IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2016

DELIVERED ON : 21.12.2016

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.747 of 2004

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

vs.

1. M/s. B.M.F. Beltings Limited
Chennai.
(1st defendant stuck out by order of this Court dated 08.12.2010)

2. 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 defendant.

i) directing the defendant to pay a sum of Rs.26,73,183.70 together with interest at the rate of 12% per annum on Rs.23,58,576.13 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 a sum of Rs.26,73,183.70 together with interest at the rate of 12% per annum on Rs.23,58,576.13 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) According to the plaintiff, the 1st defendant is the subsidiary of the 2nd defendant and looking after the contract for erection, alignment and commissioning of 18 Mill feeding conveyors from M/s.Asia Power Projects Ltd., [in short "APPL"] which is the Principle contractor of M/s.Neyveli Lignite Corporation for the expansion project of Thermal Power Station No.1, and awarded sub contract to them for the work of erection, alignment and commissioning of said 18 Mill feeding conveyors (9 conveyors in unit 1 and 9 conveyors in unit 2) through a

Purchase Order (Work Order) dated 20.06.2002. The said purchase order specifically stipulates the responsibilities of both the parties viz., the plaintiff and the 1st defendant.

(ii) The plaintiff stated that the 1st defendant failed in the timely supply of materials for the erection and assembly. The letters submitted by the plaintiff to the 1st defendant dated 16.08.2002, 09.09.2002, 29.10.2002, 20.02.2003, 26.02.2003, 13.03.2003, 28.03.2003 and 14.06.2003 specifically proves the failure of the 1st defendant in the timely supply of materials. Even after seven months from the scheduled date of completion of the work, the 1st defendant was not able to supply all the materials for the execution and completion of the work. Hence, the plaintiff suffered heavy financial loss , therefore, they are entitled for compensation against their loss from the 1st defendant.

(iii) The plaintiff further states that since the 1st defendant fixed the terms without considering the offer of the plaintiff, payment terms in the said work order were not acceptable to them. Hence, on receipt of the said work order, the plaintiff, by their letter dated 12.07.2002, stipulated their payment terms. Thereafter, the 1st defendant consented to make the payment according to the terms of the plaintiff's letter and requested the plaintiff to proceed with the work. Accordingly, the plaintiff commenced the work on 16.07.2002 with the available material supplied by the 1st defendant. However, the 1st defendant did not make prompt payment against the bills submitted by the plaintiff. This action of the 1st defendant created heavy financial crisis and loss to the plaintiff.

(iv) The plaintiff also states that the delay in taking decisions by the 1st defendant caused considerable re-work and multiplication of job and overtime work, such as, working round the clock including Sundays and holidays to compensate the time lost by the delay in proper directions for modifications. Expenses for these re-works and over time works involved extra financial commitments to the plaintiff heavily. Therefore, a meeting was convened between the 1st defendant and the plaintiff, wherein the decisions pertaining to revised rate, additional payments, immediate release of pending payments and revised work order were taken.

(v) According to the plaintiff, most of the decisions were not given effect to by the 1st defendant which resulted in delay in payment against consumables, which, in turn, interrupted the supply of the same, particularly, welding electrodes, oxygen and DA cylinders and difficulty in meeting the demands of the works, which destroyed the smooth relationship in between the plaintiff and their workers. Therefore, the plaintiff was forced to issue a legal notice dated 2.7.2003 to the 1st defendant demanding a sum of Rs.17,28,597.75 due to the plaintiff for the works carried out by them and for the refund of the sum of Rs.1,20,324/- the amount retained by the 1st defendant from the bills, due to the plaintiff. The 1st defendant issued reply to the notice of the plaintiff alleging that the plaintiff committed breach of contract. Hence, the plaintiff filed the present suit.

3. The case of the defendants, is as follows:

(i) The defendants filed their written statement denying the averments made in the plaint. According to the defendants, the 1st defendant was a wholly-owned subsidiary of the 2nd 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 , the 1st defendant company was amalgamated with the 2nd defendant company. On 13.9.2007, the defendants have also duly filed a memo to place on record the High Court's order sanctioning the said scheme. Therefore, in the present suit, the 2nd defendant is duly representing the 1st defendant also for the purpose of continuing legal proceedings against the 1st defendant.

