

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2017

CORAM

THE HON'BLE MR.JUSTICE **P.KALAIYARASAN****C.S.No.283 of 2010**

M/s. Jenefa Constructions
Civil Engineering Contractor,
Represented by its Partner,
M.Arulanandam,
No.39, Chinnathambi Street,
Chennai - 600 001. ... Plaintiff

vs

The Government of Tamil Nadu
Highways Department,
Represented by the
Divisional Engineer (H),
Chennai Metropolitan Development
Plan Division-1,
Near Guindy Road Over Bridge,
Guindy, Chennai - 600 032. .. Defendant

Civil Suit filed under Order VII Rule 1 CPC read with
Order IV Rule 1 of O.S.Rules, seeking for a judgment and
decree, directing the defendant to pay the plaintiff a sum
of Rs.1,43,84,102/- together with further interest at 18%
per annum on the principal sum of Rs.1,13,93,348/- from the
date of suit till the date of realization and for costs.

For Plaintiff : Ms.Aparna Devi
for Mr.P.Subba Reddy
For Defendants : Mr.T.Jayaramaraj
Spl. Government Pleader (CS)

JUDGMENT

This suit has been filed claiming Rs.1,43,84,102/- together with further interest at 18% p.a., on the principal sum of Rs.1,13,93,348/- from the date of plaint till the date of realisation from the defendant by the plaintiff.

2. The plaint averments are as follows :

(i) The Superintending Engineer, Highways Chennai Circle, Guindy, Chennai - 600 032 had invited tenders for the work of "CMDP 2005-2006 - widening and strengthening of two lane and strengthening of Vengadu Road K.M. 0/0 - 2/0". The plaintiff submitted his tender for the above work. The Superintending Engineer, Highways Chennai Circle accepted the plaintiff's tender for a value of Rs.87,16,009/- at 0.01% less estimate rate of 2005-2006 on 06.01.2006. The plaintiff furnished a further Security Deposit of Rs.1,17,000/- and EMD of Rs.57,500/-. An agreement was thereafter entered into between the plaintiff and the Superintending Engineer, Highways Circle, Chennai on 28.02.2006.

(ii) The period fixed for the completion of the above work was six months as per the agreement. Subsequently, the work was transferred to the defendant, the CMDP Division-1, Chennai for the administrative

convenience. The plaintiff could not complete the work within the stipulated period due to the following hurdles and hindrance during execution of the work.

(i) On the widening portion of the road on right side, there was a Bajana Koil and Pillaiyar Koil and a big tree;

(ii) On the left side of the road, there was a hut and big tree;

(iii) there was no gravel quarry in the entire Kancheepuram District.

(iv) for completion of work

(a) laying of DBM (Dense Bituminous Macadam) from K.M. 0/0 to 2/0.

(b) G.S.B (Granular Sub Base) has been completely laid on the right side box cutting portion from K.M. 0/0 - 2/0.

(c) Three slab culverts at K.M. 0/2, 0/8 and 1/8.

the defendant has not paid for the above (b) and (c) items of work.

(v) Imposed fine amount of Rs.11,000/- at various spells and the prices of road laying materials have been increased abnormally in many folds.

(iii) The defendant had issued a final show cause notice dated 28.07.2008 to the plaintiff for which the plaintiff sent a reply on 11.08.2008 narrating the above said hurdles. In another letter, the plaintiff also sought

for extension of time up to October 2008. But the defendant has issued the orders of absolute termination of contract, dated 25.08.2008 at the plaintiff's risk and cost and forfeiting the EMD amount of Rs.57,500/- and further Security Deposit amount of Rs.1,74,500/-. The plaintiff by his letter dated 18.09.2008 has furnished the details and requested to withdraw the termination order, dated 25.08.2008 issued by the defendant. Without considering the legitimate and genuine request of the plaintiff, the defendant's, Chief Engineer in his letter dated 23.10.2008 have justified the termination of contract ordered by the defendant on 25.08.2008.

