HIGH COURT OF GUJARAT

ADANI EXPORTS LIMITED
Versus
HINDUSTAN ORGANIC CHEMICALS

Date of Decision: 06 September 2000

Citation: 2000 LawSuit(Guj) 696

Hon'ble Judges: H H Mehta

Eq. Citations: 2000 3 GLR 2759, 2000 3 GLH 620, 2001 3 GCD 2334

Case Type: Appeal From Order

Case No: 287 of 2000

Subject: Civil, Contract

Acts Referred:
Code Of Civil Procedure, 1908 Or 39R 2, Sec 104, Or 39R 1, Or 43R 1(r)
Contract Act, 1872 Sec 14, Sec 17

Final Decision: Appeal allowed

Advocates: Nanavati Associates, S B Vakil

Cases Cited in (+): 7
Cases Referred in (+): 4

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[1] This is an appeal under Sec.104 of the Civil Procedure Code read with Order 43 Rule 1(r) of the Civil Procedure Code challenging an order dt. 31st July, 2000 passed below Notice of Motion Ex.6 in Civil Suit No. 2971 of 2000 by learned Auxi. Chamber Judge, City Civil Court, Ahmedabad (who will be referred to hereinafter as the learned Judge of the trial court). When this appeal was taken up for hearing at admission stage, both the parties submitted to this court that this appeal be taken up for final hearing as if it is already admitted, and therefore, at the request of both the parties, this appeal is finally heard and decided and disposed of at admission stage.

[2] Here in this appeal, appellant is a plaintiff, while respondent nos. 1 and 2 are defendant nos. 1 and 2 respectively in Civil Suit No. 2971 of 2000 which is pending on the file of learned Judge of the trial court, and therefore, for the sake of convenience,

parties will be referred to hereinafter as the plaintiff, defendant no.1 and defendant no.2 respectively at appropriate place.

[3] The facts leading to this present appeal in a nutshell are as follows:-

The defendant no.1 obtained a piece of land situated at Uran in the State of Maharashtra from Jawaharlal Nehru Port Trust (in short " JNPT ") on lease for the purpose of constructing and installing storage tank for liquid Cargo, known as "Tank Farm Project" (in short "TFP"). The said work was partly performed by the defendant no.1 and the defendant no.1 could not complete the project, and therefore, defendant no.1 invited Tenders to transfer the liability of the aforesaid TFP on JNPT.

In response to the invitation of Tenders, plaintiff received Tender from defendant no.1 on 28th October, 1999. Plaintiff filled in the particulars in the Tender, signed and then submitted it to defendant no.1 under its covering letter dt. 29th November, 1999. As it was one of the terms and conditions of the Tender, that the tenderer must pay Rs.100 Lacs by Demand Draft or Rs.200 Lacs by way of Bank Guarantee in favour of M/s. Hindustan Organic Chemicals Ltd. (i.e. defendant no.1) (In short "HOCL") by any Scheduled Bank, and therefore, the plaintiff submitted its tender under its covering letter dt. 29th November, 1999 along with a Bank Guarantee dt. 19th November, 1999 issued by defendant no.2, in favour of defendant no.1. Thereafter, there was an exchange of letters in connection with Tender in between the plaintiff and defendant no.1 inter se. As it appears from record that offer made by plaintiff vide its letter dt. 29th November, 1999, was valid for the period upto 15th January, 2000. From record, it also appears that for the first time, the defendant no.1 addressed a letter dt. 12th January, 2000 to plaintiff with a request to extend validity of offer of plaintiff for a period upto 31st March, 2000. In reply to said letter dt. 12th January, 2000 of defendant no.1, plaintiff by its letter dt. 25th January, 2000 extended the validity period of its offer for the period upto 31st May, 2000. Thereafter, defendant no.1 wrote a letter dt. 13th March, 2000 to plaintiff inviting plaintiff for negotiations with defendant no.1 at Bombay on 18th March, 2000. Accordingly a Joint Meeting of plaintiff's officers and defendant no.1's officers was held at Bombay on 18th March, 2000. It is pertinent to note that Minutes of that Meeting held at Bombay on 18th March, 2000 were not drawn either by plaintiff or by defendant no.1. In continuation of negotiations made by Officers of Plaintiff and Defendant No.1 in that Joint Meeting held on 18th March, 2000, plaintiff by its letter dt. 21st March, 2000 modified its earlier offer dt. 29th November, 1999 and put its new offer by increasing the bid price by a figure of Rs.25 Lacs extra for TFP. Thereafter, the defendant no.1 wrote a letter dt. 23rd March, 2000 to plaintiff, in continuation of Meeting held at Bombay

on 18th March, 2000. In that letter dt. 23rd March, 2000, defendant no.1 invited plaintiff to put an offer with regard to two additional liabilities that have accrued/not mentioned in the Tender. That invitation to put offer was for-

(1) "Land lease rentals due by HOCL upto March, 2000 .....1.47 crores",;

And

(2) "Notional dues towards Minimum Guaranteed Throughput (MGT) for five months i.e. for the period from November, 1999 to March, 2000..... 0.47 crorers".

