IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **16.04.2018**

CORAM

THE HON'BLE MR.JUSTICE **P.KALAIYARASAN**

C.S.No.1284 of 1995

G.Thyagarajan
carrying on business under
the name and style of Sri Thyagarajan
Enterprises, Madras - 600 083. .. Plaintiff

vs

Tamil Nadu State Construction Corporation
Limited, Madras - 106. .. Defendant

Civil Suit filed under Order VII Rule 1 CPC and Order IV Rule (1) of O.S.Rules, directing the defendant to pay to the plaintiff the sum of Rs.39,10,102/- together with interest on the principal sum of Rs.33,13,645/- with 18% per annum from this date till the date of payment and for costs.

For Plaintiff : Mr.K.K.Muralidharan
For Defendant : No Appearance

JUDGMENT

Though the defendant participated in the proceedings during the trial, there was no representation at the time of argument and after hearing the learned counsel for the plaintiff, this Court delivers the Judgment on the basis of the pleadings and evidence on record.

2. The suit is for recovery of Rs.39,10,102/- together with interest on the principal sum of Rs.33,13,645/- at 18% from the date of plaint till realization.

3. The averments of the plaint and the reply statement in nutshell are as follows :

(i) The defendant Corporation engaged in works of Civil Engineering took up the work of construction of the Link Canal as part of the Periyar-Vaigai modernisation at Madurai from the Public Works Department, Government of Tamil Nadu. The defendant initially entered into contracts with sub-contractors and since those sub-contractors failed to perform to the satisfaction of the defendant, fresh tenders were invited for the balance work left undone by such sub-contractors. The work of the construction of the Link Canal has been divided into several Reaches. The defendant invited tenders for three of the Reaches, viz, 1,7 and 9. The plaintiff being Civil Engineering contractor submitted their quotation. The defendant accepted the quotation of the plaintiff and formal agreement was entered into in May 1993. The defendant divided the work into 7 parts under the above three Reaches and 7 separate agreements were entered into. It was provided in the agreements that as regards measurements, the quantities of the various items for which rates had been quoted by the plaintiff were to be measured as executed and paid by multiplying it by the rate quoted per unit.

(ii) The concept of the agreement between the plaintiff and the defendant was on a piece work basis wherein the unit prices quoted by the plaintiff would be computed on the quantities measured based upon which relevant certificates would be issued by the defendant's Regional Engineer. The Regional Engineer is the competent authority authorised by the defendant with regard to measurement of the work and certifying payments. The work was to be completed within three months of the said agreement. The Regional Engineer of the defendant effected part payment on the basis of the measurement taken by them. The plaintiff was also compelled to incur expenditure by way of advance to the defendant's Engineer, since the defendant's Engineer at periodic intervals made representation to the plaintiff that they were in urgent need of funds for meeting the immediate requirements.

(iii) The defendant was entering incorrect measurement as well as incorrect soil classification They also omitted to take certain measurements. The discrepancy in recording measurements was continuing since the defendant recorded totally different measurements in their M-Books while certifying and effecting payments on the actual measurement. The defendant all of a sudden on 08.11.1994 addressed the plaintiff to remit the sum of Rs.73,65,512/- as excess payment. There is no provision in the agreement for making payments on rough evaluation. The payment of Rs.1,00,000/- on 27.09.1993 by the defendant to a piece rate worker on behalf of the plaintiff as stated by the defendant in his letter, dated 25.10.1994 is not correct. The balance payment pending with the defendant for work done in Reaches 1,7 and 9 as certified by the defendant comes to Rs.59,44,305/-. The advance amount given to site Engineers comes to Rs.6,33,444.59/-. The amount payable by the plaintiff towards hire charges for crusher and other recoveries comes to Rs.33,82,004.59/- and after deducting Income Tax on the above amount, total amount payable by the defendant comes to Rs.33,13,645.09/-. The plaintiff caused legal notice, for which the defendant issued reply with false allegations. Therefore the suit has been filed.

4. The averments in the written statement of the defendant are as follows :

(i) The Public Works Department floated tenders for the construction of new canal from Periyar Dam to be linked with Periyar Main Canal taking off from Peranai. The total length of the canal is

32.383 km and the entire canal was to be linked with cement concrete so as to minimise the loss of water due to evaporation and percolation. The linked canal work was a World Bank aided scheme. The link canal was divided into 9 Reaches and tenders were called for by the Public Works Department and the defendant exclusively tendered for three Reaches. Reach I : 0 - 4 Km, Reach VII : 22 - 25 Km and Reach IX : 29 - 32.383 Km. The value of the work awarded to the defendant was Rs.9 Crores.

