IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2016

DELIVERED ON : 21.12.2016

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.746 of 2004

M/s.Seeyan Associates
Represented by its Partner
K.P.Gopinath .. Plaintiff

vs.

M/s.Fenner (India) Limited
Chennai .. Defendants

Civil Suit filed under Order IV Rule 1 of Original Side Rules 1956 read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendants.

i) directing the defendant to pay a sum of Rs.11,20,294.03 together with interest at the rate of 12% per annum on Rs.9,59,690.78 from the date of the plaint till realization;

ii) to pay the costs of the suit.

For Plaintiff : Mr. S.Dhasaiya

For defendant : Mr. R.Veeraraghavan

J U D G M E N T

The suit is filed for recovery of sum of Rs.11,20,294.03 together with interest at the rate of 12% per annum on Rs.9,59,690.78 from the date of the plaint till the date of realisation.

2.The brief facts of the case of the plaintiff are as follows:

(i) The plaintiff, viz., M/s. Seeyen Associates is a registered partnership firm. The defendant is engaged in the contract works with M/s.Neyveli Lignite Corporation (In short " NLC") for the expansion project and awarded sub contract to the plaintiff for fabrication of straight ducts, hoods, flanges, bends, 'Y' pieces, 'T' Sections etc.; erection of ducting; fabrication and erection of supporting structures; and leading of material to erection area through a Purchase Order (Work Order) dated 14.12.2001. The terms of the work order assures payment of 90% of the bill amount to the plaintiffs on certification by the defendant's site officials and 10% after completion of work. But the defendant used to release only part payment on the bills submitted by the plaintiff.

(ii) The plaintiff states that they commenced the erection work of ducts after the completion of the fabrication of the parts as per the the drawings supplied by the defendant, but with the reasons pointed out in the plaintiff's letter dated 24.06.2002 addressed to the defendant the work could not be proceeded with. As specified in that letter, without making necessary alterations and modifications, involving additional engagement of manpower and usage of consumables, tools, tackles and machineries, the erection work became impossible because of the site conditions. Since there was no response for the said letter, the plaintiffs again on 02.7.2002 made a request to the defendant for permission to take out their machineries mobilised for the fabrication work but the same was refused stating that they are required for modification.

(iii) When things are such, the defendant came forward with certain modifications beyond the scope of the work order assuring additional payment for such modification based on the additional usage of manpower, tools tackles and machineries. When the plaintiff raised bills for payment, the same were not paid by the defendant inspite of repeated requests. Instead of payment, the defendant sent a letter dated 28.09.2002 to the plaintiff mentioning slow progress of the work, for which the plaintiff sent a reply pointing out the reasons for the delay, which are on the part of the defendant.

(iv) The defendant simultaneously wanted the plaintiff to execute some other inter-related works such as S.S.Liner fixing on peddle feeder table; Fabrication and erection, modification and erection of monorails; fabrication of packing plates, pipe blocks etc., and modification and pre-assemble of Technological Structures of Mill, feeding conveyers for inspection purposes etc., The plaintiff executed the work and submitted bills and the same were partly paid. Further, the defendant used to deploy some skilled technicians of the plaintiff without the plaintiff's knowledge and consent. Though the plaintiff addressed a letter to the defendant in this regard, no action was taken. Therefore, the plaintiff issued a legal notice dated 03.7.2003 to the defendant calling upon them to make payment of Rs.9,08,391.60 as per the bills together with TDS certificates withheld by the defendants, for which the defendant sent a reply alleging that the plaintiff committed breach of contract. Therefore, the plaintiff has filed the present suit.

3. The case of the defendant, in nut shell are as follows:

(i) The defendant filed their written statement denying the averments made in the plaint. According to the defendant, in regard to the portion of the dust extraction systems for the Lignite handling system, the defendant had awarded to the plaintiff several subcontract jobs, and a few other subcontract jobs as well in the premises of Neyveli as per the terms determined in the each such contract. The BMF Beltings Limited, (in short "BMF"), a subsidiary company of the defendant also came to be awarded a contract for some work in the premises of NLC and the plaintiff was also working as a subcontractor for BMF.

(ii) It is the case of the defendant that in another part of the work NLC was getting done for its TPS 1 Expansion Project; NLC had a contractor, viz, Asia Power Projects Pvt.Limited (in short"APPL") for carrying out design, engineering , supply of equipment, erection, alignment and commissioning of 18 mill feeding conveyors. APPL, in turn, subcontracted to another company known as Babcock Borsing Power Systems Limited (in short "BBPS") a part of the contract job obtained from NLC in relation to the 18 mill feeding conveyors. APPL also subcontracted to

BMF, which, in turn, had subcontracted to the plaintiff. Thus, the plaintiff came to be involved in the transactions with BMF also in the premises of NLC.