(ii) It is the case of the defendants that the plaintiff was the sub contractor of the 1st defendant, when Neyveli Lignite Corporation Limited, Neyveli was implementing its project Thermal Power Station- 1, Expansion. The project consisted of several packages and one such package included the work of design, engineering and supply of equipment as also erection, alignment and commissioning of such equipment in relation to 18 mill feeding conveyors. The said 18 mill feeding conveyors consisted of two Units, viz., Unit -1 encompassing 9 mill feeding conveyors and Unit -II encompassing the remaining 9 mill feeding conveyors. NLC had awarded a contract for the entire package, which included such work relating to the said 18 mill feeding conveyors, to a company called "APPL". A part of the contract job obtained from NLC in relation to the 18 mill feeding conveyors was subcontracted to another company by APPL. The work subcontracted by APPL in the work relating to design, engineering and supply of equipment in relation to the said 18 mill feeding conveyors and the company to which the said sub contract was given is known as Babcock Borsig Power Systems Limited (in short "BBPS"). The said work relating to design, engineering and supply of equipment in respect of the said 18 mill feeding conveyors, were subcontracted to the 2nd defendant by BBPS. The APPL also sub contracted to the 1st defendant, the remaining part of the contract job obtained from NLC in relation to the said 18 mill feeding conveyors. The work subcontracted by APPL to the 1st defendant is the work relating to erection, alignment and commissioning of the said 18 mill feeding conveyors. The 1st defendant, in turn, had subcontracted to the plaintiff the entire work of erection, alignment and commissioning of the said 18 mill feeding conveyors.

(iii) The 1st defendant denied the allegation that the plaintiff did not accept the terms of the purchase order and thereafter, the 1st defendant consented to the terms of the counter offer. According to the defendants, the purchase order dated 20.06.2002 was amended by the 1st defendant's purchase orders dated 19.12.2002 and 20.01.2003. When the contract between the plaintiff and the 1st defendant stood amended, the erection work undertaken by the plaintiff needed modifications, alterations and rectifications and the plaintiff was carrying out the modifications as per the instructions of the 1st 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. Later, after discussions, the 1st defendant issued an amended purchase order dated 20.01.2003, amending the original purchase order dated 20.6.2002. In that amended purchase order, a separate rate of Rs.3,369/- per mt, was fixed for modifications for 9 conveyors for Unit-1, which is different from the plaintiff's case as though any additional usage of manpower, tools, tackles, machineries and consumables was the basis for any payment due to the plaintiff for work relating to the modifications. Later, a meeting took place between the plaintiff and the 1st defendant on 25.01.2003, which *interalia* decided upon an enhanced composite rate of payment to the plaintiff including for carrying out any and all modifications and rectifications of conveyors in Unit-I and Unit-II. In the meeting held on 25.01.2003, both parties came to an agreement in regard to 18 mill feeding conveyors comprised in Unit-I and Unit-II, till successful commissioning and load trial operations of conveyors.

(iv) It is also the case of the defendants that the NLC had awarded another part of the work for its TPS-I Expansion Project, to the 2nd defendant for putting up the lignite handling system in a package known as AO2 package. In regard to a portion of the dust extraction systems for the lignite handling system, the 2nd defendant had awarded several sub contract jobs to the plaintiff and a few other sub contract jobs as well in the premises of Neyveli. Thus, the plaintiff was dealing with both the 1st defendant and the 2nd defendant in the different sub contract jobs undertaken by the plaintiff and all such subcontract jobs were being done by the plaintiff. The plaintiff also knew that the 1st defendant was a wholly owned subsidiary of the 2nd defendant.