(ii) As the defendant did not have sufficient sophisticated machinery such as Poclain and JCB to work, has allotted the work to the sub-contractors. As the progress of work was very slow, the defendant terminated the earlier sub-contractors and fresh quotations were called for. Subsequently the plaintiff was awarded six works. In terms of the agreement, the rates vary for escalation work in respect of soil such as all soil, medium rock and hard rock. The rate was to be paid by the measurement as worked by multiplying it with the rate quoted and accepted. In terms of the agreement, the defendant agreed to pay part of the bill raised every month. It was agreed in principle that the acceptance of the final bill should be only after measurement was taken by the Site Engineer, Project Engineer of the defendant and the measurement given by the plaintiff should be in accordance with the measurement accepted by the Public Works Department, i.e., the Principal employer. The plaintiff was in the habit of seeking adhoc advance bill during the period of contract and the adhoc advance was to be adjusted from and out of the final bill.

(iii) The site was handed over on 20.05.1993 and the plaintiff completed Reach 1 only after 9 months, i.e., on 30.04.1994. In respect of work in Reach 7, the plaintiff did not complete the job even by September 1994 and thereafter refused to do the job for no reason whatsoever. After notice the agreement was terminated w.e.f., 15.03.1995 and the job left undone by the plaintiff was completed by the defendant by engaging piece rate workers. Due to delay, Public Works Department, the principal employer imposed liquidated damages of Rs.7,48,500/- on the defendant.

(iv) The alleged certificates issued by the then Regional Engineer cannot have precedence over the measurements contained in the M.Book. The certificates were obtained by the plaintiff under undue influence and coercion from the Regional Engineer and the certificates are false and fabricated and the same cannot be relied upon. A separate enquiry is being conducted by the Vigilance against the officers concerned, who made the payments without measurements. While signing the agreement the plaintiff had agreed to the condition regarding hire charges prevailing at the time. The certificates referred in the plaint did not contain any detailed measurements and it says that "the quantum of work done is sufficient".

(v) It is the Fundamental concept that in any public works, payments are effected only based upon the measurements recorded in M-Books. The certificates furnished by the Regional Engineer after October 1993 are all based upon inflated figures too and do not take into account the recoveries to be made from the plaintiff for machineries belonging to the corporation lent on hire charges.

(vi) As per the measurements in M-Books, it is found that there is excess payment to the tune of Rs.72,36,646/- to the plaintiff. The plaintiff has also signed the defendant's M-Book in respect of the work. The defendant makes counter claim on the said amount. In addition, the defendant also claims interest and liquidated damages. The suit is liable to be dismissed.

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

"1. Is not the plaintiff entitled to the amounts claimed in the plaint ?
2. Is not the defendant bound by the recovery rates for hired equipment as specified in the plaintiff's letter dated 11.05.1993 and accepted by the defendant ?
3. Is not the defendant bound to reimburse the plaintiff, the amounts advanced by the plaintiff to the defendant's Engineers ?
4. Has the plaintiff completed the work entrusted under the agreement dated 14.02.1991 ?
5. Is not the plaintiff liable to reimburse the liquidated damages of Rs.7,48,500/-?
6. Is not the plaintiff bound by the measurements contained in the 'M' Book ?
7. Is not the plaintiff liable to pay Rs.72,36,640/- towards the excess payment made to him ?
8. Is not the plaintiff liable to pay interest at 24% p.a., on Rs.72,36,640/- from 15.03.1995 till payment in full ?

9. To what reliefs are the parties entitled ?

6. The plaintiff himself was examined as P.W.1 and Ex.P.1 to Ex.P.70 were marked. The Manager (Accounts) of the Defendant Corporation was examined as D.W.1 and marked Ex.D.1 to Ex.D.34.

7. Before discussing the issues, it is pertinent to note that the defendant Corporation is a Government of Tamil Nadu undertaking and the officers including Regional Manager and Regional Engineer of the defendant have been charge sheeted by the Deputy Superintendent of Police, Vigilance and Anti-corruption in Cr.No.2 of 1998 for the offences under Sections 13 (2) r/w 13 (1) (c) (d) of Prevention of Corruption Act, 1988 and the plaintiff / contractor has been charge sheeted for the offences under Sections 15 r/w 13 (1) (c) (d) r/w 13 (2) of Prevention of Corruption Act, 1988. The Special Court (Vigilance and Anti-Corruption Act), Madurai, in its Judgment, dated 16.10.2008 in Spl.Case No.1 of 2006 convicted and sentenced them to undergo imprisonment of various terms for the aforesaid offences. The Judgment of the Special Court has been marked as Ex.D.2. The finding of the criminal court is no doubt binding in civil matters. This Court has to analyse the issues independently.

