ganganagar (Rajasthan). The plaintiff says that as defendant No., 2 was hostile towards the plaintiff on account of, plaintiff not accepting the revised agreement in respect of Bikaner work and with a view to harm the plaintiff and further pressurize it, defendant No. 2 also invoked the bank guarantee of Rs.4,38,000/- on fraudulent, flimsy and fabricated grounds. It has also been pleaded that the cause of action for filing the suit arose on 11 -7-91 when plaintiff was informed by the bank by letter dated 10-7-91 that the defendant No. 2 had invoked

the bank guarantees. The plaintiff says that as the bank guarantees were issued by defendant No. I bank at Delhi and defendant No. 2 had invoked the bank guarantee in Delhi and the bank is threatening to make the payments of the- bank guarantees in Delhi , Therefore, this Court has jurisdiction to entertain this suit.

4. Defendant No. I has not appeared. Defendant No. 2 has, however, strongly opposed the application and has filed a detailed reply raising various objections. It has been, inter alia, pleaded that there are two separate contracts between plaintiff and defendant No., 2 which were entered into on different dates, for different projects, for different sites and in regard to each of the said contracts performance guarantee had been furnished by defendant No. I to defendant No. 2, One project is located at Shri Ganga Nagar and the, other at Bikaner and one suit is not maintainable. It has also been pleaded that suit has been filed without complying with the mandatory requirement of notice prescribed under S. 101 of the Multi State Cooperative Act, 1984. Defendant No. 2 further pleads that plaintiff has suppressed the vital fact from this court that bid document contains a clause prescribing that until a formal agreement is prepared and executed the bid together with a written acceptance thereof shall constitute a binding contract between the parties together with all the general and special conditions of contract, specifications, schedule of quantities and prices, appendix, drawings detailed in the specifications and instructions to bidder etc. According to defendant No. 2 drawing up of a formal contract is only a matter of procedure and has no real consequence to the Bikaner project as the same is totally covered. by the bid documents. The other facts said to have been suppressed is that notwithstanding the non-execution of the formal contract plaintiff has commenced the work and had been paid large sum from time to time aggregating about Rs. 9 to Rs. 10 lakhs for the Bikaner Project. The plea is that at the time of taking. charge of the site, commencing work and raising bills and particularly receiving payments the plaintiff never objected on account of lack of formal contract. Regarding Shri Ganganagar Project it has been pleaded that plaintiff should have completed the work by September 1990 whereas he had not still completed the said work and was thereby guilty of delay in execution of the work. It has, also been pleaded that the plaintiff had drawn the excess amount. Regarding the Bikaner project it has been pleaded that the plaintiff should have finished substantial amount of work as the work had to be completed within 12 months which expired in August 1991, the entire value of the project was Rs. 156 lakhs whereas the running bills submitted by the plaintiff were of Rs. I I lakhs only and thus the extent of the work which had been carried on by the plaintiff was clear. The plaintiff is: said to be entirely responsible for delay caused in execution of the Bikaner project. The objection is raised regarding the territorial jurisdiction of this court on the ground that as the pre bid document relating to Bikaner project the jurisdiction was of courts at Pune and for Shri Ganganagar project, -as per the agreement, the courts at Jaipur exclusively had the jurisdiction. Regarding the bank guarantee it is pleaded that the same were unconditional and the amount was

payable without any demur or argument. The invocation is said to be in terms of the bank guarantee. The plaintiff is said to have committed fraud on defendant No. 2 by abandoning the work of Shri Ganganagar project after receiving Rs. 77 lakhs and Bikaner project after having received about Rs. 10 lakhs. It has also been pleaded that projects are being funded by the World Bank and European Economic Community and the defaults of the plaintiff has caused problems to defendant No. 2.

5. Defendant No. 2 has further pleaded that the plaintiff had on 7th June, 1991 instituted in Court at Bikaner a suit seeking, inter alia, permanent injunction in respect of encashment of bank guarantee of Rs. 5 lakhs relating to Bikaner project and has suppressed from this court the fact of the filing of the said suit. plaintiff has also hot disclosed that in the suit at Bikaner he had filed an application for grant of interim stay and no order had been passed in the matter pending at Bikaner. Similarly, plaintiff had filed a suit in the Munsif court at Shri Ganganagar seeking injunction in regard to encashment of bank guarantee of Rs. 4,38,000/- relating to Shri Gangahagar project. In the said suit too, no orders were passed granting interim relief in favor of the plaintiff. In the reply it has been pleaded that those suits are still pending.

6. In so far as injunction relating to bank guarantee dated 24th October, 1989 in respect of Shri Ganganagar project for Rs. 4,38,000/ - the plaintiff has not given any facts in the plaint stating how the plaintiff is entitled to ''an injunction restraining invocation of the said guarantee. No facts about fraud have been given. It has also not been pleaded or shown how the letter of invocation is not in terms of the guarantee. The plaintiff has only made a passing reference in the plaint about the relief relating to the guarantee of Shri Ganganagar project. Learned counsel for the plaintiff did not seriously press relief in respect of the said guarantee.