(v) It is the further case of the defendants that the plaintiff has also filed another money suit being CS.No.746 of 2004 in this court with regard to the plaintiff's sub contracts with the 2nd defendant, wherein, the 2nd defendant herein is the sole defendant. The terms of any contract between the plaintiff and the 1st defendant for the work done by the plaintiff at Neyveli are to be found in written contracts in the form of a purchase order dated 20.6.2002. Out of 25 bills filed along with the plaint, only 11 bills were covered by the scope of the contract that existed between the parties. The total amount of such 11 bills, as raised by the plaintiff was Rs.24,46,534.06. After deducting the TDS and Surcharge, the net aggregate amount to be paid to the plaintiff was Rs.20,87,863.76. Further, so far as the work done by the plaintiff is concerned, the plaintiff had not completed his part of the contract and had left unfinished and uncompleted some crucial part of his work. In terms of purchase order dated 20.6.2002 and also the amended purchase orders dated 19.12.2002 and 20.01.2003, 10% of the order value was payable to the plaintiff only after successful commissioning and handing over of the system to the client. The purchase order dated 5.2.2003 issued in support of the minutes of the meeting held on 25.01.2003, stipulates that 5% of the value of the purchase order was payable to the plaintiff only after commissioning and load test of all conveyors of Unit I & Unit II respectively and accepted by the client. The plaintiff also admits that the 1st defendant had also cancelled the contract awarded to them. It is also stated that certain amounts became due and recoverable from the plaintiff either by the 1st defendant or the 2nd defendant owing to certain acts and omissions of the plaintiff. Hence, the defendants 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 under section 69 of the Partnership Act?
>
> 2.Whether the plaintiff is entitled to a decree as prayed for with costs?"

5. On the side of the plaintiff, P.W.1 was examined and Exs.P1 to P54 were marked. On the side of the defendants, D.W.1 was examined and Exs.D1 to D81 were marked. The details of the documents are hereunder:

Exhibits produced on the side of the plaintiff:

Sl.No	Exhibits	Date	Description of Documents
1.	P-1	18.12.2001	Xerox copy of acknowledgment of Registration of Firm.
2.	P-2	27.11.2001	Xerox copy of Partnership deed
3.	P-3	20.06.2002	Purchase Order
4.	P-4	16.08.2002	Copy of the letter from the plaintiff to the defendant
5.	P-5	09.09.2002	Copy of the letter from the plaintiff to the defendant
6.	P-6	21.10.2002	Copy of the letter from the plaintiff to the defendant
7.	P-7	18.02.2003	Copy of the letter from the plaintiff to the defendant
8.	P-9	26.02.2003	Copy of the letter from the plaintiff to the defendant
9.	P-9	13.03.2003	Copy of the letter from the plaintiff to the defendant
10	P-10	28.03.2003	Copy of the letter from the plaintiff to the defendant
11	P-11	14.06.2003	Copy of the letter from the plaintiff to the defendant
12	P-12	12.07.2002	Xerox Copy of the letter from the plaintiff to the defendant
13	P-13	07.09.2002	Xerox Copy of the letter from the plaintiff to the defendant
14	P-14	21.10.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.2
15	P-15	26.11.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.3

Sl.No	Exhibits	Date	Description of Documents
16	P-16	14.01.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.4
17	P-17	16.05.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.10
18	P-18	25.10.2002	Copy of the letter from the plaintiff to the defendant
19	P-19	28.12.2002	Copy of the letter from the plaintiff to the defendant
20	P-20	25.01.2003	xerox copy of the minutes of the meeting
21	P-21	19.02.2003	Copy of the letter from the plaintiff to the defendant
22	P-22	22.02.2003	Copy of the letter from the plaintiff to the defendant
23	P-23	19.05.2003	Copy of the letter from the plaintiff to the defendant
24	P-24	07.06.2003	Copy of the letter from the plaintiff to the defendant
25	P-25	24.06.2003	Xerox copy of the letter from the defendant to the plaintiff
26	P-26	13.06.2003	Copy of the letter from the plaintiff to the defendant
27	P-27	02.07.2003	Copy of the legal notice issued by the plaintiff's counsel to the defendant with postal receipt
28	P-28	28.07.2003	Reply notice issued by the defendant's counsel to the plaintiff's counsel
29	P-29	08.02.2003	Xerox copy of the letter from the plaintiff to the defendant

