

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **16.04.2018**

CORAM

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

C.S.No.977 of 1993

1. K.P.Paulose Nechupadam (Deceased)

2. C.P.Paul

S/o. Late Paulose Nechupadam

Chairman,

M/s. Paulose Nechupadam Constructions Pvt., Ltd.,

No.6, Wheat Crafts Road, Nungambakkam,

Madras - 600 034.

3. C.P.Susan

4. K.P.Marry

5. Annie Paul

6. Valsa

.. Plaintiffs

vs

The Tamil Nadu Electricity Board

Madras - 600 002,

Rep. by its Chairman.

.. Defendant

(For Second Plaintiff - Substituted
as per order of Court, dated 16.10.2003
made in A.No.4423 of 2003)

(Plaintiffs 2 to 6 are brought on record
as LR's of first plaintiff as per order
of Court, dated 18.03.2002 in
A.No.4949 of 2001)

Civil Suit filed under Order VII Rule 1 CPC read with Order II and
IV Rule 1 of O.S.Rules, seeking for a judgment and decree, directing
the defendant to pay the plaintiff (a) a sum of Rs.1,73,17,532.15/-
together with interest at 12% p.a., on Rs.1,44,31,277.15/- from the

date of the plaint till realisation; (b) a sum of Rs.3,43,800/- together with interest at 12% p.a., on a sum of Rs.2,86,500/- from the date of the plaint till the date of realisation; (c) a sum of Rs.6,12,955/- together with interest at 12% p.a., on a sum of Rs.5,10,796/- from the date of the plaint till the date of realisation and for costs.

For Plaintiffs : Mr.J.Harikrishna

For Defendant : Mr.V.Viswanathan

JUDGMENT

This suit has been filed seeking direction to the defendant to pay the plaintiff Rs.1,82,74,287.15/- with interest at 12% p.a., from the date of the plaint.

2. The plaint averments are as follows :

(a) The defendant, Tamil Nadu Electricity Board floated tender for the work of "North Madras Thermal Power Project, Stage-I - Specification No.SGCC 66 - Site Improvement Works - Group-II". The plaintiff submitted their tender dated 04.03.1987 and the same was accepted by the defendant on 11.01.1988. The plaintiff also gave a letter of intend, dated 14.01.1988. As per the Acceptance Letter / Tender, the cost of the work was Rs.2,86,49,000/- and the period of the construction work was 15 months. As per the conditions of the tender, the contractor has to start the work within four weeks from 14.01.1988 and complete the same on or before 14.04.1989.

(b) The land was not made available to the plaintiff due to the legal impediments in acquiring the land by the defendant. The plaintiff informed the Superintending Engineer (Civil) on 23.01.1989 that no field work is possible as land was not made available to him. The plaintiff also asked for directions about the transport of equipments to the site, likely idling charges payable by the T.N.E.B for non-deployment of his equipment and the financial loss incurred by him for the barge arranged by him for transport of heavy machineries across Ennore Sand Bar. He also wrote letters on 03.10.1988, 03.11.1988 and 11.11.1988. The defendant sent a letter to the plaintiff on 15.11.1988 shirking of their responsibility without minding the injustice done to the plaintiff by not handing over the site even after 10 months though the work was to be completed within 15 months.

(c) The plaintiff's Appeal dated 12.01.1989 to the Chairman, T.N.E.B and reminder, dated 14.03.1989 did not yield any result. The plaintiff gave a chart program due to the pressure by the T.N.E.B authorities. The prime clause of the contract, viz., "Time is the essence of the Contract" has been fully flouted by the T.N.E.B. The plaintiff in his letter, dated 14.04.1989 requested extension of the contract period and urged for settlement of compensations due to him for breach of contract by T.N.E.B.

(d) The plaintiff in his letter, dated 12.05.1989 placed on record all his requests about escalation limit, release of Security Deposit, Bank Guarantee for mobilisation advance, enhancement of rates and compensation for idling machinery, establishment, overhead charges etc. The same was also discussed in the meeting between the plaintiff and the higher officials of the defendant. The plaintiff had agreed to commence the work on the definite understanding that his aforesaid normal or legitimate claims would be accepted.

(e) By the defendant's letter, date 15.03.1990, the plaintiff was informed that the revised rate was being recommended to their Head Quarters for their approval. The work was completed in all respects and taken over by the Board on 31.03.1991 and the plaintiff submitted the Ninth R.A.Bill on 07.08.1991 and the Tenth R.A. and final Bill dated 30.08.1991 for the balance of Rs.1,44,31,277.15/- due to him which the defendant did not pay despite several demands.