(iii) According to the defendant, the plaintiff was treating BMF as one with its holding company (i.e., the defendant) in such transactions in the Neyveli Projects and the defendant acted for its subsidiary. BMF also in their transactions with the plaintiff in the subcontract jobs awarded by the defendant and BMF to the plaintiff in NLC premises at Neyveli. The plaintiff also filed another suit in C.S.No.747 of 2004 in regard to the plaintiff's said subcontract with BMF, in which BMF is the first defendant and the defendant herein is the second defendant. In terms of a scheme of arrangement, demerger and amalgamation sanctioned by the Madras High Court by its order dated 27.03.2006 in C.P.No.11 to 15 of 2006 under sections 391 to 394 of the Companies Act, 1956, BMF was amalgamated with the defendant company.

(iv) According to the defendant, the suit claim of the plaintiff is allegedly for moneys due for work done in reference to 37 bills filed along with the plaint. The defendant had issued 11 purchase orders to the plaintiff. Out of 37 bills filed along with the plaint, 24 of bills were covered by such purchase orders though the defendant did not accept the full value of the said 24 bills as due and payable. The plaintiff is also incorrect in alleging as though the full value of all his 37 bills were due and payable.

(v) When the contract between the plaintiff and the defendant stood amended, the erection work undertaken by the plaintiff needed modifications, alterations and rectification and the plaintiff was carrying out the modifications as per the instructions of the defendant. Though the plaintiff requested separate payment for carrying out the modifications according to the hours of work spent by labourers and use of machineries, consumables and tools and tackles employed, the defendants did not agree for the same. After completion of all works, the plaintiff and the defendant agreed on the amount payable to the plaintiff for all such modification work. No correspondence has been made by the plaintiff quoting the rate. As regards the payment, the defendant was releasing the payment from time to time and had indeed fully paid whatever was due to the plaintiff on their valid bills of work actually done accepted and assessed and the plaintiff was indeed over paid in the end. Thus, the defendant submitted that they does not owe the amount of Rs.11,20,294.93 or any other amount to the plaintiff as claimed. Hence, the defendant prayed for dismissal of the suit.

4. On the above pleadings, originally, this Court, on 20.06.2008, has framed the following issues:

1. Whether the suit is barred by limitation under Section 6 of the Limitation Act?

3. Whether the plaintiff is entitled to claim Rs.11,20,294.03 together with interest and costs as prayed for in the suit?

5. On the side of the plaintiff, P.W.1 was examined and Exs.P1 to P53 were marked. On the side of the defendants, D.W.1 was examined and Exs.D1 to D87 were marked. The details of the documents are hereunder:

Exhibits produced on the side of the plaintiff:

S. No	*Exhibits*	*Date*	*Description of documents*
1.	P-1	18.12.2001	Acknowledgment of Registration of Firm
2.	P-2	27.11.2001	Partnership deed
3.	P-3	04.12.2001	Purchase Order

S. No	Exhibits	Date	Description of documents
4.	P-4	24.06.2002	Xerox copy of the letter from the plaintiff to the defendant
5	P-5	02.07.2002	Copy of the letter from the plaintiff to the defendant
6	P-6	12.07.2002	Xerox copy of the letter from the plaintiff to the defendant
7	P-7	29.07.2002	Copy of the letter from the plaintiff to the defendant
8	P-8	13.08.2002	Copy of the letter from the plaintiff to the defendant
9	P-9	23.08.2002	Copy of the letter from the plaintiff to the defendant
10	P-10	19.09.2002	Copy of the letter from the plaintiff to the defendant
11	P-11	28.09.2002	Letter from the defendant to the plaintiff
12	P-12	03.10.2002	Copy of the letter from the plaintiff to the defendant
13	P-13	27.04.2003	Xerox copy of the letter from the plaintiff to the defendant
14	P-14	09.06.2003	Copy of the letter from the plaintiff to the defendant
15	P-15	19.04.2003	Copy of the letter from the plaintiff to the defendant
16	P-16	26.05.2003	Xerox copy of the letter from the plaintiff to the defendant
17	P-17	03.07.2003	Copy of the legal notice issued by the plaintiff's counsel to the defendant with postal receipt
18	P-18	28.07.2003	Reply notice issued by the defendant's counsel to the plaintiff's counsel
19	P-19	06.12.2002	Bill No.147
20	P-20	30.09.2002	Bill No.136
21	P-21	21.10.2002	Bill No.139

S. No	Exhibits	Date	Description of documents
22	P-22	30.09.2002	Bill No.135
23	P-23	09.09.2002	Bill No.127
24	P-24	07.09.2002	Bill No.126
25	P-25	26.08.2002	Bill No.121
26	P-26	02.08.2002	Bill No.120
27	P-27	02.08.2002	Bill No.119
28	P-28	22.07.2002	Bill No.115
29	P-29	22.07.2002	Bill No.114
30	P-30	22.07.2002	Bill No.113
31	P-31	02.07.2002	Bill No.112
32	P-32	30.06.2003	Bill No.187
33	P-33	17.05.2003	Bill No.178
34	P-34	17.05.2003	Bill No.179
35	P-35	02.05.2003	Bill No.175
36	P-36	28.03.2003	Bill No.168
37	P-37	03.03.2003	Bill No.164
38	P-38	15.02.2003	Bill No.161
39	P-39	22.06.2002	Bill No.108
40	P-40	28.06.2003	Bill No.110
41	P-41	01.11.2002	Bill No.140
42	P-42	25.07.2002	Bill No.118
43	P-43	24.08.2002	Bill No.124
44	P-44	19.02.2003	Bill No.162
45	P-45	17.05.2003	Bill No.177
46	P-46	22.04.2002	Xerox Copy of Bill No.5
47	P-47	22.03.2002	Xerox copy of Bill No.102/1
48	P-48	17.05.2002	Xerox copy of Bill No.6
49	P-49	02.04.2002	Xerox copy of Bill No.104
50	P-50	30.09.2002	Xerox copy of Bill No.101
51	P-51	23.07.2002	Bill No.133
52	P-52	23.07.2002	Bill No.117

