

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.11.2017

PRONOUNCED ON: 14.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.93 of 2017

M/s.Four Square Agencies, by its Partner, P.Kothandaraman
Chennai-4

Plaintiff

Vs

1. SBIOA Educational Trust, by its
Secretary and Correspondent, Chennai-101

2. M.P.Kesavan Kutty, Proprietor
M/s.Stelmec, Chennai-53

Defendants

Prayer:- This Civil Suit is filed under Order IV Rule 1 of Original Side Rules
read with Order VII Rule 1 of CPC.

For Plaintiff : Mr.Mohammed Fayaz Ali

For Defendants : Set Exparte

JUDGEMENT

This Civil Suit is filed under Order IV Rule 1 of Original Side Rules
read with Order VII Rule 1 of CPC, to pass a Judgement and Decree against
the 1st Defendant:-

a) to pay a sum of Rs.29,86,098/- (Rupees twenty nine lakhs
eighty six thousands ninety eight only) together with interest
on the said amount at the rate of 12% p.a. from the date of
the plaint till the date of realisation.

b) to pay a sum of Rs.5,00,000/- (Rupees five lakhs only)
towards damages occasioned on account of loss of
business and loss of profit.

c) to pay the costs of the suit.

2. The case of the Plaintiff is as follows:-

a. The Plaintiff is in the business of construction for nearly a decade.

The 1st Defendant had invited the Plaintiff to take part in a tender process through email dated 27.5.2013 for construction of new toilet block at SBOA School and Junior College, situated at No.18, School Road, Anna Nagar (Western Extension), Chennai-101 run by the 1st Defendant. The Plaintiff sent emails dated 1.6.2013 and 3.6.2013 to the 1st Defendant, raising queries with respect to the Bill of Quantities (BOQ). The 1st Defendant did not chose to reply to the said emails. However, the Plaintiff submitted their bid to the 1st Defendant in a sealed cover on 5.6.2013 by quoting a sum of Rs.62,52894/- for the said construction work. The 1st Defendant invited the Plaintiff for a meeting on 19.6.2013. As discussed in the said meeting, the Plaintiff had submitted a revised quote for Rs.58,06,861/-. Again the Plaintiff offered discount 3% on the said revised quote by letter dated 1.7.2013 and it worked out to Rs.56,32,655.17/-.

b. Pursuant to the above, the Plaintiff and the 1st Defendant had entered into an Articles of Agreement dated 5.7.2013 in respect of the construction work. In terms of the said agreement, the 1st Defendant is entitled to retain 5% of the total value of the construction work, as retention fund for a period of 12 months, which was reckoned from the date of submission of the final bill. The 1st Defendant was liable to pay the amount due under the final bill within 15 days from the date of certification of the final bill by the 2nd Defendant. On request of the 1st Defendant that the bill towards the demolition

of the old toilet block can be raised by the Plaintiff separately, the Plaintiff completed the demolition work and disposed of the unusable items. The Plaintiff also requested the Defendants to provide with the drawings for execution of the construction work.

c. A final set of drawings dated 8.8.2013 prepared by the 1st Defendant's authorised Structural engineers, viz. M/s.Sundararajuly and Associates, was forwarded to the Plaintiff for execution on 9.8.2013. The 1st Defendant did not provide the revised bill of quantities corresponding to the revised final set of working drawings to enable the Plaintiff to submit a fresh quote, however, advised the Plaintiff to proceed with the construction work and raise bill for the items/works that were actually executed. The Plaintiff had on 18.8.2013 commenced the construction activities and the periodical inspection was also done by the Defendants at different stages. Due to heavy rain during August-September 2013, the Plaintiff incurred additional costs in pumping out the water stagnation in the foundation pit. The construction was completed by the Plaintiff to the satisfaction of the 2nd Defendant and constructed block was handed over to the 1st Defendant on 10.03.2013 in a fully operational and equipped manner. The Plaintiff had raised a final bill dated 28.6.2014 for a sum of Rs.69,25,889.49/- on the 1st Defendant for payment.

