IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : **02.02.2017**

Judgment pronounced on **: 17.02.2017**

CORAM

THE HON'BLE MR. JUSTICE **C.V.KARTHIKEYAN**

C.S.No.705 of 2010

Tamil Nadu Newsprint and Papers Ltd.,
Rep by its Senior Manager (Legal)
Mr.A.Ponnambalam
having its registered office at
No.67, Mount Road,
Guindy, Chennai 600 032. ... Plaintiff

Vs.

K.Ashraf Ali
Sole Proprietor of M/s.A.K.Steels
6/3, Vedagiri Mudali Street, Alandur
Chennai 600 016
and also at
New No.57, Old No.14/A,
Shop No.1, Ashar Kaana Street,
Alandur, Chennai 600 016. ... Defendant

Prayer:- Plaint filed under Order IV Rule 1 of O.S.Rules read with order VII rule 1 of CPC

a. for a sum of Rs.79,11,378.84/-

b. for interest at the rate of 24% p.a on Rs.56,35,985/- from the date of the suit till the date of realisation in full

c. for the costs of this suit

d. to pay the costs of the suit.

For Plaintiff : Mr.Shivakumar

For Defendant : Mr.T.Ramachandran

JUDGMENT

Suit filed for judgment and decree against the defendant for a sum of Rs.79,11,378.84/- together with interest @ 24% per annum on Rs.56,35,985/- from the date of plaint till the date of realisation and for cost.

2. The plaintiff is a company, promoted by the Government of Tamil Nadu for manufacture of newsprints, printing and writing papers. It has been stated that the equity of the plaintiff is held by the public and other financial institutions. The Board of Directors consists of All India Service Officers of Tamil Nadu cadre, representatives of IDBI and other persons from public and technical experts. The plaintiff has its factory at Pugalur in Karur district and provides employment for about 1800 persons directly and an equal member of persons indirectly. The plaintiff is in the manufacture of paper production.

3. The plaintiff issued a tender No.TNPL MM SS 2008023 dated

03.04.2008 for the sale of boilers and auxiliaries at EID, Pugalur. This tender was published in newspapers on 12.04.2008. The last date of submission of tender was 28.04.2008. The defendant had submitted the tender form on 28.04.2008. The defendant paid Rs.3.25 lakhs towards EMD. The defendant was called by the plaintiff vide its letter dated 30.04.2008 for discussion. The discussion were held on 03.05.2008 and the defendant was found to be eligible for two lots of boilers, auxiliaries and conveyors. The plaintiff held a meeting on 08.05.2008 with the defendant and it was stipulated that the delivery period would be three months from the date of realisation of LOI/sale order. This was accepted by the defendant. The defendant confirmed payment in three equal installments. The defendant agreed and confirmed this by letter dated 12.05.2008. The plaintiff issued a letter dated 15.05.2008 calling the defendant to come for discussion on 16.05.2008. The defendant sought postponement of meeting till 20.05.2008 on which date the defendant was clarified with the terms and conditions. It was informed that the issues raised by the defendant with respect to payment of taxes by letter dated 12.05.2008 was contrary to the terms and conditions of the tender. The defendant was also informed that if they do not perform the agreement, the plaintiff would forfeit the EMD and blacklist the defendant. The defendant refused to sign the minutes. On 26.05.2008 the plaintiff issued a letter to the defendant. Sale order was placed on 31.05.2008 for two lots of boilers and auxiliaries at Rs.2,55,55,786/- and conveyors at the rate of Rs.30,13,786 together with taxes. The terms and conditions clearly stipulated that the machineries should be cleared and removed on or before 31.08.2008. In clause 2 it was stipulated that the EMD amount of Rs.2,25,000/- would be retained as security deposit against the sale order. In clause 3 it was stated that the total payment should be paid in three installments. The defendant did not pay the advance amount according to the terms and conditions. The plaintiff issued a telegram dated 06.06.2008. On 09.06.2008 the defendant requested time to make the payment. The defendant stated that they would make payment of first installment in the first week of July 2008 and the next two installments at the intervals of 20 days from the first installment. This was not accepted by the plaintiff. Another letter dated 18.06.2008 was issued by the plaintiff calling them to make payment immediately and start clearing the materials. The defendant by letter dated 20.06.2008 requested a copy of the minutes of the meeting and assured that they would pay the amount within one week. The plaintiff issued another letter dated 02.07.2008 and the defendant by reply dated 04.07.2008 stated that they would make the payment in three installments. The plaintiff issued another letter dated 08.07.2008 and yet another two letters on

