

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH

AND

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.S.A. No. 329 of 2011

Unique Industrial Handlers Pvt Ltd.,
Rep. By its Regional Director,
Mr. J. Ramachandran
206. Nahar & Seth Industrial Estate Chakala,
Andheri (East)
Mumbai - 400 099

...Appellant

Vs.

1. The Chairman,
Tamil Nadu Electricity Board,
6th Floor, Eastern Wing,
N.P.K.R.R. Malligai,
800, Anna Salai, Chennai - 600 002.

2. The Manager,
Canara Bank,
348/352, Abdul Rahman Street,
Mumbai - 400 003

...Respondents

Prayer: Appeal under Order 36 Rule 1 of the Original Side
Rules read with Clause 15 of the Letters Patent against the
order dated 06.11.2009 made in C.S. No. 109 of 2001

For Appellant : Mr.S.Rajasekar

For Respondents: Mr.V.Viswanathan for R1

J U D G M E N T
(Delivered by M.M.SUNDRESH, J.)

This appeal is preferred against the order of the learned
Single Judge, who, after going through the entire materials
available on record, was pleased to dismiss the suit.

2. The appellant, being the plaintiff, entered into
agreement with the first respondent for manufacture, supply,

erection, testing and commissioning of one number 125/25T EOT Crane for underground Pykara Ultimate State Hydro Electric Project at Masinagudi in Nilgiris District. Various contracts have been awarded in favour of several contractors for the purpose of completing the project. The appellant's contract is one among them. Therefore, all the contracts are integrated contracts.

3. The appellant was contracted to supply and erect the EOT Crane, apart from manufacturing. Pursuant to the agreement entered into between them, the Purchase Order was issued. The time limit was fixed for a period of eight months from the date of receipt of Purchase Order. The appellant, admittedly, could not complete the project within the time limit. Notwithstanding the series of correspondence made between the parties, the entire installation and erection could not be completed. This resulted in completion of remaining work through some other agency. Accordingly, a specified sum of Rs.7,69,900/- was withheld. The security deposit was also not paid which is for a sum of Rs.2 lakhs. Under those circumstances the appellant filed the suit seeking the following relief:-

"(a) directing the First Defendant to pay to the plaintiff a sum of Rs. 20,02,847/- with interest at 18% per annum from the date of plaint till the date of realisation,

(b) directing the First Defendant to return the Bank Guarantee No.98/IBG-138 dated 26.11.1998 duly cancelled to the Second Defendant Bank.

Or in the alternative

(c) A permanent injunction restraining the First Defendant from enforcing and realizing the Bank Guarantee No.98/IBG-138 dated 26.11.1998.

(d) directing the Defendant to pay the Plaintiff the costs of the suit."

4. The written statement has been filed by the first respondent stating that the appellant had taken four months time even to give the inspection call. As per the purchase order, EOT Crane has to be delivered within four months from the date of approval of the drawing. The appellant did not follow the manufacture of EOT Crane even by 20.01.1998. There was no delay on the part of the respondent but only by the appellant. By the letter dated 16.04.1998, the appellant has admitted that it is the contractor who has taken his own time for finalization of order of transportation of EOT Crane. It is not correct to state that the site was not ready since the appellant was not able to complete the work within the time specified. No steps were taken to plan transport of packages. Under those circumstances,

a sum of Rs.7,69,900/- was with held as 10 per cent retention towards the liquidity damages.

