

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.02.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.342 of 2010

1.Tamil Nadu Water Supply & Drainage Board,
Rep. By its Superintending Engineer,
Salem.

2.The Executive Engineer, TWAD Board,
Salem.

3.The Assistant Engineer, TWAD Board,
Salem.

... Appellants/Plaintiffs

...Vs...

P.Elango

... Respondent/Defendant

Prayer: Appeal filed Under Section 96 C.P.C, against the judgment and decree dated 31.10.2007 made in O.S.No.344 of 1999 on the file of the Additional Subordinate Judge, Salem.

For Appellants : Ms.S.Thamizharasi

For Respondent : Mrs.Zeenath Begam
for Mr.T.Murugamanickam

JUDGMENT

The plaintiffs, whose suit for money viz., the damages suffered by them due to the non performance of the contract by the defendant was dismissed, are the appellants. The suit came to be filed for recovery of a sum of Rs.3,62,206/- with subsequent interest consisting of a sum of Rs.1,53,669/- the difference in cost for the balance of work completed by other agency and a sum of Rs.1,09,826/- being the value of the materials not returned by the contractor viz., the defendant.

2. The plaintiffs would aver in the plaint that the defendant was entrusted with the work of laying underground pipeline for supplying drinking water to Attur Town under a project called Attur Water Supply sub project under Group III. Since the defendant was the lowest bidder, the contract was entrusted to him and an agreement was entered into on

04.07.1988 between the plaintiffs and the defendant. The defendant had commenced the work upon issue of the work order on 27.05.1988 itself. The parties had agreed that the work should be completed within nine months, that is on or before 26.04.1989.

3. According to the plaintiffs, since the defendant was unable to complete the work, he had sought for and obtained extensions and even after several extensions that were given up to 30.04.1993, it was found that the defendant had not fully completed the work. Hence, the plaintiff had terminated the contract on 17.09.1993. In the order of termination itself, it was made clear that the defendant would be liable for any difference in cost that is incurred by the plaintiffs for completing the work. Contending that the defendant had not returned some of the materials, that were supplied to him for the performance of the contract and the plaintiffs had suffered a loss as it was forced to engage a third party to complete the work, the plaintiffs have come forward with the above suit.

4. The defendant resisted the suit contending as follows:

The execution of the agreement and the fact that the time for performance was extended on various dates up to 30.04.1993 is admitted. The defendant would however, claim that the contract was to be performed using the materials that are supplied by the plaintiffs. According to the defendant, the plaintiffs were highly irregular in supply of the materials required for completion of work. The extensions were necessitated only due to the fact that the plaintiffs were unable to supply the required materials in time. Therefore, according to the defendant the delay had been caused only because of the failure on the part of the plaintiffs to supply the materials and he could not complete the work by purchasing the materials from other sources, as the agreement prohibited such purchases. On the above pleadings, the defendant sought for dismissal of the suit.

5. The learned trial judge, having considered the rival pleadings framed the following issues:

"1. Whether the defendant completed the work as per agreement dated 04.07.1988?

2. As per agreement dated 04.07.1988 whether plaintiff supply the materials to defendants without delay. So as to complete the work by the defendant in time as per agreement dated 04.07.1988?

3. Whether the said agreement is based as per Contract Act?

4. Whether the plaintiff is entitled as prayed for?

5. What relief if any?"

[Typed as found in the judgment of the trial Court]

6. On the side of the plaintiffs one Rajendran was examined as P.W.1 and Exs.A-1 to A57 were marked. On the side of the defendant, the defendant was examined as D.W.1 and no documentary evidence was produced.

7. Upon consideration of the evidence on record, the learned trial Judge came to the conclusion that the plaintiffs have not established the essential requirement viz., the materials were supplied in time. The receipts produced by the plaintiffs under Exs.A2 to A43 were disbelieved by the trial Court on the ground that most of them evidenced the delivery of goods to one Kandasamy and not the defendant. The trial Court had also examined the receipts and found that they contain several alterations. Ex.A-44 viz., the day book of stores of the plaintiffs was also found to be inconsistent with the receipts produced by the plaintiffs. Upon the above findings, the trial Court concluded that the failure on the part of the defendant for completing the work, within the extended time, was because of the delay in supply of materials by the plaintiffs. On the question of return of the goods supplied, the trial court found that the plaintiffs had not proved even the entrustment of the goods and therefore, cannot seek refund of the value of the goods. It was also found that the evidence of entrustment was sketchy and unbelievable. On the above findings, the learned trial Judge dismissed the suit. Aggrieved the same, the plaintiff has come forward with the present appeal.