15.07.2008, 18.07.2008 asking the defendant to make the payment on or before 23.07.2008. On 23.07.2008 discussion were held between the plaintiff and the defendant and the defendant agreed that they would pay the first installment on or before 04.08.2008. On 06.08.2008 the plaintiff issued yet another letter. By letter dated 12.08.2008 the defendant sought further time. The plaintiff issued yet another letter dated 14.08.2008 and again on 20.08.2008. Since the defendant had not performed their part as per the agreement, another contractor was appointed on 30.08.2008, who quoted Rs.1.97 crores against the defendant bid of Rs.2,55,55,786/- putting the plaintiff to loss of Rs.55,30,786/- and a further sum of Rs.1,05,199/- towards re-tendering charges. The plaintiff issued a legal notice on 11.12.2008 and yet another notice on 14.10.2009. The defendant did not reply to the said notice, hence the plaintiff has come to Court seeking recovery of amount as claimed in the plaint.

4. The defendant admitted in the written statement that the plaintiff had issued a tender dated 03.04.2008 for sale of wilders and auxiliaries at Pugalur. This was published in the newspaper on 12.04.2008. The defendant submitted tender form on 28.04.2008 and paid a sum of Rs.3.25 lakhs as EMD. The defendant appeared for discussion on 03.05.2008 and became eligible for purchase of two

lots of boilers, auxiliaries and conveyors. The defendant stated that even as per the version of the plaintiff, the new tenderer had quoted 1.97 lakhs and consequently stated that the defendant was the highest bidder. It was stated that the materials were not found on the factory premises, but the plaintiff had canceled the EMD and black listed the defendant. The plaintiff had re-tendered the entire project and claim a sum of Rs.55,30,786 and a sum of Rs.1,05,199/-. These claims are not accepted by the defendant. It had been stated that merely because the defendant signed in the minutes book it does not amount to acceptance or admission of liability. The plaintiff had obtained a typed matter for signature and their claim is not genuine. It had been stated that the defendant is not liable to pay any amount. The allegations in the plaint had been denied by the defendant as false. The defendant sought dismissal of the suit.

5. On the basis of the above pleadings, this Court had framed the following issues on 13.10.2011.

> ***"1. Whether there was any breach of contract on the part of the defendant in not making payment of any one of the installments towards payment of the amount quoted in the tender submitted by him and accepted by the plaintiff"?***
>
> ***2. Whether the plaintiff, besides forfeiting***

Rs.3,25,000/- paid as EMD and blacklisting the defendant, can claim the shortfall in the re-tender submitted by M/s.Azad Steel Corporation as damages?

3. Whether the plaintiff is entitled to claim a sum of Rs.1,05,199/- as re-tendering charges?

4. Whether the plaintiff is entitled to a decree for a sum of Rs.79,11,378.84 P as damages with interest on the said amount till the date of plaint?