Sl .No	Exhibits	Date	Description of Documents
30	P-30	09.09.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.131
31	P-31	09.09.2002	Bill No.132
32	P-32	03.10.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.137
33	P-33	14.11.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.141
34	P-34	25.11.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.142
35	P-35	25.11.2002	Copy of the letter from the plaintiff to the defendant along with Bill No.144
36	P-36	31.01.2003	Bill No.157
37	P-37	15.02.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.160
38	P-38	22.02.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.163
39	P-39	14.03.2003	Copy of the letter from the plaintiff to the defendant along with No.165
40	P-40	24.03.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.166
41	P-41	28.03.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.167

Sl .No	Exhibits	Date	Description of Documents
42	P-42	02.04.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.169
43	P-43	19.04.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.171
44	P-44	19.04.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.170
45	P-45	19.04.2003	Bill No. 172
46	P-46	28.04.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.173
47	P-47	30.04.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.174
48	P-48	23.05.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.180
49	P-49	24.05.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.181
50	P-50	26.05.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.182
51	P-51	13.06.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.184
52	P-52	30.06.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.185

Sl .No	***Exhibits***	***Date***	***Description of Documents***
53	P-53	30.06.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.185
54	P-54	30.06.2003	Copy of the letter from the plaintiff to the defendant along with Bill No.188

Exhibits produced on the side of the defendants:

S. No	*Exhibits*	*Date*	*Description of documents*
1	D-1	30.09.2002	Letter from the plaintiff to the defendant
2	D-2	07.10.2002	Copy of the letter from the defendant to the plaintiff
3	D-3	07.10.2002	Copy of the letter from the defendant to the plaintiff
4	D-4	21.10.2002	Letter from plaintiff to the defendant
5	D-5	25.11.2002	Letter from plaintiff to the defendant
6	D-6	20.06.2002	Xerox copy of purchase order amendment
7	D-7	20.06.2002	Xerox copy of purchase order amendment
8	D-8	25.01.2003	Xerox copy of the minutes of the meeting
9	D-9	30.01.2003	Letter from the plaintiff to the defendant
10	D-10	20.06.2002	Purchase order amendment

S. No	*Exhibits*	*Date*	*Description of documents*
11	D-11	19.02.2003	Letter from plaintiff to the defendant
12	D-12	19.02.2003	Xerox copy of the letter from the defendant to the plaintiff
13	D-13	19.02.2003	Xerox copy of the letter from the defendant to the plaintiff
14	D-14	22.02.2003	Letter from plaintiff to the defendant
15	D-15	27.03.2003	Copy of the letter from the defendant to the plaintiff
16	D-16	24.04.2003	Copy of the letter from the plaintiff to the defendant
17	D-17	28.04.2003	Copy of the letter from the defendant to the plaintiff
18	D-18	16.05.2003	Copy of the letter from the defendant to the plaintiff
19	D-19	28.05.2003	Letter from the defendant to the plaintiff
20	D-20	28.05.2003	Letter from the defendant to the plaintiff
21	D-21	02.0.2003	Xerox copy of the letter from the plaintiff to the defendant
22	D-22	06.06.2003	Letter from the defendant to the plaintiff
23	D-23	16.06.2003	Xerox copy of the letter from the defendant to the plaintiff
24	D-24	24.06.2003	Xerox copy of the letter from the defendant to the plaintiff
25	D-25	24.06.2003	Letter from the defendant to the plaintiff
26	D-26	25.06.2003	Letter from the plaintiff to the defendant

