

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON :**22.01.2018**

JUDGMENT PRONOUNCED ON : **29.01.2018**

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.393 of 2010

Antony Motors Pvt. Ltd.,
A-390/391, M.I.D.C.
T.T.C. Zone, Mahape,
Navi Mumbai 400 701
Rep herein by its Director
Jose Antony, s/o.K.O.Antony,
functioning at A-390/391, M.I.D.C.
T.T.C. Zone, Mahape, Navi Mumbai 400 701. ... Plaintiff

Vs

1. The Commissioner,
Corporation of Chennai
Rippon Buildings,
Chennai 600 003.
2. The Chief Engineer,
Mechanical Engineering Department,
Corporation of Chennai,
Rippon Buildings, Park Town,
Chennai 600 003.
3. The Superintending Engineer,
Mechanical Engineering Department,
Corporation of Chennai,
Rippon Buildings, Part Town,
Chennai 600 003. ... Defendants

Prayer : Complaint filed under Order IV Rule 1 of O.S. Rules read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

(a) declaration, declaring that the imposition of penalty clause in the tender in clause 6 and in page 14 of the contract for the supply of compactor equipments – 39 nos, with 14 cubic meter capacity in M.E.D.N.C.D.C. No.B3/1039/2007 duly issued by the Superintending Engineer, (M), Mechanical Engineering Department, Corporation of Chennai, the 3rd defendant herein as set out hereunder namely

Penalty:

1. subject to Force majeure, if the supplier fails to deliver any or all of the goods or perform the services within the time period(s) specified in the contract, the department shall deduct from the contract price a sum equivalent 0.5% of the delayed goods or unperformed services for each day of delay upto maximum deduction of 10% of the delayed supply or services. Once the maximum is reached the department may consider termination of contract.
2. In case, if any of the material is rejected because of inferior quality, the Commissioner reserves the rights to levy penalty for such inferior supply from the manufacturer/supplier at 20% of the cost of the material including replacement of parts/materials free of cost.

is illegal, irregular, unsustainable, unenforceable and *ultra vires* of the Article 14 of the Constitution of India,

- (b) directing the Commissioner, Corporation of Chennai, Rippon Buildings, Park Town, Chennai 600 003 the 1st defendant herein to pay a sum at Rs.52,03,340.50 that had been withheld by the Corporation of Chennai with interest at the rate of 24% per annum from the date of filing the plaint till its realization
- (c) for the cost of the suit

For Plaintiff : Mr. D. Ashok Kumar

For Defendant : Mrs. Karthikaa Ashok

J U D G M E N T

Suit is one for a declaration that the penalty clause in the tender conditions, which provides for a deduction of up to 10% of the contract price for the delay in supply and the Clause which provides for levy of penalty of 20% of the cost of the material, if it is rejected inferior quality as illegal, irregular and unenforceable and for a direction to the defendant to pay a sum of Rs.52,03,340.50, which is withheld by the defendants with interest at 24% per annum from the date of suit till date of realization.

2. The averments made in the plaint are as follows:

The 1st defendant had issued a tender for supply of 39 compactor vehicles with 14 cubic meter capacity. The plaintiff was the successful tenderer and he was awarded the contract for supply of 39 compactor

vehicles to the defendants. As per the terms of the contract, the vehicles that to be supplied as per the time framed fixed under the contract. Since there was a delay in supply of the vehicles, the defendants had withheld a sum of Rs.52,03,340.50, which represents 10% of the total value of the contract towards the said delay.

3. According to the plaintiff, the said Penal Clause in the Tender notification which enables the plaintiff to withhold 10% of the contract value for the delay is illegal and *ultra vires* Article 14 of the Constitution of India. The plaintiff would further contend that the supply of the compactors was delayed because of the delay in supply of the chassis by the manufacturer, viz., Ashok Leyland Limited. It is also averred that the clutches supplied by the manufacturer were sub-standard quality therefore, the plaintiff had sought for replacement of the clutches, which resulted in the delay. Thus, it is seen that the plaintiff's claim is primarily based on sub-standard quality of goods supplied by the manufacturer. The plaintiff would also contend that the defendants being a Corporation cannot impose such a penalty clause while it is expected to function for public good. Claiming that the Penalty clause and the Forfeiture clause are *ultra vires* Article 14 of the Constitution, plaintiff has come forward with the above suit seeking the declaration as stated supra.

4. The first defendant filed a written statement contending that the plaintiff being a party to the agreement and having signed the contract with eyes wide open cannot now be heard to contend that the penalty clause is arbitrary or *ultra vires*. According to the defendants, only 10 out of 20 compactors, which were to be supplied in the first 90 days were supplied within the time. The supply of the other compactors was delayed and the total delay caused by the plaintiff in supply of the compactors was about 133 days.