8. I have heard Ms.S.Thamizharasi, learned counsel for the appellants and Ms.Zeenath Begam, appearing for Mr.T.Murugamanikkam, learned counsel for the respondent.

9. The learned counsel for the appellants would contend that the defendant's plea relating to delay in supply of materials is not clear. The defence taken being very vague, the trial Court should not have put the burden of proving supplies on the plaintiff. The learned counsel would further contend that Exs.A-2 to A-43 would prove the entrustment of the materials and in the absence of a plea by the defendant that Kandasamy is not his authorised agent, the trial Court ought not to have concluded that the supplies made to Kandasamy cannot be accounted for as supplies made to the defendant. The counsel would therefore contend that the trial Court erred in dismissing the suit.

10. Ms.Zeenath Begam, the learned counsel appearing for the respondent would point out that the receipts viz., Ex.A-2 to A-43 were not produced along with the plaint and they were tendered in evidence only when P.W.1 was examined. Therefore, there was no opportunity for the defendant to have taken a plea that Kandasamy was not his authorized agent. The learned counsel would also point out that in the evidence of D.W.1,

particularly in cross examination, there is not even a suggestion that the goods that were entrusted to Kandasamy were received by the said Kandasamy on behalf of the defendant. The absence of even a suggestion to that effect, according to the learned counsel, would show that the plaintiffs were also aware that the said Kandasamy has nothing to do with the defendant. Apart from the above the learned counsel would contend that though the plaintiffs claimed that extensions were sought for by the defendant, because of his inability to complete the work, the plaintiffs have not chosen to produce either the letters requesting extensions or the orders granting such extensions. Those documents, which are admittedly in the custody of the plaintiffs, have not been produced. Therefore, the learned counsel would seek the court to draw an adverse inference against the plaintiff for non production of material evidence. On the above rival contentions, the following questions arise for determination in this appeal:

1. Whether the plaintiffs have proved the entrustment of the materials required for completion of the contract within the time stipulated/extended?
2. Whether the defendant is guilty of not returning of some of the materials supplied by the plaintiffs?

Point No.1

11. The agreement stipulates the period of nine months. It is not in dispute that the agreement was extended periodically up to 30.04.1993 that is for nearly five years. The plaintiffs, who are in custody of the documents relating to the request for extensions and grant of extensions, failed to produce those documents for reasons best known to them. The defendant would categorically plead that the delay was caused only because of failure to supply the materials by the plaintiffs. The only evidence of supply of material is in the form of receipt book, which are marked as Exs.A-2 to A-43. A perusal of the said receipt book would show that it is not reliable and the dates are not in a chronological order. The supply made on 09.05.1989 to Kandasamy is reflected in receipt No.2110 and supply made on the same date i.e., 09.05.1989 to the defendant, Elango, is reflected in receipt No.2158. In some of the receipts there is overwriting and the nature of the materials supplied is not very clear from those receipts. It is for the plaintiffs to establish that it had supplied the required materials at the required point of time to succeed in a suit for damages. But, unfortunately for the plaintiffs, there is no evidence to show that the required materials were supplied at the relevant periods. The contract itself does not stipulate what are the materials to be supplied and the dates on which such materials have to be supplied. The contract further stipulates that the defendant cannot substitute the materials and it is only the materials that are supplied by the plaintiffs should be used for execution of the works. On an analysis of the receipts viz., Exs.A-2 to A-43

the learned trial judge has come to the conclusion that the plaintiffs have not established that the materials required for performance of the contract were supplied by it in time. I have gone through the receipts viz., Exs.A-2 to A-43. Upon examination of the entire set of documents, I am unable to persuade myself to disagree with the finding of the trial Court to the effect that plaintiffs have not established the supply of materials in time so as to enable the defendant to complete the work.