S. No	*Exhibits*	*Date*	*Description of documents*
27	D-27 series	28.06.2003	Cash voucher No.345 of the 2nd defendant along with the stamped receipts
28	D-28 series	15.07.2003	Cash voucher No.445 of the 2nd defendant along with the stamped receipts
29	D-29 series	22.07.2003	Cash voucher No.466 of the 2nd defendant along with the stamped receipts
30	D-30	22.07.2003	Cash voucher No.467
31	D-31	22.07.2003	Stamped money receipt
32	D-32	22.07.2003	Stamped money receipt
33	D-33	22.07.2003	Stamped money receipt
34	D-34	22.07.2003	Stamped money receipt
35	D-35	22.07.2003	Stamped money receipt
36	D-36	22.07.2003	Stamped money receipt
37	D-37	22.07.2003	Stamped money receipt
38	D-38	22.07.2003	Stamped money receipt
39	D-39	22.07.2003	Stamped money receipt
40	D-40	22.07.2003	Stamped money receipt
41	D-41	22.07.2003	Stamped money receipt
42	D-42	22.07.2003	Stamped money receipt
43	D-43	22.07.2003	Stamped money receipt
44	D-44	22.07.2003	Stamped money receipt
45	D-45	22.07.2003	Stamped money receipt
46	D-46	22.07.2003	Stamped money receipt
47	D-47	22.07.2003	Stamped money receipt
48	D-48	22.07.2003	Stamped money receipt
49	D-49	22.07.2003	Stamped money receipt

S. No	Exhibits	Date	Description of documents
50	D-50	22.07.2003	Stamped money receipt
51	D-51	22.07.2003	Stamped money receipt
52	D-52	22.07.2003	Stamped money receipt
53	D-53	22.07.2003	Stamped money receipt
54	D-54	22.07.2003	Stamped money receipt
55	D-55	22.07.2003	Stamped money receipt
56	D-56	22.07.2003	Stamped money receipt
57	D-57	22.07.2003	Stamped money receipt
58	D-58	22.07.2003	Stamped money receipt
59	D-59	22.07.2003	Stamped money receipt
60	D-60	22.07.2003	Stamped money receipt
61	D-61	22.07.2003	Stamped money receipt
62	D-62	22.07.2003	Stamped money receipt
63	D-63	03.07.2003	Letter from plaintiff to the defendant
64	D-64	03.07.2003	Letter from plaintiff to the defendant
65	D-65	10.o07.2003	Xerox copy of the letter from the defendant to the plaintiff
66	D-66	05.04.2003	Letter from the defendant to the plaintiff
67	D-67	03.11.2003	Letter from NLC Ltd. to the defendant
68	D-68	24.01.2004	Letter from NLC Ltd. to the defendant
69	D-69	28.01.2004	Internal correspondence of the 2nd defendant
70	D-70	30.01.2004	Copy of the letter from the defendant to NLC Ltd.

S. No	*Exhibits*	*Date*	*Description of documents*
71	D-71	12.02.2004	Letter from NLC Ltd. to the defendant
72	D-72	17.09.2003	Internal correspondence of NLC Ltd.
73	D-73	06.03.2004	Stamped receipt
74	D-74	19.03.2004	Xerox copy of the letter from the defendant to NLC Ltd.
75	D-75	20.03.2004	Postal receipt
76	D-76		Postal acknowledgment
77	D-77	25.09.2004	Letter sent by Asia Power Projects Pvt. Ltd., to the defendant
78	D-78	28.03.2005	Letter sent by Asia Power Projects Pvt. Ltd., to the defendant
79	D-79	27.03.2006	Xerox copy of the order in C.P.Nos.11 to 15/2006
80	D-80	07.01.2011	Certificate issued by the state Bank of India to the defendant
81	D-81	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 defendants

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. Learned counsel for the plaintiff submitted that the plaintiff was awarded a contract for erection, alignment and commissioning of 18 mill feeding conveyors vide purchase order dated 20.06.2002 by the 1st defendant. As per the above purchase order, the plaintiff was responsible to collect all the conveyor components from the store of the 2nd defendant, and transport them to the erection site, carry out erection, alignment and commissioning jobs. The components were supplied by the 2nd defendant to APPL through another contract. The purchase order, which is marked as Ex.P3 stipulates that the 1st defendant has to supply all the materials on or before 30.10.2002. However, the 1st defendant has not supplied the materials for erection in time and in view of the huge delay on the part of the 1st defendant, the plaintiff has suffered a lot. Even after the expiry of the contract period, the supplies were not made by the 1st defendant.