7. The plaintiff has not disputed that, as noticed above, it had filed one suit in the court at Bikaner and the other suit in the court at Shri Ganganagar. In both the suits decree for permanent injunction were sought by the plaintiff. Defendant No. 2 has placed on record the copies of plaints of the said two suits. In suit filed at Bikaner the prayer of the plaintiff, inter alia, is as under:

"A decree for permanent injunction be passed restraining defendant from - invoking/ encashing the bank guarantee No. 432 dated 30th October,1990 for Rs. 5 lakhs issued by the State Bank of India, Friends Colony, New Delhi. "

8. In suit filed at Shri Ganganagar the plaintiff has prayed for decree of permanent injunction, to restrain defendant from encashing the bank guarantee of Rs. 4,38,000/ -. In both the suits plaintiff had also filed applications under 0. 39, Rr. I and 2 read with S. 151, C.P.C. for grant of interim injunction restraining the encashment of the bank guarantees. It is also not disputed that no orders were made on the said applications and when the present suit was filed both the suits as also the

applications for grant of interim injunction were pending. It is not disputed that the said two suits were withdrawn by the plaintiff about -three months after the institution of the present suit. The present suit was filed in July 1991 whereas the said suits were withdrawn in October 1991. The plaint of suit filed at Bikaner shows that the plaintiff has, inter alia, made a grievance that defendant No. 2 herein was trying to get the clauses in the agreement changed though plaintiff had already signed the agreement. In the said suit it has also been pleaded that the plaintiff was not agreeable for any amendment in the agreement which had been signed by the ''plaintiff on 5th November 1990 and that the defendant is bent upon to invoke the bank guarantee of Rs. 5 lakhs.

9. In the plaint of the present suit or in this application the plaintiff has not made any reference to the filing of the aforesaid two suits. Mr. Jaitley contends that though even on merits the plaintiff has no case and is not entitled to an order restraining encashment of bank guarantee but without going into the merits the application deserves rejection in view of suppression of material facts about the filing of the earlier two suits.

10. The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court. Reference may be made to decision in The King v. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensingion, 1917 (1) KBD 486 where the court refused a writ of prohibition without going into the merits because of suppression of material facts by the applicant. The legal position in our country is also no different. (See : Charanji Lal v. Financial Commissioner, Haryana, Chandigarh AIR 1978 P & H 326. Reference may also be made to a decision of the Supreme Court in Udai Chand Vs. Shankar Lal and Others, . In the said decision the Supreme Court revoked the order granting special leave and held that there was a misstatement of material fact and that amounted to serious misrepresentation. The principles applicable are same whether it is a case of misstatement of a material fact or suppression of material fact.

11. I have already noticed herein before the prayers made in the two earlier suits filed by the plaintiff as also the pleas taken in the plaint filed in court at Bikaner and the pleas taken in the present suit. Mr. Bhasin, learned counsel for plaintiff, submits that the two suits filed earlier were based on different cause of action whereas the present suit is based on a different cause of action and as such the filing of the said suits was not a material fact requiring disclosure and that being so there is -no suppression of material fact from this Hon''ble Court. Counsel contends that it is one

thing to say that it would have been desirable to disclose the filing of the earlier suits and it is altogether different to say that there was obligation on the part of the plaintiff to make a disclosure of the filing of the said suits. In so far as the present suit is concerned, Mr. Bhasin contends that, if at all, the present case falls in the former category. I do not agree. The contention that the filing of the said two earlier suits was not a material fact is misconceived. Briefly, the case set up in the plaint of the present suit as also in the plaint filed in Bikaner court is same, namely, defendant No. 2 was pressurizing the plaintiff to sign the altered agreement and was taking advantage of the fact that plaintiff had handed over the bank guarantee of Rs. 5 lakhs to defendant No. 2 before signing of agreement by defendant No. 2. The other point of distinction pointed out by learned counsel for the plaintiff that the earlier suit was based on threat of invocation of the bank guarantee, whereas the present suit was based'' on the issue of letter of invocation is not material when the plea in both suits is almost similar and relief claimed is same. The plaintiff has not made full, complete and honest disclosure of the material facts. Further point of distinction that in the earlier suit bank was not a party whereas in the present suit the bank is a party is also of no consequence.

12. The tendency of the litigants to approach different courts to somehow or the other obtain interim orders without full disclosure of the earlier judicial proceedings and without full disclosure of all material facts is on constant increase and it is necessary for due administration of justice to reiterate the legal proposition that such a person may be refused a hearing- on merits. As the plaintiff, as noticed above, has suppressed material facts from this court, I would dismiss this application without going into the merits.

13. For the reasons stated above, the application is dismissed with costs quantified as Rs. 3,000 / -.

14. Application dismissed.