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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

and

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

W.A(MD)No.331 of 2011

S.Kalyanasundaram

.. Appellant/Petitioner

Vs.

1.The Chief Engineer,
Highways & Rural Road,
Guindy, Chennai - 32.

2.The Superintending Engineer,
Rural Roads Circle, Trichy - 20.

3.Assistant Engineer, Rural Road,
Gramasalaigal, Kumbakonam.

4.Assistant Divisional Engineer,
Rural Roads (Gramasalaigal),
Kumbakonam.

5.Divisional Engineer, Rural Roads (H),
Gramasalaigal,
Thanjavur.

.. Respondents/ Respondents

PRAYER: Writ Appeal is filed under Clause 15 of the Letters Patent against the order, dated 01.02.2008, passed in W.P(MD)No.2028 of 2005, by the learned Single Judge.

Prayer in WP(MD). 2028/ 2005 :

Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the Respondents to consider the legal notice dated 15.07.2004 and 29.10.2004 issued to the Respondents herein in accordance with law and direct the Respondents to refund the Earnest Money Deposit, Retention amount and FSD amount in a sum of Rs.2,37,000/- along with interest to the petitioner.

For Appellant

: Mr.N.Sivakumar

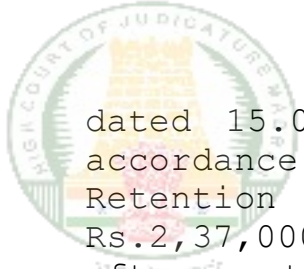
For Respondents

: Mr.S.Satheeshkumar,
Additional Government Pleader.

J U D G M E N T

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.]

<https://hcservices.ecourts.gov.in/hcservices/> The petitioner is the appellant. He filed W.P(MD) No.2028 of 2005, praying for issuance of writ of mandamus, directing the respondents herein, to consider the legal notices,



dated 15.07.2004 and 29.10.2004, issued to the respondents, in accordance with law and refund the Earnest Money Deposit, Retention Amount and Security Deposit, aggregating to a sum of Rs.2,37,000/-, along with interest, to him. The writ petition, after contest, came to be dismissed, on 01.02.2008, holding that the remedy open to the petitioner, if any, is to approach a competent civil forum. The writ petitioner, aggrieved by the dismissal of the writ petition, has filed this writ appeal.

2.The facts leading to the filing of this writ appeal, necessary for the disposal, briefly narrated, are as follows:

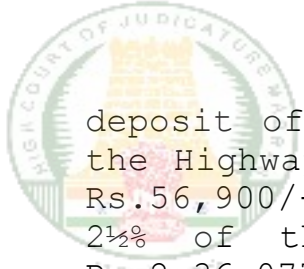
(i)The appellant/writ petitioner, in the affidavit filed in support of the writ petition, would aver, among other things, that he was ordered contract for laying and making improvements on the road between Sathangudi - Kallur (Via) Agarathur K.M.0/0-4/0 and according to him, he was entrusted with the said work, on 17.04.2000 and completed the same, on 26.05.2001, as per the advice and specifications of the respondents. The officials of the respondents also caused visit to the work spot and supervise the execution of the work and took measurements of the execution work and submitted a final report and on approval of the execution, final payment was also made to him. It is the specific case of the petitioner that with regard to quality of the work-done, there was no complaint whatsoever.

(ii)The petitioner would further aver that the respondents, as per the agreement, retained the earnest money deposit and security deposit amount, to a sum of Rs.2,37,000/- and he is entitled for the said amount after completion of the work and after expiry of three years of observation period, he has also sought refund of the same and the third respondent has informed him, on 30.10.2003, that he has to carry out the patch work on the road. The petitioner would state that though it had happened on account of natural cause, he has completed the said work and informed the third respondent and even thereafter, the execution of the said patch work was supervised by the third respondent.

(iii)The petitioner would further state that he also maintained the road for three years, as per the contract, and despite completion of the same, there was no refund of earnest money deposit and security deposit amounts and in this regard, he has issued legal notices, dated 15.07.2004 and 29.10.2004, to the respondents and despite receipt and acknowledgment, the respondents did not come forward to refund the said amounts and therefore he was constrained to approach this Court by filing this writ petition.

3.The writ petition was entertained by this Court and notice was ordered.

4.The respondents have filed a common counter affidavit and took a stand that the petitioner was become the successful bidder and he was entrusted with the said work and he paid earnest money



deposit of Rs.40,000/- by way of National Savings Certificate to the Highways and Rural Roads Wing and further security deposit of Rs.56,900/- and sum of Rs.1,39,177/- towards retention amount of 2½% of the total value of work and the entire amount of Rs.2,36,077/-, has been kept under deposit.

(ii) It is further averred that though the petitioner has to complete the work, on or before 16.04.2001, has completed the said work, only on 26.05.2001, with a delay of forty days.

