

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.4927 of 2017

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful petitioner-plaintiff is directed against the order, dated 08.08.2017, of the learned Presiding Officer, Commercial Court for Trial and Disposal of Commercial Disputes, at Hyderabad, passed in I.A.No.215 of 2017 in COS No.22 of 2017.

2. I have heard the submissions of *Sri. M. Satish Kumar*, learned counsel appearing for the revision petitioner-plaintiff (hereinafter, 'plaintiff'), and of *Sri N. Ashok Kumar*, learned Standing Counsel for GHMC, appearing for defendants 1 to 3/respondents 1 to 3 (hereinafter, 'defendants'). The 4th respondent is stated to be not a necessary party. I have perused the material record.

3. From the submissions made and the material record including the pleadings, the following facts emerge for consideration:

On conclusion of the agreements, on 30.08.2011, the plaintiff was entrusted with three separate works, viz., 1) Investigation, Surveying, Design, Preparation of Detailed Estimates and execution of construction of houses in (G+3) pattern 800 houses (50 blocks) at Jawaharnagar in R.R.Dist-II under Engineering Procurement and Construction (EPC) system; 2) Investigation, Surveying, Design, Preparation of Detailed Estimates and execution of construction of houses in (G+3) pattern 608 houses (38 blocks) at Karmanghat in R.R.Dist-II under Engineering Procurement and Construction (EPC) system; and 3) Investigation, Surveying, Design, Preparation of Detailed Estimates and execution of construction of houses in (G+3) pattern 712 houses (44 blocks + 8

Houses) at Abdullapurmet package-I in R.R.Dist-II under Engineering Procurement and Construction (EPC) system. All three work sites were handed over to the plaintiff, on 17.09.2011. As per the agreement conditions, the works have to be completed in 11 ½ months. The works could not be completed; and, for whatever reasons, there were extensions of time. Eventually, there was termination. On one hand, the plaintiff contends that he terminated the works by notice, dated 25.07.2014. *Per contra*, the GHMC contends that in respect of the three works, three separate notices, dated 25.07.2014, were issued and that pursuant to the requests made by the GHMC to the Government, the Government have issued GO, on 20.01.2017, according permission to the Commissioner, GHMC to terminate the contract.

4. Both parties traded allegations. Eventually, the plaintiff brought the present suit and two other suits. In the present suit, the plaintiff claimed the following reliefs:

- “(a) **An amount of Rs. 86,21,317/- with future interest @ 24% P.A. from the date of suit till the date of realization; and**
- (b) **An amount of Rs. 83,12,329/- towards damages with future interest @ 24% P.A. from the date of suit till the date of realization; and**
- (c) **To grant a mandatory injunction by directing the Defendants to return the extended EMD B.G. No. 110133IBG00399 dated 12-06-2014, of IDBI Bank Limited, Chapel Road, Hyderabad, along with the Original B.G. dated 14-06-2011.**
- (d) **To award cost of the Suit; and**
- (e) **To pass such other or future reliefs which the Plaintiff is entitled to in law.”**

4.1 In the subject suit, the plaintiff filed the afore-stated interlocutory application seeking the following relief:

“to appoint advocate commissioner for doing local investigation for recording the measurements and also to note down the inventory lying at the site with the assistance of approved Government Engineer from the Institution of Engineers India, Visvesvaraya Bhavan, Khairatabad Circle, Khairatabad Road, Chinthal Basthi, Khairatabad, Hyderabad, Telangana 500004, in respect of the Work of “Investigation, Surveying, Design, Preparation of Detailed Estimates and Execution of Construction of Houses (G+3) Pattern 712 Houses (44 Blocks + 8 Houses) at Abdullapurmet Package-I in Ranga Reddy District – II under JNNURM under Engineering Procurement and Construction (EPC) System”, vide Agreement No.32/ENC/GHMC/TA-III/K1/2011 Dated 30-08-2011 in C.O.S No. 7 of 2017.”

4.2 The said application was also resisted by the GHMC by filing a counter. On merits and *vide* orders impugned in the revision, the said interlocutory application is dismissed. Therefore, the plaintiff is before this Court.