It is submitted by the learned counsel for the plaintiff that the supplied components were also defective in nature. The plaintiff has sent various communications in this regard, which is marked as Exs.P4 to P11. Having received the communications, no reply, whatsoever, has been sent by the 1st defendant. Thereafter a meeting was conducted. The minutes of the meeting was recorded on 25.01.2003, under Ex. P20. Taking into consideration the overall the circumstances, the total amount of contract was arrived at Rs.25,25,000/-, which is evident from Ex.P20.

8. The learned counsel for the plaintiff further submitted that though the plaintiff has raised bills for various works done by them, the 1st defendant made only part payment and several bills were not honoured. It is also submitted that those bills were not even rejected by the 1st defendant. As the 1st defendant failed to pay the bill amount then and there, the plaintiff could not pay the wages to labourers even when 90% of project have been completed. While so, the 1st defendant abruptly, cancelled the contract on 24.06.2003. Even on the date of

cancellation of the contract, the admitted amount payable by the 1st defendant has not been paid. According to the plaintiff, as on 30.6.2003, the 1st defendant is liable to pay a sum of Rs.18,58,576.13. Therefore, it is the submission of the learned counsel for the plaintiff that the plaintiff is also entitled for interest at the rate of 15% p.a.

9. The learned counsel for the plaintiff further contended that the discharge as pleaded by the 1st defendant has not been established. It is the contention of the learned counsel for the plaintiff that the entire breach of contract was committed by the 1st defendant. Further, it is submitted that the labour went on strike only due to the non payment of the bill amount by the 1st defendant then and there. Therefore, it is submitted by the learned counsel for the plaintiff that the discharge pleaded by the defendant cannot be sustained.

10. On the contrary, the learned counsel for the defendant submitted that the 1st defendant company has been struck out from the suit by an order of this Court dated 08.12.2010 in Application No.6325 of 2010 with a direction

that the suit shall proceed only against the 2nd defendant in terms of Clause 6.16 of the Scheme. The learned counsel for the defendant further submitted that a contract was awarded by the 1st defendant under Ex.P3. But the plaintiff has not done the work as per the contract. Even though the amount was raised as per the modified contract, the plaintiff has not completed the work as agreed, which led to labour strike and, that the 1st defendant was forced to clear the amount due to the labourers. Exs.D26 clearly shows the payment made to the workers. It is submitted by the learned counsel for the 1st defendant that since the work is very poor in quality, the original contractor issued debit note to the 1st defendant under Ex.D78 for some amount and, therefore, the contract was cancelled by the 1st defendant. Therefore, it is the submission of the learned counsel for the 1st defendant that without challenging the cancellation of the contract, the plaintiff cannot claim amount for the bills which were not covered under the purchase order or subsequent minutes.

11. It is the contention of the learned counsel for the defendant that the amount claimed towards total costs

of the articles, i.e. a sum of Rs.3,50,000/-, has not at all been established by the plaintiff. No details, whatsoever, available on record to substantiate the said claim. Further, there is no particulars either in the pleadings or in the plaintiff's evidence to show that out of 25 bills, how may bills were raised on the basis of written contract. Further there is a subsequent contract arrived at between the parties under Ex.P20=D8 and supported by D.10. Therefore, the oral contract as alleged by the plaintiff is not sustainable in law.

12. It is further contended by the learned counsel for the defendant the interest claimed by the plaintiff is also not sustainable in law as the same has not been covered under the contract. The learned counsel for the defendant vehemently contended that the suit is barred under Section 69 (2) of the Partnership Act as the mandatory conditions set out in the above section are not complied with by the plaintiff.

13. 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).*** Thus, the learned counsel for the defendant prayed for dismissal of the suit.

14. For the sake of convenience, the relevant issues framed by this Court are reproduced as under:

> "1. Whether the suit is barred under section 69 of the Partnership Act?
>
> 2.Whether the plaintiff is entitled to a decree as prayed for with costs?"