8. **Issue No.6** :

There is no dispute that the work namely Reaches 1, 7 and 9 were entrusted to the plaintiff on sub-contract basis by the defendant. The plaintiff's main contention is that as per the agreement, the payment was made on the basis of the actual measurement taken then and there as per the decision of the Regional Engineer and Regional Manager. The specific case of the defendant is that as per the agreement, the payment is to be effected at the accepted rate as per the measurement recorded in M-Book and even though part payment have been made, final bill is to be settled only by verifying the measurements in M-Book. It is further contended that the plaintiff in collusion with the Regional Manager and the Regional Engineer received excess payments on the basis of fabricated certificates. To substantiate the contention as to the fabrication of the certificate and excess payments, the defendant pressed into service, Ex.D.2, the Judgment of the Special Court, Madurai, wherein the plaintiff as well as the Regional Manager and Regional Engineer of the defendant have been convicted for having drawn excess amount by fabricating the certificate.

9. The Article of Agreement has been marked as Ex.P.1. Condition No.10 reads thus :

> "The quantities for various items for which rates are quoted in the Schedule 'A' shall be measured as executed and paid by multiplying it by the rate quoted per unit. Normally a part bill shall be made once in every month."

10. The plaintiff examined as P.W.1 says in his cross-examination, dated 20.02.2017 that the Measurement Books were maintained by the defendant and only based on the measurements, certificates were prepared according to the value for the work done by him. Ex.P.21 is the letter addressed by the defendant to the plaintiff wherein the plaintiff was requested to collect the cheques from the office after giving the acceptance of measurements in the M-Books. But the certificate issued by the Regional Engineer does not refer to any measurement. Even in the plaint, it has been mentioned that the certificate denotes only "work done is sufficient".

11. When the condition 10 of the agreement provides for payment of part bill once in every month, part payment towards the work cannot be taken advantage by the defendant to contend that the payment was effected only as per the measurement. The rate quoted

per unit for all soil, medium rock and hard rock is to be calculated only after taking the measurement. Even the plaintiff admits that the defendant Corporation has been maintaining the measurement Book. Therefore the calculation should be made taking into account the measurement recorded in the measurement book as per the terms of the agreement. Therefore the contention of the plaintiff that the amount paid as per the actual measurement taken by the defendant is in accordance with the agreement cannot be accepted. The plaintiff is bound by the measurements contained in the M-Book as per the terms of the agreement and this issue is answered against the plaintiff.

12. **Issue Nos.1 to 4** :

The plaintiff hired the equipments from the defendant for doing work. As per the contract, the plaintiff is bound to pay the hire charges to the defendant. The plaintiff examined as P.W.1 admits in his evidence that the hire charges are to be paid to the defendant for the usage of the equipments. Even as per Ex.P.63, the letter dated 11.05.1993, the plaintiff is bound to pay the hire charges. But there is absolutely no document with calculation as to the hire charges for the equipments availed.

13. The plaintiff pleads that he advanced the amount to the defendant's Engineer. Except the oral evidence of P.W.1 and some correspondence, there is no acceptable evidence as to the receipt of advance amount by the Engineers of the defendant. The plaintiff took works in three Reaches and completed the work in one Reach. The defendant has specifically pleaded that the plaintiff has not completed the work for Reaches 9 and the contract was terminated. Though the plaintiff claims to have completed the work, no document has been filed as to the completion of the work.

14. D.W.1 specifically says that the left out work was done by the defendant by engaging piece rate workers. Therefore this Court holds that the plaintiff has not completed the work entrusted under agreement, dated 14.02.1991. In the light of the decision made to Issue No.1 and for the aforesaid reasons, the plaintiff is not entitled to any amount and these issues are answered against the plaintiff.

15. **Issue Nos. 5, 7 and 8** :

The defendant pleads that the Principal contractor, namely P.W.D collected liquidated damages from the defendant a sum of Rs.7,48,500/- for the delay in executing the work and the plaintiff is liable to reimburse the same. The defendant though made counter claim with respect to excess payment has not claimed reimbursement of liquidated damages by paying Court fee. The defendant made counter claim of Rs.72,36,640/- towards excess payment from the plaintiff. The defendant is correct in projecting its case that the final payment is to be settled. According to the measurement recorded in M-Book of the defendant Corporation as per the terms of the agreement. But the defendant has not produced the M-Book and established how excess payment has been made to the plaintiff.

16. D.W.1 has deposed that M-Books or the certified copies of the M-Books have not been filed as they were seized by the Vigilance and Anti-corruption wing. Unless the defendant establishes the excess payment by producing the M-Book and the records with respect to the actual payment made for the work to the plaintiff, this Court cannot decide the exact amount to be recovered from the plaintiff and the interest also. Therefore both issue Nos.5, 7 and 8 fail and these issues are answered accordingly.

17. **Issue No.9** :

For the aforesaid reasons, this Civil Suit as well as the counter claim are dismissed.

In the result, this Civil Suit is dismissed. The counter claim made by the defendant is also dismissed. No costs.

16.04.2018

Index : Yes / No

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P.KALAIYARASAN, J

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Judgment
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