5. Whether the plaintiff is entitled to future interest? If so, at what rate?

6. To what relief, the plaintiff is entitled?".

6. The plaintiff examined as PW1. V.K.Parameswaran who was the authorised representative of the plaintiff's company.

a. The board resolution authorised him to tender evidence which was marked is Ex.P.1.

b. Advertisement in the Hindu newspaper regarding Tender dated 12.04.2008 was marked as Ex.P.2

c. Advertisement in the Daily Thanthi newspaper regarding tender dated 12.04.2008 was marked as Ex.P.3.

d. Tender documents submitted by the defendant to the plaintiff dated 28.04.2008 was marked as Ex.P.4.

e. Minutes of the meeting between plaintiff and defendnat dated 08.05.2008 was marked as Ex.P.6.

f. Minutes of the meeting between plaintiff and defendant dated 20.05.2008 was marked as Ex.P.10.

g. Grievance between the plaintiff and the defendant on various dates relating to the issued marked as Ex.P.5, Ex.P.7, Ex.P.8, Ex.P.9, Ex.P.11, Ex.P.13 to Ex.P.25 and Ex.P.27 to Ex.P.32.

h. The copy of the minutes dated 23.07.2008 between the plaintiff and the defendant was marked as Ex.P.26.

i. Re-tender dated 30.08.2008 was marked as Ex.P.33 and the same order issued to the new tenderer dated 24.10.2008 was marked as Ex.P.34.

j. The two legal notices issued by the plaintiff were marked as Ex.P.35 and Ex.P.36.

7. The defendant marked the sole proprietor K.Ashraf Ali as DW1 and did not mark any document.

Maintainability of the suit:- During the arguments even though an issue was not framed for consideration the learned counsel for the defendant urged this Court to render a finding on the maintainability of the suit, since the suit had been verified and presented by the Senior Manager (Legal) and the authorised signatory, Mr.A.Ponnambalan. It had been stated by the learned counsel for the defendant that the plaintiff being a company registered under the

Companies Act, must be represented only by the Company Secretary and the signatory to the plaint had no authority to present the plaint before the Court. The learned counsel also challenged the status of PW1 to give evidence stating that he is also an authorised signatory and when the signatory to the plaint was available, the plaintiff had deliberately examined another person as witness. The learned counsel for the defendant consequently stated that the plaintiff had not proved the allegations. In this connection, PW1 in his proof affidavit had stated as follows.

> ***"I am the duly authorised person of the plaintiff company and as such I am well acquainted with the facts and circumstances of the case. The Board resolution given by the company to me can be marked as Exhibit A.1"***

8. A perusal of Ex.P1 which is the copy of the minutes dated 25.08.2006 of the Board of Directors of the plaintiff's company shows that Item No.4 of the said minutes relates to ratification of power of attorney to initiate legal proceedings including to Thiru.V.K.Parameshvaran, Senior Officer (legal) among other list officers. The said V.K.Parameshvaran was authorised to sign vakalat, written statement, making applications submitted documents and

tender evidence. The Power of attorney granted by the plaintiff's company to Thiru.V.K.Parameshvaran was also enclosed along with Ex.P.1 and this Power of attorney was dated 01.04.2004. The suit was instituted on 28.06.2010. Along with Ex.P.1, the power of attorney was also enclosed which granted power to PW1 to depose before this Court. Consequently even though the issue was not framed, I am not able to find any infirmity in the institution of the suit and I hold that suit is maintainable.

Issue No:1

9. The plaintiff is a company, promoted by the Government of Tamil Nadu for manufacture of newsprints, printing and writing papers. It has been stated that the equity of the plaintiff is held by the public, financial institutions and the Government of Tamil Nadu. The Board of Directors consists of All India Service Officers of Tamil Nadu cadre, representatives of IDBI and other persons from public and technical

experts. The plaintiff has its factory at Pugalur in Karur district and provides employment to about 1800 persons directly and an equal member of persons indirectly. The plaintiff issued an advertisement in The Hindu Newspaper regarding placing of tender in issue dated

12.04.2008. Similar advertisement was issued in Tamil, in Daily Thanthi Newspaper dated 12.04.2008. The advertisement in Hindu Newspaper was marked as Ex.P.2 and advertisement in Daily Thanthi Newspaper was marked Ex.P.2 and Ex.P.3 is as follows:-