S. No	Exhibits	Date	Description of documents
53	P-53	09.09.2002	Bill No.128

Exhibits produced on the side of the defendants:

S. No	Exhibits	Date	Description of documents
1	D-1	30.03.2002	Office copy of purchase order amendment
2	D-2	04.06.2002	Copy of purchase order
3	D-3	-	Copy of purchase order
4	D-4	28.08.2002	Office copy of purchase order amendment
5	D-5	31.08.2002	Xerox copy of purchase order amendment
6	D-6	31.08.2002	Purchase order
7	D-7	15.11.2002	Purchase order
8	D-8	07.05.2003	Purchase order
9	D-9	30.03.2002	Xerox copy of purchase order
10	D-10	-	Xerox copy of purchase order amendment
11	D-11	16.07.2002	Xerox copy of purchase order
12	D-12	-	Xerox copy of purchase order
13	D-13	22.08.2002	Xerox copy of purchase order
14	D-14	27.01.2003	Purchase order
15	D-15	26.02.2002	Purchase order
16	D-16 series	26.02.2002	Xerox copy of letter from the plaintiff to the defendant
17	D-17	22.03.2002	Bill No.102/1
18	D-18 series	02.04.2002	Bill No.102/1
19	D-19 series	22.04.2002	Letter from the plaintiff to the defendant
20	D-20	22.03.2002	Letter from the plaintiff to the defendant

S. No	*Exhibits*	*Date*	*Description of documents*
21	D-21 series	22.06.2002	Bill No.108
22	D-22 series	28.06.2002	Copy of the letter from the plaintiff to the defendant with bill No.113
23	D-23 series	02.07.2002	Bill No.102
24	D-24 series	23.07.2002	Copy of the letter from the plaintiff to the defendant with bill No.113
25	D-25	23.07.2002	Bill No.116
26	D-26	23.07.2002	Xerox copy of Bill No.117
27	D-27 series	25.07.2002	Bill No.118
28	D-28 series	02.08.2002	Copy of the letter from the plaintiff to the defendant with bill No.119
29	D-29 series	02.08.2002	Copy of the letter from the plaintiff to the defendant with bill No.120
30	D-30 series	26.08.2002	Letter from the plaintiff to the defendant with bill No.124
31	D-31 series	26.08.2002	Bill No.121 with measurement sheet
32	D-32 series	07.09.2002	Bill No.126 with measurement sheet
33	D-33 series	09.09.2002	Bill No.127 with measurement sheet
34	D-34	30.09.2002	Bill No.133
35	D-35	30.09.2002	Bill No.134
36	D-36 series	19.02.2003	Bill No.162 with measurement sheet
37	D-37 series	17.05.2003	Bill No.177 with measurement sheet
38	D-38 series	15.02.2003	Bill No.161 with additional work details

S. No	Exhibits	Date	Description of documents
39	D-39 series	03.03.2003	Letter and Bill No.164 with additional work details
40	D-40 series	28.03.2003	Letter and Bill No.168 with additional work details
41	D-41 series	02.05.2003	Letter and Bill No.175 with additional work details
42	D-42	05.01.2002	Letter from the plaintiff to the defendant
43	D-43 series	05.07.2002	Internal correspondence of the defendant
44	D-44 series	03.03.2003	Internal correspondence of the defendant
45	D-45 series	04.10.2002	Internal correspondence of the defendant
46	D-46 series	04.01.2003	Internal correspondence of the defendant
47	D-47 series	05.03.2003	Internal correspondence of the defendant
48	D-48 series	03.06.2003	Internal correspondence of the defendant
49	D-49	07.10.2002	Xerox copy of the letter from the defendant to the plaintiff
50	D-50	23.01.2003	Letter from the defendant to the plaintiff
51	D-51 series	15.05.2003	Letter from the defendant to the plaintiff along with declaration format
52	D-52 series	03.03.2003	Xerox copy of the letter from the plaintiff to the defendant along with outstanding bills receivables
53	D-53	05.06.2003	Complaint given by the defendant to the Inspector of Police, Neyveli
54	D-54	05.06.2003	Copy of letter from the defendant to NLC

