

OCD-2

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA  
COMMERCIAL DIVISION  
ORIGINAL SIDE

CS-COM/244/2024  
[Old No. CS/42/2021]

ZILLION INFRAPROJECTS PVT LTD  
-Vs-  
SASHASTRA SEEMA BAL (SSB) AND ANR

BEFORE:  
The Hon'ble JUSTICE KRISHNA RAO  
Date : November 25, 2024.

Appearance :  
Mr. Dhruba Ghosh, Sr. Adv.  
Mr. Soumen Das, Adv.

Mr. Altamash Alim, Adv.  
...for the plaintiff

Mr. Arik Banerjee, Adv.  
Mr. Jit Ray, Adv.  
Ms. Bishalaxmi Ghosh, Adv.  
...for the defendant no. 2

The Court: Mr. Dhruba Ghosh, learned Senior Counsel, is appearing for the plaintiff.

Mr. Arik Banerjee, learned counsel, is appearing for the defendant no.2.

The matter was fixed on 15<sup>th</sup> July, 2024 for framing of issues and on the said date, both parties have filed their suggested issues. On receipt of the copy and the suggested issues of the plaintiff, learned counsel for the defendant no. 2 has raised objection with regard to suggested issues no. 1. Accordingly the matter is taken up for hearing today.

The suggested issues no. 1 of the plaintiff reads as follows:

“1. Was the invocation of Bank Guarantees by the Defendant No.2 in violation of the terms and conditions of the agreement made between the Plaintiff and the Defendant No.2?”

Learned counsel for the defendant no. 2 submits that the plaintiff has not made any averment in the plaint that invocation of bank guarantee was in violation of the terms and conditions of the agreement and as such the defendant no. 2 could not get an opportunity to deal with the contention raised by the plaintiff.

Counsel for the defendant no. 2 submits that there is no pleading in the plaint with regard to invocation of the bank guarantee by the defendant no.2 in violation of the terms and conditions of the agreement and as such no issue can be framed. Counsel for the defendant no. 2 further submits that even the plaintiff has not prayed for any declaration that the invocation of the bank guarantee by the defendant no. 2 is in violation of the terms and conditions of the agreement and as such no issue can be framed as suggested by the plaintiff.

In support of the submission, learned counsel for the defendant no. 2 has relied upon the judgment of privy council reported in 1950 in the case of **KANDA AND OTHERS VS. WAGHU** dated 6<sup>th</sup> December, 1949 and submitted that if the question is not raised in the pleadings, no issue can be framed.

The defendant no. 2 has further relied upon the judgment in the case of **BACHHAJ NAHAR VS. NILIMA MANDAL AND ORS** reported in **AIR 2009, Supreme Court 1103** and submitted that the object of issue is

to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. He submits that in the present case the plaintiff has not made any averment or pleadings and as such the defendant could not get an opportunity to deal with the contention raised by the plaintiff.

Per Contra, learned counsel for the plaintiff submits that the plaintiff in paragraph 37 and 38 of the plaint has categorically stated that the invocation of the bank guarantee was contrary to the letter dated 21<sup>st</sup> July, 2017 issued by the defendant no. 2 which clearly stated that the subject agreement was extended till dated 31<sup>st</sup> December, 2017. Relying upon paragraph 38 of the plaint, the learned counsel for the plaintiff submits that it is categorically mentioned that the plaintiff protested against the said encashment of bank guarantee by letter dated 31<sup>st</sup> August, 2017 and explained that the act of the defendant no. 2 is contrary to all principle of law and the agreement between them.

Counsel for the plaintiff submits that in reply to paragraph 37 and 38 of the plaint, the defendant in paragraph 14 of the written statement has denied the contention of the plaintiff and as such, at this stage, the defendant cannot say that the plaintiff has not pleaded with regard to the invocation of the bank guarantee contrary to the agreement.