(iii) The respondents would further aver that on completion of the above work, it was handed over to Kumbakonam Panchayat Union for future maintenance, vide communication of the fourth respondent, dated 09.10.2001 and the Commissioner of Kumbakonam Panchayat union, vide his letter, dated 08.11.2001, had stated that they will take charge of the road only after rectification of defects and damages and therefore the fourth respondent orally requested the petitioner, to rectify the defects and damages, for several times, but he did not do so and it was also followed by written communications, dated 20.08.2003 and 30.10.2003 and despite receipt and acknowledgment of the same, the petitioner did not come forward to rectify the defects. In this regard, the cadres of Communist Party of India (Marxist), had also called for an agitation on 06.11.2004, with regard to the bad condition of the road, which also lead to law and order problem and though it was brought to the knowledge of the petitioner, he was very adamant and not intended to repair the said work and lastly the repair works were carried out and the entire amount retained by them, were appropriated and as such they are not liable to pay any amount to the petitioner and prayed for dismissal of the writ petition.

5. The learned Single Judge, after taking note of the materials placed, found that the matter in issue, involves adjudication on disputed question of fact and evidence have to be let-in and documents have to be marked for the same and therefore citing the said reasons, dismissed the writ petition, granting liberty to the petitioner, to work out his remedy, if any, before the appropriate forum, in accordance with law. The petitioner, challenging the legality of the order, dated 01.02.2008, passed in W.P(MD)No.2028 of 2005, in and by which, the writ petition came to be dismissed, came forward to file this writ appeal.

6. The learned counsel appearing for the appellant/writ petitioner made the following submissions:

As per the condition for retention amount of 2½% of the total value of work, which has been issued, as per G.O.Ms.No.73, Transport Department, dated 09.01.1987, the contractors are also informed that for cross drainage works and protective works, 2½% of the total value of work will be retained for a period of two years from the date of completion of work in order to enable the departmental officers to watch the fate of the work in all seasons and indemnity bond should also be given by the



contractor for a further period of three years, to establish the quality of work executed. It is also stipulated that for the recovery of storage charges on the materials returned by the contractors, 5% charges on the cost of materials will be recovered from the contractor, as per G.O.Ms.No.1382/PWD, dated 29.06.1971.

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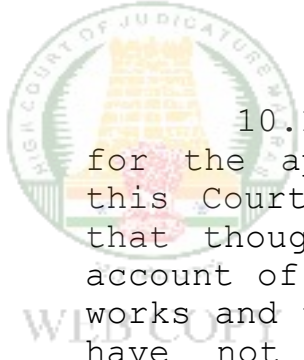
7.The learned counsel appearing for the appellant has also drawn the attention of this Court to the special conditions of contract and it is relevant to extract the following:

"Earnest Money Deposit and Retention Money:

All earnest money specifically retained on behalf of the Government of Tamil Nadu under this contract or so much of it shall not have become forfeited to Government, shall be returned to the Contractor on expiry of six months after the completion of the work. In respect of retention money 2½% of total value of contract will be retained for a period of one year, reckoned from the date of completion of the work and will be released after one year in production of an indemnity bond for a further period of two years to establish the quality of work expected".

8.The primordial submission made by the learned counsel appearing for the appellant is that during the execution of the work, at each and every stage, the officials of the respondents caused inspection at regular intervals, noted down the measurement and quality of the work and after completion, it was handed over to the officials, who in turn, handed over the same to the Kumbakonam Panchayat Union and even assuming without admitting that the quality of the work done by the petitioner, is not upto the mark, the respondents are entitled to retain only 2½% of the total value of the contract, for a period of one year reckoned from the date of completion of the work and will be released after one year, in production of an indemnity bond for a further period of two years to establish, the quality of work. Admittedly, the respondents had appropriated 2½% of the retention amount and they are bound to return the earnest money deposit of Rs.40,000/- given by the petitioner by way of National Savings Certificate and further security deposit of Rs.56,900/- and despite issuance of legal notices, it has not been done so.

9.The learned counsel appearing for the appellant/writ petitioner would further submit that since the calculation of the amount, has already been indicated, in paragraph 4 of the counter affidavit, filed by the respondents, it does not involve any adjudication on disputed question of fact and therefore prays for appropriate orders, directing the respondents to return the earnest money deposit of Rs.40,000/- given by way of National Savings Certificate and security deposit of Rs.56,900/- with appropriate rate of interest.