S. No	*Exhibits*	*Date*	*Description of documents*
55	D-55	05.06.2003	Copy of letter from the defendant to NLC
56	D-56	-	Letter from the defendant to NLC
57	D-57 series	12.09.2002	Voucher No.618 and cash receipt
58	D-58 series	14.09.2002	Voucher No.618 and cash receipt
59	D-59	08.01.2003	Voucher No.1060
60	D-60	04.02.2003	Voucher No.1183
61	D-61	04.02.2003	Voucher No.1184
62	D-62	06.02.2003	Voucher No.1197
63	D-63	16.02.2003	Voucher No.1241
64	D-64	08.01.2003	Voucher No.1309
65	D-65 series	10.03.2003	Voucher No.1313 cash receipt and credit bill No.86
66	D-66	19.03.2003	Voucher No.1355
67	D-67	31.03.2003	Voucher No.1399
68	D-68	05.06.2003	Voucher No.239
69	D-69	11.06.2003	Voucher No.275
70	D-70	21.06.2003	Voucher No.318
71	D-71	25.06.2003	Voucher No.329
72	D-72 series	28.06.2003	Voucher No.339 along with various bills
73	D-73 series	08.01.2003	Voucher No.360 along with cash receipt and bills
74	D-74 series	05.07.2003	Voucher No.387 along with various bills
75	D-75	12.07.2003	Voucher No.435
76	D-76 series	20.07.2003	Voucher No.462 along with various bills
77	D-77	22.07.2003	Voucher No.471
78	D-78 series	08.01.2003	Voucher No.487 and bill

S. No	Exhibits	Date	Description of documents
79	D-79	12.08.2003	Voucher No.569
80	D-80 series	20.08.2003	Voucher No.592 along with cash receipt and bills
81	D-81 series	22.08.2003	Voucher No.602 and bill
82	D-82	31.03.2003	Form 16-A
83	D-83	31.05.2003	Form 16-A
84	D-84	31.05.2004	Form 16-A
85	D-85	27.03.2006	Xerox copy of the order in C.P.Nos.11 to 15/2006
86	D-86	07.01.2011	Certificate issued by the State Bank of India to the defendant
87	D-87	07.01.2011	Certificate issued by the State Bank of India to the defendant

Witnesses examined on the side of the plaintiff:

P.W.1. - K.P.Gopinath

Witnesses examined on the side of the defendant

D.W.1 - P.Venkateswarlu

6. Heard, Mr.S.Dhasaiya, the learned counsel appearing for the plaintiff and Mr. R.Veeraraghavan, the learned counsel appearing for the defendant and perused the records.

7. It is the contention of the learned counsel for the plaintiff that the suit has been filed for recovery of money due from the defendant for the work done by the

plaintiff. It is submitted by the learned counsel for the plaintiff that the defendant was the main contractor for providing Lignite Handling system for the expansion of project of the Thermal Power Station No.1 (TPS-1) of NLC at Neyveli. It is further submitted by the learned counsel that under purchase order dated 04.12.2001, Ex.P3, the defendant awarded a part of the contract for Fabrication and Erection of Ducts of the Dust Extraction Systems to the plaintiff. As per Ex.P3 the plaintiff has to fabricate the ducts with the materials supplied by the defendant and erect them in correct position. Similarly, the purchase order ensure payment of 90% on prorata basis on certification of bills by defendant's site officials. In addition to the above said works, the plaintiff executed several other aspects as per the oral and written instructions of the defendant.

8. It is the contention of the learned counsel for the plaintiff that though the plaintiff has submitted 39 bills, i.e., Exs. P.19 to P.53, for the value amounting to Rs.17,20,100.50, the defendant made part payment and the remaining amount to the tune of Rs.9,59,609.78 has not been paid in spite of several communications, including the

legal notice, Ex.P.17. It is further contended by the learned counsel that none of the bills submitted by the plaintiff were paid by the defendants even after the certification given by their site officials. The allegation of the defendant that they reduced the quantity of work is not correct. In fact, as per the amended purchase order, the defendant increased the quantity and delayed the process which led to the amendment at the belated stage. During such delay, the defendant withheld the amount of the plaintiff. Further, the difficulties suffered by the plaintiff in execution of the work were informed by the plaintiff to the defendant through letter dated 29.07.2002 (Ex.P7) but no action was taken by the defendant. Exs. P4 to P16, letters sent by the plaintiff on various dates, clearly show that the plaintiff made repeated demand and the same was not considered by the defendant.

9. The learned counsel for the plaintiff also submitted that though 39 bills raised by the plaintiff were acknowledged and acceded to by the defendant, none of them were replied or no action was taken by the defendant. The learned counsel for the plaintiff further submitted that,

in addition to the above said work, vide purchase order Ex.P3, the plaintiff also executed several other works related to TPS 1 expansion project of NLC for the defendant as per clause No.14 and 17 of the general terms and conditions of the purchase order. It is the submission of the learned counsel for the plaintiff that out of 15 bills raised by the plaintiff for the above said process, defendant made only part payment of 10 bills and no payments were made on the other 5 bills, which is a clear breach of contract committed by the defendant. Likewise, several other works were executed then and there as per the oral instruction of the defendant for which also, the defendant failed to make payment. Further, no bill was returned to the plaintiff at any point of time. It is the submission of the learned counsel for the plaintiff, that the defence of long delay has been taken for the first time only in the written statement in order to deprive the plaintiff's lawful claim. Ex.P32, bill, towards rent for the machineries was also not paid by the defendant. Further, the defendant did not permit the plaintiff to take machineries, which caused much loss to the plaintiff. Therefore, the amount claimed in the plaint is reasonable one.