Counsel for the plaintiff submits that the judgments relied by the defendant no. 2 are not applicable in the present case as in both the cases there was no pleading with regard to the issue which learned Court had framed and in one of the case, the learned appellate court has framed the additional issues without the pleadings and thus, Hon'ble Court has

held the without the pleading issues cannot be framed but in the present case the plaintiff has categorically pleaded in paragraphs 37 and 38 of the plaint and as such the issue raised by the plaintiff being suggested issue no. 1 is required to be framed for proper adjudication of the suit filed by the plaintiff. The counsel for the plaintiff has further submits that on the basis of the said pleadings in paragraphs 37 and 38 of the plaintiff, the plaintiff has made the claim in paragraph 54 clause 10 which reads as follows :-

S. No.	PARTICULARS	AMOUNT
10	Debited For Payment against BG Encashments-Annexure-11	51,659,930.

Counsel for the plaintiff further submits that in paragraph 54 the plaintiff has raised the total claim accordingly, in prayer (a) of the plaint, the plaintiff has prayed for decree of Rs. 36,10,56,796/-.

Heard the learned counsel for the respective parties. Perused the materials on record and the judgments relied by the defendant no.2.

Order XIV Rule 1 of the Code of Civil Procedure reads as follows:

**“Rule 1: Framing of issues.** (1) *Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*

(2) *Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.*

*(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*

*(4) Issues are of two kinds:*

*(a) issues of fact,*

*(b) issues of law.*

*(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.*

*(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”*

The plaintiff has made averment in the plaint in paragraph 37 and 38 in the plaint which reads as follows :

*“37. The plaintiff states that the invocation of the said Bank Guarantees were contrary to letter dated 21/07/2017 issued by the Defendant No. 2 which clearly states that the subject Agreement was extended till 31/12/2017. The plaintiff further states that the validity of the said Bank Guarantee were extended and further states that there were no need to extend the Bank Guarantee since the amount available with the Defendant No. 2 is more than the required amount equal to unrecovered mobilization advance, there was no need to extend the Bank Guarantee mentioned in the subject.*

*38. That the Plaintiff protested against the said encashment of the said Bank Guarantees vide their letter dated 31/08/2017 and explained that the said act of the*

*Defendant No. 2 is contrary to all principles of law and the agreement between them.”*

The defendant has filed written statement along with counterclaim by dealing with paragraphs 37 and 38 in paragraph 14 which reads as follows:

*“14. With reference to paragraphs 37 to 47 of the said plaint save and except what are matters of record and may appear therefrom all other allegations are denied and disputed by the defendant No. 2. It is denied that the invocation of the bank guarantees were in contravention to the letter dated 21.07.2017 and/or terms of the tender. It is denied that the validity of the bank guarantees did not need to be extended. It is denied that the amount available with the defendant no. 2 is more than the required amount equal to the unrecovered mobilization advance. It is denied that encashment of bank guarantees were in violation of the principles of law and agreement between the parties. It is denied that the show cause notice issued by the defendant no 2 was illegal malafide or arbitrary. It is submitted that the plaintiff was not entitled to continue work at the site. It is submitted that the reasons provided by the plaintiff for the delay in executing the works were sham and were put forward to hide its own incompetency and deficiencies. It is denied that the plaintiff was provided time upto 1.03.2018 to complete the works. It is denied that till date the defendant no 2 has failed to deal with the contentions of the plaintiff. It is denied that the representatives of defendant no 2 failed to draw up minutes when both sides met. It is submitted that the letter dated 13.10.2017 contained false and wrong facts and is accordingly denied. It is denied that any sum of money was*

*due and payable to the plaintiff from the defendant no 2. On the contrary, monies are due and payable by the plaintiff to the defendant No. 2 as will appear from the counter claim.”*

In paragraph 37 and 38 the plaintiff has categorically stated that the invocation of the bank guarantee was contrary to the letter dated 21<sup>st</sup> July 2017 issued by the defendant no. 2 which clearly states that the subject agreement was extended till 31<sup>st</sup> December, 2017. In paragraph 38, the plaintiff has further stated that the plaintiff protested against the encashment of the guarantee by letter dated 31<sup>st</sup> August, 2017 and explained the act of the defendant no. 2 which was contrary of principle of law and the agreement between them. Taking into consideration of these two paragraphs, the plaintiff has made his claim with respect of Bank Guarantee in Clause 10 of paragraph 54 for an amount of Rs. 5,16,59,930/-. In paragraph 54, the plaintiff has made several claims for total amount of Rs. 32,10,56,796/-.