(iv) The defendant has issued the impugned order of termination of contract on 25.08.2008, when there was no currency of contract. The termination itself is illegal and therefore, the plaintiff is entitled to EMD amounting to Rs.57,500/- and further Security Deposit of Rs.1,74,500/- and retention money Rs.87,180/-. The difference in cost incurred by the plaintiff due to increase of prices comes to Rs.21,67,238/-. The materials stocked in a private land comes to Rs.10,00,000/-. The fine imposed on the plaintiff to the tune of Rs.11,000/- also to be refunded. The payment for construction of 3 culverts to the tune of

Rs.17,09,330/- is to be paid. Towards profit earning prevented by the defendant consequent to the illegal termination comes to Rs.5,26,308/-. Towards loss and profit and over heads due to prolongation of contract works out to Rs.68,34,972/-. Thus the plaintiff claims Rs.1,43,84,102/- and also with further interest at 18% p.a.

3. The averments in the written statement are as follows :

(i) The suit has to be dismissed for non-joinder of necessary parties. The tender was called for by the Superintending Engineer, Highways, Chennai circle for the work of "CMDP 2005-2006 - widening and strengthening of two lane and strengthening of Vengadu Road K.M. 0/0 - 2/0". On completion of the formalities, the agreement was entered into between the Superintending Engineer and the plaintiff on 28.02.2006 for the work.

(ii) The work entered between the Superintending Engineer and the plaintiff was under the supervision of the Divisional Engineer, Chengalpet. Subsequently, Chennai Metropolitan Development Planning (CMDP) Scheme was formed and this work was transferred to the defendant only for the execution and over all supervision of the work on

28.04.2008. There is no privity of contract between the defendant and the plaintiff.

(iii) Time is essence of the contract. The agreement dated 28.02.2006 stipulates that the work ought to have been completed on or before 28.08.2006, i.e., within a period of six months from the date of handing over the possession. In spite of several extensions and reminders given by the Divisional Engineer, Chengalpet, the plaintiff has not done any work till 2008. It is learnt from the records that the plaintiff has completed only 20% of the work entrusted to him as on 28.02.2006. After the inception of the defendant on 28.04.2008 and till the date of termination, not even a single piece of work was done by the plaintiff, in spite of several reminders. Finally by the order, dated 25.08.2008, the work was terminated at the risk and costs of the plaintiff by the defendant, which was subsequently ratified by the Chief Engineer (Highways), Metro, Chennai-16. After the termination, the EMD of Rs.57,500/- and the further Security Deposit of Rs.1,17,000/- was forfeited and brought into account of the Government. Suppressing all these facts, the plaintiff has come forward to file this suit.

(iv) There is absolutely no hindrance or hurdles as depicted by the plaintiff. In fact after the termination

of the contract the work was entrusted to another agency by floating fresh tender for the balance quantity of the work which was also nearing completion by the agency without any demur or claim.

(v) As per Clause 103.5 of SSRB, it is the duty cast upon the plaintiff that the plaintiff has to inspect the site before entering into the contract or before participating in the tender. Having accepted the work and signed the agreement, the plaintiff cannot come now and claim that the presence of Bajanai Koil etc, as a hindrance. In fact from the date of taking the possession on 28.02.2006 till the date of termination, the plaintiff has not whispered anything about the presence of any hindrance for completion of the work.

(vi) Regarding laying of dense bituminous macadam from km 0/0 to 2/0, the payment corresponding to the work was paid by the Divisional Engineer, Chengalpet. Out of six, three slap culverts at km 0/2, 0/8 and 1/8 have been completed by the plaintiff and the defendant made recommendation to the Divisional Engineer, Chengalpet to make the payment.

(vii) It is the plaintiff who prolonged the

contract without completing the work and the plaintiff had no intention to complete the work in spite of various reminders and extensions granted to him, which forced the defendant to terminate the contract on 25.08.2008.

(viii) As per Clause 110.09 of the contract, the defendant is empowered to terminate the contract for the failure of the contractor who has defaulted and committed a fundamental breach of the contract in not completing the work within the stipulated time. Almost 26 months, after the expiration of the contract period the plaintiff has prolonged the work. Had it completed within the stipulated time, the cost of the rate laying materials would not have increased. The fine was imposed for non-performance of the contract. The proportionate amount for the work done by the plaintiff has been settled taking into note the entries made in the 'M' book. The termination of the contract is valid one and the risk and costs imposed on the plaintiff has to be upheld. Therefore, the suit is to be dismissed.