By that letter dt. 23rd February, 2000, defendant no.1 also requested plaintiff to discuss with regard to invitation to offer for aforesaid two additional liabilities with the Chairman of the plaintiff and send offer to defendant no.1. That means, the earlier offer put by plaintiff was not accepted by the defendant no.1, till 23rd March, 2000. Thereafter, plaintiff wrote and sent by FAX, a letter dt. 01st April, 2000 to defendant no.1 wherein plaintiff did not agree for invitation to offer for Land lease rentals due by HOCL upto March, 2000 which was for 1.47 corers. The plaintiff in its letter dt. 01st April, 2000 referred this item of Rs.1.47 corers in third Para of said letter. The plaintiff informed the defendant no.2 that this amount (Rs.1.47 corers) has not been mentioned anywhere in the Tender document and there is no reason for AEL (Plaintiff) agreeing to pay for the land lease rentals due by HOCL to JNPT for a period upto March, 2000. As per pen-ultimate para of letter dt. 01st April, 2000 of the plaintiff addressed to defendant no.1, plaintiff agreed to put its offer for "Notional dues towards Minimum Guaranteed Throughput (MGT) for five months for .... Rs. .047 corers", and therefore, the plaintiff modified its earlier latest offer put under its letter dt. 21st March, 2000 by increasing the bid price by a figure of Rs. 0.47 corers. Thereafter, the plaintiff wrote a letter dt. 20th April, 2000 (which is very important letter to decide this appeal) to defendant no.1, wherein plaintiff again modified its earlier latest offer put by it under its letter dt. 01st Aril, 2000 addressed to the defendant no.1 and that modification was with regard to following two new conditions-

(A) all contingent liabilities related to JNPT authority may be settled by defendant no.1 giving plaintiff "No Due Certificate" from JNPT before transfer of assets;

And

(B) the dues of private parties which are mentioned in Tender, Section 7 - M/s. CME Industries Ltd., M/s. AFCON, M/s. Dalal Consultants and M/s. Srinivas Plates and Structurals Co. Ltd. will be settled by plaintiff and other dues, if any, not mentioned in Tender will be settled by defendant no.1.

[4] The plaintiff made it clear in last Para of said letter dt. April, 20, 2000 and requested defendant no.1 to consider the offer put in that very letter i.e. letter dt. 20th April, 2000 treating it as plaintiff's final offer on or before 31st May, 2000 with a specific further offer that if defendant no.1 will fail to consider that final offer before 31st May, 2000, then that final offer will stand as cancelled.

[5] Looking to this correspondence upto 20th April, 2000, any of the offers were not accepted by defendant no.1 and plaintiff modified its earlier first offer dt. 29th November, 1999 from time to time and ultimately, plaintiff put its last final offer by its letter dt. 20th April, 2000. It is interesting to note that defendant no.1 did not reply to that letter dt. 20th April, 2000 of plaintiff. Thereafter, plaintiff wrote another letter dt. 26th April, 2000 in continuation of its last final offer put in letter dated 20th April, 2000. The plaintiff made it clear that at no point, plaintiff had agreed to proposal of defendant no.1 which defendant no.2 had mentioned in its earlier letter dt. 23rd March, 2000 with regard to "Land lease rentals due by HOCL upto March, 2000 for ..... Rs. 1.47 Crores ". The plaintiff reiterated that fact again in pen-ultimate para of letter dt. 26th April, 2000 that plaintiff in the said Meeting held on 18th March, 2000 did not agree for the same (i.e. for Rs. 1.47 Corers). It is interesting to note that defendant no.1 did not reply letter dt. 26th April, 2000 of the plaintiff for considerable long period of about one month. Thereafter, the plaintiff again wrote a letter dt. 20th May, 2000 to defendant no.1 and extended the validity period of its offer for the period upto 31st July, 2000 together with extension of validity of EMD Bank Guarantee upto 31st July, 2000. In response to plaintiff's two letters one dated 20th April, 2000 and another dated 26th April, 2000, defendant no.1 suddenly accepted the offer by its letter dt. 25th May, 2000. It is pertinent to note that defendant no.1 has not made any clarification in its letter dt. 25th May, 2000 for two conditions in form of offer of plaintiff which are referred to in its letter dt. 20th April, 2000 and also with regard to offer for "Land lease rentals due by HOCL upto March, 2000 which is for Rs.1.47 Crores". It appears from the record that defendant has advanced its case that by its letter dt. 25th May, 2000, the offer of plaintiff was accepted, as a result of which contract was completed and plaintiff was legally duty bound to act upon further as per that contract. By its letter dt. 25th May, 2000, defendant no.1 called upon the plaintiff to make Down Payment of 25% of Rs. 18.21 Crores i.e. Rs. 4.5 Crores within seven days of receipt of that letter by plaintiff, as per the Tender conditions.

[6] It appears from the record that immediately on receipt of letter dt. 25th May, 2000, plaintiff rushed to the City Civil Court, Ahmedabad and filed Civil Suit No. 2971 of 2000 against the defendant no. 1 and defendant no.2 on 30th May, 2000 and by filing that suit, the plaintiff sought a decree for perpetual injunction restraining the

defendant no.1 from invoking and encashing Bank Guarantee given to defendant no.1 by defendant no.2 on behalf of the plaintiff.

[7] The day on which plaintiff filed aforesaid Civil Suit No. 2971 of 2000, plaintiff submitted Notice of Motion Ex.6 and requested the Court to grant in its favour an interim injunction, pending the suit, on the line of perpetual injunction prayed for in the suit, restraining defendant no.1 from invoking and encashing Bank Guarantee given by defendant no.2 on behalf of the plaintiff and also for interim injunction restraining defendant no.2 from making payment to the defendant no.1 pursuant to the Bank Guarantee given by defendant no.2 on behalf of the plaintiff till final disposal of the suit.