<u>3.</u>

Issue No.2:

15. It is an admitted fact that NLC for the purpose of implementing its project TPS 1- Expansion project including the erection, alignment and commissioning of 18 mill feeding conveyors awarded a contract to one APPL. The said APPL, in turn, sub contracted a part of the contract job obtained from NLC in relation to the 18 mill feeding conveyors to one BBPS, which, in turn, sub contracted the above work to the 2^{nd} defendant herein. APPL also subcontracted to the 1^{st} defendant the remaining part of the contract job. The above work so sub contracted by APPL to the 1^{st} defendant contains erection, alignment and commissioning of the 19 said mill feeding conveyors. The 1^{st} defendant, in turn, had subcontracted the said work, viz., erection, alignment and commissioning of the 18 mill feeding conveyors, under Ex.P3, purchase order dated 20.6.2002 for the total value of Rs.8,63,800/-. This fact is not in dispute.

16. Insofar the terms of payment is concerned, it is

agreed that 80% of the payment amount against placement and alignment of equipment on prorata basis as per the certification from the defendant's cite officials and 10% after acceptance and trial operation on prorata basis and remaining 10% after successful commissioning and handling over of the system. It is also agreed that the contract work should be completed before 31.8.2002. The other terms set out in the purchase order show that the raw materials required for erection from FIL store work to spot shall be collected by the contractor in advance. From the terms of the contract, it could be seen that, the work should have been completed on or before 31.8.2002. In this regard, Ex.P4 to P11, letters addressed by the plaintiff clearly indicate that the required materials have not been supplied by the 1st defendant in spite of repeated request. Ex.P11, letter dated 14.06.2003, clearly indicate that due to short supply of materials, delay in rectification by the 1st defendant and also blocking of the supply of funds, caused delay in execution of the work. From the above documents, it is very clear that even though specific time was stipulated in the contract, because of the delay in supplying the materials for such erection, the contract could not be executed in time.

17. Similarly, under Ex.P12, letter dated 12.07.2003, the plaintiff made request for release of the amount. In Ex.P19, also, the plaintiff pointed out the delay on the part of the 1st defendant. Subsequently, meeting was held between the plaintiff and the 1st defendant and the minutes of the said meeting was marked as Ex.P20 dated 25.01.2003. In Ex.P20, the 1st defendant also agreed to release the outstanding payments within ten days. Similarly, he has also agreed to revise the rate of the original contract. Prior to that, amendment purchase order was also issued under Ex.D7 increasing the amount from Rs.8,63,800 to Rs.12,62,628. In Ex.D8 Minutes, the rate was also revised to Rs.6,250/- per MT for both units 1 and 2 which includes handling materials from stores to workspot, installation, erection, modification, rectification and all other misc. works till successful commissioning and load trial operation of Conveyors. These facts are also not disputed.

18. It appears that the only dispute is with regard to the payment of money. According to the plaintiff, the bills submitted by him under Exs.P.30 to P54 have not been honoured fully. There is a due of Rs.18,58,576.13. It is to be noted that from very beginning, the plaintiff was requesting the 1st defendant to release funds. Ex.D13, letter dated 19.02.2003 and Ex.D.14 letter dated 22.2.2003 would prove the same. The plaintiff also issued Ex.D21 letter requesting the 1st defendant to release the payment. It is specifically pointed out by the plaintiff to the 1st defendant that since payment was not released, the Labour went on strike. Even in Ex.P26, letter dated 13.6.2003, the plaintiff requested release of funds. Though the 1st defendant has pointed out some defects in work, from their correspondence in Ex.D 18, letter dated 16.5.2003, it can be easily inferred that the due to the delay in releasing the payment by the 1st defendant, the entire work was getting delayed.

19. Admittedly, the plaintiff has submitted bills, Exs.P13 to P17 and Exs.30 to 54. However, it is the

contention of the 1st defendant that they paid a sum of Rs.1,32,699.70 under Ex. D27 to the plaintiff's workers. Similarly, under Ex.D28 another sum of Rs.1,01,505/- said to have been paid to the workers. Likewise, under Ex.D29, another sum of Rs.83,127/- said to have been paid to the workers directly. Furthermore, under Ex.D.30, a sum of Rs.1,15,799/- said to have been paid to the workers by the 2nd defendant. Another sum of Rs.75,000/-said to have been paid under Ex.D73 towards accident compensation to one K.Venkatesan. Under Ex.78, debit of Rs.2,24,997/- has been shown.