5. The crux of the case of the petitioner is that after the three works are assigned under concluded agreements, the plaintiff executed parts of the works. The works completed, according to the plaintiff, are as stated in the table infra:

S.No.	Project Work	Blocks to be handed over	Actual Blocks handed over	Blocks not handed over along with %
1.	Karmanghat	38 Blocks	32 Blocks	6 Blocks 16.00%
2.	Abdullapurmet	44 Blocks + 8 Houses	24 Blocks	20 Blocks 46%
3.	Jawaharnagar	50 Blocks	16 Block	34 Blocks 68.75%

The claims in the three suits made by the plaintiff are stated in the Table infra:

Suit No.	Project Work	Actual amounts due and payable	Damages amount	Total amount
COS No.23/17	Karmanghat	56,55,799.00	71,99,892.00	1,28,55,691.00
COS No.07/17	Abdullapurmet	86,21,317.00	83,12,329.00	1,69,33,646.00
COS No.22/17	Jawaharnagar	26,45,457.00	93,74,215.00	1,20,19,672.00

6. According to the plaintiff, to substantiate the suit claim in each of the three suit, an appointment of a Commissioner for the purpose stated in the petition, which is already extracted supra, is necessary, and that unless the measurements of the work done by the plaintiff are taken, it is not possible to ascertain exactly the work done and determine the payment to which the plaintiff would eventually be entitled to in the case of the plaintiff's success in each suit. According to the further submission of the plaintiff, measurement of the works done by the plaintiff is necessary, even according to the contentions of the GHMC and, therefore, the GHMC proposed a joint inspection and the plaintiff deputed his representative, Satyanarayana, for being present at the time of joint inspections and that at the joint inspections done at the three work sites, the stages of the works, number of blocks and number of houses are only taken note of, but, no measurements were taken on the respective dates of inspections of the sites and that the said representative of the plaintiff signed on the inspection notes, dated 04.03.2017, prepared at Karmanghat work site, but he has not signed the inspection notes prepared, on 07.03.2017 and 06.03.2017, respectively at Jawaharnagar work site and Abdullapurmet work site. Further, according to the plaintiff, certain reasons are also stated by the plaintiff for the representative of the plaintiff not signing the inspection notes at the two latter mentioned sites. According to the plaintiff, unless a Commissioner is appointed in each of the cases and the works, thus, far done by the plaintiff are measured, it is not possible to establish the pleaded case of the plaintiff insofar as the actual amounts due and payable for the works done at each work site by the plaintiff.

6.1 Therefore, the plaintiff submits that the appointment of a Commissioner for measurements of the works done at each of the three

work sites with the assistance of a qualified Surveyor of the GHMC or any other independent engineer of a reputed Institution is essential and that the trial Court erroneously dismissed the petitions filed by the petitioner/plaintiff in each of the cases by incorrectly observing that the inspections are already done and that the representative of the plaintiff has not even made protest that the measurements are not taken properly, though in fact only stages etcetera are noted, but, no measurements are taken and that in the facts and circumstances of the case, the order impugned is unsustainable and is liable to be set aside and that a Commissioner is to be appointed as sought for by the plaintiff.

7. *Per contra*, learned Standing Counsel for GHMC while supporting the impugned orders and while drawing the attention of this Court to the counter affidavit filed before the trial Court on behalf of the respondents would *inter alia* contend as follows:

The works are entrusted to the plaintiff in each of the cases under Engineering Procurement and Construction (EPC) System, under a Scheme of the Central Government, which is funded by the Central Government. It is a time bound programme. The plaintiff failed to complete the entrusted works within the time schedule. Therefore, after issuing reminders and after giving extensions of time and on the failure of the plaintiff to complete the works on account of his negligence and for deliberate delay in completely performing the works under the agreements, separate notices, dated 25.07.2014, were issued and eventually on the request of the GHMC, the agreements/contracts were terminated by the Government. Further, whatever amounts, due and payable for the works done, were already paid to the plaintiff. On account of laches of the plaintiff and the delay, the GHMC has incurred huge loss in a sum of Rs.22,00,00,000/- and odd. Since the works were

left incomplete, for completion of the works at all the three work sites, fresh tenders were called for and the successful tenderers were entrusted with the balance works. The said successful subsequent tenderers have already commenced the works at the respective work sites. 5% to 10% of the work is already done by them at each work site. Before entrusting the works to the successor tenderers, photographs, videographs and measurements of the works done by the plaintiff were taken and there is record with the GHMC in that regard. Therefore, the appointment of a Commissioner for the purpose stated by the plaintiff would be a futile exercise. Hence, the order of the trial Court is justified. As rightly observed by the trial Court, the petitioner/plaintiff could not explain as to why the plaintiff could not file the present petitions at the earliest available opportunity and also the delay in filing the petitions. Hence, the revision is devoid of merit and is liable to be dismissed.

