

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2016

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

C.S.No.1457 of 1995

G.Thyagarajan,
Carrying on business under the
name and style of Sri Thyagarajan Enterprises,
Chennai-600 083.
... Plaintiff

Vs.

Tamil Nadu State Construction Corporation Ltd.,
represented by its Managing Director,
Chennai 600 106
... Defendant

(amended as per the order dated 06.11.2015
made in A.No.6073 of 2015)

Prayer: Civil Suit filed under Order IV Rule 1 of Original
Side Rules r/w. Order 7 Rule 1 of C.P.C. praying for a
judgment and decree:

(a) directing the defendant to pay to the
plaintiff a sum of Rs.49,40,712.50 together with
interest at 18% per annum on the principal amount
of Rs.42,40,954.95 from this date till the date of
payment;

(b) directing the defendant to pay to the
plaintiff the costs of the suit;
and

(c) pass such further or other orders as may be
just and necessary in the circumstances of the
case.

For Plaintiff

: Mr.K.K.Muralitharan

J U D G M E N T

The Suit was called in the morning and there was no representation on behalf of the defendant and since the learned counsel for the defendant reported no instructions, the matter was called in the afternoon and once again there was no representation on behalf of the defendant and therefore, this Court has proceeded to dispose of the Suit on merits.

2. The averments in the plaint are as follows:

2.1. Tamil Nadu Urban Development Programme [in short "TNUDP"] undertook a World Bank assisted programme for the formation of a bye-pass road in Tirunelveli Branching from Km 146/4 and joining at Km 155/8 of the Madurai-Kanyakumari Road and the said work in-turn was entrusted to the defendant company and the defendant invited tenders from piece rate contractors for carrying out the different pavement portion of the bye-pass project with carriageway of the above said work. The plaintiff has submitted a tender and it was accepted and a formal agreement came into being on 4.10.1993 and the approximate value as set out in the said agreement was for a sum of Rs.2,51,16,410/-. The agreement stipulates among other things that payment is to be made for various items by measuring the quantities as

executed and paid by multiplying it by the rate quoted per unit and thus the agreement itself contemplates payments being made only against work turned out and as would be evident. The agreement also stipulates that time is the essence of the contract and that the defendant would permit free access to the site by the plaintiff so as to enable the plaintiff to achieve the rate of progress stipulated in the agreement, which is a period of five months from the date of commencement.

2.2. The grievance expressed by the plaintiff is that though the agreement came into being on 04.10.1993, till 24.01.1994 the site was not handed over in full to the plaintiff in a manner which would enable the plaintiff to proceed with the work and correspondences were also addressed to the defendant pointing out several factors which are delaying the work and called upon the defendant to take necessary action to rectify the same. It is further pleaded that between 1992 and 1993, the bye-pass road site was affected by severe floods and as a result of which, a substantial portion of the existing embankment had been washed away and as against the required width at the sand gravel mix level of 14.62 metres, hardly a width of 11 metres was available.

2.3. The plaintiff would further aver that plant and equipment which were required to be supplied by the defendant such as Roller, Water Lorries etc., were not made available to the plaintiff when required and even when such equipment was made available, they were in a state of disrepair and therefore, could not be used freely on the work and these factors hampered the plaintiff's progress in completing the work within the time stipulated. It is also stated by the plaintiff that according to the Assistant Engineer and Assistant Executive Engineer, as per the records, the quantity of earth work required to be done was 95% compaction: 139352 Cu.mtrs: 100% compaction: 22365 Cu.mtrs totaling to 161761 Cu.mtrs. It is further stated that as per the agreement dated 04.04.1994, the earth work required to be carried out would be far greater than the quantity of 1,61,717 Cu.mtrs as evaluated by the Engineers of TNUDP and the earth work carried out by the plaintiff was 53,100 Cu.mtrs and according to the plaintiff, they had done work to the extent of Rs.76 lakhs and recommendation has been made to release the Bank Guarantee given in respect of mobilization advance.

2.4. The plaintiff would further aver that as per statement, the quantities of earth work carried out by the plaintiff are as follows:

A. Berms	53,100 cubic meters
B. Berms in 0 to 1 Km	6,000 cubic meters
C. ROB	44,500 cubic meters
D. ROB II	1,850 cubic meters
E. Flood Damage	4,252.70 cubic meters

The Regional Manager has also approved the said statement and had recommended the same for payment and inspite of positive recommendation, no payment has been made and totally Rs.1,65,00,000/- has been paid, leaving a balance of Rs.35,90,033.50. The plaintiff also made a complaint at the belated point of time that the defendant attempted to introduce Measurement Books [M-Book] and seek to prepare part bills on the basis of unilateral and incorrect measurement allegedly recorded in the M.Books is totally unjustified and the unilateral decision coupled with the inordinate delay in passing the bills forced the plaintiff to walk out of the contract.