In the judgments relied by the defendant no.2 in the case of KANDA AND OTHERS VS. WAGHU (supra) the fact of the case is that at the appellate stage, the appellate Court has framed additional issues and subsequently when the order was challenged, it was held that there was no pleadings and as such, the Hon'ble Court has overruled the same on the ground that without the pleading no issue can be framed. Similarly, in the case of BACHHAJ NAHAR VS. NILIMA MANDAL AND ORS (supra) also the Hon'ble Supreme Court held that there was no prayer in support of the claim and as such the Hon'ble Supreme Court held where there is no prayer for a particular relief and no pleadings to support such a relief, if

the consent considers and grants such relief, it will read to miscarriage of justice. In the present case the plaintiff has categorically made averment in paragraphs 37 and 38 of the plaint and the defendant no.2 has dealt with the said paragraphs in paragraph 14 of the written statement and as such this Court found that the plaintiff has made a statement that the invocation of the bank guarantee by the defendant No. 2 is in violation of the terms and conditions of the agreement. The claim of Bank Guarantee's made in paragraph 54, clause 10 of the plaint. Thus, the objection raised by defendant no. 2 is not sustained.

Accordingly after hearing the parties, perusing the pleadings and the suggested issues of the parties, the following issues are framed :-

**:- I S S U E S :-**

1. Was the invocation of Bank Guarantees by the Defendant No.2 in violation of the terms and conditions of the agreement made between the Plaintiff and the Defendant No.2?
2. Is the termination of contract at the instance of the Defendant No.2 illegal, arbitrary and with mala fide intention?
3. Whether the Defendant No.2 failed and/or neglected to release the payment to the Plaintiff in spite of receiving payment from the Defendant No.1 against the R.A. Bills?
4. Whether the Defendants have failed and/or neglected to issue Form No. V to obtain Labour Licence from the concerned authority within the stipulated time as mentioned in the Agreement?

5. Is the counter claim of the Defendant No.2 for a sum of Rs.9,68,00,000/- as against the Plaintiff barred by law?
6. Whether the plaintiff in its present form can maintain the suit in accordance with law?
7. Whether the plaintiff has committed breach of its obligations under the agreement dated March 13, 2015 entered into for 'construction of residential building for 20<sup>th</sup> battalion-Sashastra Seema Bal (SSB) at Sitamarhi in the State of Bihar?
8. Whether the defendant No.2 has acted in breach of its obligation under the said agreement on March 13, 2015?
9. Whether the plaintiff has made out any case in support of their allegations against the defendant no.2 of acting in the breach of its obligations under the agreement of March 13, 2015?
10. Whether the defendant no.2 was liable to make payment to the plaintiff only after receiving the corresponding payment from the defendant no.1 as per clause no.21 of the LOI dated 19.01.2015 which is part of the agreement dated 13.03.2015?
11. Whether the plaintiff has able to make considerable progress in the work inspite of extensions being granted till 20<sup>th</sup> June, 2017 by the defendant no.2 on 4<sup>th</sup> April, 2017?
12. Whether the plaintiff is entitled to a decree for a sum of Rs.36,10,56,796/- as pleaded in paragraphs 54 and 55 of the plaint?
13. Whether the plaintiff is entitled to any other decree?

14. Whether the defendant no.2 is entitled to make counter claim on account of the risk and cost of the plaintiff for their failure to complete the work?
15. Whether the defendant no.2 is entitled to a counter claim as detailed in paragraph 22 of the written statement for a sum of Rs.9.68 crores against the plaintiff?
16. Whether the suit of the plaintiff is barred by limitation?

It is found from the record before framing of issues, on the prayer of the learned counsel for the respective parties, Commissioner was appointed for examination of the witnesses on commission but at the time commission, the Commissioner pointed out that no issues has been framed. Accordingly the parties have mentioned the matter before this Court and now this Court has framed issues.

In view of the above, the Commissioner is directed to complete examination of witnesses within three months from date.

The Commissioner is directed to file report on 28<sup>th</sup> February, 2025.

(KRISHNA RAO, J.)