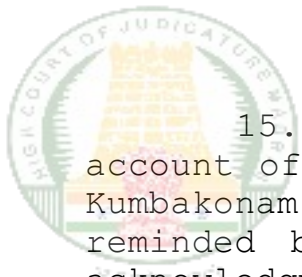
10. It is also submitted by the learned counsel appearing for the appellant/writ petitioner, by drawing the attention of this Court to the counter affidavit filed in this writ appeal, that though a stand has been taken by the respondents that on account of the bad quality of the roads, they have done the repair works and therefore they appropriated the amount, break up details have not been furnished and the said stand taken by the respondents, is completely unacceptable, in the facts and circumstances of the above case.

11. Per contra, the learned Additional Government Pleader appearing for the respondents has invited the attention of this Court to the counter affidavit filed by the fifth appellant in the writ appeal and would submit that vide communication, dated 30.10.2013 and 24.10.2004, the appellant/writ petitioner was intimated to do the repair work, otherwise the charge would be collected from the contractor for the work and inspite of repeated reminders, he has not done so and as per the concluded condition of the agreement between the contractor and the Divisional Engineer (H) NABARD and Rural Roads Division, Thanjavur, the repair work was carried out after meeting the deposit amount available in this work, which is in order as per the signed agreement between the parties and hence prays for dismissal.

12. This Court has considered the rival submissions and perused the materials available on records.

13. The relevant terms of the special condition indicated above, would disclose that the respondents are entitled to retain 2½% of total value of contract by way of retention of money, for a period of one year, reckoned from the date of completion of work and the same will be released after one year in production of an indemnity bond for a further period of two years to establish the quality of the work. It is not in dispute that during the course of the contract awarded to the petitioner, the work done by him, has been periodically inspected, measurements have been effected and noted in the relevant measurement books and after satisfying the work, possession of the road was taken and according to the respondents, it was handed over to Kumbakonam Panchayat Union and the Commissioner of Kumbakonam Panchayat Union has pointed out certain defects and despite two communications sent to the appellant/writ petitioner, he has not done so and therefore the remaining amount has been utilised for carrying out the said work.

14. In the considered opinion of this Court, the terms and conditions are governed by the contract entered into between the appellant/ writ petitioner and the respondents and the above said condition stipulates that the respondents are entitled to retain 2½% of total value of contract work and as per the counter affidavit filed in W.P(MD)No.2028 of 2005, the amount of Rs.1,39,107/- retained, has also been appropriated.



15. It is also the specific case of the respondents that on account of quality of the work pointed out by the Commissioner of Kumbakonam Panchayat Union, the appellant/writ petitioner was reminded by way of two communications and despite receipt and acknowledgment, he has not done anything and therefore the amount retained by them, apart from the retention of 2½%, has been utilised for effecting the repairs. It is pertinent to point out, at this juncture, that either in the counter affidavit filed in W.P(MD)No.2028 of 2005 or in the counter affidavit filed in the writ appeal, the details of the amount spent out of the amount of earnest money deposit and security deposit, has not been indicated.

16. The learned Single Judge dismissed the writ petition mainly on the ground that the issue involved in the writ petition requires adjudication in the form of evidence and therefore granted liberty to the petitioner to work his remedy before a competent civil Court. In the considered opinion of this Court, in the light of the above said condition, it is not open to the respondents to retain the earnest money deposit of Rs.40,000/- given by the petitioner by way of National Savings Certificate and the security deposit amount of Rs.56,900/-.

17. It is once again pointed out that in the absence of break-up details as to the amounts spent by the respondents towards patch of works, the claim made by them for retaining the earnest money deposit as well as security deposit for the purpose of carrying out the patch works, cannot be sustained.

18. In the result, the writ appeal is allowed and the impugned order dated 01.02.2008, passed in W.P(MD)No.2028 of 2005, is set aside. The third respondent is directed to return the National Savings Certificate for a sum of Rs.40,000/- given by the appellant/writ petitioner and security deposit of Rs.56,900/- to the appellant/writ petitioner, within a period of eight weeks from the date of receipt of a copy of this Judgment. While doing so, the third respondent shall pay 6% simple interest on the security deposit of Rs.56,900/- from the date, it is payable. No costs.

Sd/-

Assistant Registrar(Writs)

/True Copy/

Sub Assistant Registrar

To

<https://hcservice.hccourtsofchennai.org/>
The Chief Engineer,
Highways & Rural Road,
Guindy, Chennai - 32.



2.The Superintending Engineer,
Rural Roads Circle, Trichy - 20.

3.The Assistant Engineer, Rural Road,
Gramasalaigal, Kumbakonam.

4.The Assistant Divisional Engineer,
Rural Roads (Gramasalaigal),
Kumbakonam.

5.The Divisional Engineer, Rural Roads (H),
Gramasalaigal, Thanjavur.

+1cc to M/S.N.Sivakumar, Advocate SR.No. 40482

JUDGMENT MADE IN
W.A (MD) No.331 of 2011
04.01.2018

SMN

JM/SV MMS/SAR 1/24.01.2018/7P/7C