[8] It appears from the record that on 30th May, 2000, the learned Judge, Court No.25, City Civil Court, Ahmedabad passed following order-

> " The defendant no.1 is hereby restrained to encash the Bank Guarantee (Ex.3/4) on the condition that plaintiff shall extend the Bank Guarantee Ex.3/4 which is lasting upto 31-05-2000. R/O. 15-6-2000 ".
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> Dt.30.5.2000 Sd/- Judge, Court No.25." After passing aforesaid order, the learned Judge of Court No.25, passed further order as follows:
>
> " After passing the order the undertaking to the effect that the Bank Guarantee shall be extended by the plaintiff is produced which is taken on record. The registry to give it exhibit. 31/5 Sd/- Judge, Court No.25."

[9] From record, it appears that defendant no.1 appeared and submitted its affidvit-in-reply to the said Notice of Motion, on 26th June, 2000. Thereafter, the plaintiff filed its affidavit-in-rejoinder to the affidavit filed by defendant no.1 in reply to the Notice of Motion on 30th June, 2000 and again, defendant no.1 filed its affidavit-in-Sur-rejoinder to plaintiff's affidavit-in-rejoinder, on or about 12th July, 2000. Thereafter, the learned Judge of the trial court heard the arguments of the learned advocates of both the parties and after taking into consideration the documents and affidavits filed by the respective parties, came to a conclusion that plaintiff has no prima facie case and further that before revoking the order put by plaintiff, defendant accepted the offer of plaintiff and a concluded, enforceable and binding agreement had come into existence on 25th May, 2000, and therefore, now plaintiff cannot ask for injunction restraining defendant no.1 from encashing the Bank Guarantee given by defendant no.2. Hence the learned Judge, by passing an elaborate order dt. 31st July, 2000 below Ex.6, rejected the Notice of Motion Ex.6 of the plaintiff, and ad-interim injunction granted earlier on 31st July, 2000 was ordered to be vacated. As against that order dt. 31st

July, 2000 passed below Ex.6 in Civil Suit No. 2971 of 2000, the plaintiff has preferred this present appeal challenging the legality of that order.

[10] I have heard Shri S.N.Shelat, learned Additional Advocate General for the appellant and Shri S.B.Vakil, learned Senior Advocate for the respondent no.1 in detail at length. Here, in this present appeal, the appellant has produced copies of certain documents in one compilation under caption "Paper Book". That documents produced by appellant are perused and taken into consideration while deciding this appeal. I have also gone through the impugned order dt. 31st July, 2000 passed below Ex.6 in Civil Suit No. 2971 of 2000 which is challenged in this present appeal.

[11] During the course of arguments, Shri S.N.Shelat representing the appellant has challenged the impugned order on the ground that learned Judge of the trial court did not take into consideration most material two important documents to reach a conclusion on the point as to whether plaintiff has got a prima facie case or not. That two documents namely (i) Letter dt. 01st April, 2000 of plaintiff addressed to defendant no.1 which is comprising Pages 93 and 94 in the paper book and (ii) letter dt. 20th April, 2000 of plaintiff addressed to defendant no.1 which is comprising Pages 95 and 96 in the paper book. His main thrust of the arguments to challenge the impugned order of the learned Judge of the trial court is two fold.

(A) Looking to series of documents of which exchange took place in between plaintiff and defendant No.1 interse, it can be safely be said that no concluded, enforceable and binding agreement has ever come into existence between plaintiff and defendant no.1, and therefore, question does not arise for invoking and encashing bank guarantee given to defendant no.1 for and on behalf plaintiff by defendant no.2.

(B) Another attack of the appellant is to the effect that contract, as alleged to have been concluded agreement, as alleged by defendant no.1, is voidable contract, because in this present case, fraud had been committed by defendant no.1 when invitation to make offer was made by defendant no.1 by floating tenders, and therefore, while making an offer, it cannot be said to be offer with free consent, because while making an offer persuant to invitation to make offer by Tender was caused by fraud as defined in Se.17 of the Indian Contract Act, 1872 and therefore, in view of Sec.19 of the Indian Contract Act 1872, when consent to an alleged agreement is caused by fraud, that contract is voidable at the option of party whose consent was so caused".

[12] It is an admitted fact on part of both the parties that defendant no.1 had undertaken a work of Tank Farm Project (for short TFP) on JNPT. As defendant no.1