(f) As per Clause 5.0 of Section E of Specification, the plaintiff paid Demand Draft, an initial security deposit of Rs.5,73,000/-, being 2% of the contract value on 28.11.1988. As per Clause 5.1, the defendant also made a deduction of 5% of the value of the work done

from each Running Bill as Retention Money. The total amount deducted by the defendant from the plaintiff's Running Bill by way of Retention Money is Rs.5,10,796/-. On account of the reduction of the quantity of contract work, the Security Deposit by cash was reduced to Rs.2,86,500/- and for the balance Rs.2,86,500/-, the plaintiff had furnished the Bank Guarantee to the defendant valid up to 03.09.1991. As per Clause 28 of Section E of the contract, the defendant is liable to release the Security Deposit and Retention Money on the completion of 6 months from the date of completion of the work. Though the plaintiff is entitled to claim interest on the amounts due to the plaintiff under three heads (1) Bill amount due; (2) Return of Security Deposit; (3) Return of Retention Deposit (EMD) from the date of completion of the work, namely 31.03.1991, allowing sufficient time to the defendant to process and check the final bill, the plaintiff is restricting the claim for interest to the period from 01.10.1991, namely after 30 days from the date of submission of final bills, i.e., 30.08.1991.

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(g) The plaintiff through his counsel sent a written memorandum, dated 13.01.1992 to the Chairman of the defendant Board to which the defendant through his counsel sent a reply, dated

28.07.1992 containing untenable excuses and grounds leveling false accusation on the plaintiff. For which the plaintiff sent a rejoinder, dated 10.09.1992. Therefore the plaintiff has come forward with the suit.

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

(a) The contract for the site improvement works-Group I was accepted and awarded to the plaintiff by order, dated 14.01.1988 to a value of Rs.2,86,49,000/-. The prices accepted are firm for the entire duration of the contract and for any agreed extensions thereto as per Clause 7.3 of specification No.SECC-66 and as per Clause 2.0 of the said acceptance letter. As per the contract terms, the plaintiff has to pay an initial security deposit of 2% of the contract value, i.e., Rs.5,73,000/-, within 15 days from the date of the acceptance letter for the due fulfillment of the contract, besides a further deduction of 5% of the value of the work done shall be effected from each running bill for the due fulfillment of the contract. The Security Deposit and Retention amount will not carry any interest as per the contract condition.

(b) As per Clause 5.1 of Section E of contract specification No.SECC-66, a written agreement is to be entered into between contractor and the Board in the prescribed form and the contract shall not be deemed to be complete until the said agreement has been signed by the contractor. The plaintiff has violated the condition by not signing the agreement till date.

(c) As per the terms of contract, the work should have been completed on or before 14.04.1989, i.e., within 15 months from the date of issue of acceptance letter, dated 14.01.1988. Since the site was under litigation, the same could not be handed over to the plaintiff immediately. Hence it was agreed between the Board and the plaintiff that the time limit of 15 months has to be computed from the date of taking over the site. The plaintiff has taken over the site on 17.05.1989 and the plaintiff should have completed the work on or before 16.08.1990. It is true that the acceptance letter was based on plaintiff's tender letters, dated 17.10.1987 and 27.10.1987. The plaintiff in his letter, dated 17.10.1987 had stated that he was not sure when the orders awarding the work would be issued and the work commence. Therefore the plaintiff had stipulated that the price adjustment for escalation of costs according to the formula given in his

letter dated 17.10.1987 would be made in his rates for all works that are delayed beyond 03.02.1989 for no fault on him.

(d) The plaintiff had also specified that payment of escalation may be limited to 7 1/2% of the total probable amount of contract. The plaintiff in his subsequent letter, dated 27.10.1987 had extended his validity of tender up to 03.01.1988 and confirmed that the offer contained in the tender remains unchanged. It was agreed mutually between the parties that time limit of 15 months in completing the work shall be computed from the date of taking over of the site.

(e) The delay in handing over the site was due to the reasons beyond the control of the Board namely the various obstructions and the consequent court proceedings in acquisition of land. This fact was well within the knowledge of the plaintiff himself.

(f) Mobilisation of equipment, men and materials were only a part of the work undertaken by him and covered under clause (9) of the acceptance letter. Further the plaintiff had arranged for barge to transport the materials to the site without the knowledge of the Board. There is no provision in the contract for reimbursement of expenditure incurred in transporting the barge or for keeping the equipment idle.

(g) The plaintiff's contention that he had agreed to commence the work on the definite understanding that his claim should be accepted is denied. All the claims put forth by the plaintiff are beyond the scope of the contract. The defendant Board could not accept the enhanced rate in view of the fact that there is no provision in the contract for allowing such revised rates and inasmuch as the plaintiff was paid escalation at 7 1/2% of the value of work done as per Clause (7) of the acceptance letter, dated 14.01.1988. There was no question of extension of contract period in the instant case as the stipulated 15 months period was permitted by the Board to the plaintiff from the date of handing over of the site as against the date of acceptance letter, dated 14.01.1988.

