

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO.59 OF 2017
IN
COMMERCIAL SUMMARY SUIT NO.151 OF 2017

East Coast Constructions and Industries Ltd., Fabrication Division	... Plaintiffs
v/s	
Mumbai Metropolitan Region Development Authority and others	... Defendants

Mr Durgesh Kulkarni i/b M/s Lex Firmus for Plaintiffs.
Mr Piyush Raheja with Mr Nirav Shah and Mr Anuj Jaiswal i/b M/s
Little and Co. for Defendant No.1.

CORAM : B.P. COLABAWALLA, J.

DATE : NOVEMBER 24, 2017

P.C.:

1. This Summons for Judgment has been filed seeking a judgment against Defendant No.1 to make payment of a sum of Rs.10,90,57,646/- with interest at the rate of 18% p.a. from the date of filing of the Suit and till the date of payment and/or realization thereof.

2. The Plaintiffs are engaged in the business of construction and infrastructural projects. Defendant No.1 is a statutory body established under the provisions of the Mumbai Metropolitan Development Act 1974 and is engaged in long term planning, promotion of new growth, centers, implementation of strategic projects and financing infrastructure development. Defendant No.2 is the Metropolitan Commissioner appointed under section 4(1)(xxvii) of section 11 of the Act. As far as Defendant No.2 is concerned, the learned counsel appearing on behalf of Plaintiffs fairly concedes that there cannot be any personal liability of Defendant No.2 and therefore seeks leave to delete him from the Suit. Leave is accordingly granted and the Applicants shall carry out this amendment within a period of two weeks from today. Re-verification is dispensed with.

3. It is the case of the Plaintiffs that the Defendants had invited tenders for construction of Sky Walk at Dahisar vide Public Advertisement ED/Skywalk/MMR/2008 dated 29th July 2008. In response to this tender notice, the Plaintiffs responded to the same. The total length of the Sky Walk was to be 860 mtrs. This bid of the

Plaintiffs was accepted by the Defendants vide its letter dated 20th October 2008 and the Plaintiffs were requested to furnish the initial security deposit of 2.5 % of the contract price. The Applicants were also to furnish a bank guarantee as per the tender notice. In compliance of this letter of acceptance by the Defendants, the Plaintiffs by their letter dated 12th November 2008 furnished a bank guarantee dated 11th November 2008 issued by its bankers viz. Corporation Bank in favour of the Defendants towards the amount of security deposit i.e. Rs.56,06,437.

4. Thereafter, the Plaintiffs and the Defendants entered into a “Contract Agreement” for the work of construction of a Sky Walk at Dahisar (West), Mumbai. Under this Agreement, the Sky Walk was to be completed within a period of six months from the date of the letter of acceptance. The Defendants vide its letter dated 12th November 2008 issued a notice to the Plaintiffs to proceed with the said work. As per the said letter, the date of starting of the said work was the date of issue of the said letter and the date of completion was six months i.e. 11th May 2009. In other words, the completion of construction work of the Sky Walk was to be done by 11th May 2009.

5. It is the case of the Plaintiffs that since the work could not be completed within the aforesaid period, the Defendants allowed the continuation of the work without levying upto 25th September 2010 any compensation. According to the Plaintiffs, the cost of the tender was also resiled to Rs.32.3 crores. The Applicants have averred in the plaint that the construction of Sky Walk was completed in all respects and handed over to the Defendants on 25th September 2010 and the Defendants have issued Work Completion Certificate dated 23rd March 2011 stating that the work has been completed and the site has been handed over to the Respondents.

6. After this was done, the Plaintiffs submitted its final bill dated 25th April 2011 for an amount of Rs.11,97,31,038/-. Out of this amount claimed by the Plaintiffs, the Defendants on 24th August 2011 made a payment of Rs.1,06,73,392/- towards the aforesaid final bill. The Plaintiffs accepted the same under protest. Since the balance amount was not paid, the Plaintiffs submitted its claim amounting to Rs.10,90,57,646/- to the Chief Engineer, MMRDA vide its letter dated

8th September 2011. After hearing the Plaintiffs, the Chief Engineer, vide his letter dated 14th February 2012 informed the Plaintiffs about his decision of rejection of the claims of the Plaintiffs. Thereafter, the Plaintiffs appealed to the Additional Metropolitan Commissioner under clause 30(2) of the condition of the contract. The Additional Metropolitan Commissioner, after hearing the Plaintiffs, upheld the decision of the Chief Engineer, MMRDA and rejected the claim of the Plaintiffs. The Plaintiffs thereafter appealed to Defendant No.2 (who is now deleted) under clause 30(3) of the conditions of contract, who also rejected the claim of the Plaintiffs vide its letter dated 3rd December 2013. It is thereafter that the present Suit has been filed by the Plaintiffs seeking a decree against the Defendants in the sum of Rs.10,90,57,646/-. This Suit has been lodged in this Court on 9th December 2016. After the writ of summons in this Suit was served upon the Defendants, they filed their appearance through an Advocate. Thereafter, the Plaintiffs have filed the present Summons for Judgment which has been opposed by the Defendants by filing its affidavit in reply dated 16th August 2017. The Plaintiffs have also filed an Affidavit in Rejoinder dated 10th November 2017.