10. It is submitted by the learned counsel for the plaintiff that without any basis, the defendant had deducted some amount, which is not sustainable. It is further submitted that despite nonpayment of bills certified by the defendant's site officials, the defendant is trying to put the blame on the plaintiff. It is also the submission of the learned counsel for the plaintiff that the defendant is trying to mix up the issues raised in C.S.No.747 of 2004 indicating arrears of wages, wages to the workmen etc, which are not at all relevant in this case. Thus, it is the submission of the learned counsel for the plaintiff that from the entire bills submitted by the plaintiff, a sum of Rs.11,20,294.03 is due and payable by the defendant together with interest and cost. Hence, the learned counsel for the plaintiff prays for decree and judgment.

11. On the contrary, it is the submission of the learned counsel for the defendant that the suit is barred under Section 69 (2) of the Partnership Act. The mandatory conditions set out in the above section are not complied with by the plaintiff. Hence, it is the submission of the

learned counsel for the defendant that the suit filed by the plaintiff is not maintainable.

12. It is also the submission of the learned counsel for the defendant that the interest claimed by the plaintiff is not sustainable in law, as there is neither agreement nor any conditions stipulated in the purchase order to pay the interest. In the absence of any contract to pay the interest, the plaintiff is not entitled to claim interest. Furthermore, notice in the manner contemplated under Section 3(1) (b) of the Interest Act, 1978 was not given to the defendant.

13. Insofar as the claim with regard to the principal amount is concerned, it is the contention of the learned counsel for the defendant that Ex.D52, letter dated 04.6.2003, written by the plaintiff to the defendant clearly shows that no amount was due and payable by the defendant. Further, as per Ex.P3, the required machineries, tools and tackles shall be arranged by the plaintiff. It is also stated in Ex.P3 that the plaintiff has to carry out any extra item of works. Ex.D.8 envisage only payment of wages for labourers and cost of consumables by defendant for modification works. Ex.P.32 is not certified by the defendant and the same pressed into service and only after

thought. Nowhere in the purchase order, it is agreed between the parties that rent shall be paid to the machineries whereas, the specific condition, as articulated in Ex.P3, was that the machineries shall be arranged by the plaintiff. Therefore, the amount claimed by the plaintiff towards rent for the machineries is not legally sustainable.

14. It is also the contention of the learned counsel for the defendant that every work has to be carried out only on the basis of the modified purchase order, Ex.D8. Therefore, the contention of the plaintiff's counsel that as per the oral instruction of the plaintiff, some works were executed cannot be given much importance, as the terms set out in Ex.D8 are binding on the parties. Further, the aggregate value of 39 bills produced by the plaintiff is Rs. 17,94,794.98 whereas the principal amount claimed in the suit itself is Rs.9,59,690,78. Ex.D86, shows that the defendant has taken a Demand Draft towards settlement of the bills submitted by the plaintiff. Ex.D52, letter dated 04.6.2003 written by the plaintiff indicate that the net balance amount receivable by them as on 04.6.2003 is Rs.2,92,665.70/-. Exs. D52, D57, D58, D60, D63 and D70 altogether show that the balance amount due to the

plaintiff is Rs.72,665.70/-. It is submitted that after making deductions and adjustments from the said sum of Rs.72,665.70, which has been established in the evidence of D.W.1, excess payment to the tune of Rs.1,09,429.76 have been made to the plaintiff. It is therefore submitted that the alleged oral agreement or instruction as pleaded by the plaintiff cannot be given much importance in the eye of law. Further, the alleged oral agreement has not been established in the manner known to law.

15. It is submitted that modification work order has been issued only after the completion of work. Exs.P.35 to P.38 bills clearly show that the same pertains to wage for labourers and cost of consumables and not for rent towards machineries, as alleged by the plaintiff. The above Exs. are dated 15.2.2003 to 02.5.2003. It is submitted by the defendant that only for the first time, after termination of the contract, the plaintiff claimed rent towards machineries, which is against the terms of the contract. Similarly, other bills have been submitted without any certification order issued by the defendant and, therefore, the same were rightly rejected by the defendant. The defendant also shown justification for paying the lessor amount and for making proper deduction under law, in

respect of certain bills. It is submitted that there is no due, whatsoever, payable to the plaintiff. Hence the learned counsel for the defendant prayed for dismissal of the suit.

