

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.03.2015

Delivered on : 30.04.2015

CORAM

THE HON'BLE MR. SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE M.M. SUNDRESH

O.S.A. No.358 of 2013

M/s. Amma Lines Ltd.,
Having its Office at
House No.12, 3rd Street,
Ulagandhapuram, Ennore,
Chennai 600 057
Registered office at
Flat No.G-3, Eashwaripriya Apartments,
95/2, Arya Gowda Road Extension
Chennai-600 0033.

... Appellant

versus

M/s. Fugro Survey (India) Pvt. Ltd.,
A Company incorporated under the
Provisions of Indian Companies Act, 1956,
Fugro House, D-222/30,
TTC Industrial Area,
MIDC, Nerul, Navi Mumbai-400 706,
Maharashtra.

... Respondent

Prayer : Appeal filed under Order 36 Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent Act, against the order dated 30.01.2013 in Company Petition No.141 of 2011 and Company Application No.558 of 2011.

For Appellant : Mr. M.K.Kabilan
Senior Counsel for
M/s. Vijayalakshmi K. Raja Rathnam

For Respondent : Mr. Rajeev Kumar Panday and
Mr.A.Vijayakumar

J U D G M E N T

The Hon'ble Chief Justice

The appellant-company, stated to be engaged in the business of marine construction and infrastructure sector, approached the respondent-company for utilization for hire the services of a survey expert team of the respondent for intermediate and final services of Rathnagiri Gas and Power Private Limited (RGPPL) Channel at Dabhol for a period of five months, which gave rise to a work order dated 19.12.2009. This was accepted on 22.12.2009. The respondent-company claims to have carried out the task in terms of the work order relating to the pre-dredging survey for deputing its experts, for which an invoice of Rs.26,31,460/- with interest at 2% per annum for delay in payment was raised. The Completion Certificate in respect of this work was issued on 15.1.2009 duly signed on behalf of the appellant by Mr. Arjun Singh, their representative. On 21.1.2010, a preliminary volume material estimation was made with respect to the survey carried out for the scope of the work of the channel, which was duly signed not only by the two parties, but also the representative of the EIC, the Engineers In Charge, which resulted in the final report and drawings being submitted by the respondent on 11.3.2010.

2. The payment was, however, not made and it is only on 24.4.2010 that for the first time the appellant sought to raise issues about the work completed by the respondent and informing that the survey report was not acceptable for releasing the payment. The rationale for the same was specified as under in the letter dated 24.4.2010 :-

"3.0 However, further details of the Quantities (without estimated area) to be dredged for Soft and Rock/boulder materials submitted on 21.01.2010 are different. It is observed that there is drastic reduction in the quantities of the Rock/boulder and also soft materials in two Pre-dredged Survey reports, which prima facie appears abnormal and cannot be accepted without proper analysis and supporting details.

4.0 Also you have recently stated regarding level of the bench mark being disturbed. As a contractor our entire costing is dependent on accuracy as well as authenticity of the Survey work. However, the details submitted raises serious concerns and needs further clarification before our acceptance."

3. On 28.4.2010, a fax message was signed by the respondent to the appellant in respect of the letter dated 24.4.2010. It would be relevant to reproduce the same as under :-

"Subject: Pre Dredging Geo Physical Survey for LNG import Facilities at RGPPL Dabhol.

Ref : (1) Your Fax letter No.ALL/FSIPL/100424/01 dated 24th April, 2010

(2) Lol No.ALL/FSIPL/091219/01 dt.19.12.2009

Dear Sir,

1.0 Please refer to the LOI No.ALL/FSIPL/091219/01 dated 19.12.2009 and your fax No.ALL/FSIPL/100424/01 dated 24th April 2010.

2.0 Please note that, as per the scope of work mentioned in LOI, we were suppose to carry out Survey and reduce all raw data to the Chart Datum (CD) using SOI bench mark shown by your and Gammon India's representatives at Site.

3.0 Accordingly, all the depths have been reduced to CD using the SOI bench mark. As far as linking the present survey BM and BM used during previous survey is concerned, it is not part of scope of survey.

4.0 You will appreciate that, the entire survey spread was mobilized on the day's notice to keep your commitment and thereafter, the survey was carried out without compromising on the quality aspect, although there were some demoralizing issues related to food and accommodation of our team at Site, which was conveyed to you earlier.

5.0 You will further appreciate that, we had put in extra efforts and resources on holidays to process the data in presence of your representative in our office to achieve the target dates committed by you to your client. We did not hold back any data, although payment was not made as per our proposal (soon after mobilization and on completion of the work) in a good faith.

6.0 In view of the foregoing, it is amply clear that, we have carried out the survey work in a professional manner as per agreed scope and we went beyond our agreed terms to help you at various stages. In view of the above, it is requested

that, all the outstanding amount may be released immediately as they are all long due.”