5. In view of the said delay and in view of the penalty clause contained in the tender document as well as the agreement entered into between the parties, the defendants were justified in withholding the said sum of Rs. 52,03,340.50. The plaintiff cannot be heard to contend that the penalty clause itself is invalid after having entered into an agreement and after having effected supply of the compactors as per the agreement. On the above contentions the defendants sought for dismissal of the suit.

6. Defendants 2 and 3 adopted the written statement filed by the 1st defendant.

7. On the above pleadings, this court had framed the following issues:

1. *Is the penalty clause under clause VI at page 14 of the contract for the supply of compactor equipment issued by the 3rd defendant is illegal and unenforceable?*
2. *Is the plaintiff entitled to recover the suit claim as prayed for, as the penalty imposed by the first defendant is against law?*
3. *Is the 1st defendant/Commissioner, Corporation of Chennai is entitled to retain the suit claim under the guise of delay?*
4. *Whether the contract for the supply of compactor equipments issued by the 3rd defendant is legal as the relationship between the Corporation and the plaintiff is that of employer and employee?*
5. *To what other reliefs the parties are entitled to?*

8. At trial, one Anil Shivaji Chaudhari, Director of the plaintiff was examined as P.W.1 and Mr.R.A.Prabakar, Executive Engineer, Mechanical Engineering Department of the 1st defendant Corporation was examined as D.W.1. Exhibits P1 to P19 were produced by the plaintiff and the defendants produced Exhibit D1.

9. I have heard Mr.D.Ashok Kumar, learned counsel appearing

for the plaintiff and Mrs.Karthikaa Ashok, learned counsel appearing for the respondents.

Issue No.1:

10. The terms of the contract are not in dispute. Nothing turns the oral evidence in the case on hand. The Tender document has been produced by the plaintiff as Ex.P1. The fact that the plaintiff was the successful tenderer and that he had entered into an agreement for supply of the 39 compactors vehicles on 25.01.2008 is not disputed. Clause 6 at page 14 of the Tender document reads as follows:

"6. Penalty

a) Subject to Force majeure, if the supplier fails to deliver any or all the goods or perform the services within the time period(s) specified in the contract, the department shall deduct from the contract price a sum equivalent 0.5% of the delayed goods or unperformed services for each day of delay up to maximum deduction of 10% of the delayed supply or services. Once the maximum is reached the department may consider termination of contract."

11. The plaintiff had accepted the Tender conditions and had taken

part in the tender. He also entered into a contract under Ex.P2 for supply of the vehicles on 25.01.2008. Clause 15 of Ex.P2 reads as follows:

“15. Penalty for delay:

*In case of delay in delivery of materials the Corporation of Chennai may at his option, impose a penalty calculated at the rate of 0.1 percent of the Indent/Contract value of such portion only of the quantity as have not been delivered on the specified date, for each day of delay. Such reduction shall be in full satisfaction of the suppliers liability for the delay and **shall not in any case exceed five percent of the total value of contract.**”*

12. The fact that an agreement for supply was entered after the plaintiff having been declared as successful tenderer is also admitted. The plaintiff had based its claim on the ground that there is an employer employee relationship between the plaintiff and the defendant. The said assumption of a relationship of an employer and employee between the plaintiff and the defendants appears to be misconceived. The contract is one for supply of certain goods, viz. compactor vehicles to the defendants for its use and the plaintiff is a contractor, who had submitted its bids as per the tender document and has been declared as a successful tenderer. It is

a fundamental position of law that the person, who accepts the tender conditions and bids at the tender cannot turn around and contend that the clauses in the tender document are invalid or illegal. Apart from accepting the tender conditions and bidding at the tender, the plaintiff has also signed in Ex.P2 agreement, which also contains a penalty clause. Therefore, I do not think the claim of the plaintiff that the penalty clause in the tender document as well as the agreement dated 25.01.2008 is invalid and unenforceable could be accepted. Therefore, issue No.1 is answered against the plaintiff, the Penalty clause in the tender document as well as the agreement dated 25.01.2008 is valid and legally binding on the plaintiff.

Issue No.4:

13. As already pointed out the plaintiff has participated in the tender knowing fully well it is a contract for supply of certain goods, viz. Compactor vehicles from the defendant Corporation. The relationship between the parties is one of the supplier and a purchaser. The fact that the process of purchase is through a tender does not alter the situation of the parties. At no stretch or imagination can it be said that there was an employer-employee relationship between the plaintiff and the defendant. The relationship is only that of supplier and a purchaser and nothing more. Hence, the issue No.4 is answered against the plaintiff and in

favour of the defendants.

Issue Nos. 2 and 3:

14. Now let me consider what is the quantum of penalty contemplated between parties. Ex.P1, which is the tender document provides for deduction of 0.5% of the value per day subject to the maximum of 10%. But the agreement entered into between the parties after the grant of tender provides for a penalty of 0.1% for each day of delay subject to a maximum of 5% of the total value of the contract.