could not complete the said project of TFP, defendant no.1 decided to transfer the liability of the aforesaid TFP on JNPT for which defendant no.1 floated tenders. That tender is produced in paper book at Pages from Page 76 to 83. This tender has been produced in the suit at Mark 3/1. As per General Tender Notice and conditions for tendering at Page 79, the tenderer was required to pay Rs.100 Lacs by Demand Draft or Rs.200 Lacs by way of Bank Guarantee in favour of defendant no.1, by any Scheduled Bank (vide Condition No. 7.0). It was another condition recited on Page 79 that earnest money deposited by successful tenderer will be retained towards the security deposit for the fulfillment of the agreement, but shall be forfeited, if the tenderer fails to comply with the agreement (Vide Condition No.8.1). Thus, it is very much clear that Bank Guarantee can be forfeited only and only, if the tenderer fails to comply with the agreement. Shri S.N.Shelat, the learned Additional Advocate General for the appellant has vehemently argued that respective conditions at Serial Nos. 7 and 8.1 on Page 79 on the paper book clearly suggest that defendant no.1 shall become entitled to forfeit the earnest money deposit which has been made by plaintiff in form of Bank Guarantee, only if a concluded, enforceable and binding agreement has come into existence between plaintiff and defendant no.1. He has further argued that looking to the exchange of letters between plaintiff and defendant no.1 interse, no concluded contract has been made in between plaintiff and defendant no.1. He has further argued that letters exchanged between the parties referred to above go to show that the parties were only negotiating and had not reached to stage of any final agreement. He has further argued that in exchange of letters, stage never reached when the negotiations were going on giving rise to a binding contract.

[13] It is an admitted fact that in response to tender which was issued to plaintiff on 28th October, 1999 (Page 81 of paper book), the plaintiff made his proposal or so to say, put its offer by its letter dt. 29th November, 1999 (Page 84 of paper book) and along with that letter dt. 29th November, 1999, plaintiff sent a Bank Guarantee dt. 19th November, 1999 issued by defendant no.2 in favour of defendant no.1 (Page 85 and 86 of the paper book). Thereafter, there was exchange of letters in between defendant no.1 and plaintiff.

13.1 Then on 13th March, 2000, defendant no.1 convened a Joint Meeting of defendant no.1 with plaintiff at Bombay inviting plaintiff for negotiation (Page 89 of the paper book). Thus till, 13th March, 2000, negotiations were going on. Offer put by plaintiff vide its letter dated 29-11-1999 was not at all accepted by the defendant no.1. It is also an admitted fact that a Joint Meeting was held by defendant no.1 with plaintiff on 18th March, 2000, but no Minutes were drawn. It is very much necessary to know as to what was the end result of that meeting. Still however, defendant no.1 tried to incorporate certain alleged decisions taken in that

Meeting, in its letter dt. 23rd March, 2000 addressed to plaintiff. In Para 3 of that letter (Pages 91 and 92 of the paper book), it is stated by defendant no.1 that finally it was agreed that M/s. Adani Exports Limited will improve on their offer and that the additional liabilities that have been accrued/not mentioned in Tender, were brought to an attention of plaintiffs' officers. That additional Liabilities are stated as follows :-

(I) One of that additional liabilities was with regard to "Land lease rentals due by HOCL to JNPT upto March, 2000 total amounting to Rs. 1.47 Crores". Thus, it seems that for the first time, an attention for the item which is not reflected in Tender was brought to plaintiff as alleged by defendant no.1, in Meeting held on 18th March, 2000.

(Ii) Another liability of which an attention of plaintiff was brought was, as alleged by defendant no.1, with regard to Notional dues towards Minimum Guaranteed Throughput (MGT) for five months total amounting to Rs. 0.47 Crores.

[14] Thus for the first time, defendant no.1, invited plaintiff to put an offer on aforesaid two new additional liabilities of which there is no reference in Tender. It is not stated in said letter dt. 23/3/2000 of defendant no.1 addressed to plaintiff that plaintiff had agreed upon to make that offer for aforesaid two additional liabilities to defendant no.1. It is stated in said letter dt. 23/3/2000 of the defendant no.1 addressed to plaintiff that officers of the plaintiff who attended the said joint meeting held on 18th March, 2000 informing the plaintiff that plaintiff's officers desired that they would like to discuss with their Chairman in connection with aforesaid two additional liabilities and after discussing with their Chairman, plaintiff would send their revised offer to defendant no.1, and therefore, invitation to offer by floating Tender was modified by defendant no.1 itself, in Meeting held on 18th March, 2000, and therefore, it can be said that invitation to new offer with regard to two new additional liabilities was extended by defendant no.1 to plaintiff on 23rd March, 2000.

14.2 Within a week from date of receipt of letter dt. 23rd March, 2000 of defendant no.1, plaintiff addressed a letter dt. 01st April, 2000 to defendant no.1 and it was sent by FAX. That letter dt. 01/04/2000 is at Pages 93 and 94 of the Paper Book. The plaintiff, at the earliest, made it clear in its said letter dt. 01/04/2000 addressed to defendant no.1 that they have come to know by letter dt. 23/3/2000 of defendant no.1 that the Land lease rentals due by HOCL to JNPT for the period upto March, 2000 which is of Rs. 1.47 Crores, is payable by plaintiff. The plaintiff also made it clear that said amount has not been mentioned anywhere in Tender document, and further that there is no reason for plaintiff agreeing to pay for the Land lease rentals due by HOCL to JNPT.

