

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.177 of 2019
and
C.M.P.No.15725 of 2019

1.The Commissioner,
Corporation of Chennai,
Ripon Buildings,
Chennai 600 003.

2.The Chief Engineer, (No such official)
Mechanical Engineering Department,
Corporation of Chennai,
Ripon Buildings, Park Town,
Chennai 600 003.

3.The Superintending Engineer,
Mechanical Engineering Department,
Corporation of Chennai,
Ripon Buildings, Park Town,
Chennai 600 003.

... Appellants

Vs

M/s.Antony Motors P. Ltd.,
A-390/391, M.I.D.C.,
T.T.C.Zone, Mahape,
Navi Mumbai 400 701
Rep. 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.

... Respondents

PRAYER : Appeal filed against the Decree and Judgement passed
by this Court in C.S.No.393 of 2010, dated 29.01.2018.

For appellants : Mr.Karthikaa Ashok

For Respondents : Mr.D.Ashok Kumar

J U D G M E N T

(Judgment of the Court was delivered by N.KIRUBAKARAN, J)

The appeal has been preferred by the Corporation aggrieved over the decreeing of the Suit filed by the respondent herein which sought declaration that the 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 3rd defendant and for deduction from the contract price a sum equivalent to 0.5% of the delayed goods as illegal, irregular and unenforceable.

2.The appellant Corporation issued tender notice for the supply of 39 compactor vehicles with 14 cubic meter capacity. As per the tender notification 10% of the value of the contract would be deducted in case of any delay. The respondent was the successful bidder and the value quoted by the respondent was Rs.7,53,28,890/-. The work order was given on 04.01.2008 and thereafter, an agreement was entered into between the appellant Corporation and the respondent on 21.05.2008. As per the contract, the respondent has supplied the vehicle as required by the appellant Corporation between 12.03.2008 and 19.08.2008 and in the course of the said period, the entire 39 vehicles have been supplied intact and there was no delay and even if there was any delay it was only negligible. The time limit given by the appellant Corporation was six months and the same came into effect from the date of the agreement viz., 25.01.2008 and the period ends only on 24.07.2008 whereas the vehicles have been delivered between 12.03.2008 and 19.08.2008. There was 26 days of delay. The delay is also not due to the fault of the respondent but owing to the non-availability of the chassis, at the Ashok Leyland Company who is the suppliers of chassis to the respondent company. However, the Corporation disbursed only a sum of Rs.7,06,83,317/- out of full claim of Rs.7,58,86,657.50/- retaining a sum of Rs.52,03,340.50/- which represents 10% of the total value of the contract towards the said delay. The said amount was deducted based on the penalty clause that the appellant Corporation shall deduct from the contract price a sum equivalent to 0.5% of the delayed goods or unperformed services for each day of delay upto maximum delay 10% of the delayed supply or services. The said penalty clause has been incorporated in the tender document. Challenging the said deduction only the respondent has come before this Court.

3.According to the respondent though the tender document speaks about penalty of 0.5% to 10%, the contract entered between the appellant Corporation and the respondent on 25.01.2008 speaks about a penalty of 0.1% for each day of delay subject to maximum of 5% of total value of contract. Therefore, they challenged the penalty clause as well as

decree for a sum of Rs.52,03,340.50/- which has been deducted as 10% penalty for the delay in supplying the vehicles as per tender document.

4.The appellant Corporation contested the suit stating that it is only the tender document which is binding on the parties. Moreover, the same penalty clause has been reiterated in the work contract and therefore, agreement dated 25.01.2008 cannot override the tender document as well as work order.

5.On the side of the plaintiff PW1 was examined and Ex.P1 to Ex.P.19 were marked and on the side of the defendants DW1 was examined and only one document Ex.D1/Original authorisation letter was marked.

In C.S.No.393 of 2010, the learned single Judge 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?"