d. When the construction work was in progress, the Plaintiff had raised two running account bills, viz. RAB-1 dated 27.10.2013 and RAB-II, dated 21.12.2013 and the 2nd Defendant had approved payment for a sum of Rs.13,35,014.26 under RAB-1 and Rs.15,43,901.57 under RAB-II. The 1st Defendant had made payments under the said bills. In terms of the agreement,

the said final bill was forwarded by the Plaintiff to the 2nd Defendant for approval. The 2nd Defendant had approved the final bill on 28.6.2014 for payment of Rs.67,18,112.81/- by the 1st Defendant. After making appropriate deduction for the amounts paid by the 1st Defendant to the Plaintiff, the total outstanding under the final bill worked out to Rs.14,39,197/-. From the above final bill, the Plaintiff had raised a bill dated 26.5.2014 for Rs.11,85,339.50/- being the value of extra items used in the construction work. The 2nd Defendant had certified for payment of Rs.975,287.90/- and recommended payment of Rs.1,68,309.90/-, totalling a sum of Rs.11,43,597.80/- under the above bill.

e. The total outstanding payable to the Plaintiff under the final bill and the bill for extra items worked out to Rs.25,82,795.00/-. The 1st Defendant had issued a cheque dated 27.7.2015 for Rs.6,37,541/- towards settlement of EMD of Rs.1,50,000/-, retention fund of Rs.1,43,945/- and an amount of Rs.3,53,546/- towards part payment of total balance amount payable to the Plaintiff under letter dated 1.8.2015 of the 1st Defendant. The 1st Defendant had paid only a meagre amount of Rs.3,53,546/- as against the claim of the Plaintiff of Rs.25,82,795/-. The 1st Defendant is liable to pay a sum of Rs.22,29,249/-. In spite of countless reminders, the 1st Defendant did not chose to pay the amount and hence, the Plaintiff sent a legal notice dated 18.9.2014, calling upon the 1st Defendant to settle the amounts. The 1st Defendant had sent a reply notice dated 31.10.2015, stating false and frivolous allegations and stating that full payment was made and the matter was closed.

Then the Plaintiff sent a letter dated 9.2.2016 to the 2nd Defendant, to settle the

disputes. The 2nd Defendant had issued a final certificate dated 22.4.2016, making it clear that the payments certified by the 2nd Defendant, totalling a sum of Rs.73,08,730.67/- and the corresponding 5% retention amount, shall be payable by the 1st Defendant to the Plaintiff. Even in the said final certificate, the 2nd Defendant did not take into consideration the claim of the Plaintiff regarding escalation cost, which works out to Rs.1,68,310/-.

f. In terms of the arbitration clause of the agreement, the Plaintiff sent a notice dated 11.5.2016, calling upon the 1st Defendant through the 2nd Defendant for appointment of K.Rajagopalan, FIIA (Past President of the Indian Institute of Architects) as the sole Arbitrator to adjudicate the claim of the Plaintiff that was not considered by the 2nd Defendant while issuing the final certificate. However, the 1st Defendant did not chose to respond to the same. Since the 1st Defendant neither has any intention to pay and settle the claims approved by the 2nd Defendant in the final certificate nor to agree for appointment of an Arbitrator to adjudicate upon the claims that were not considered by the 2nd Defendant in the final certificate, this civil suit has been filed for the reliefs as stated above.

3. Though the 1st and 2nd Defendants were served on 21.4.2017 and 10.05.2017 respectively, no written statement has been filed by the Defendants and hence, the matter was ordered to be listed under the caption of "Undefended Board". For non filing of the Written Statement, the Defendants were set exparte and exparte evidence was ordered to be recorded by the order of this court dated 24.07.2017. One R.Kothandaraman, the Partner of the Plaintiff Firm, has filed the proof affidavit for his chief examination and receipt

of 47 documents as documentary evidence to prove the suit claim. In the Evidence, the said Partner examined himself as PW.1 and marked Exs.P1 to P47 as documentary evidence in order to prove the suit claim.