2.5. The defendant came out with a false plea stating that the work done by the plaintiff was only Rs.1,44,03,231.50, resulting in an eligible payment of Rs.1,38,00,000/- paid to the plaintiff and therefore, the plaintiff was called upon to remit a sum of Rs.29,99,150/- alleged to have been received by the plaintiff in excess, which was strongly reputed by the plaintiff. In the light of the above pleadings, the plaintiff came forward to file the present Suit for recovery of money and other consequential reliefs.

3. The defendant has filed a written statement denying the averments made in the plaint and contended that the plaintiff has failed to carryout the work entrusted within the stipulated time frame and the plaintiff completed upto DBM level for 4.50 Km out of 7.60 Km for the carriage way and completed negligible quantities in shoulders and the plaintiff has not even started the works of laying of A.C., P.C., for the bye-pass road. The defendant would further contend that as per agreement condition No.4, the Regional Engineer of the Corporation or a Subordinate Officer deputed by him shall within a period of 15 days from the date of acceptance of the piece work agreement shall furnish the full and complete particulars of work to be done with drawings wherever necessary to the contractor and permit him and his workers free access to the site on which works is to be completed, however the plaintiff has failed to do so and also denied the averment that there was only semblance of embankment when the plaintiff was entrusted the work and the top width of the embankment was in the order of 13m to 14m at the time of entry of the plaintiff. It is also averred by the defendant that the total quantity was computed during March 1994 and the quantity computed during February 1993, the difference in the same works out to 845 Cu.mtrs and the quotation offered by the plaintiff and the defendant and the amount mentioned in the agreement are more or less tentative

and approximate and the prevalent practice in such contracts is to work out the measurements on the basis of the levels as is mentioned in the agreement. It is also averred that adhoc payments recommended by the Regional Engineer cannot be accepted as basis for evaluation as it was not based on M-Book measurements and the plaintiff cannot take advantage of the mistake committed by the Regional Manager and the amount claimed by the plaintiff is imaginary and fanciful and the same is only on the basis of wrong certificate furnished by the Regional Engineer alone and not by measurement recorded in the M-Book by the concerned field officers who are the only empowered to record measurements and the plaintiff prevailed upon the then Regional Engineer to certify wrong quantities so as to enable him to obtain weekly adhoc payments and the same is unsustainable. In sum and substance, the defence projected by the defendant is that the plaintiff has failed to carryout his part of obligation as per the agreement and since the measurements entered in the M-Book did not tally with the claim projected by the plaintiff, they are liable to refund the excess payment and prays for dismissal of the Suit.

4. This Court, upon perusal of the pleadings, framed the following issues:

1) Is not the plaintiff entitled to be paid

the amounts claimed in the plaint?

2) Has the plaintiff completed the work entrusted to him?

3) Is not the plaintiff bound by the measurements contained in the 'M' book?

4) Has not the plaintiff failed to complete the work and is he not liable to pay damages to the defendant?

5) Is not the plaintiff liable to pay the counter claim of Rs.23,96,010/- with interest to the defendant Corporation?

6) Was not the defendant justified in terminating the contract of the plaintiff for failure to complete the work?

7) To what other reliefs are the parties entitled to?

5. Mr.G.Thyagarajan, proprietor of Sri Thyagarajan Enterprises has filed the proof affidavit and marked Exs.P1 to P77 and the cross examination of PW1 has also been completed, however the defendant did not chose to enter into the witness box and the learned counsel appearing for the defendant has also reported no instructions. The Suit was posted for defence evidence and since they did not enter into the box, the matter was directed to be listed before this Court and the defendants were called absent and they were set exparte on 28.08.2015 and the Suit was posted for

arguments.

6. The learned counsel appearing for the plaintiff has drawn the attention of this Court to the proof affidavit of PW1 as well as the cross examination and would submit that in the absence of any contra oral evidence and arguments, the claim projected by the plaintiff has been proved and the defendant has also stated that payments have been made as per the recommendation of the Regional Engineer and though it was contended by them that the Regional Engineer was guilty of acting beyond his capacity, no action has been taken and no averments are available in the written statement as to whether any departmental or other action taken against the concerned Regional Engineer and prays for decreeing of the Suit.