4. On 19.5.2010, the respondent raised the issue of outstanding payments stating that in pursuance to the letter dated 24.4.2010, a meeting was held between the parties on 15.5.2010. The relevant portion of this letter is reproduced as hereunder :-

“4. As agreed in this meeting, we have checked the quantities as finally reported in our 2008 and 2010 Surveys, and the same are tabulated below for your kind perusal:-

FSINPVT Survey Report	Volume Of Soft Material l (m3)	Area of Soft Material Spread (m2)	Area of Rock and Boulders Spread (m2)	Volume of Rocks/Bould ers (m3)	Remarks
May 2008	688,194	1,614,515	104,971	55,229	Design depth was 14.5 m from old CD level of 2008 Survey (RGPPL BM)
Jan 2010	3,301,3 24	2,580,801	523,650	197,377	Design depth was 14.5m from new CD level of 2010 Survey (SOI BM)

5. As already explained by our Survey Manager on 15th may, 2010 in your office, the main reason for the abnormal increase

in the Volume is the lowering of the Chart Datum (CD) level by about 30cms (+/-5 cms) in the current 2010 Survey.

6. It is evident from the above that, all the technical issues raised in your letter above have been duly clarified and explained to your entire satisfaction.

7. You are, therefore, requested to release our outstanding payment of Rs.26,31,487.00 (Rupees Twenty Six Lakhs Thirty One Thousand Four Hundred Eighty Seven Only) immediately for the Survey Work completed by us on 25th January, 2010."

5. Surprisingly, the appellant, vide letter dated 27.5.2010, claimed to have found out that there was a credit balance in the account of the respondent of Rs.2,97,810/-, the basis of which is not stated.

6. The issue of payment was never resolved and the respondent issued a notice of winding up through counsel dated 29.12.2010 under Sections 433 and 434 of the Companies Act, 1956, to which there was no reply and thereafter, the winding up petition was filed.

7. The learned single Judge in terms of the impugned order dated 30.1.2013, admitted the petition, while accepting the plea of the respondent, but postponed the advertisement and publication alone till the respondent-company deposits the entire amount due to the appellant to the credit of the Company Petition within 12 weeks from the date of receipt of the order. The appellant, aggrieved by this order, preferred the appeal. In appeal, interim orders were granted on 12.11.2013 and that application was disposed of on 21.3.2014 directing the deposit of a sum of Rs.15 Lakhs instead of amount claimed without prejudice to the rights and contentions of the parties within eight weeks from the date of that order, failing which the interim order would automatically stand vacated. The amount was directed to be kept in any of the nationalised banks in and around the High Court of Madras for a minimum period of six months to be renewed thereafter if the situation so warrants without the right of the respondent to withdraw the amount till the disposal of the appeal.

8. We heard the learned counsel for the parties who took us through the records as also the impugned order.

9. The preliminary plea raised by the appellant for opposing the winding up petition was that there were financially solvent and the non-payment was due to defective work. The survey work carried out by the respondent was alleged to suffer from lot of variations, discrepancies and not accurate and thus, the same was not acceptable. Insofar as the Completion Certificate is concerned, it was claimed that the same was not issued by their authorised representative.

10. The learned single Judge opined that it was no one's case that the amount claimed was not in accordance with the revised schedule of rates issued by the respondent on 22.12.2009, nor was the authority of Mr. Arjun Singh, who had issued the Completion Certificate, disputed at any stage earlier. The preliminary report had in fact been acknowledged by the same Arjun Singh on behalf of the appellant-company. The Completion Certificate dated 15.1.2010 thus gave accord to the satisfactory completion of the work and was followed by the preliminary volume material estimation dated 21.1.2010, which was not only signed by the parties, but even by the Engineering Consultants. The issues sought to be raised by the letter dated 24.4.2010 were clearly an after-thought, primarily arising from the finding that the appellant may not find it profitably feasible to carry on the task.

11. The plea that the appellant was solvent and that a bona fide dispute had been raised that thus, the winding up proceedings ought not to be used for recovery of debt was negated by the learned single Judge as the defence raised by the appellant was not a substantial one and no valid grounds exist to deny the release of payment coupled with the failure to reply to the statutory notice.

12. In the context of the aforesaid findings, learned counsel for the appellant, while assailing the same, sought to make out a case that the work could not have been completed within the time stipulated as the project required 120 days from date of commencement in terms of the letter of the respondent dated 22.12.2009, the work was commenced only on 28.12.2009 and the work was stated to have been completed on 15.1.2010. It is also submitted that the Completion Certificate dated 15.1.2010 was issued by the representative of the appellant on the respondent's letter head. Learned counsel also sought to go into the veracity of what was stated in the preliminary volume material estimation dated 21.1.2010 to doubt it, even though it was signed by the representatives of both the parties and the Engineering Consultant, by observing "Here again, the appellant's representative is made to sign". Doubting the accuracy of the draft report as questionable, it was pleaded that the appellant suffered cancellation of the contract with RGPPL on 27.4.2010 and the Bank Guarantee of Rs.1 Crore was invoked. The methodology for draft report adopted by the respondent was stated to be not correct and once again, the authorization of Mr. Arjun Singh was sought to be doubted. There is stated to be no crystallized debt on account of the survey report being doubted, as also the plea of the appellant-company being commercially viable.