5. Learned Single Judge after hearing the parties framed the following issues:-

- "1. Whether the first defendant was responsible for the delay in approving the General Arrangement Drawing?
2. Whether the ownership of the E.O.T crane effectively got transferred in favour of the first defendant on 27.04.1998 when the same was delivered in good condition duly accepted by the first defendant?
3. Whether the first defendant was justified in retaining a sum of Rs.10,37,995/- payable by it under Invoice No.138, dated 27.03.1998?
4. Whether the conduct of the first defendant in not handing over the Erection Front to the plaintiff in order to commission the E.O.T. Crane, would dis-entitle it from claiming liquidated damage?
5. Whether the first defendant has suffered any loss on account of the overall delay of four months in effecting the supply of Crane?
6. Whether the guarantee for satisfactory performance of equipments given by the plaintiff expired on 27.04.2000 as per the terms of the purchase order?
7. Whether the plaintiff is entitled for a sum of Rs.20,02,847/- with interest at 18% per annum from the date of claim?
8. Whether the plaintiff is entitled for a direction from this Court the defendant for return of the Bank Guarantee No.98/IBG-138, dated 26.11.1998 duly cancelled by the defendant bank?
9. To what other reliefs are the parties are entitled for?"

6. After considering the entire evidence produced, the suit was ultimately dismissed by the learned Single Judge and hence the appeal.

7. Before we proceed further, let us consider the relevant Clauses governing the parties with respect to the terms and conditions. Clauses 7 and 8 speak about the time limit for delivery and erection. Clause 11 speaks about liquidity damages. The said clauses are reproduced herein:-

"7. Delivery

The delivery of equipments covered by the

Purchase Order shall be completed within 8 months from the date of receipt purchase order. The EOT Crane is required for erection of the generating machinery. Hence delivery may be advanced so as to make in 4 months from the date of approval of drawings. However for the purpose of levy of L.D. the delivery period of 8 months quoted in the tender will be applicable.

8. Erection

The erection, testing, commissioning of the EOT Crane shall be completed within eight weeks (8) from the date of handing over of erection front.

11. Liquidated Damages

The delivery should be guaranteed by you under liquidated damages clause given below:

Should the delivery be delayed by strikes, lockouts, fire accidents or any cause whatsoever beyond the reasonable control of the contractor, as stated in Fore Majeure clause and whether such delay or impediment occurs before or after the time or extended time for despatch or completion, a reasonable extension of time shall be granted.

If the contractor fails to deliver the equipment/materials within the time specified in the contract or any extension thereof, the purchaser shall recover from the contractor as liquidated damages a sum of HALF PERCENT (0.5%) of the contract price of the undelivered equipment/materials for each calender week of delay. The liquidated damages shall not exceed FIVE PERCENT (5 percent) of the contract price of the units/materials so delayed. Equipments and materials will be deemed to have been delivered and when all the component parts are also delivered. If certain components are not delivered in time, the equipments and materials shall be considered as delayed till the missing parts are also delivered. The total amount of damages for delay under the contract shall be subject to a maximum of 10% of the total price (including supervisor charges is applicable).

The actual date of delivery at

destination stores shall be reckoned for the purpose of deciding "Liquidated Damages" for delay in supply. It should be the suppliers' responsibility to arrange for inspection, despatch etc., in time to keep up the delivery schedule.

If supplies rendered against purchase order are made by the contractor beyond the period of delivery and they are accepted by the Board, such acceptance is without prejudice to Board's rights to levy liquidated damages for the delay in supply. Liquidated damages will also be made applicable for non-supply of items.

The Board will also be at liberty to cancel the order if the supply is not completed within the above accepted delivery period not withstanding the liquidated damages clause applicable for the balated supplies. Any charges for cancelling the order will not be accepted under any circumstances.

In the event of cancellations of this order or non-completion of supply by the suppliers, then the short supplied items may be ordered a fresh. The excess price if any between the original and new contract will be recovered from the original supplier from the amount due to the original supplier either from this contract or from any other contract."

8. This clause initially deals with the damages for the failure to deliver the equipment/material and also states about the delay caused by the contractor. A maximum sum 10 per cent of the total price has been fixed. Incidentally, it also speaks about the cancellation and the expenses incurred thereafter.

9. Security deposit has been dealt with in Clause 22. As per Clause 22 any loss arising out of contract will be recovered from the security deposit. It also further states that if the purchaser incurs any loss or damage on account of breach of any claim, the security deposit will not be refunded. The following are the relevant clauses:-

"22. Security Deposit:

You have to furnish a Security Deposit of 10% of this value of the contract, inclusive of EMD paid of this 2% of the value of the contract including amount remitted as EMD has to be paid in cash and the balance 8% by Bank

Guarantee within 15 days from the date of receipt of this P.O. This Bank Guarantee is to be kept valid for the guarantee period also.