"TENDER FOR DISPOSAL OF OLD BOILERS &
ASSOCIATED AUXILIARIES FROM
M/s.EID-PUGALUR, TNPL OFFSITE

Sealed Tenders are invited from the interested buyers for disposal of the following old Boilers & Associated Auxiliaries available at M/s.EID, Pugalur, Tamil Nadu, TNPL Offsite on "as is where is basis,

TENDER No. 2008023

Description of Equipment

Condemned Boiler & Auxiliaries – Two Numbers of Boilers & Auxiliaries with housing structures and coverings Capacity: 35 TPH (Each), Pressure: 14 Kg/CM2, Temperature: 310ºC, Make: Thermax (installed in 1984) Boiler & Auxiliaries include all pressure parts, Fans, Pipelines and its valves, insulation, supporting structures, pumps, ducts and dampers, skin casing, instruments, control panel, chemical dozing system, coal bunkers and its chutes, ash discharge chutes) dust collectors, etc.

Condemned Mechanical Spares

Condemned Conveyors (Conveyors are in erected condition without Belt, Gear Box & Motor)

condemned Electrical spares
Condemned instrumentation spares".

10. Ex.P.4 gives the details regarding their tender and also the payment schedule which has to be adhered by the defendant. The defendant had quoted a total sum of Rs.2,55,55,786/- for purchase of the items mentioned in Ex.P.2 and Ex.P.3 advertisements. The Earnest Money Deposit payable by the defendant was Rs.2,00,000/-. The rates are exclusive of all Applicable Duty & Taxes which meant that the tax on the purchase of goods has to be borne separately. The value quoted by the defendant was only for the cost price of the goods mentioned. More over it had been given in the general terms and conditions specifically as follows:-

> ***"All taxes & duties due under provisions of local law shall be payable by the purchaser exclusive of the sale value and the purchaser shall produce the receipt in token of payment of such taxes before collection of material."***

11. Subsequently, however the defendant did not make the payment as undertaken by him. In this connection, the defendant wrote a letter marked as Ex.P.6 dated 22.05.2008 stating that they are agreeing to the terms and conditions ***"only if taxes included on your offer rate"***. This was the first stage in which the defendant did

not keep up to the conditions which was agreed between the plaintiff and the defendant in Ex.P.4 and subsequently during discussions. The defendant issued a letter dated 16.05.2008 in response to a telegram issued by the plaintiff dated 15.05.2008. The telegram had been marked as Ex.P.7 and the letter dated 16.05.2008 had been marked as Ex.P.8. The plaintiff had called the defendant for further discussion. In a meeting held between the plaintiff and the defendant, which was attended by the representatives of the defendant, it was once again clarified as follows:-

> ***"It was clarified to M/s.A.K.Steel, Chennai that tender conditions clearly indicate that the rates quoted are exclusive of taxes. Further their offer does not indicate that the rates are inclusive of taxes".***

12. However, the representatives of the defendant refused to sign the said minutes. It is thus clear that, the defendant having offered to purchase the items mentioned by the plaintiff in Ex.P.2 and Ex.P.3, had even at the initial stage withdrew from the offer. At that very point, the loss to the plaintiff became evident. Subsequently the plaintiff issued a letter marked as Ex.P.11 dated 26.05.2008 in which again the following was clarified namely that the offer of the defendant did not indicate that the rates are inclusive of taxes. A sale order was issued by the plaintiff to the defendant which has been

marked as Ex.P.12 dated 31.05.2008 in which the total value was given as Rs.2,85,69,572/-. It was further stipulated in the terms and conditions that VAT at 12.5%, TCS at 1.1% & Cess 2% on TCS and H.E.Cess 1% on TCS has to be paid by the defendant. The plaintiff sent yet another telegram dated 06.06.2008 marked as Ex.P.13, in which the plaintiff had started that the sale order was released on 31.05.2008 and there had been several telephone conversation with respect to the same, but the defendant had not paid even the first installment of advance payment and have not started clearance of the materials. It is therefore seen that the plaintiff had protested against the acts of the defendant in non payment of the advance amount at the very first instance. In this regard the defendant wrote a letter marked as Ex.P.14 dated 09.06.2008 in which time was requested for making payment, it was given as follows:-