20. Now it is the contention of the defendant that a sum of Rs.8,80,278.15 to be deducted from the plaintiff's case. It is to be noted that the purchase orders stipulate specific time. However, there was a huge delay in supplying the materials by the defendant which led to modification of the contract as evident from Ex.P20.

21. It is well known that extra work is bound to happen at the time of doing major work, particularly, while erecting or aligning. 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. In the present case, it is seen that some 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 defendant 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.

22. Furthermore, from the evidence, as well as the pleadings, it can be easily inferred that there was delay in releasing funds then and there, led to labour strike and for which the, plaintiff cannot be blamed. If the 1st defendant released the funds then and there, such a

situation would not have arisen. Therefore, the contention of the defendant's that the contract was terminated only because of the delay on the part of the plaintiff cannot be accepted at all. Though the defendant claim a sum of Rs.8,08,228/- is due from the plaintiff, it is not known as to how the 1st defendant paid a sum of Rs.5,08,121/- to the labourers. Except some documents marked on this aspect, actually, payment to the said workers has not been proved by the defendant in the manner known to law. Except the evidence of D.W.1 no one was examined to prove this aspect. Further, no workers have been examined in this regard for receipt of the amount. Therefore, the alleged payment to the workers has not all been established.

23. Similarly, the defendant has relied on Ex.D73 to show that some of Rs.75,000 was paid towards accident compensation. In this regard also, except marking Ex. D.73, receipt said to have been given to one Venkatesan, the signatory of the receipt has not been examined. Therefore, the alleged payment has not been proved beyond

reasonable doubt. If really there was accident as alleged, such things should have been settled by claiming Insurance. Therefore, the discharge as pleaded by the 1st defendant has also not been established,.

24. Similarly, Ex.D78, is the Debit Note, which was issued by the Original Contractor, viz., ASPL. On a perusal of the Debit Note, it is seen that original contractor ASPL debited a sum of Rs.2,24,997/- towards repayment charges of the damaged conveyor, which was covered under the plaintiff's contract. Since there was a Debit Note in respect of the poor quality of work, this Court is of the view that such amount can be debited from the plaintiff's outstanding as it is the duty of the sub contractor to erect the conveyor without any defects. At the most, the defendant can deduct only a sum of Rs.2,24,997/- from the outstanding amount payable to the plaintiff i.e. from a sum of Rs.18,58,576.13. Therefore, after deducting the above sum of Rs.2,24,997/- from the outstanding bill amount of Rs.18,68,576.13, the plaintiff is entitled to remaining amount of Rs.16,33,579.13, less

all legal deductions as made in the other bills.

25. Though the plaintiff has claimed a sum of Rs.3,50,000/- towards the total cost of articles and also a sum of Rs.1,50,000/- towards the usage and illegal retention of the machineries belonging to the plaintiff, the same has not been established. The plaintiff has not produced any documents, whatsoever, to show that what are the nature of the machineries he left in the site. Therefore, the claim towards cost of the articles and usage of machineries is not sustainable.

26. Though it is the contention of the defendant that certain bills are not covered under the contract, as already stated, it is well known that some extra work is always bound to happen in a major work, like erection or alignment, even though it is not specifically mentioned in the contract. The defendant now cannot contend that certain bills are not covered under the purchase order and hence, they are not liable to pay. Therefore, this Court is of the view that the contention of the defendant has no

force at all.

27. As already stated above, the defendant is, certainly, liable to pay a sum of Rs.16,33,579.13, after legal deduction such as TDS etc., as per law.

28. 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.

29. In this case, Ex.29 legal notice issued on 02.7.2003 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 filing 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. 16,33,579.13, after making legal deductions, from the date of suit till the date of realisation. It is ordered accordingly. Issue No.2 is answered accordingly.

Issue No:1

30. 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."

31. 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.

32. 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.

33. 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.

34. 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. .. .."

35. 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 .. .. .. "***

36. 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, issue No.1. is answered.

37. 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/06.03.2017 COURT OFFICER

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