(h) The plaintiff completed the work on 31.03.1991. The 9th Running Account Bill (RAB) was passed and paid in full. The X and Part bill as accepted by the plaintiff comes to only Rs.1,34,85,505/- But after verification it was found that the bills prepared by the field officers of the defendant and accepted by the plaintiff comes to only Rs.1,33,90,831/-. The 10% increase in price claimed by the plaintiff in the said bills is not payable and the plaintiff is not entitled to under the terms of contract. Therefore after disallowing the said 10% increase,

the plaintiff has been paid a sum of Rs.1,17,15,936/- up to X and part bill. The balance payment payable as per the contract terms and after effecting due recoveries is only Rs.4,68,469/-.

(i) The plaintiff remitted a sum of Rs.5,73,000/- being 2% of the value of contract towards security deposit which includes a sum of Rs.1,00,000/- initially remitted as Earnest Money Deposit. Besides this a sum of Rs.5,10,796/- was also recovered as per the acceptance letter in their various work bills upto X and part bill towards retention amount at 5% of the value of the work. As quantum of leveling of site was reduced to about 50%, the proportionate 50% of cash security deposit was released on 04.12.1989 retaining only the balance 50% with the Board. Thus the security deposit of Rs.2,86,500/- and the Retention amount of Rs.5,10,796/- available with the Board could not be released for non-execution of the agreement by the plaintiff as required by the acceptance letter, dated 14.01.1988. The balance amount due and payable to the plaintiff is only Rs.12,65,765/-. Therefore the suit is liable to be dismissed.

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

- "1. Whether the plaintiff is entitled to claim interest on the amounts due to him as mentioned in the plaint ?
2. Whether the defendant is liable only to pay the amount admitted in the written statement ?"

5. The power of attorney holder of the second plaintiff was examined as P.W.1 and Exs.P.1 to P.57 were marked. The Assistant Engineer / Civil Maintenance / NCTPS of the respondent Board has been examined as D.W.1 and Exs.D.1 to D.31 were marked.

6. **Issue No.2** : There is no dispute that the plaintiff submitted tender for the work of "North Madras Thermal Power Project, Stage-I - Specification No.SGCC 66 - Site Improvement Works - Group II" and the same was accepted by the defendant by letter of acceptance dated 11.01.1988. The fact also remains that work is to be completed by the plaintiff within 15 months by commencing the work on 14.01.1988 and complete the same on or before 14.04.1989 and the work site was made available to the plaintiff by the defendant due to problems in acquisition only on 17.05.1989 and the work could be completed on 31.03.1991. Though the total cost of the work as per acceptance letter is Rs.2,86,49,000/-, the same was reduced to 50%.

7. The plaintiff claims that the delay in handing over the site for the work is attributable only to the defendant and there is no fault on the part of the plaintiff and therefore he is entitled to the revised rate as claimed by him through several letters to the defendant, apart from the security deposit and the retention money with interest.

8. The defendant contends that the plaintiff has not signed the agreement and returned and therefore the security deposit and retention money could not be paid to the plaintiff. Further as per the letter of acceptance, the plaintiff is entitled to the escalation of 7.5% of the total cost of work and the plaintiff is not entitled to the amount as claimed by them and the defendant has to pay the bill amount of Rs.4,68,469/- only. Thus the defendant is bound to pay the above bill amount, security deposit and retention money, totaling Rs.12,65,765/- As per the terms, the plaintiff is not entitled to claim any interest.

9. The following clauses found in the letter of acceptance will be helpful to decide the issue :

"5.0. Work schedule and Time of completion :

5.1) Time is the essence of the contract. The total completion period shall be as stipulated under clause 1.0 of Section A3 of specification SECC-66.

5.2) If you fail to maintain the stipulated time of completion as above you will be liable to pay liquidated damages as set out in General conditions of contract under clause 26.0 of Section E of specification SECC-66.

7.0 Escalation :

The prices accepted are firm upto 3.2.89. If there is delay in completion of work and the delay is not attributable to you, then for the works that are executed beyond 3.2.89, the escalation is applicable as per clause 83.0 of Section E of specification and as per formula furnished by you which is given below.

.....
.....
.....

The escalation amount payable under the above 3 (Three) head shall however be subject to a maximum of 7 1/2% (Seven and half percent only) of the value of work, executed beyond 3.2.89."

10. The plaintiff submitted his tender on 04.03.1987 and the same was accepted by the defendant on 11.01.1988. The site was handed over on 17.05.1989 and the plaintiff commenced the work and completed on 31.03.1991. Having accepted the tender, allowing to

complete the work and also paid most of the bills, the defendants contention that the security deposit amount and retention money could not be paid for want of submission of the signed agreement by the plaintiff cannot be accepted.