8. I have given earnest consideration to the facts and submissions. Insofar as the allegations traded and the claims and rival claims, there is no need to make any observations at this stage, as the core question to be considered now is as to whether a Commissioner, as sought for by the plaintiff, shall be appointed for the purpose of taking measurements of the works/parts of the works done by the plaintiff at the three respective work sites, viz., Karmanghat, Abdullapurmet and Jawaharnagar. It is not in dispute that some amounts are paid to the plaintiff. The plaintiff also furnished Bank Guarantee/s is also not in dispute. Certain interim orders were also passed by the Court below regarding the said Bank Guarantees is also not in dispute. Be that as it may. In the considered view of this Court, the petitioner would be entitled to payment of some money due and payable in respect of the work done at the subject suit work site in the event success of the plaintiff in the suit. Even in the

concluding paragraph of the notice, dated 25.07.2014, the GHMC, has stated that a recommendation is made by it to the Government to determine the contract as per agreement conditions and as per Clause 60(a) of the APDSS duly forfeiting the deposits (EMD & FSD) including the value of work done, but not paid for. Whether the GHMC would be entitled to such forfeiture or not will have to be decided in the suit after full fledged trial. Further, a perusal of the joint inspection notes, dated 07.03.2017, would show that only the stage of work, number of blocks and number of houses at the work site were only noted with remarks. The said inspection note does not disclose or reflect that measurements were taken. Further, measurements, if any, taken were not noted in the said notes. In the considered view of this Court, in a case of this nature, if a Commissioner visits the work site and measures the works admittedly done by the plaintiff and files a report, such evidence would be in the nature of one more assuring piece of evidence before the trial Court for effectively adjudicating the *lis*. Such assuring piece of evidence in the form of commissioner's report may be of immense value and may be helpful to the trial Court in assessing the other evidence, which the parties may let in, during the course of trial. The evidence, which the parties secure by seeking appointment of a Commissioner, cannot be secured by any other means in a case of this nature. If a Commissioner is not appointed and if the parties and their respective supporting witnesses assert, on oath against oath, their respective cases insofar as the work done by the plaintiff, such evidence would of no avail and will not be of much assistance to the Court below in adjudicating the issues that are settled for determination in the suit.

9. Viewed thus, this Court finds that the request of the petitioner-plaintiff merits consideration and that the revision petition deserves to be

allowed and that the order impugned, which is not justified calls for interference.

10. On the above analysis and for the reasons assigned, this Court finds that the ends of justice would be met and the ultimate cause of justice would be sub-served, if a Commissioner is appointed.

11. In the result, the Civil Revision Petition is allowed and the impugned order, dated 08.08.2017, passed by the Court below in I.A.No.215 of 2017 in COS No.22 of 2017 is set aside and as a sequel, the said I.A. is allowed. Accordingly, the trial Court is directed to appoint a competent Advocate Commissioner from the panel of Advocates being maintained by it for the purpose desired by the petitioner-plaintiff in the petition i.e., for local investigation and for making an inventory & taking and recording the measurements of the work done by the plaintiff at the subject suit work site, with the assistance of a qualified and competent Engineer of the GHMC, and file a report along with measurements of the work done by the plaintiff. Considering the fact that the successor successful tenderers are required to continue the work from where the plaintiff has left the works at respective work sites, the trial Court shall give necessary directions to the Advocate Commissioner to complete the work entrusted, as expeditiously as possible, and preferably within a period of one (01) month from the date of entrustment of the warrant to the Commissioner. In view of the afore-stated orders, the GHMC shall ensure that the successor successful tenderers, who are entrusted with the completion of the remaining works at the three work sites, shall not proceed with further construction work and activity at the respective sites for the purpose of maintaining *status quo* till the Commissioner appointed at least completes basic and essential part of the measurement of the works.

There shall be no order as to costs.

In the facts and circumstances of the case, the plaintiff shall fully bear the Commission expenses irrespective of the result of the suit.

Miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

JUSTICE M. SEETHARAMA MURTI

Date: 6th October, 2017

Note: Issue C.C. by 09.10.2017.

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