7. This Court has considered the submissions made by the learned counsel appearing for the plaintiff and also perused the pleadings, oral and documentary evidence.

Issue No.2

8. A perusal of the pleadings, oral and documentary evidence would disclose that the plaintiff has completed major portion of the work and on account of non-cooperative attitude exhibited by the defendant, they walked out of the contract and in fact the Regional Engineer has also certified under Exs.P27 and P32, based on which payments have been made. Admittedly, the plaintiff did not carryout

the entire work and according to them, on account of non-cooperative attitude on the part of the defendant, they are not able to do so and therefore, this Court is of the view that the plaintiff has completed major portion of the work entrusted.

Issue No.3

9. A perusal of Ex.P3/agreement dated 04.10.1993 would disclose that payment for work shall be done at unit prices specified in Schedule "A" for the quantity of work done under each item and computation of quantities executed under each item shall be done by an officers of the Corporation designated for this purpose and in case of dispute in the measurement the decision of the Regional Engineer shall be final. Condition No.9 of Schedule "B" to the Ex.P3/agreement would read that the quantities for various items for which rates are quoted in the Schedule 'A' shall be measured as executed and paid by multiplying it by the rate quoted per unit and normally a part bill shall be made once in every month and payment shall be made and if bill is not made, an adhoc payment should be made based on the work turned out. Admittedly, as per Ex.P27 and P32, the Regional Engineer has certified the bills, based on which part payments have been made and it is the stand of the defendants in the written statement that adhoc payments recommended by the Regional Engineer cannot be accepted as

basis for evaluation as it was not based on M-Book measurements and the plaintiff cannot take advantage of the mistake committed by the Regional Engineer. As already pointed out by the learned counsel appearing for the plaintiff, departmental or other action taken against the concerned Regional Engineer has not been disclosed in the written statement and even as per the terms of Ex.P3/agreement, in the event of any dispute in the measurement, the decision of the Regional Engineer shall be final. Admittedly, the Regional Engineer has recommended for payment and part payment was also effected. Therefore, this Court is of the view that the plaintiff is not bound by the measurements contained in the M-Book.

10. Hence, Issue No.3 is answered in affirmative in favour of the plaintiff.

Issue No.4

11. It is the specific case of the plaintiff that on account of the non-cooperative attitude exhibited by the defendants, they are unable to complete the work and therefore, walked out of the contract and though PW1 was cross-examined, the defendant did not enter into the witness box either in support of the defence or counter claim and therefore, the plaintiff is entitled to claim damages.

12. Hence, Issue No.4 is answered in affirmative in favour of the plaintiff.

Issue No.5

13. Admittedly, the defendants made counter claim of Rs.23,96,100/- with interest, however they did not enter into the witness box in support of their claim. Hence, the defendant is not entitled to any counter claim and issue No.5 is answered in favour of the plaintiff.

Issue No.6

14. It is the specific stand of the defendant that the plaintiff did not extend maximum cooperation for timely completion of the contract and left with no other alternative, they have walked out of the contract and Exs.P72 and P73 also evidence the said fact and therefore, the defendant is justified in terminating the contract. Hence, Issue No.6 is answered in affirmative in favour of the plaintiff.

Issue Nos.1 and 7

15. The plaintiff, though oral and voluminous documentary evidence, has sustained their claim and though on behalf of the defendant, the cross examination of PW1 was done, they have not let in any evidence either to support their defence or counter claim and therefore, the plaintiff is entitled to a decree as prayed for and issue Nos.1 and 7 answered in favour of the plaintiff.

16. In the result, there shall be a judgment and decree

directing the defendant to pay to the plaintiff a sum of Rs.49,40,712.50/- together with interest at 18% per annum on the principal amount of Rs.42,40,954.95 from the date of the plaint till the date of decree and thereafter interest @ 6% per annum on the principal sum of Rs.42,40,954.95 from the date of decree till the date of realisation and the plaintiff is also entitled to cost of the Suit.