4. On perusal of the pleadings of the parties, the following issues have been framed for trial :

"1. Whether the defendant has handed over free site for widening the road

till the date of termination of contract (25.08.2008) ?

2. Whether the defendant can terminate the contract when the contract / agreement was not in force / alive ?

3. Whether the plaintiff is entitled to get refund of EMD amounting to Rs.57,500/- FSD Rs.1,74,500/- (BG) and the retention money of Rs.87,180/- (Total Rs.1,44,600 + 1,74,500 BG)?

4. Whether the imposition of fine for Rs.11,000/- and recovered the same from the running bill by the defendant is illegal ? If so to what relief the plaintiff is entitled ?

5. Whether the plaintiff is entitled to claim Rs.21,67,238/- from the defendant being the difference in cost incurred by the plaintiff consequent to abnormal price hike and escalation of price for the work done by the plaintiff ?

6. Whether the plaintiff is entitled for payment of Rs.17,09,330/- for the work done from the defendant ?

7. Whether the plaintiff is entitled for a sum of Rs.5,26,308/- as profit earnings prevented by the defendant to complete the entire work by the plaintiff by way of illegal termination ?

8. Whether the plaintiff is entitled to

claim Rs.68,34,972/- against the defendant towards loss of profit and over heads due to prolongation of contract ?

9. Whether the plaintiff is entitled to payment of interest on one or more of the claims ? If so, what rate and from which date ?

10. Whether the plaintiff is entitled to cost ?

11. To what relief if any the plaintiff is entitled to ?"

5. The plaintiff has been examined as P.W.1 and Exs.P.1 to P.13 were marked on his side. The first defendant was examined as D.W.1 and no exhibits were marked on his side.

6. Issue Nos. 1, 2 and 3 :

The admitted facts are that the plaintiff and the Superintending Engineer, Highways, Chennai circle entered into an agreement, dated 28.02.2006 for the work of "CMDP 2005-2006 - widening and strengthening of two lane and strengthening of Vengadu Road K.M. 0/0 - 2/0" for a total value of Rs.87,16,009/-. The period fixed for the completion of the work was six months as per the agreement. After formation of Chennai Metropolitan Development

Planning, the work was transferred to the defendant in April 2008. The defendant after issuing final show cause notice on 28.07.2008 terminated the contract by order, dated 25.08.2008.

7. The question of non-joinder of necessary party due to non impleadment of Superintending Engineer, Highways, Chennai circle, as contended by the defendant does not arise. The defendant in its written statement admits that Chennai Metropolitan Development Planning Scheme, the defendant herein was formed on 07.04.2007 and the work entrusted to the plaintiff was also transferred to the defendant on 28.04.2008 and the defendant after issuing final show cause notice terminated the contract by its order, dated 25.08.2008. Though the agreement was entered into between the plaintiff and the Superintending Engineer, Highways, Chennai Circle, subsequently, the work was transferred to the defendant after its formation and termination order was issued only by the defendant and therefore, the plea of non-joinder is not sustainable.

8. The main contention of the plaintiff is that there were hindrances for execution of the work by way of existence of two temples, hut and trees and free site was not handed to the plaintiff.

9. Clause 103.5 of SSRB reads thus :

"Examination of plans, specification, several provision and site of work :
The bidder is required to examine carefully the site of the work source of materials of the proposals, plans specifications, special provision and contract forms for the work contemplated. It will be construed that the bidder has investigated and satisfied as to the conditions to be en-counterred for performing the work as schedule. It is mutually agreed that submission of tender shall be considered conclusive evidence that the bidder has made such examination and is satisfied as to all the conditions and contingencies."

10. Therefore, as per the above clause, the plaintiff is expected to inspect the site before submissions of the bid. The plaintiff submitted the tender on 14.12.2005 and the same was accepted by the defendant on 06.01.2006. The agreement was signed between the parties on 28.02.2006. As per the agreement, the work should have been completed within six months from the date of the agreement. Since only 20% of the work was done by the plaintiff, final show

cause notice was issued by the defendant on 28.07.2008. Only in the reply dated 11.08.2008 sent by the plaintiff to the above final show cause notice issued by the defendant, the plaintiff for the first time elaborated the reason for the delay saying about the hindrances etc. For about 30 months from the date of agreement, the plaintiff has not whispered anything about the hindrances to the defendant. Finally the defendant terminated the contract on 25.08.2008. It is also pertinent to note that the subsequent contractor have been completing the balance work without any demur or complaint about the hindrances as deposed by the Divisional Engineer who was examined as D.W.1. Therefore, the contention of the plaintiff that free site was not handed over to him is not acceptable.