15. Mr.D.Ashok Kumar, learned counsel appearing for the plaintiff would contend that the defendants were not justified in withholding 10% of the value of the contract, viz. Rs.52,03,340.50. He would submit that the tender document is superseded by the agreement Ex.P2, as per the agreement under Ex.P2, the defendants are entitled to deduct 0.1% of the value of the contract for every days delay subject to a maximum of 5%.

16. Per Contra, Mrs.Karthikaa Ashok, learned counsel appearing for the defendants would contend that it is the tender document that would govern the situation and not the contract, she would in the alternative submit that the reduction of penalty amount in the contract dated

25.01.2008 is a typographical error. A perusal of the tender document would show that the penalty clause enables the defendants to deduct 0.5% of the value of the delayed goods are un-performed services for each day of delay subject to a ceiling of 10% of the total value of the contract. However, while entering into the agreement, the said quantum of penalty is reduced to 0.1% per day subject to a maximum of 5% of the contract value. The document Ex.P2 is signed by the Executive Engineer (Mechanical) of the Chennai Corporation. I do not think the defendants could raise a plea that the tender document would alone prevail because the agreement for supply is subsequent to the tender document and under the agreement, the quantum of penalty is altered. Therefore, it could be only taken as a conscious alteration of the quantum of penalty by the parties to the contract. In my considered opinion Ex.P2 alone would govern the situation seen and not the tender conditions since Ex.P2 supersedes the tender conditions. It should also be borne in mind Ex.P2, subsequent to the award of the contract to the plaintiff. Therefore, I am of the opinion that the defendants were not justified in deducting or withholding the 10% of the contract value, viz., a sum of Rs.52,03,340.50. As per the Clause 15 of the contract for supply of materials dated 25.01.2008, marked as Ex.P2, defendants are entitled to deduct only 5% of the contract value. Therefore, Issue No.2 is answered the effect that the

plaintiff is entitled to recover the money withheld by the defendants over and above the permissible limit of 5% of the contract value. It is not in dispute that the sum of Rs.52,03,340.50 represents 10% of the contract value. The defendants are entitled to withhold only 5% of the contract value i.e., equivalent to Rs.26,01,670.25. Therefore, the plaintiff is entitled to recover a sum of Rs.26,01,670.25 which is over and above the 5% of the contract value.

17. In view of the fact that the Clauses in the contract providing for penalty have been upheld the 1st defendant would be entitled to retain an amount equivalent to 5% of the contract value towards the delay in supply of the compactors by the plaintiff.

Issue No.5:

18. In view of the above discussion, it is found that the defendants are not entitled to withhold 10% of the contract value, but they are entitled to withhold 5% of the contract value. They are bound to return the excess amount withheld by them with interest at 12% per annum from the date of suit till date of realization.

19. In fine the suit is decreed for a sum of Rs.26,01,670.25 with

interest at 12% per annum from the date of suit till date of decree and thereafter at 6% per annum till date of realization. Parties are directed to bear on their own costs.

29.01.2018

jv

Index: Yes/No

Internet: Yes/No

Speaking order/Non Speaking order

List of the Witnesses examined on the side of the Plaintiff:

P.W.1 Anil Shivaji Chaudhari

List of Exhibits marked on the side of the Plaintiff:

Sl.No.	Exhibits	Description of documents	Date
1	Ex.P1	Photocopy of contract for the supply of compactor equipment	-
2	Ex.P2	The photocopy of contract for the supply of materials	-
3	Ex.P3	The office copy of the letter to Ashok Leyland	-
4	Ex.P4	The photocopy of the letter from Ashok Leyland	-
5	Ex.P5	The photocopy of the communication to Ashok Leyland	-
6	Ex.P6	The photocopy of the communication to Ashok Leyland	
7	Ex.P7	The photocopy of the communication to the Corporation of Chennai	-
8	Ex.P8	The original minutes of the meeting	-

Sl.No.	Exhibits	Description of documents	Date
9	Ex.P9	The office copy of the communication	20.06.2008
10	Ex.P10	The office copy of the letter	30.06.2008
11	Ex.P11	The office copy of the communication	19.08.2008
12	Ex.P12	The office copy of the letter of Corporation of Chennai	19.08.2008
13	Ex.P13	The office copy of the letter	24.09.2008
14	Ex.P14	The office copy of the letter	24.11.2008
15	Ex.P15	The office copy of the letter to the Corporation of Chennai	10.12.2008
16	Ex.P16	The office copy of the communication	16.02.2009
17	Ex.P17	The photocopy of the delivery schedule	-
18	Ex.P18	Certified copy of order in W.P.No.21287/2009	-
19	Ex.P19	The Board Resolution	12.03.2015

List of the Witnesses examined on the side of the Defendants:

D.W.1 R.A.Prabhakar

List of Exhibits marked on the side of the Defendants:

Sl.No.	Exhibits	Description of documents	Date
1	Ex.D1	The original authorization letter	24.01.2017

WEB COPY 29.01.2018

jv

To

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

R.SUBRAMANIAN,J.

jv



Pre Delivery Judgment
C.S.No.393 of 2010

WEB COPY 29.01.2018