The cash and Bank Guarantee towards security deposit will be returned only if the contract is completed in all respect, to the satisfaction of the purchaser. If, the purchaser incurs any loss or damage on account of the breach of any clause mentioned above or any other cause arising out of the contract, becomes payable by the contractor to the purchaser, then the purchaser will in addition to such other rights that he may have under law, appropriate the whole or part of the security deposit and such amount that is appropriated will not be refunded to the contractor."

10. Learned counsel appearing for the appellant would submit that as per Section 74 of the Indian Contract Act, the actual damage will have to be considered. In the absence of any material, the learned Single Judge was not correct in dismissing the suit. The site was not ready and, therefore, the delay cannot be attributed against the appellant. Even otherwise, there cannot be any withholding of amount payable under the invoice raised along with the security deposit. Therefore, the appeal will have to be allowed. To buttress his submission, he has placed reliance on the judgment of Apex Court in Kailash Nath Associates v. Delhi Development Authority and another reported in (2015) 4 SCC 136.

11. Learned counsel appearing for the first respondent would submit that admittedly there was delay on the part of the appellant. At every stage, there was a delay and the project has to be seen as a whole. The delay by one contractor would, in effect, lead to delay in completion of the project. That is the reason why Clause 11 has been introduced. In a case where it is impossible to quantify the damages, the clause would operate. It is not correct to state that the supply was not made because of the delay caused by the first respondent. The fact remains that the appellant was not able to manufacture and erect the crane. The fact that there was a subsequent contract to a third party to complete the incompleted work is not in dispute. In view of the factual finding, the relevant clauses governing the parties have been rightly invoked. Therefore, there is no interference required of the judgment and decree rendered by the learned Single Judge.

12. The question for consideration is as to whether the

appeal will have be allowed in the light of the issues answered by the learned Single Judge or not.

13. On a reading of the judgment of the learned Single Judge, it appears that it is the appellant who was at fault in not completing his part of the contract. It was his responsibility to deliver the crane within the limit granted. The appellant took four months time for putting the EOT crane in the Test Bay. Even earlier also the appellant has taken four months time to give the inspection call, after getting approval of the original drawing. On facts, the work was not completed. That is the reason why the work was done through the subsequent agency. Therefore, we do not find any error in the finding rendered by the learned Single Judge.

14. Section 74 has to be read with Section 73. It is not in all cases there has to be an effective adjudication of actual damages caused. The project itself is an integrated project. The project will be completed when all the contractors perform their respective contracts. When once the project is made out coupled with the loss occurred, it is for the appellant to satisfy the Court that they were not responsible for the loss. In the case on hand, it is the appellant who filed the suit. It is not as if the entire money due was withheld. Only 10 percent of the amount of damages was withheld.

15. Similarly, insofar as the security deposit is concerned, once the project is made out the entitlement for refund comes. The decision in Kailash Nath Associates, supra, relied on by the learned counsel appearing for the appellant would not help this case. It is appropriate to refer to the following conclusion arrived at in ONGC Ltd v. Saw Pipes Ltd. reported in (2003) 5 SCC 705:-

"68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of

breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

16. While exercising the appellate power, this Court is expected to give credence to the judgment and decree rendered by the Court at first instance, especially when all the documents have been analyzed and factual findings are given. We do not find any perversity or illegality in the order passed by the learned Single Judge.

Thus, we do not find any merit in this appeal. Accordingly, the appeal is dismissed. No costs.

ssm

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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

+1cc to Mr.S.Rajasekar, Advocate, SR.No.2454
+1cc to Mr.C.Viswanathan, Advocate, SR.No.2600

O.S.A. No. 329 of 2011

Kj (CO)
Kak(26/03/2019)