Point No:2

12. On the second question, that is return of unused materials, the plaintiff would calim a sum of Rs.1,09,826/- as the value. It is seen from Ex.A-49, written by the defendant to the Executive Engineer of the plaintiffs that his attempt to return the goods failed, because of the refusal by the authorities to receive the goods, for the reason that they were themselves unsure about who is to take back the goods. However, by a letter dated 23.09.1998, which was marked as Ex.A-52, the defendant has stated that all the remaining goods have been returned to the City Station Store and since he has been directed to entrust them with the Salem maintenance Zone, he had sought for permission of the Executive Engineer to remove them and entrust them with the Salem zone. There is nothing on record to show that this letter viz., Ex.A-52 was replied to and such permission was granted. It is also not in evidence that the entrustment claimed by him is false. Therefore, the trial Court has rightly come to the conclusion that the defendant has not retained any of the goods belonging to the plaintiffs so as to make him liable to pay the value of such goods allegedly retained by him. The evidence of P.W.1 on the entrustment is also not very satisfactory. He would plead ignorance of such return of the goods entrusted to them by the defendant. I do not see any reason to interfere with the findings of the trial Court on this issue also.

13. Therefore, the appeal is dismissed confirming the judgment and decree of the trial Court. However, there was no order as to costs in this appeal.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

vsm

To

1.The Additional Subordinate Judge,
Salem.

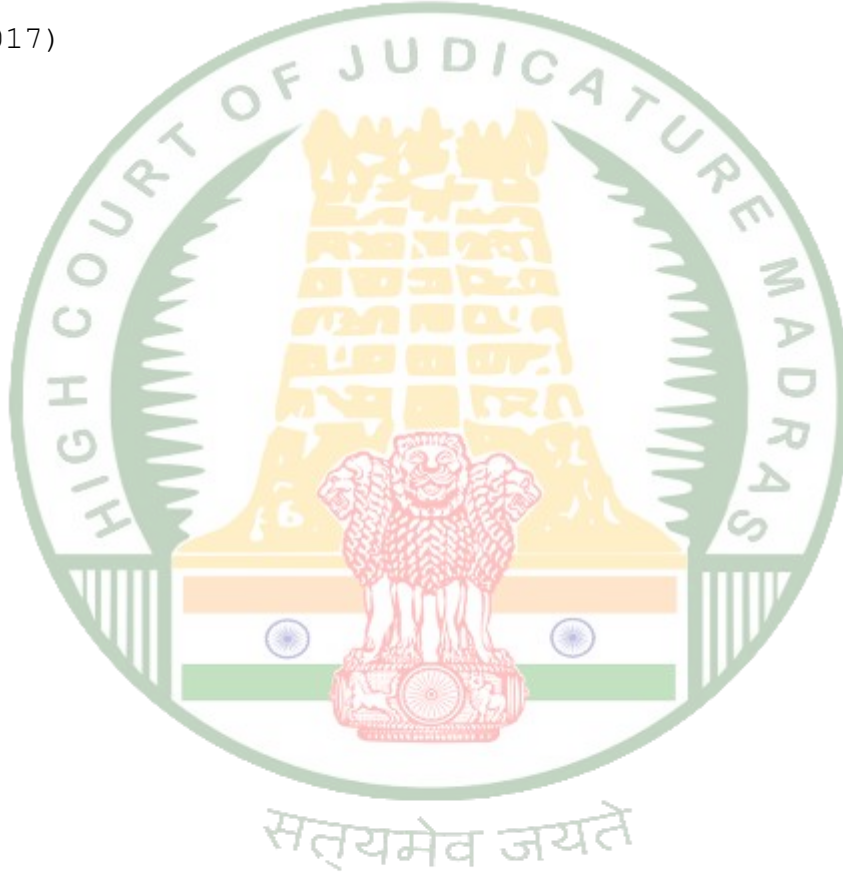
2.The Section Officer,VR Section,High Court,Madras

+1cc to M/s.T.Murugamanickam,Advocate sr.12008

+1cc to M/s.S.Thamizharasi,Advocate sr.11864

A.S.No.342 of 2010

rsk(co)
ss(15/3/2017)



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