14.3. Plaintiff by its letter dated 01-04-2000 puts its offer for an amount of Rs. 0.47 Crores for Notional dues towards Minimum Guaranteed Throughput (MGT) upto March, 2000, and therefore, plaintiff again modified and revised its earlier offer which it put by letter dt. 29/11/1999. On reading that letter dt. 01/04/2000, it is crystal clear that plaintiff did not put its offer for Rs. 1.47 Crores against the head "Land Lease Rentals due by HOCL to JNPT for the period upto March, 2000". It is interesting to note that defendant no.1 did not reply that letter at. 1/4/2000 of plaintiff addressed to defendant no.1, which was sent to defendant no.1 by FAX. Thereafter, plaintiff wrote one another important letter dt. 20/4/2000 to defendant no.1. In Clause (d) of that letter dt. 20/4/2000 (Page 95 of the Paper Book), plaintiff informed the defendant no.1 that during the Meeting dt. 18/3/2000, plaintiff confirmed to pay dues towards minimum guaranteed throughput to JNPT for the period from 29/11/1999 to 28/3/2000, total amounting to Rs. 47 Lacs. Looking to this recital with regard to Rs. 47 Lacs, in the Meeting held on 18/3/2000, plaintiff agreed for invitation to offer only for dues towards minimum guaranteed throughput for the period from 29/11/1999 to 28/3/2000. In said letter dated 20-04-2000 at the second breath, the plaintiff modified and revised its offer and stated that plaintiff puts forward that all the dues to be payable to JNPT/Government would be borne by defendant no.1 till transfer of assets except minimum guaranteed throughput to JNPT for the period from 29/11/1999 to 28/3/2000. By that letter dt. 20/4/2000, plaintiff put two new conditions on Page 2 of that very letter dt. 20/4/2000 (relevant Page 96 of Paper Book) Relevant Para is necessary to reproduce with exact words, with regard to that two conditions hereinbelow. It is

" We confirm to take over the amount of Contingent Liability stated in your Tender, Section 7, Page 44 and 45 from which we propose that all Contingent Liability related to JNPT authority may be settled by you, giving us No Due Certificate from JNPT before transfer of assets and the dues of private parties which are mentioned in your Tender, Section 7 -M/s. CME Industries Ltd., M/s. AFCON, M/s. Dalal Consultants and M/s. Shrinivas Plates and Structurals Co. Ltd. only will be settled by us and other dues, if any, not mentioned in Tender will be settled by you."

[15] Looking to aforesaid plen-ultimate para of letter dt. 20/4/2000, it is crystal clear that plaintiff again modified and revised its earlier latest offer put in letter dt. 1/4/2000. The plaintiff put two conditions-

(I) that all Contingent Liability related to JNPT authority would require to be settled by defendant no.1 and for that, defendant no.1 would require to give " No Due Certificate " from JNPT to the plaintiff;

And

(Ii) all dues due from defendant no.1 to all parties except following four parties would require to be settled by defendant no.1 and not by plaintiff. The offer to settle the liability to pay dues due from defendant no.1 was agreed upon to be paid by plaintiff only for four parties viz. (i) M/s. CME Industries Ltd., (ii) M/s. AFCON, (iii) M/s. Dalal Consultants and (iv) M/s. Shrinivas Plates and Structurals Co. Ltd.

[16] It is pertinent to note that defendant no.1 did not reply to this most material important document which is in the form of letter dt. April 20,2000 of plaintiff addressed to defendant no.1, till 25th April, 2000 and hence plaintiff again addressed a letter dt. 26th April, 2000 (Page 97 of the Paper Book) to defendant no.1, wherein plaintiff again made it clear in unambiguous terms that at no point of time, plaintiff had agreed to defendants' proposal which defendant no.1 had mentioned in their letter dt. 23/3/2000 to pay Rs. 1.7 Crores towards Land Lease Rentals upto March, 2000, and therefore, there was no offer from plaintiff for Rs. 1.47 Crores towards Land Lease Rentals due by HOCL to JNPT for the period upto March, 2000. The plaintiff also made it clear in its letter dt. 26th April, 2000 that they did not agree for an item of Rs.1.47 Crores in the Meeting held on 18th March, 2000. It is interesting to note that defendant no.1 kept silence for that two letters dt. 1/4/2000, and another dt. 20/4/2000 for the period upto 19/5/2000.

16.1 Defendant no.1 addressed a letter dt. 20/5/2000 to plaintiff requesting plaintiff to expedite the final offer to be put by the plaintiff, meaning thereby till 20/5/2000, defendant no.1 did not consider either to accept or reject the modifications made in the offer including two conditions imposed, till 20/5/2000. Thus, it can safely be said that that till 20/5/2000, offer of the plaintiff was not at all considered and accepted by the defendant no.1, and on fine morning of 25/5/2000 i.e. five days after letter dt. 20/5/2000 of the plaintiff, defendant no.1 addressed a letter dt. 25/5/2000 to plaintiff stating that they have accepted offer with regard to TFP for total consideration of rs.18,20,78,879.00. That letter dt. 25/5/2000 is at Page 99 in Paper Book.

[17] Thus it appears from letter dt. 25/5/2000 of defendant no.1 that defendant no.1 did not consider the offer put by plaintiff in its earlier letters dt. 1/4/2000 and 20/4/2000, and therefore, it can be said that latest offer with modifications which was put by plaintiff has not been accepted, and therefore, it cannot be said that a concluded, enforceable and binding agreement has come into existence between plaintiff and defendant no.1 on 25/5/2000.

[18] Shri S.N.Shelat, learned Addl. Advocate General for the appellant has argued that in this case, no final agreement reduced into writing has come into existence and entire process of exchange of offer, counter-offer, Revised offer and so called acceptance took place in between plaintiff and defendant no.1 by correspondence. He has drawn an attention of this court to Para 262 of HALSBURY'S LAW OF ENGLAND, Fourth Edition, Page 140, wherein following discussion appears: Para 262 Contracts by correspondence.