16. In support of his contention, the learned counsel for the defendant relied on the judgments of various High Court reported in AIR 1952 Nagpur 57 ***(KAPURCHAND BHAGAJI V. LAXMAN TRIMBAK);*** AIR 1964 Punjab 270 ***(BUTA MAL V. CHANAN MAL)*** ; AIR 1978 Bombay 348 ***(GANDHI AND CO., V. KRISHNA GLASS PVT. LTD.)*** and AIR 1993 KERALA 88 ***(BHARATH TRUST V. D.DIVAKAR RAO)*** and also the judgment of the Hon`ble Supreme Court in AIR 1965 SCC 1718 ***(MAHARANI MANDALSA DEVI V. M.RAMNARAIN PRIVATE LIMITED)*** and (1989) 3 SCC 476 ***(M/s. SHREERAM FINANCE CORPORATION V. YASIN KHAN AND OTHERS).***

17. For the sake of convenience, the relevant issues framed by this Court are as follows:

> 1. Whether the suit is barred by limitation under Section 6 of the Limitation Act?
>
> 2. Whether the plaintiff is

entitled to claim Rs.11,20,294.03 together with interest and costs as prayed for in the suit?

18. It is pointed out by the learned counsel appearing for the plaintiff as well as the defendant that there is a typographical error crept in while framing the issue No.1, i.e., Whether the suit is barred by limitation under Section 6 of the Limitation Act?

19. In the course of argument, the learned counsel for both sides agreed that the appropriate issue would be "Whether the suit is barred under Section 69 of the Partnership Act". In view of the same, the corrected version of issue No.1 reads as follows:

1. Whether the suit is barred by limitation under Section 69 of the Partnership Act?

Issue No.2:

20. The suit is filed for recovery of a sum of Rs.11,20,294.03 together with interest at the rate of 12% p.a. on Rs.9,59,690.78 from the date of plaint till date of realisation. It is the case of the plaintiff that the

defendant is the main contractor of NLC. The plaintiff is the Sub contractor and he was awarded a sub contract for a portion of the Dust Extraction System, under purchase order dated 04.12.2001 for fabrication of straight Ducts, hoods, flanges, bends "Y" pieces , "T" Sections etc., Erection of ducting, Fabrication and Erection of supporting structures and leading material to erection area.

21. According to the plaintiff, as per the contract, the plaintiff is entitled to 90% of the bill amount on certification by the defendant's site officials and remaining 10%, after completion of erection work. As per the contract, the plaintiff commenced work and for re-routing, which became necessary for the project, modification and alteration on the already fabricated parts of the ducts was the only solution during erection. Though the defendant had issued modified purchase order on several occasions, at the time of work, as per the instruction of the defendant's site officials, works were carried out by the plaintiff then and there and in respect of the same, the plaintiff has submitted 39 bills. But the defendant has not paid the entire bill fully and only some of them were honored and in spite of the repeated demands and

letters, they have failed to pay the suit amount.

22. But on the other hand, it is the contention of the defendant that the work order is the basis for allotment of work. Accordingly, the defendant had issued 11 purchase orders and out of 39 bills submitted by the plaintiff, 27 bills alone are covered by the said purchase order and that, 12 bills related to some other jobs, which were not covered by any purchase order. Therefore, the defendant has rightly refused to honour the above bills. Insofar bill No.187, which is marked as Ex.P32, for a sum of Rs.6,17,050/- dated 30.6.2003 is concerned, there is no basis for the plaintiff to raise such bill. In fact, the above amount is covered only in respect of the machineries. Therefore, it is the contention of the defendant that all rights and obligations are covered only by the purchase order and not on the basis of any alleged oral agreement. It is the further contention of the defendant that purchase orders were issued in confirmation of the work done or being done on the basis of the prior transaction. Only after completion of the modification work, the purchase orders were issued. Finally, last purchase order was issued on 07.5.2003. Therefore, any correspondence prior to

that were superseded.

23. In the light of the above background, when pleadings and evidence of both sides are carefully perused, it appears that there is no dispute with regard to the allotment of the said work to the plaintiff by the defendant. Similarly, there is no dispute with regard to 39 bills raised by the plaintiff. In this regard, D.W.1, in the Chief examination, has spoken about receipt of the bills. According to D.W.1, only 26 bills were considered by them and 12 bills could not be assessed by them since there is no contract for the same. On a careful perusal of the entire documents, more particularly, Ex.P3, purchase order dated 04.12.2001 and Exs.D1 to D14, purchase order of various dates, it is seen that the said purchase orders stipulate 90% of payment on prorata basis, that too, on certification of the bills by the defendant's site officials, and remaining 10% of payment after completion of entire erection work.

24. It is the contention of the plaintiff that there was a delay in making payment even after amended purchase order. It is also the contention of the plaintiff that there were some bills still pending for payment even after execution of the work also. A perusal of Exs.P4 to P10

letters addressed by the plaintiff to the defendant, clearly show that the plaintiff was repeatedly requesting the defendant for payments. Ex.P11 is the letter dated 28.9.2002 written by the defendant requesting the plaintiff to expedite the work. In the said letter, the defendant did not find fault with the defective nature of the contract. The defendant has only stated about the slow progress of the work. Exs.P12, P.14 to P.16 also clearly show that the plaintiff was repeatedly requesting the defendant to make payments. Ex.P17 is the legal notice issued by the plaintiff on 03.7.2003 claiming a sum of Rs.9,03,237/- as on 30.6.2003 and retention amount of Rs.6,00,000/- together with certificate of TDS. The defendant has sent a reply under Ex.P18 denying the said amount. Ex.P20 to P53 are the various bills raised by the plaintiff.