11. The agreement between the parties dated 28.02.2006 is marked as Ex.P.2. The defendant extended the period of agreement till 30.06.2008 in its letter dated 02.05.2008 and the same is marked as Ex.P.3. D.W.1 has deposed that as per the order, dated 15.07.2008 further extension of time was granted till 31.08.2008. He further says that the above said order was communicated to the plaintiff on 22.07.2008 by Registered post. This Court does not see any reason to disbelieve the evidence of the above witness. Therefore,

this Court construes that termination order was issued during the subsistence of the contract. Termination of contract was done as the plaintiff had not completed the work in spite of the reminders and imposing of fines. Therefore, termination is valid. When termination is held valid, the plaintiff is to forgo EMD and further Security Deposit. Therefore, forfeiture of the said amount at the time of termination of contract cannot be questioned. The Issue Nos.1,2 and 3 are answered in favour of the defendant.

12. Issue No.6 :

The plaintiff claims that he has completed Granular Sub Base work from km 0/0 to 2/0 and out of six culverts, three culverts at km 0/2, 0/8 and 1/8 have been completed and for that work Rs.17,09,330/- has to be paid by the defendant. The defendant's officer in his letter to the plaintiff, dated 23.06.2008, which is marked as Ex.P.4 confirms the completion of the above work, which reads thus:

"On inspection of site, it is found that DBM was completed over the existing width portion from Km. 0/0-2/0 and GSB has been completed in right side box cutting portion from Km. 0/0-2/0. Out of

six culverts, three slabs culverts at Km. 0/2, 0/8 and 1/8 have been completed."

13. In the pleadings as well as in the deposition of D.W.1, the completion of the above work is admitted. For the work done by the plaintiff, the defendant is bound to pay. Therefore, the plaintiff is entitled to Rs.17,09,330/- from the defendant. This issue is answered in favour of the plaintiff.

14. Issue Nos. 4,5,7 and 8 :

The fine has been imposed on various spells to the tune of Rs.11,000/- to the plaintiff. The plaintiff contends that only because of the delay of shifting of Bajanaï Koil, Pillayar Koil, hut and trees by the defendant, the work could not be completed within the stipulated time of contract. As already pointed out, the reason given by the plaintiff for the delay is not acceptable and the plaintiff could complete only 20% of the work in 30 months though the stipulated time to complete the work is six months. Therefore, the imposition of fine cannot be termed as illegal.

15. The price hike and escalation of price for the work done by the plaintiff cannot be a ground to claim

under the said head, as the plaintiff alone prolonged the period without executing the work.

16. The claim under profit earnings prevented by the defendant is also not acceptable for the reasons already given in Issue Nos. 1 to 3.

17. The plaintiff is also not entitled to claim any amount towards loss of profit and over heads due to prolongation of contract, as the prolongation was only at the instance of the plaintiff and the plaintiff alone committed the breach. Therefore, the plaintiff is not entitled to any of the claims under Issue Nos. 4,5,7 and 8.

18. Issue No.9 :

The plaintiff has been held entitled for payment of Rs.17,09,330/- for the work done from the defendant. The defendant is required to pay the amount immediately after the work, but the defendant has not done so in this case. Therefore, the plaintiff is entitled to interest at 9% p.a., from the date of the plaint till the date of realisation.

19. Issue No.10 :

The plaintiff is entitled to proportionate costs.

In fine, this Civil Suit is partly allowed with costs, whereby the plaintiff is entitled for a sum of Rs.17,09,330/- from the defendant with interest at 9% p.a., from the date of the plaint till the date of realisation. With respect to the other reliefs, the suit is dismissed.

sd/.P.K.R.J

07.06.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/22.11.2017

COURT OFFICER

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

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