> "If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is a no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered; and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters; and the mere fact that the parties think there is a binding contract is not conclusive. But once there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot, without the consent of both, get rid of the contract which has been made."

[19] By citing aforesaid legal position with regard to contract by correspondence, Shri S.N.Shelat has argued that here in this case, no formal instrument of agreement has been reduced into writing, and therefore, whole of the correspondence must be considered. He has argued that the learned Judge of the trial court did not take into consideration letters dt. 1st April, 2000 and 20th April, 2000 while coming to a conclusion that an concluded and enforceable agreement has come into existence. When the learned Judge of the trial court has not considered most material two letters while coming to a conclusion that concluded agreement has come into existence, then certainly this court can upset the order under appeal even without going into merits of the case. This Court has come across a case of SREE JAIN SWETAMBAR TERAPANTHI VID(S) vs. PHUNDAN SINGH AND OTHERS, reported in AIR 1999 SUPREME COURT 2322, wherein it has been held by Hon'ble Supreme Court as under:-

> " It is one thing to conclude that the trial Court has not recorded its prima facie satisfaction on merits but granted the temporary injunction and it is another thing

to hold that trial Court has gone wrong in recording the prima facie satisfaction and setting that finding on the basis of the material on record....."

Here in this case, the learned Judge of the trial court has not recorded his satisfaction on prima facie case of plaintiff on merits. Had he considered letters dt. 1st April, 2000 and 20th April, 2000, in its correct perspective, possibly he would not have come to a conclusion that plaintiff has a prima facie case. Under the circumstances, this is a fit case in which this court can up-set the order under appeal.

[20] Shri S.N.Shelat, learned Additional Advocate General for the appellant has argued that defendant no.1 by its letter dt. 23rd March, 2000 invited plaintiff to offer for Lease Land Rentals due by HOCL to JNPT upto March, 2000 total amounting to Rs. 1.47 Crores. The plaintiff by its letter dt. 1st April, 2000 did not put offer for subject under Tender, by not taking into consideration an item of Land Lease Rentals due by HOCL to JNPT for the period upto March, 2000 which is for Rs. 1.47 Crores. The defendant no.1 has stated in its letter dt. 25th May, 2000 that they have accepted the offer towards the subject under Tender for a total consideration of Rs. 18,20,78,879/- which is rounded upto Rs. 18.21 Crores.

[21] Shri S.B.Vakil, learned Senior Advocate for respondent no.1 has argued that this figure of Rs. 01.47 Crores is reflected in offer put by plaintiff in its letter dt. 1st April, 2000. Relevant Para of said letter dt. 1st April, 2000 reads as follows:-

" Reiterating our stand, we mention here that our offer for HOCL's tank farm at JNPT is for an amount of Rs.14.00 Crores, contingent liabilities of Rs. 3.49 crores, with an additional amount of Rs. 0.25 crore only and the liability towards minimum guaranteed throughput up to March 2000 (notional value Rs. 0.47 crore)."

Shri S.B.Vakil has argued that if we make total sum of items stated in aforesaid Para, total consideration comes to Rs.18.21 crores, and therefore, when plaintiff has put an offer of Rs. 3.49 crores as against contingent liabilities, that offer includes an item of Rs. 1.47 crores. Counter-offer put by defendant no.1 in its letter dt. 23rd March, 2000 of Rs. 1.47 crores is shown separately over and above Rs. 3.49 crores, and therefore, the defendant no.1 has not taken into consideration an item of Rs. 1.47 crores while accepting the offer.

[22] Shri S.N.Shelat, learned Addl. Advocate General for the appellant has further argued that defendant no.1 has not specifically made it clear in its letter dt. 25th May, 2000 that item of Rs.18.21 crores does not include an item of Rs. 1.47 crores. The defendant no.1 ought to have made it clear that they have fully considered letter dt. 20/4/2000 at the time of accepting offer. When correspondence in between the parties

is consisting of offer, counter-offer, modified offer and acceptance, then in the last letter of alleged acceptance of offer, the defendant no.1 ought to have made it clear with specific words that they did not insist for an item of Rs. 1.47 crores.

[23] Shri S.N.Shelat, learned Addl. Advocate General for the appellant has also argued that when plaintiff first put its offer by letter dt. 29/11/1999, the price offered for TFP was including with an offer for an item of contingent liabilities with regard to JNPT Authority which is at Point 2.2 of Section 7 of the Tender (Page 82 of the Paper Book). Shri Shelat has argued that when plaintiff addressed a letter dated 20th April, 2000 plaintiff modified and revised its earlier offer with regard to contingent liability and put an offer with condition that the amount of contingent liability stated in Tender Section-7 on Pages 44 and 45 with regard JNPT, be settled by defendant no.1 and offer with regard to other contingent liabilities of parties except four parties as stated in letter dt. 20/4/2000, be settled by defendant no.1. There is no reference with regard to these conditions imposed by plaintiff in his letter dt. 20th April, 2000 in letter dt. 25th May, 2000 of defendant no.1, and therefore, it appears that defendant no.1 accepted an offer of plaintiff, in piecemeal by making fractions. Shri S.N.Shelat has cited an authority of GENERAL ASSURANCE SOCIETY LTD. Vs. LIFE INSURANCE CORPORATION OF INDIA, reported in AIR 1964 SUPREME COURT 892, wherein it has been held as under:

> " When one party makes a composite offer, each part thereof being dependent on the other, the other party cannot by accepting a part of the offer, compel the other to confine its dispute only to that part not accepted, unless, the party offering the composite offer agrees to that course."
>
> Here in this case, by two letters dt. 1st April, 2000 and 20th April, 2000, the plaintiff put composite offer. Out of parts of that composite offer, defendant no.1 accepted only a part of an offer with regard to consideration of Rs.18.21 crores without clarifying anything about the conditions imposed in letter dt. 20th April, 2000, and therefore, it cannot be said that a concluded and enforceable agreement has come into existence.