1. We will make the payment by three equal installments.

2. We will make payment for the first installment on 1st week of July 2008. (We will take delivery of 250 MT after we remit the Ist payment)

3. Next installment will be on after 20 days from the Ist installment. (We will take delivery of 250MT after we remit the IInd payment)

4. Third installment will be on after 20 days from the IInd installment. (We will take delivery of balance material after we remit the IIIrd payment)

5. In connection with us Instrument lot allotted to somebody else. They have to clear their materials first for our free and fast completion of our work."

13. However, the plaintiff did not accept to the said request and insisted that the defendant should make payment immediately. This was by letter dated 14.06.2008 marked as Ex.P.15. The plaintiff wrote another letter dated 18.06.2008 marked as Ex.P.16, once again requesting payment. In this connection the defendant, sent a reply dated 20.06.2008 marked as Ex.P.17, in which they undertook to pay the amount within one week. However, by letter dated 02.07.2008 in Ex.P.18, the plaintiff had stated that the defendant had not made any payment at all and consequently called upon the defendant to make payment according to the terms and conditions. The defendant once again agreed to make the payment by letter dated 04.06.2008 marked as Ex.P.19 and they had written as follows:-

"Which we have already mentioned our letter date 09.06.2008 & Conversation through Phone

1. We will make the payment by the three equal installments,

2. We will take delivery of 250mt materials after remitting the first installment

3. We will take delivery of 250mt materials after remitting the 2nd installment

4. We will take delivery of balance material after we remit the final payment

5. For gas cutting purpose oxygen and LPG (commercial type) should be allow

6. After receiving the confirmation from your end we will make the payment within 10 days on receipt your letter"

14. The defendant did not keep up with the payment schedule and the plaintiff wrote a letter dated 08.07.2008 which is marked as Ex.P.20. Once again requesting payment by telegram dated 15.07.2008, the plaintiff called the defendant to come for discussion. Again a final notice was issued by the plaintiff by letter dated 18.07.2008, marked as Ex.P.22 asking the defendant to make payment according to the terms and conditions. The defendant thereafter asked for time by letter dated 18.07.2008 marked as Ex.P.23. The plaintiff sent a telegram dated 18.07.2008 again calling the defendant for discussion and sent another letter dated 18.07.2008 marked as Ex.P.25 asking for payments. Finally a meeting was held

between the plaintiff and the defendant on 23.07.2008 marked as Ex.P.26 and the following was agreed.

> "***1. As per the Sl.No.14 of Terms and Conditions of Tender No.2008023, the Lots to be cleared in 3 months from the date of Sale order. The Sale Order was released on 31.05.2008. Hence the lots party to be cleared before 30.08.2008.***
>
> ***2. As per Sl.No.3 of terms and conditions of Sale Order, "The First installment of payment should be made on or before 10.06.08". Party informed that they will make first installment of payment on or before 04.08.2008, second installment in next 20 days and third and final installment within next 20 days thereafter 250 MT of scrap will be cleared for each of first and second installment and balance material after third installment".***

15. This was signed by both the plaintiff and the defendant. Since the defendant did not keep up with the time schedule, the plaintiff wrote a letter dated 06.08.2008 marked as Ex.P.28 stating that the Earnest Money Deposit/security deposit of Rs.2,25,000/- will be forfeited and the defendant will be black listed and loss of revenue for re-tendering will be recovered from the defendant. The defendant then wrote a letter authorising their representative J.Kaleel to pay the balance sale and take delivery of the materials. This letter was dated