11. As per the terms of acceptance letter, time is essence of contract and if the execution of work goes beyond 03.02.1989 for no fault of the plaintiff, the plaintiff is entitled to the escalation price subject to a maximum of 7 1/2%. It is also provided that if the work is not completed within the stipulated time, the plaintiff is bound to pay the defendant liquidated damages. The above terms have been stipulated under the understanding that the work will be commenced immediately after acceptance letter and will be completed within 15 months, i.e., on or before 14.04.1989. The plaintiff could not have visualized that the defendant would take nearly 1 1/2 years for handing over the site. The plaintiff after taking over the site on 17.05.1989, completed the work on 31.03.1991. The clause of escalation mentioned in clause 7.0 of the letter of acceptance can be invoked if the work is commenced and progressed as per the time stipulated in the contract. But here after about 1 1/2 years, the site was handed over by the defendant and the escalation percentage

stipulated in the terms of acceptance letter cannot be made applicable, that too in the light of stipulation of fastening liquidated damages to the plaintiff for non-completion of the work within the stipulated time.

12. The plaintiff addressed through several letters to the defendant claiming revised rate due to the delay in handing over the site. Ex.P.54 is the letter addressed by the Superintending Engineer, North Madras Thermal Power Project to the Chief Engineer whereby made the following recommendations by assigning valid reasons, which reads thus :

"The above escalation of 16.5% of the contract amount is against the maximum limit of 7 1/2% of the value of work stipulated in the acceptance letter. Though the increase in the escalation limit is reasonable due to the delay in handing over the site and also the overall increase in the cost of labour and materials throughout the country, the above limit can be reasonably fixed in between the 7 1/2% and 16 1/2% say as about 12% or so."

The above recommendation has not been considered by the defendant.

13. Since the defendant has broken the contract by not handing over the site so as to execute the work within the time stipulated in

the acceptance letter, this Court holds that the plaintiff is entitled to the escalation of 12% of the value of work. D.W.1 gives the following calculation in his evidence :

Work portion	: Rs.1,13,88,957.00
Escalation	: Rs. 8,54,172.00

	:Rs.1,22,43,129.00
Less : Amount already paid to the contractor up to X and part bill	: Rs.1,17,15,936.00

	Rs. 5,27,193.00
Less : Recovery	: Rs. 58,724.00

Bill amount to be paid	: Rs. 4,68,469.00

The escalation has been worked out at the rate of 7 1/2%. If the same is calculated at 12%, it would come to Rs.13,66,675/-. Therefore calculating the escalation at 12%, the calculation will be as follows :

Work portion	: Rs.1,13,88,957.00
Escalation	: Rs. 13,66,675.00

	:Rs.1,27,55,632.00
Less : Amount already paid to the contractor up to X and part bill	: Rs.1,17,15,936.00

Bill amount to be paid	: Rs. 10,39,696.00

The bill amount payable to the plaintiff by the defendant comes to Rs.10,39,696/- (Without making any recovery towards Retention money for this amount).

14. There is no dispute that the security deposit of Rs.2,86,500/- and retention money of Rs.5,10,796/- totaling Rs.7,97,296/- is with the defendant. The plaintiff is entitled to the bill amount of Rs.10,39,696/-, Security Deposit of Rs.2,86,500/- and retention money (EMD) of Rs.5,10,796/-, totaling a sum of Rs.18,36,992/-. This Court answers the issue accordingly.

15. Issue No.1 :

The plaintiff claims interest for the claim from 01.10.1991, i.e., after two months from the date of presentation of the final bill. P.W.1 admits during cross examination that as per letter of acceptance, clause 3.0, retention money and security deposit will not carry any interest. Immediately after the presentation of the final bill, the defendant should have settled the claim one way or the other and returned the security deposit and retention money along with the final bill amount, which the defendant felt entitled to by the plaintiff. As already pointed out, since time is essence of contract as per the letter

of acceptance and the contract was broken down by the defendant by delaying about 1 1/2 years in handing over the site, the plaintiff is entitled to the interest from 01.10.1991 as claimed for the amount entitled to by the plaintiff. Considering the entire transaction, this Court is of the view that awarding 7.5% interest p.a., would be reasonable. Accordingly, this issue is answered.

In the result, this Civil Suit is partly decreed with costs, whereby the plaintiffs are entitled to recover from the defendant a sum of Rs.18,36,992/- with interest at the rate of 7.5% p.a., from 01.10.1991 till the date of realisation.

16.04.2018

Index : Yes / No

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P.KALAIYARASAN, J

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**Judgment
in
C.S.No.977 of 1993**

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