25. It is the contention of the defendant that they paid extra amount to the plaintiff and there is no amount due and payable to the plaintiff. The defendant has also relied upon Ex.D52 (series), letters addressed by the plaintiff on 04.6.2003 along with statement, wherein the plaintiff had admitted that net balance amount receivable is only Rs.2,92,665.70, as on 26.5.2003.

26. It is to be noted that out of 39 bills, the defendant has rejected 12 bills amounting to Rs.1,51,600/-. It is the contention of the learned counsel for the defendant that these bills are not covered under any purchase order. These bills are Exs. P.19 to P.22, P.28, P.29, P.33, P.34, P41, P53 (3 bills). When these bills are carefully perused, it is seen that they pertain to the incidental work done at the time of erection. Therefore, merely because there is no specific mention about the alleged work in the purchase orders issued by the defendants from time to time, it cannot be contended that no such work is done and the plaintiff is not entitled for the payment of work.

27. It is well known that extra work is bound to happen at the time of doing major work. In the present case, it is submitted that the alleged extra works were done as per the instruction of the site officials of the defendant from time to time. It is to be noted that the term "extras" is generally used in relation to the works which are not expressly or impliedly included in the original contract and, therefore, not included in the original contract price, provided the work is done within the frame work of the original contract. Whether a

particular work is extra or not will depend upon the terms and conditions of the contract, its specifications, plans drawing, nature of the work etc. The work having been done within the frame work of the contract is liable to be treated as extra work.

28. On a careful perusal of Exhibits P.19 to 53, it is seen that all the bills were raised only in connection with the main contract. Such work is normal. Some time, deviations must occur while doing the major work, particularly, while erecting or digging or fabricating. Therefore, the defendant now cannot contend that since those bills are not covered under the purchase order, they are not liable to pay. Therefore, this Court is of the view that the contention of the defendant has no force at all.

29. Furthermore, when Exs.20,21,23 to 27, 30, 31, 35 to 40, 42 to 52 are carefully perused, it is seen that those bills have been paid, after making deduction of TDS and surcharge etc. The remaining 12 bills rejected by the defendant for the value of Rs. 1,51,600.10 alone are not paid by the defendant. The rejection of the above bills is without any basis. Therefore, as discussed above, the

defendant is, certainly, liable to pay a sum of Rs.1,51,600.10 after legal deduction such as TDS etc., as per law.

30. It appears that the main dispute, as articulated in the entire records, emanated from Ex.P32. Under Ex.P32, the plaintiff has claimed a sum of Rs.6,17,050/- towards rent for the machineries. It is the specific contention of the defendant that the purchase order and subsequent modification order clearly stipulate that Tractor cum Trailor for transportation of items at site shall be arranged by the plaintiff. Similarly, the plaintiff has to arrange for tools and tackles, which are necessary required for completion of job in time. On a careful perusal of the terms and conditions of the purchase order, it is clear that only the plaintiff has to bear the cost for any tools and machineries. Further, minutes of the meeting between the defendant and the plaintiff on 25.01.2003 marked as Ex.D15 also clearly indicate that only the plaintiff has to give proposal indicating the details of proposed modification, referring drawings and revision along with expected manpower, consumables and tools and tackles. Therefore, the plaintiff's claim under Ex. P-32

for a sum of Rs. 6,17,050/- is not sustainable. Though the plaintiff has arrived a sum of Rs.9,59,609.78 as on 30.6.2003, there is no details whatsoever found place in the plaint for arriving such amount.

31. In any event, the dispute between the parties is with regard to 12 bills rejected by the defendant as well as Ex.P32. As discussed above, the plaintiff, at the most, is entitled to get payment for 12 bills, less legal deductions. Insofar as Ex.P.32 is concerned, there is no contract, whatsoever, to pay the rent for the machineries. It is the duty of the plaintiff to bring the tools and machineries and, therefore, he cannot claim a separate rent for the machineries. Therefore, this Court is not in a position to accept the plaintiff's contention with regard to the rent payable under Ex.P32.

32. Therefore, this Court hold that the plaintiff is entitled to a sum of Rs.1,51,600.10 less all legal deductions as made in the other bills.

33. Though the plaintiff claimed interest on the amount, it is to be noted that there is no contract,

whatsoever, for paying any interest in the purchase order. In the absence of any contract, it is the duty of the plaintiff to issue a notice in writing claiming interest. In this regard, it is useful to refer Section 3 of the Interest Act, 1978, which reads as follows:

> **3. Power of Court to allow interest.-**
> (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-
>
> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do no relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

From the above section, it is very clear that for claiming interest, demand shall be made by the party concerned. In this case, Ex.P17 legal notice issued on 03.7.2003 is silent about interest except claiming the alleged due. Therefore, in the absence of notice in writing, plaintiff's claim with regard to interest cannot be ordered. Therefore, the plaintiff is not entitled to claim interest up to the date of suit. As there is no written notice given claiming interest, the plaintiff is not entitled to claim interest up to the date of suit.

