

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Judgment Reserved 26.04.2019	Date of Judgment Pronounced 30.07.2019
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THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.1037 of 2019
and
C.M.P.No.7756 of 2019

K.S.Mani Electricals
represented by its Proprietor
K.Subramaniyan
S/o P.Kuppusamy
H.O.50, 3rd Cross Street
Velmurugan Nagar
Kuyavarpalayam
Pondicherry - 605 013.

... Appellant/Petitioner

Vs.

1. The Project Director
Tamil Nadu Road Sector Project II
No.171, First Floor
TNMB Building,
South Kesavaperumalpuram
Greenways Road
Raja Annamalaipuram
Chennai - 600 028.

2. VDB Projects (P) Limited
rep. by its Project Manager
No.842/A, 3rd Floor, Binnamangala
100 feet Road, Indira Nagar
Bangalore - 560 038.

... Respondents/Respondents

Writ Appeal is filed under Clause 15 of the Letters Patent,
to set aside the order dated 12.02.2019 made in W.P.No.33916 of
2018 passed by this Court.

Prayer in WP.33916 of 2018:

Writ Petition filed under Article 226 of the constitution of India praying to issue a Writ of Mandamus directing the 1st respondent to consider the petitioners representation dated 26.11.2018 and to pay the entire bill amount to the petitioner as per the details furnished along with the Annexure contained in the petitioner's written representation in dated 26.11.2018

For Appellant : Mr.R.Gandhi
Senior Counsel
For Mr.P.Arivudai Nambi
For R1 : Mr.R.P.Prathap Singh
Government Advocate

JUDGMENT

(Judgment of the Court was delivered by V.BHAVANI SUBBAROYAN.J)

This Writ Appeal has been filed by the appellant herein challenging the correctness of the order passed in W.P.No.33916 of 2018 dated 12.02.2019, dismissing the Writ Petition.

2. The brief facts of the appellant's case as stated before the Writ Court is that the second respondent had entered into a contract with the first respondent to execute certain Government contract work. The said contract provides for engagement of utility contractor for shifting any utility (including electric line, water pipes, telephone etc) to an appropriate location or alignment. The appellant claimed before the Writ Court that having completed all the work in full and the first respondent officials having issued completion certificate long back, the appellant is entitled for the payment as per the bill raises by the appellant before the first respondent.

3. The appellant would further claim that the second respondent, the Principal Contractor, has illegally withheld certain amount which is in due to the appellant from the first respondent and also illegally appropriated from the appellant Escrow amount. These facts were brought to the knowledge of the first respondent. However, the first respondent despite being a Government authority is refusing to pay the bills of the appellant herein.

4. Before the Writ Court, the appellant has prayed for issuance of a Writ of Mandamus, directing the first respondent to consider the appellant's representation dated 26.11.2018 and to pay the entire bill amount to the appellant as per the details in the representation dated 26.11.2018. The first

respondent argued before the Writ Court that the appellant is not a contractor under the first respondent and there is no privity of contract between the appellant and the first respondent, and as such, the appellant cannot make any claim for payment from the first respondent, and if at all there is any payment due to the appellant, the same has to be made only against the second respondent initiating appropriate civil proceedings.

5. On hearing the submissions made by the parties before the Writ Court, the learned Single Judge held that there is no legally enforceable claim available to the appellant against the first respondent as there is no privity of contract between the appellant and the first respondent, and the claim is between the private parties, namely, the appellant and the second respondent, which has to be agitated by the appellant before the competent civil court by initiating appropriate civil proceedings, and declined to grant the relief as prayed for in the Writ Petition. As against this order, the present Writ Appeal has been filed.

6. The learned Senior Counsel Mr.R.Gandhi appearing for the appellant would submit that as per Article 9.2 of the agreement dated 06.07.2015 entered between the first and second respondent, which provides for engagement of utility contractor though there is no direct contract or agreement between the appellant and the first respondent. The original contract under Article 9.2 provides for engagement of utility agency, and the first respondent having acknowledged the work of the appellant, is entitled to receive the payment for the bills raised corresponding to the work done. The first respondent having issued the clearance certificate, acknowledging the completion of the work by the appellant is bound to make payment to the appellant irrespective of whether there is any claim made by the second respondent.

7. The learned Senior Counsel would further submit that under the contract between the first and second respondent, the disbursement to the utility agency, the actual cost of utility agency bill, less supervision charges of agency less under 10% towards the contractors overhead shall be payable by the first respondent to the second respondent which would mean that such payment is in addition to the contract price and therefore there need not be any privity of contract between the appellant and the first respondent.

8. The learned Senior Counsel would also submit that when there had been a direct relationship between the appellant and the first respondent as each and every work of completing the contract, the first respondent has obtained required permission from all the necessary authorities for completion of work by the appellant and as such, when there being a direct relationship between the appellant and the first respondent, the appellant is

entitled to claim the bill amount directly from the first respondent.

9. The learned Senior Counsel would further submit that the first respondent being a Government Organisation, filing a civil suit as against the first respondent to disburse the payment to the appellant would be a futile exercise and cumbersome process. The appellant having invested huge amount of money and labour in completing the utility contract, had also obtained loan from several banks for making payment to the labourers and for procuring machineries for the purpose of completing the contract. At this juncture, despite the completion of contract as early as 2018, the first respondent not settling the legal dues is illegal and the order passed by the learned Single Judge has to be set aside.

10. The learned Government Advocate Mr.R.P.Prathap Singh appearing for the first respondent, to counter the arguments put forth by the learned Senior Counsel, has contended that there is no privity of contract between the appellant and the first respondent, and as the appellant worked under the second respondent, he can make claim only against the second respondent.