List of Witnesses:

PW1 : Mr.G.Thyagarajan

List of Exhibits:

Exhibit s	Description of Documents	Date
Ex.P1	The copy of letter sent by the defendant to plaintiff	03.10.1993
Ex.P2	The copy of letter sent by the plaintiff to defendant	04.10.1993
Ex.P3	The agreement	04.10.1993
Ex.P4	The letter	12.01.1994
Ex.P5	The copy of letter	21.01.1994
Ex.P6	The letter	24.01.1994
Ex.P7	The letter	25.01.1994
Ex.P8	The letter	26.01.1994
Ex.P9	The letter	01.02.1994
Ex.P10	The letter	17.01.1994
Ex.P11	The copy of letter	07.02.1994
Ex.P12	The copy of letter	20.02.1994
Ex.P13	The copy of letter	24.02.1994
Ex.P14	The letter	02.03.1994
Ex.P15	The letter	25.03.1994
Ex.P16	The copy of article of agreement	04.04.1994

Exhibit s	Description of Documents	Date
Ex.P17	The copy of statement issued by ADE	06.04.1994
Ex.P18	The letter	26.04.1994
Ex.P19	The letter	06.05.1994
Ex.P20	The letter	07.05.1994
Ex.P21	The letter	18.05.1994
Ex.P22	The letter from Regional Manager	03.06.1994
Ex.P23	The letter of defendants Regional Engineer	14.06.1994
Ex.P24	The letter	01.07.1994
Ex.P25	The letter	04.07.1994
Ex.P26	The copy of letter	11.07.1994
Ex.P27	The letter	08.08.1994
Ex.P28	The copy of letter	17.08.1994
Ex.P29	The letter	22.08.1994
Ex.P30	The letter	07.09.1994
Ex.P31	The letter	27.09.1994
Ex.P32	The letter	27.09.1994
Ex.P33	The letter	01.10.1994
Ex.P34	The letter	03.10.1994
Ex.P35	The letter	12.10.1994
Ex.P36	The letter	13.10.1994
Ex.P37	The letter	17.10.1994
Ex.P38	The letter	28.10.1994
Ex.P39	The letter	28.10.1994
Ex.P40	The copy of legal notice	03.11.1994
Ex.P41	The letter	03.11.1994
Ex.P42	The copy of letter	07.11.1994
Ex.P43	The letter	08.11.1994
Ex.P44	The letter	10.11.1994
Ex.P45	The letter	22.11.1994
Ex.P46	The copy of letter	30.11.1994
Ex.P47	The letter	02.12.1994
Ex.P48	The letter	06.12.1994

Exhibits	Description of Documents	Date
Ex.P49	The letter	24.12.1994
Ex.P50	The letter	06.01.1995
Ex.P51	The letter	06.01.1995
Ex.P52	The letter	06.01.1995
Ex.P53	The letter	07.01.1995
Ex.P54	The letter	11.01.1995
Ex.P55	The letter	17.01.1995
Ex.P56	The letter	20.01.1995
Ex.P57	The letter	02.02.1995
Ex.P58	The letter	02.02.1995
Ex.P59	The letter	02.02.1995
Ex.P60	The letters sent by defendant to plaintiff	24.02.1995
Ex.P61	The letters sent by defendant to plaintiff	27.02.1995
Ex.P62	The copy of letter sent by plaintiff to defendant	03.03.1995
Ex.P63	The copies of letters sent by plaintiff to defendant	06.03.1995
Ex.P64	The copies of letters sent by plaintiff to defendant	07.03.1995
Ex.P65	The copies of letters sent by plaintiff to defendant	07.03.1995
Ex.P66	The copies of letters sent by plaintiff to defendant	07.03.1995
Ex.P67	The copy of the letter sent by plaintiff to defendant	08.03.1995
Ex.P68	The copies of the letter sent by plaintiff to defendant	20.03.1995
Ex.P69	The copies of the letter sent by plaintiff to defendant	20.03.1995
Ex.P70	The copy of letter sent by the plaintiff to defendant	29.04.1995
Ex.P71	The letters sent by defendant to plaintiff	25.05.1995
Ex.P72	The letters sent by defendant to plaintiff	26.05.1995

Exhibits	Description of Documents	Date
Ex.P73	The copies of the letters sent by plaintiff to defendant	17.06.1995
Ex.P74	The copies of the letters sent by plaintiff to defendant	17.06.1995
Ex.P75	The letter sent by defendant to plaintiff	21.06.1995
Ex.P76	The copy of letter sent by plaintiff to defendant	30.06.1995
Ex.P77	The letter from defendant to plaintiff	08.11.1994

Sd/M.S.N.J

18.01.2016

//Certified to be a true copy//

Dated this the _____ day of _____ 2016

S.s/.26.04.2016

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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