However, this Court by invoking Section 34 of the CPC, award interest at the rate of 6% to the amount arrived above, i.e.1,51,600.10, from the date of suit till the date of realisation. It is ordered accordingly. Issue No.2 is answered accordingly.

Issue No:1

34. Admittedly the suit is filed by the Partnership firm represented by one of its partner, by name, K.P.Gopinath. Ex.P1 is the acknowledgment of Registration of Plaintiff's Firm dated 18.12.2001. In the said certificate, i.e. Ex.P1, address of one Sri. Binu S.Gopinath has been written. Ex.P2 is the deed of partnership said to have been entered on 27.11.2001 between one K.P.Gopinath and Binu S.Gopinath. Except this, no further documents, whatsoever, have been filed by the plaintiff to show that names of all the partners have been reflected or shown in the Registrar of Firm. It is not only necessary that the firm should be registered, but the person suing must be shown as a partner in the Registrar of Firm. For better appreciation, Section 69 of the Indian Partnership Act, 1932, dealing with the fact of non-registration, is reproduced here under.

> "69. Effect of non-registration- (1) No suit to enforce a right arising from a contract

or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

35. In such circumstances, what is to be decided in this case is whether the suit filed by the plaintiff is barred by Sec.69(2) of the Partnership Act. A close reading of Sec.69(2) will make it very clear that the bar contemplated in that proviso will become applicable only when; 1) a suit filed by a unregistered firm; 2) the suit is to enforce a right arising from a contract; 3) the suit is filed against a third party; and 4)the persons suing are not shown in the register of firms as partners in the firm.

36. In this case, Ex.P1 is the proof for registration of the Firm. On a reading of the same, it is clear that Section 69 (2) of the Partnership Act is not at all complied with by the plaintiff. The plaintiff's name is

never reflected in the acknowledgment of the Registration of the Firm. Further, no documents, whatsoever, have been filed to substantiate the fact that as on the date of filing the suit, K.P.Gopinath name was shown in the Registrar of Firm.

37. Now, let me consider the decisions relied on by the learned counsel for the defendant to cull out the legal principles settled therein. In the judgments of various High Court reported in AIR 1952 NAGPUR 57: ***(FIRM KAPURCHAND BHAGAJI V. LAXMAN TRIMBAK) ;*** *AIR 1964 Punjab 270* ***(FIRM BUTA MAL v. CHANAN MAL);*** *AIR 1978 Bombay 348* ***(GANDHI AND CO.v. KRISHNA GLASS PVT. LTD.,)*** *and AIR 1993 KERALA 88* ***(BHARATH TRUST V. D.DIVAKAR RAO),*** it is held that if the person suing not shown as partner in the Registrar of firms at the time of institution of the suit, the suit is not maintainable.

38. In this context, it is useful to refer the judgment of this Court reported in 1999(2) C.T.C. 540 (***M/s.K.R.M.Money Lenders Vs. A.Manoharan @ Doss),*** wherein this Court held as under:

".. .. .. 40. As rightly pointed out by the first appellate Court Ex.A.25 is a partnership deed relates to K.R.Murthayee Ammal Sankar and not to KRM Money Lenders. The plaintiff had failed to establish that the firm is a registered partnership firm and Ex.A.25 is the partnership deed. This failure to establish is fatal as in any suit by an unregistered partnership firm, as provided in Sec.69, it is not only essential but also the requirement to establish that the plaintiff is a registered firm and the plaintiff also should disclose who are all the partners who constitute the firm on the date of the plaint. Merely because the defendants have not raised the plea in detail the plaintiff is not exonerated, nor it could be stated that the defendants have waived such an objection. An objection which goes to the root of the matter which relates to the registration and which if not answered in favour of the defendants would be hit by Sec.69(2) and the very plaint itself is non est in law. .. .. ..”

39. Similarly, it is also useful to refer the judgment of the Hon`ble Supreme Court reported in (1989) 3 SCC 476 ***(M/s. SHREERAM FINANCE CORPORATION v.YASIN KHAN AND OTHERS)***, wherein the Hon`ble Supreme Court has held as follows:

> "6. .. .. .. ***Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Registrar of Firms. The result is that the suit was not maintainable*** ***in view of the provisions of sub-section 2 of Section 69 of the Partnership Act*** .. .. .. "

40. In view of the above settled legal position and the fact that the plaintiff has miserably failed to prove that name of the partner who filed this suit has been shown in the Registrar of Firm, the suit is not maintainable. Accordingly, the issue is answered.

41. Even though the plaintiff is found to be entitled to certain amount, as discussed above in issue No.2, in view of the above legal embargo, the suit is not maintainable.

In the result, the suit is dismissed. No costs.

sd/.N.S.K.J
21.12.2016

//Certified to be a true copy//
Dated this the day of 2017

R.s/03.03.2017 COURT OFFICER

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