7. On the basis of these pleadings, I have heard the learned counsel for the parties. Mr Kulkarni, learned counsel appearing on behalf of the Applicants submitted that the claim in the present Suit arises on the basis of a written contract viz. the contract agreement dated 12th November 2008. It is on the basis of this contract that the Plaintiffs have submitted its final bill dated 24th April 2011 to Defendants. He submitted that there is no dispute that the work has been satisfactorily completed by the Plaintiffs and the Sky Walk has been handed over to Defendant No.1. He submitted that this is further fortified by the fact that a Completion Certificate has also been issued by Defendant No.1 in this regard. It was submitted by Mr Kulkarni that the rejection of the Plaintiffs' claim by the Chief Engineer, MMRDA as well as the other authorities as mentioned earlier was wholly unjustified. There was no reasoning given for rejecting the claim of the Plaintiffs. In these circumstances, he submitted that the Defendants had no defense on the merits of the case and the Plaintiffs would therefore be entitled to a decree as prayed for or at least a conditional order of deposit before leave is granted to the Defendants to defend the present Suit.

8. On the other hand, Mr Raheja, learned counsel appearing on behalf of Defendant No.1 submitted that the Defendant has an excellent case on merits and has raised several triable issues in the present case. He firstly submitted that ex-facie the claim of the Plaintiffs is barred by the law of limitation. Mr Raheja was at pains to point out that the claim made in the present Suit is for recovery of the final bill dated 24th April 2011. The present Suit has been lodged in this Court on 9th December 2016 which was clearly beyond the period of three years from the date of the bill. He therefore submitted that ex-facie the claim of the Plaintiffs was time barred.

9. Without prejudice to the aforesaid, Mr Raheja submitted that in any event the claims made by the Plaintiffs in the final bill are in the nature of damages or in any event would require evidence to be led by the respective parties before any decree can be passed in favour of the Plaintiffs. He submitted that this being the case, there was no question at this stage when to pass any judgment against the Defendants or even imposing any condition on Defendant No.1 before it be permitted to defend the Suit.

10. I have heard the learned counsel for the parties at length and perused the papers and proceedings in the Suit. As far as the limitation issue is concerned, I find considerable force in the arguments advanced by Mr Raheja. It is not in dispute that the final bill is dated 25th April 2011. It is also not in dispute that the present Suit was lodged in this Court on 9th December 2016. This clearly goes to show that the Suit was not brought within three years from the date of the bill. The only averment that is made with reference to limitation in the plaint is at paragraph 28 wherein the Plaintiffs have stated that it had to follow the dispute redressal mechanism provided under the contract and the last decision taken by the Authority was passed by Defendant No.2 only on 3rd December 2013 and received by the Plaintiffs on 12th December 2013. Hence, the present Suit was being filed within a period of three years from the date of receipt of order / decision of Defendant No.2. Prima facie, I am unimpressed with this argument. If one peruses clauses 30(1), 30(2) and 30(3) of the contract (which have been reproduced at pages 3 and 4 of the plaint), it is clear that an appeal from a decision of the Engineer rejecting the claim of the Plaintiff (Additional Metropolitan Commissioner) is purely discretionary. Similarly, under clause 30(3),

if the contractor is aggrieved with the decision of the Additional Metropolitan Commissioner, he may approach Defendant No.2. This, to my mind, at least prima facie, would not have the effect of extending the period of limitation. There has been nothing brought to my notice in the contract that precluded the Plaintiffs from approaching this Court without going through this process as contemplated under clauses 30(2) and 30(3) of the contract. This being the position, at least prima facie I see that serious triable issues have been raised by the Defendants with reference to limitation.

11. Even otherwise, on going through the summary of the pending dues for construction of Sky Walk at Dahisar and which could be found from pages 63 to 69 of the paper-book, I find that a very large portion of this is basically in the nature of damages. For example, the Plaintiffs have claimed a sum of Rs.6.16 crores towards payment on account of loss of profit due to prolongation of the contract. Similarly, the Plaintiffs have also claimed payment on account of other charges due to prolongation of contract in the sum of Rs.6.06 crores. Thereafter, a sum of Rs.50,00,000/- is claimed by the Plaintiffs on account of illegal cancellation of additional work of Sky

Walk as well as for payment for idling charges of hydraulic rigs (for which a sum of Rs.26.5 lacs is claimed). Payment is also claimed on account of arbitrary deductions in the price variation bills in the sum of Rs.58,829/-. On going through all these claims, I find that not only do they resound in damages but cannot certainly be resolved and adjudicated upon without evidence being led by both the parties. As mentioned earlier, it is not in dispute that the contract was not completed within a period of six months as was contemplated between the parties. What effect that would have will also have to be considered at the trial of the Suit.

12. For all these reasons, I do not think that the Plaintiffs either entrusted to any judgment at this stage or any conditional order of deposit before granting leave to Defendant No.1 to defend the Suit. In these circumstances, unconditional leave is granted to Defendant No.1 to defend the present Suit. The Suit shall be transferred to the list of long cause and Defendant No.1 shall file its written statement within a period of 12 weeks from today. As stated earlier, the Defendant No.2 also stands deleted and the Suit shall proceed only against Defendant No.1.

13. Summons for Judgment is disposed off in the aforesaid terms. There shall be no order as to costs.

(B.P. COLABAWALLA, J.)