[24] Another limb of argument of Shri S.N.Shelat is to the effect that while defendant no.1 floated tenders, an invitation to make offer, was containing incorrect facts, and therefore, fraud has been committed by the defendant no.1 when an invitation to offer was extended by the defendant no.1 by floating tenders. Looking to Section 10 of the Indian Contract Act 1872, all agreements are contracts, if they are also made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, So ingredient of "free consent" is required to be shown by defendant no.1, when defendant no.1 alleges that a concluded agreement has come into

existence. In Section 14 of the Indian Contract Act, 1872, " Free consent" is defined. As per Sec.14, consent is said to be free when it is also not caused by fraud as defined in Sec.17. Sec.17 defines "fraud", and as per said definition, "fraud" means and includes any of the five acts committed by a party to a contract with intent to deceive any other party thereto, with suggestion, as a fact, of that which is not true, by one who does not believe it to be true, and the active concealment of a fact by one having knowledge or belief of the fact."

[25] Shri S.N.Shelat has argued that as per Section 7 of the Tender (relevant Page 83 of the Paper Book), contingent liability in respect to M/s. Shrinivas Plates and Structurals Company Ltd. is shown as Rs.26,46,771.00. He has further argued that looking to letter Mark 22/3 of which copy is produced in this appeal, the total liability of defendant no.1 for M/s. Shrinivas Plates & Structurals Company Ltd. is Rs. 50,19,394.00 and thus there is a very much material difference in item of contingent liability with respect to M/s. Shrinivas Plates and Structuals Company Ltd.

25.1 As per Section 7 of the Tender, another item of contingent liability is with regard to M/s. CME Industries Ltd. which is for Rs. 7,20,000.00. As per letter dt. 10th April, 2000 of M/s. CME Industries Ltd. addressed to plaintiff (Page 101 of the Paper Book), the contingent liability for M/s. CME Industries Ltd. due from defendant no.1 is Nil, and therefore, incorrect figure of Rs. 7,20,000.00 against an item no.2.5 (in section 7 of Tender) with regard to M/s. CME Industries Ltd. is shown, and therefore, prima facie, there is a reason to believe that the defendant no.1 committed a fraud while inviting the offer.

[26] Shri S.B.Vakil, learned Senior Advocate for the respondent has cited an authority of ITC LIMITED v. DEBT RECOVERY APPELLATE TRIBUNAL AND OTHERS, reported in (1998) 2 SUPREME COURT CASES 70, and argued that Bank cannot refuse payment except in case of a clear fraud to the knowledge of the Bank or irretrievable injury and while making payment, Bank is not concerned with the principal contract between seller and buyer. He has argued that here in this case, looking to legal position settled in case cited by him, no injunction can be granted against defendant no.1 from encashing Bank Guarantee given by defendant no.2. He has argued that it is not the case of the defendant no.2 that plaintiff committed any fraud with Bank when plaintiff obtained a Bank Guarantee from defendant no.2 in favour of defendant no.1.

[27] This authority will only be applicable only when concluded agreement has come into existence. Here in this case, as discussed earlier, no concluded agreement has come into existence, because acceptance of offer by defendant No.1 is in piecemeal by rejecting other parts of Composite offer and not to the entire offer consisting of more than one counter-offers.

[28] In reply to aforesaid authority cited by Shri S.B.Vakil, Shri S.N.Shelat has cited an authority of HINDUSTAN CONSTRUCTION CO. LTD. VS. STATE OF BIHAR AND OTHERS, reported in (1999) 8 SUPREME COURT CASES 436, wherein it has been held that-

> "What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf of the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

[29] Here in this case, Para 1 of Bank Guarantee itself speaks that if default shall be by M/s. ADANI Exports Limited in observing or performing any of the terms and conditions of the Tender given by them, or in payment of any money payable to defendant no.1 under the terms of the Tender, defendant no.2 on demand pay to defendant no.1 in such manner as defendant no.1 may direct the said amount of Rs. 2 Crores only or such portion thereof not exceeding said sum as defendant no.1 may from time require. Under the circumstances, defendant no.2 Bank has issued a conditional undertaking to the effect that if any default is made by plaintiff in observing or performing any of the terms and conditions of the Tender, defendant no.2 will pay Rs. 2 Crores to defendant no.1, and therefore, a question whether plaintiff has defaulted in observing or performing any of the terms and conditions of the Tender, is a pure question of fact, and both the parties are required to lead an evidence during the trial. And therefore, at this juncture, looking to this type of conditional Bank Guarantee, defendant no.1 cannot straightway encash the Bank Guarantee given by defendant no.2.