13. On the other hand, learned counsel for the respondent supported the impugned judgment, stating that the work was carried out, Completion Certificate was issued by the representative of the respondent, who had even signed the earlier documents, preliminary volume material estimations were made on 21.1.2010 on the basis of the report which contains signatures of both the parties, as also the representatives of Engineers India Limited, the Engineering Consultant, which is a public sector enterprise. Thereafter, on 11.3.2010, the final report and drawings were submitted by the respondent. During all this period of time, not a whisper was raised by the appellant about any infirmity in the work of the respondent and it is only on 24.4.2010 that objections were raised. The final report could not have come earlier, and if the final analysis projected more soft and rock/boulder materials, the respondent could not change the ground reality to make a report suitable to the appellant. Even the letter dated 24.4.2010 was suitably replied to on 28.4.2010 and the parties even met again on 15.5.2010.

14. Learned counsel further submitted that the reason for variation was categorically explained, clarifying that in the survey of 2008, the benchmark was RGGPL-BM, i.e. RGGPL Benchmark, but in the survey of 2010, the benchmark was Survey of India Benchmark, i.e. SOI-BM, which was given by the appellant and as per the work order placed on the respondent. The National Hydrographic Society (NHO) Benchmark was to be transferred from the given site by the respondent as required by the Engineer in Charge. The SOI Benchmark was given by the officials of EIC and RGGPL and the survey was done to their satisfaction, and that is the reason the Completion Certificate was issued and the report accepted by all.

15. In view of the appellant's own inability and failure to carry out the job entrusted by RGGPL and Gammon, belatedly the objections were raised on 24.4.2010. In fact, the appellant realized that the job entrusted to the company would be a non-viable and non-profitable one and thus sought to get out of it. However, that has nothing to do with the respondent, whose job was only to give the report as per the norms. In fact, the correct report helped the appellant to realise and appreciate the true facts about the huge quantum of material that was required to be removed by the appellant-company. The statutory notice was also not replied to.

16. On appreciation of the aforesaid facts, we have no doubt that the rationale permeating the order of the learned single Judge is sound and the appeal is without any merit.

17. It must be appreciated that the job of the respondent was to give a correct picture of the ground realities as per a set procedure and norms. This is exactly what the respondent did, though the results may not have been palatable to the appellant. That the appellant accepted the preliminary report is quite obvious from the Completion Certificate. It does not lie in the mouth of the representatives of the appellant to raise doubts about their own representative Arjun Singh, who was the signatory even to the earlier documents. This is only to get out of their liability.

18. The Completion Certificate has been followed up with the analysis of the preliminary report by both the parties as well as their Engineering Consultant, ECL, which is quite apparent from the preliminary volume material estimations signed by all parties on 21.1.2010. It is in terms thereof that the final report was signed on 11.3.2010.

19. During the complete process of survey and analysis of the result of the report, no objection was raised by the appellant, but on the appellant possibly finding that the ground reality was such that it may not be a profitable venture, they sought to raise issues as on account of their non-compliance, the contract was cancelled and the Bank Guarantee invoked. This has nothing to do with the quality of the report. The appellant did not even care to reply to the winding up notice.

20. We are unable to accept the plea that merely because the appellant claims to be solvent, even in case of an undisputed liability, non-bonafide pleas should be permitted to be raised by the appellant to relegate the parties to the remedy of a suit. The defence set up by the appellant-company is a moonshine defence, where the appellant even seeks to question the Completion Certificate and other documents on the spurious plea that Mr. Arjun Singh was not authorised, though the earlier documents were signed by him. The defence is thus clearly based on falsehood and was a belated endeavour to avoid the liability.

21. In this behalf, we may refer to the judgment of the Hon'ble Supreme Court in IBA Health (India) Private Limited vs. Info-Drive Systems SDN. BHD., reported in (2000(10) SCC 553, the relevant portion of which is extracted hereunder:

"24. The appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the

petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

25. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground."

22. We may, however, notice that in the meantime, as per the interim orders of the Division Bench, a sum of Rs.15 Lakhs already stands deposited and is lying in a FDR. The appellant is thus called upon to deposit the balance amount as per the impugned order within four weeks of the receipt of the copy of this judgment, to abide by the further proceedings in the company petition in pursuance to the order dated 31.1.2013. The balance amount would be Rs.11,31,460/-.

23. The appeal is accordingly dismissed in the aforesaid terms with costs quantified at Rs.7,500/- (Rupees seven thousand five hundred only) payable to the respondent within the same period of time.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

To Sub Assistant Registrar

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to Mr.A.Vijaya Kumar, Advocate, S.R.No.24782
+1cc to Mr.G.Krishna Kumar, Advocate, S.R.No.24406

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