11. The learned Government Advocate would also contend that there is no provision to make direct payment to the appellant who had been an utility contractor for whom the second respondent is solely responsible for making payment to the appellant. Further, he would contend that since there is an internal difference of opinion between the appellant and the second respondent, the first respondent being a statutory body who had no role to play in the private issue between the second respondent and the appellant, and he has to claim only with the second respondent. Hence, he would vehemently argue that no payment can be made directly to the appellant.

12. In support of his claim, the learned Government Advocate relied upon the Judgment reported in (2010) 15 SCC 546 (2) in the case of [Punjab Financial Corporation and Another Vs. Garg Steel and Another] and the Judgment reported in (2015) 10 SCC 642 in the case of [Essar Oil Limited Vs. Hindustan Shipyard Limited], to substantiate that the Writ is not maintainable when the dispute is purely civil in nature.

13. Heard the learned Senior Counsel appearing for the appellant and the learned Government Advocate appearing for the first respondent, and perused the materials available on record.

14. It is the case of the appellant being an utility contractor engaged by the second respondent in accordance with the contract entered between the first and second respondent, and after completing the contract work as specified under the contract, the appellant is made to stand with a begging bowl before the respondents herein.

15. It is not in dispute that the appellant was engaged by the second respondent as utility contractor as per the contract executed between the first and second respondent.

16. Clause 9.2 of the agreement dated 06.07.2015 entered between the first and second respondent reads as follows:

"Shifting of Obstructing Utilities: The Contractor shall, in accordance with Applicable Laws and with assistance of the Authority, shift any utility (including electric lines, water pipes, telephone cables etc.) to an appropriate location or alignment, if such utility or obstruction adversely affects the execution of Works or Maintenance of the Project Highway in accordance with this Agreement. The Contractor shall engage registered contractors of concerned utility Agency for such shifting. For shifting of electrical utilities, contractors registered with TNEB and have C or A grade Licence from Chief Electrical Inspector to Government shall be employed. For TWAD works, registered contractors of TWAD with Grade I qualification shall be employed. The actual cost of such shifting, based on executed BOQ basis on rates estimated and corrected by the utility agency, less supervision charges of Agency plus 10% towards Contractor's overhead shall be paid by the Authority to the Contractor separately in addition to the Contract Price. However, the Authority will assist in obtaining required permissions for such shifting from the concerned utility Agency including submission of application on TNRS name. The works shall be carried out in close coordination with utility agency and all precaution/conditions stipulated by the agency shall be diligently followed."

17. It is clear from the above position that the contract provides for engagement of utility contractor for completion of the entire contract work between the first and second respondent. In other words, the specified work as per the contract under Clause 9.2 cannot be or should not be done or performed by the second respondent who is the contractor for the entire work. However, Clause 9.2 strictly provides that the contractor, the second respondent herein, shall engage the utility contractor for the purpose of completing the entire work, and as such, work entrusted to the utility contractor shall be carried out in close Coordination with the first respondent as per the conditions stipulated by the first respondent.

18. It is also clear from the work completion certificate that the first respondent has categorically certified each and every work completed by the appellant herein. No where the appellant has been questioned for his irregular work or incomplete work. All the work that have been completed by the appellant has been acknowledged and endorsed by the first respondent by issuing work completion certificate.

19. It is also seen from the series of bills raised by the appellant that it was received by the first respondent as early as 2017. However, the first respondent after receiving the bills and acknowledging the work completed by the appellant has not moved despite issuing work completion certificate, which made the appellant to make the representation to the respondents claiming the amount due to the appellant. In ordinary sense if the appellant is engaged independently by the second respondent as a Sub contractor which is not supported by the contract entered between the first and second respondent, the appellant would not stand a case in the present Writ Appeal. However, when the contract provides for engagement of appellant as an utility contractor, independent of contract work to be performed by the second respondent. In other words, when the original contract provides for engagement of an independent body, like the appellant as an utility contractor whose work is also specified under the contract independent of the original work to be done by the parent contractor, such third party being engaged under the contract, have direct relationship between the parent contractor and the authority with whom there is a contract in existence between them.

20. In exceptional and in rarest of rare cases, where the appellant like contractors not as a Sub contractor but as the utility agency, without whom the entire contract is impossible of being performed by the original contractor, the claims made by such utility agency cannot be shelved away merely because there is no direct contract between the agency and the authority. Hence, we are of the view, as the present appellant who has performed his work under the contract and who forms part of the contract and whose payment is also made separately in addition to the contract price and whose claim has been denied by the first respondent, cannot be brushed away merely because there is a dispute between the first and second respondent. As such, the claim of the appellant necessarily have to be considered by the first respondent.

21. Under these circumstances, while setting aside the order of the learned Single Bench, we direct the first respondent to consider the representation dated 26.11.2018 and disburse the dues payable to the appellant on scrutinising the bills raised by the appellant at the earliest, in any event not beyond the period of eight weeks from the date of receipt of a copy of this Judgment.

22. Accordingly, the Writ Appeal is allowed in favour of the appellant. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

raja

To

The Project Director
Tamil Nadu Road Sector Project II
No.171, First Floor
NMB Building,
South Kesavaperumalpuram,
Greenways Road,
Raja Annamalaipuram,
Chennai - 600 028.

+1cc to Mr.P.Arivudai Nambi, Advocate, S.R.No.64846
+1cc to the Government Pleader, S.R.No.65711

W.A.No.1037 of 2019
and
C.M.P.No.7756 of 20130.07.2019

RJI (CO)

RRS (20/08/2019)



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