[30] Shri S.N.Shelat has cited one another authority in case of LARSEN AND TOUBRO LIMITD Vs. MAHARASHTRA STATE ELECTRICITY BOARD AND OTHERS, reported in AIR 1996 SUPREME COURT 334, wherein it has been held that bank guarantee can be said to be valid till successful completion of trial operation. In that case, Maharashtra Electricity Board admitted that plant after successful trial operation, performance, test etc. has been taken over. Once the contract has been completed, the injunction from encashing bank guarantee can be refused. Shri S.N.Shelat has argued that this cited case is with regard to completion of work under contract for which Bank Guarantee had been given. The same analogy of principles will be applicable to this present case on its extreme other-end. He has argued that when a concluded enforceable binding

agreement has not come into existence between plaintiff and defendant no.1, certainly defendant no.1 can be restrained from encashing the Bank Guarantee by defendant no.1.

[31] Shri S.N.Shelat has argued that looking to Para 1 of Bank Guarantee, (Pages 85 and 86 of Paper Book) defendant no.2 agreed with defendant no.1 that defendant no.2 will pay an amount of Bank Guarantee on demand made by defendant no.1, if "default shall be by M/s. Adani Exports Ltd. in observing or performing any of the terms and conditions of the Tender." This situation will arise only after a concluded enforceable agreement has come into existence. Here in this case, plaintiff has come with a case that there is no concluded enforceable agreement in between the parties, as against say of defendant no.1 that defendant no.1 accepted offer of plaintiff and concluded agreement has come into existence. When question is required to be investigated as to whether, in fact, concluded agreement has come into existence or not, in view of letters dt. 1st April, 2000 and 20th April, 2000, at present, it can be said that plaintiff has got a prima facie case. It is well settled principles of law that the rule that before the issue of a temporary injunction, the Court must satisfy itself that the plaintiff has a prima facie case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to prejudging the case on its merits. All that the Court has to see is that on the face of it the person applying for an injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defects.

[32] It is also well settled principle of law that in order to make out a prima facie case, necessary for granting an interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to the existence of right which he alleged and can satisfy the court that the property in dispute should be preserved in its present actual condition until such question is disposed of. The court must also, before disturbing any man's legal right stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit.

32.1 It is also a well settled principles of law that what the Court has to determine in granting injunction is whether there is a bona fide contest between the parties and when there is a fair and substantial question to be decided as to the rights of the parties in the suit, it is not necessary for the purpose nor is it right that the Court should further examine the question in dispute or anticipate the decision of the question in the suit itself.

32/2 Keeping in mind, the above legal position, it clearly appears that the plaintiff has made out his prima facie case on the ground that no concluded and enforeable

agreement has come into existence and that fraud has been committed by defendant no.1, when it invited to make offer, by floating Tenders.

[33] Shri S.B.Vakil, learned Senior Advocate for defendant no.1 has argued that in case, if this court comes to conclusion that injunction is required to be given as prayed for by the plaintiff, then some arrangement should be made for security of interest on an amount of Bank Guarantee for the period from 1st June, 2000 to the date of final decision in the suit. Looking to the facts and circumstances of this present case, this court is of the opinion that interest of defendant no.1 should be protected for Bank Guarantee and "Interest" on Rs. 2 Crores when this court finds that plaintiff has got a prima facie case to obtain an interim injunction, pending the suit, and therefore, necessary directions are given in the final order.

[34] In view of what is stated hereinabove, impugned order challenged in this appeal can be said to be perverse because two letters - one dated 1st April, 2000 and another dated 20th April, 2000 of plaintiff addressed to defendant no.1, are not taken into consideration by the learned Judge of the trial court in correct perspective in the manner in which they ought to have been taken into consideration. Under the circumstances, impugned order cannot be said to be "an order according to law". It appears that in exercise of discretionary powers, the learned Judge of the trial Court has acted unreasonably, capriciously and has ignored relevant fact, and therefore, impugned order requires to be quashed and set aside. This appeal is therefore allowed and order dt. 31st July, 2000 passed below Notice of Motion Ex.6 in Civil Suit No. 2971 of 2000 is quashed and set aside.

34.1 Consequently this court grants an interim injunction operative against both the defendants in favour of plaintiff in terms of Para 15A of injunction application Ex.6 in Civil Suit No. 2971 of 2000 pending on the file of learned Auxiliary Chamber Judge, City Civil Court, Ahmedabad. Looking to the peculiar facts and circumstances of the present case and with a view to protect interest of defendant no.1, the plaintiff shall furnish security of two solvent sureties within four weeks, to the satisfaction of the trial court for an Interest amount on an amount of Bank Guarantee for the period from 1st June, 2000 to date of final decision in the suit, at the Bank rate prevailing as on the date of final decision of the suit.

34.2 The plaintiff is further directed to give instructions in writing to defendant no.2 to extend the validity period of Bank Guarantee dt. 19th November, 1999 which has been extended from time to time upto 15th September, 2000, for further period upto the date of final decision in the suit and accordingly defendant no.2 shall also extend the period of validity of Bank Guarantee accordingly.

Looking to the nature of proceedings, the suit is required to be expedited at the earliest, and therefore, the learned Judge of the trial court is directed to dispose of the suit as early as possible, preferably within one year from the date of receipt of writ of this court from the Registry, without being influenced in any manner by observations made by this court in this judgment. Appeal allowed. No order as to costs.