04.08.2008 and marked as Ex.P.29. They then asked for further twenty days time by letter dated 12.08.2008 by Ex.P.30. This was not considered by the plaintiff by letter dated 14.08.2008 marked as Ex.P.31. Finally by letter dated 20.08.2008 marked as Ex.P.32, the defendant was given one week time to make payment of the first installment and clear the material on or before 30.09.2008. Since the defendant did not come forward, the plaintiff was forced to issue another tender dated 30.08.2008 with respect to the same items. It is in that circumstances that the plaintiff issued legal notice dated 11.12.2008 setting out the entire facts and the commitments of the defendant and the failure of the defendant to make the payment and called upon the defendant to pay a sum of Rs.55,30,786/- and another sum of Rs.1,05,199/- together with interest at 24% p.a from 01.10.2008. There was no reply from the defendant and consequently another legal notice was sent dated 14.10.2009 marked as Ex.P.36, once again calling upon the defendant to make payment as committed by him. From the above documents the following aspects are established.

1. the defendant had offered to purchase the goods sold by the plaintiff.
2. the defendant did not make any payment
3. the defendant did not clear the goods

4. the plaintiff wrote several letters asking the defendant to make payment
5. the plaintiff and the defendant had discussions during which the defendant agreed to make the payment.
6. still the defendant did not make payment.

16. In these circumstances, it is very clear that the defendant had not made their payment in accordance with the schedule given by them. In fact they had not made any payment. Consequently with respect to issue No.1. I hold that the defendant had not made any payment and hold this issue against the defendant and in favour of the plaintiff.

Issue No.2 & 3

It is seen that re-tendering process was a direct result of failure by the defendant to make payment as accepted by them. Re-tender had caused actual loss to the plaintiff . It must be kept in mind that the plaintiff is a Government Company and public money is involved in the finances of the plaintiff's company. The plaintiff had issued legal notice which was not even replied by the defendant. It had been very clearly stated that the plaintiff had to issue fresh tender dated 30.08.2008 and another company called Azad Steel Corporation was awarded the contract for Rs.1.97 crores as against the quotation of the defendant for Rs.2,55,55,786/-. It is therefore clear that the plaintiff was put to loss of Rs.58,55,786/- and additional charges of Rs.1,05,199/- Consequently I hold that the plaintiff is entitled for the short fall in the re-tender and also re-tender charges. Consequently these issues is also held in favour of the plaintiff and against the defendant.

Issue No.4

In view of the aforesaid discussion, the plaintiff having suffered loss is entitled for a decree for a sum of Rs.79,11,378.84 as damages with interest on the said amount till the date of the plaint. It is seen that this loss of the plaint of the plaintiff is a direct result of the non payment made by the defendant. Consequently, I hold that the plaintiff is entitled for the amount as claimed in the plaint together with interest. This issue is held in favour of the plaintiff.

Issue No.5

I hold that the plaintiff and the defendant were involved in a commercial transaction. However, the plaintiff had also black listed the defendant. Therefore, I hold that the plaintiff is entitled for interest at 6% p.a. only from the date of suit to the date of realisation.

Issue No.6

In the result, I hold that the plaintiff is entitled for a judgment and decree for a sum of Rs.79,11,378.84 together with interest at 6% p.a. of Rs.56,35,985/- from the date of the suit till the date of realisation. The plaintiff is also entitled for costs.

17. Finally in the result, suit is decreed as prayed for with costs.

17.02.2017

dpq

C.V.KARTHIKEYAN.J,
dpq

To

The Sub Assistant Registrar, Original Side,
High Court, Madras.

C.S.No.705 of 2010

17.02.2017

PRE-DELIVERY JUDGMENT IN

C.S.No.705 of 2010

THE HONOURABLE Mr. JUSTICE C.V.KARTHIKEYAN

Respectfully Submitted.

dpq -P.A.