6.As far as issue No.1 is concerned, the learned single Judge found that the penalty clause in the tender document as well as agreement dated 25.01.2008 is valid and legally binding on the plaintiff as knowing the consequences only, the respondent entered into the agreement. The respondent was declared as successful bidder by the appellant Corporation. When that is the position, the respondent's contention that there is an employer-employee relationship between the appellant Corporation and the respondent was negatived, holding that it is only supplier and purchaser and nothing more. Having gone through the tender conditions only, the respondent participated in the tender. Having agreed to the condition in the tender and declared as successful bidder, now it is not for the respondent to turn around and to challenge the very same tender clause in a tender document through which he got the contract and therefore, challenge to the penalty clause was rightly negatived by the learned Single Judge and there is no occasion for this Court to have a different view. Therefore, the learned single Judge has correctly declared that the penalty clause is binding on the respondent also.

7.As far as issue Nos.2 and 3 are concerned, the learned single Judge held that the penalty clause in the agreement alone is binding on the parties. Though the tender document speaks about deduction of 0.5% of the value per day subject to maximum of 10%, subsequently, when the agreement was entered into between the appellant Corporation and the respondent on 25.01.2008, it was modified, which provides penalty of 0.1% for each day's delay subject to maximum of 5%. On negotiation, the agreement dated 25.01.2008 was entered subsequent to the declaration of the respondent as successful bidder. Moreover, the agreement was prepared by the appellant Corporation who is in a better position to bargain, left with no other go only the respondent entered into agreement. After the tender, subsequent agreement was entered into between the parties and that alone would have priority over tender document. Therefore the learned single Judge held that the tender document is superseded by the agreement dated 25.01.2008 viz., Ex.P.2. Therefore, the learned single Judge rightly held that the appellant Corporation is entitled to deduct only 0.1% of the value of the contract for every day's delay, subject to maximum 5% by holding that Rs.52,03,340.50/-, as decree amount. The said amount represents the balance 50% of the amount decreed along with interest. Therefore, the finding given by the learned single Judge regarding issue Nos.2 and 3 are valid and based on the reasons and appreciation of evidence on record and the same cannot be interfered with.

8.Regarding issue No.4, the learned single Judge held that the very same finding as per issue No.1 viz., whether the contract for the supply of the compactor equipment issued by the 3rd defendant is legal as relationship between the Corporation and Plaintiff is that of an employer and an employee. It was also held in issue No.1 that there is no relationship of employer-employee and it is only supplier and purchaser and nothing more than that. The tender itself is for supply of compactor vehicles. The role of the appellant Corporation is that of a purchaser and the role of the respondent is that of a supplier and that is the crux of the tender document as well as agreement. When such is the position, the respondent is not entitled to raise that point and it has been rightly held against the respondent.

9.As far as issue No.5 is concerned, the learned single Judge in a nutshell held that the appellant Corporation is 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. The suit was 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 the date of realisation.

10. In view of the above, there is no occasion for this Court to interfere with the decree and judgment passed by the learned single Judge on the grounds raised by the appellant.

11. Accordingly, the appeal fails and the same is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

12. Though this Court held against the appellant, it is curious to note that when the tender document speaks about maximum deduction of 10% of the contract value, the subsequent agreement was entered into, with the officials limiting the liability only to 5%. Unless there was some understanding between the Corporation officials and the respondent, the liability would not have been limited. It is known to the officials that the respondent alone is the successful bidder and that is the reason why limited liability has been fixed, thereby causing loss to the appellant/Corporation. Therefore, the Commissioner of Corporation is directed to investigate the matter and take appropriate action against the officers responsible for fixing the limited liability in agreement dated 25.01.2008, contrary to the tender document, within a period of four months from the date of receipt of a copy of this order and action taken report should be filed before this Court on 03.12.2019.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

sai

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Corporation of Chennai,
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Chennai 600 003.

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Copy To

1.The Joint Registrar (OS),
High Court, Madras.

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

+1cc to Mr.Karthikaa Ashok, Advocate SR.No.64083

+1cc to Mr.D.Ashok Kumar, Advocate SR.No.64049

O.S.A.No.177 of 2019

SSV(CO)
GMY(24/01/2020)



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