4. Considering the oral and documentary evidence, viz. Ex.P1 to Ex.P47 adduced by PW.1, this Court is of the view that the plaintiff has proved the suit claim and hence, the Plaintiff is entitled for the reliefs, as asked for. Accordingly, this civil suit is decreed as prayed for, with costs. Time for payment is three months.

14.11.2017

Index:Yes/No
Web:Yes/No
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1. List of Witnesses Examined on the side of the Plaintiff:-
 1. P.W.1 - R.Kothandaraman
2. List of Exhibits Marked on the side of the Plaintiff:-
 1. Ex.P1 is the original resolution of the Plaintiff firm dated 2.12.2016.
 2. Ex.P2 is the copy of the certificate of registration of Partnership dated 7.10.2008.
 3. Ex.P3 is the printed copy of the email from the 1st Defendant to the Plaintiff inviting tender dated 27.5.2013.
 4. Ex.P4 is the printed copy of the email from the Plaintiff to the 1st Defendant seeking further clarification dated 1.6.2013.
 5. Ex.P5 is the printed copy of the email from the Plaintiff to the 1st Defendant seeking further clarification dated 3.6.2013.
 6. Ex.P6 is the printed copy of the email submission of quote by the Plaintiff to the 1st Defendant dated 5.6.2013.
 7. Ex.P7 is the office copy of the submission of revised bill of quantities/suggestions of the 2nd Defendant forwarded by

the 1st Defendant to the Plaintiff dated 19.6.2013.

8. Ex.P8 is the office copy of the revised quote submitted by the Plaintiff to the 1st Defendant dated 19.6.2013.
9. Ex.P9 is the office copy of the letter from the Plaintiff to the 1st Defendant offering discount of 3% on total value of work dated 1.7.2013.
- 10.Ex.P10 is the office copy of the articles of agreement entered into between the Plaintiff and the 1st Defendant along with General Conditions of Contract dated 5.7.2013.
- 11.Ex.P11 is the office copy of the letter from the Plaintiff to the 1st Defendant submitting the EMD of Rs.1,50,000/- dated 8.7.2013.
- 12.Ex.P12 is the copy of the letter from the Plaintiff to the 1st Defendant requesting mobilisation advance dated 10.7.2013.
- 13.Ex.P13 is the printed copy of the email from the 1st Defendant to Plaintiff attaching the floor wise plan dated 17.7.2013.
- 14.Ex.P14 is the printed copy of the email from the 1st Defendant to the Plaintiff attaching revised foundation drawings as of 6.8.2013 dated 8.8.2013.
- 15.Ex.P15 is the printed copy of the email from the 1st Defendant to the Plaintiff attaching ground floor roof drawing dated 8.8.2013.
- 16.Ex.P16 is the printed copy of the email from the structural Engineer to the Plaintiff attaching revised footing marking carry out schedule of footings and details of combined footings as of 8.8.2013 under copy to the 1st Defendant dated 9.8.2013.
17. Ex.P17 is the printed copy of the email from structural Engineer to the Plaintiff attaching first floor roof drawings dated 21.8.2013.
18. Ex.P18 is the photocopy of the certificate issued by the 2nd Defendant certifying payment of Rs.12,68,263.55/- for RAB-1 to the Plaintiff dated 27.10.2013.
19. Ex.P19 is the photocopy of the drawing of second open

terrace floor roof beam layout dated 31.10.2013.

20. Ex.P20 is the photocopy of the certificate issued by the 2nd Defendant certifying payment of Rs.14,66,706.49
21. Ex.P21 is the copy of the letter from the Plaintiff to the 1st Defendant for approval of estimate for plumbing and sanitary and electrical works dated 27.12.2013.
22. Ex.P22 is the office copy of the approval of the 2nd Defendant for the estimation of plumbing and sanitary and electrical works dated 4.1.2014.
23. Ex.P23 is the original of the plumbing 7 sanitary pipeline drawing as per execution by Plaintiff to the 1st Defendant dated 12.02.2014.
24. Ex.P24 is the office copy of the letter from the Plaintiff to 1st Defendant and certified by 1st Defendant towards earth used for filling the foundation and basement dated 26.5.2014.
25. Ex.P25 is the office copy of the letter from the Plaintiff to the 1st Defendant and certified by the 1st Defendant towards de-watering from foundation up to basement level dated 26.5.2014.
26. Ex.P26 is the office copy of the letter from the Plaintiff to the 1st Defendant and certified by the 1st Defendant towards providing anti termite in all stages with approved chemical dated 26.5.2014.
27. Ex.P27 is the office copy of the letter from the Plaintiff to the 1st Defendant and certified by the 1st Defendant towards providing and fixing MS grills for new toilet on various points dated 26.5.2014.
28. Ex.P28 is the office copy of the letter from Plaintiff to the 1st Defendant and certified by 1st Defendant towards painting of superior quality ready mix paint for inner and outer walls dated 26.5.2014.
29. Ex.P29 is the photocopy of the summary bill for extra items submitted by the Plaintiff to the d and certified by the 2nd Defendant dated 26.5.2014.
30. Ex.P30 is the copy of the letter from the Plaintiff to the 1st Defendant raising bill for rate difference in sand and

recommended by the 2nd Defendant dated 26.5.2014.

31. Ex.P31 is the copy of the certificate issued by the 2nd Defendant certifying payment of Rs.36,47,237.13/- for final bill to the Plaintiff dated 28.6.2014.
32. Ex.P32 is the copy of completion certificate issued by the 2nd Defendant dated 29.9.2014.
33. Ex.P33 is the copy of the letter from the Plaintiff to the 1st Defendant requesting to release balance of payment with enclosures dated 2.3.2015.
34. Ex.P34 is the copy of the letter from the Plaintiff to the 1st Defendant requesting to release balance of payment dated 18.5.2015.
35. Ex.P35 is the copy of the letter from the Plaintiff to the 1st Defendant requesting to release balance of payment dated 15.6.2015.
36. Ex.P36 is the copy of the letter from the Plaintiff to the 1st Defendant requesting to release EMD retention amount and withheld balance payment dated 11.07.2015.
37. Ex.P37 is the original letter from the 1st Defendant to the Plaintiff enclosing cheque for R.6,37,541/- dated 1.8.2015.
38. Ex.P38 is the copy of the letter 'without prejudice' from Plaintiff to the 1st Defendant dated 6.8.2015.
39. Ex.P39 is the copy of the legal notice issued by the Plaintiff to the 1st Defendant dated 18.9.2015.
40. Ex.P40 is the copy of the legal notice issued by the Plaintiff to the 1st Defendant dated 18.9.2015.
41. Ex.P41 is the copy of the deed of amendment in partnership of the Plaintiff dated 1.4.2011.
42. Ex.P42 is the copy of the letter from the Plaintiff to the 2nd Defendant dated 19.11.2015.
43. Ex.P43 is the copy of the letter from the Plaintiff to the 2nd Defendant under copy of d dated 9.2.2016.
44. Ex.P44 is the cop of the letter from the Plaintiff to the 2nd

Defendant under copy of the 1st Defendant dated 20.4.2016.

45. Ex.P45 is the copy of the final certificate issued by the 2nd Defendant to the 1st Defendant and copy to the Plaintiff dated 22.4.2016.

46. Ex.P46 is the copy with legal notice issued by the Plaintiff to the Defendants dated 11.5.2016 with one return cover and 3 acknowledgement cards.

47. Ex.P47 is the copy of the deed of partnership of the Plaintiff dated 1.10.2008.

3. List of Witnesses Examined on the side of the defendants:-

Nil

4. List of Exhibits Marked on the side of the defendants:-

Nil

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14.11.2017

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Pre-Delivery Judgement in
CS.No.93 of 2017

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