

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION**

**SUMMONS FOR JUDGMENT NO. 52 OF 2019  
IN  
COMM SUMMARY SUIT NO. 1237 OF 2019**

M/s. Mahendra Realtors & Infra. Pvt. Ltd. ...Applicants  
**In the matter between**  
M/s. Mahendra Realtors & Infra. Pvt. Ltd. ...Plaintiffs  
**Versus**  
The National Co-operative Construction and  
Development Federation of India ...Defendant

**WITH  
SUMMONS FOR JUDGMENT NO. 51 OF 2019  
IN  
COMM SUMMARY SUIT NO. 1230 OF 2019**

M/s. M. S. Shah & Asso. ...Applicant  
**In the matter between**  
M/s. M. S. Shah & Asso. ...Plaintiff  
**Versus**  
The National Co-operative Construction and  
Development Federation of India ...Defendant

**WITH  
SUMMONS FOR JUDGMENT NO. 53 OF 2019  
IN  
COMM SUMMARY SUIT NO. 1219 OF 2019**

M/s. Mahendra Realtors & Infra. Pvt. Ltd. ...Applicant  
**In the matter between**  
M/s. Mahendra Realtors & Infra. Pvt. Ltd. ...Plaintiff  
**Versus**  
The National Co-operative Construction and  
Development Federation of India ...Defendant

Mr. Ramesh Ramamurthy, a/w Saikumar Ramamurthy and  
Ms. Jayasree Pillai, for the Plaintiffs.  
Mr. Nilesh R. Pandey, i/b Equajuris, for the Defendants.  
Mr. Shailesh Savakhande, Manager, NFCD, present.

**CORAM: N. J. JAMADAR, J.**

**DATED : 25<sup>th</sup> FEBRUARY, 2020**

**Oral Order:**

1. These commercial division summary suits have been instituted for recovery of the amount of RA Bills and security deposit under the terms of contract. These suits have their genesis in a contract executed between the parties on 4<sup>th</sup> March, 2017. Hence, all these summonses for judgments are being disposed of by a common order. The facts in Suit No.1237 of 2019 are noted in detail as the said suit was heard as a lead case, extensively. The facts of the Suit No.1230 of 2019 and Suit No.1219 of 2019, are thereafter noted in brief.

2. The material averments in the plaint can be stated in brief as under:

(a) The plaintiff is a private limited company. It deals in the business of contract. The defendant is a company registered under Ministry of Agricultural, Govt. of India, Department of Agriculture & Cooperation, New Delhi. Defendant deals in the business of construction and development work on depository work basis. The defendant had invited a tender on 7<sup>th</sup> January, 2017 for the work of structural repair and allied civil work for SDF Building No.1 to 6 and Gems and Jewellery building nos.1

to 3 in the premises of SEEPZ SEZ (Special Economic Zone) Authority, Mumbai. The estimated cost of the said work was Rs.35,68,32,015/-. The plaintiff had submitted the bid. The defendant issued a Letter of Intent on 17<sup>th</sup> February, 2017. In terms of the Letter of Intent, the plaintiff accepted the offer by submitting a letter of acceptance on 18<sup>th</sup> February, 2017. A work order came to be issued on 4<sup>th</sup> March, 2017. The scope of work was to carry out structural repairs and allied civil works of SDF building nos.5 and 6 at SEEPZ SEZ premises for Rs.13,70,23,065.67. The work was to be carried out within the stipulated period of eight months. It was further stipulated that the work was to be carried out under the supervision and guidance of M/s. Conspro Management Services, the Project Manager. A formal contract for the said work came to be executed on 4<sup>th</sup> March, 2017.

(b) The plaintiff commenced and carried out the work in terms of the contract and completed the same by 31<sup>st</sup> October, 2017. The Project Manager certified the completion of work in accordance with the terms of the contract. The plaintiff raised RA Bills. Out of them, the defendant paid the amount covered by 5<sup>th</sup> RA Bill. The 6<sup>th</sup> RA Bill was raised vide letter dated 8<sup>th</sup> December, 2017. After adjusting the payment received, including

an advance, a sum of Rs.3,22,76,410/- was due and payable under the 6<sup>th</sup> RA Bill.

(c) The defendant did not disburse the payment under the 6<sup>th</sup> RA Bill within the period of 10 days, as per the terms of the contract. The plaintiff thus called upon the defendant to release the payment by letter dated 12<sup>th</sup> January, 2018. As the amount remained outstanding the plaintiff addressed as many as six reminders. Further correspondence ensued. The plaintiff was constrained to even address a communication to the concerned officers of SEEPZ SEZ. However, the defendant failed to pay the amount under the RA Bills for the work which was executed.

(d) After a protracted correspondence, the defendant on 24<sup>th</sup> August, 2018 informed the plaintiff that the balance payment shall be made after receipt of payment from the SEEPZ SEZ Authority. It was further informed that the payments would be made after obtaining approval from the Ministry. In another communication dated 14<sup>th</sup> September, 2018 it was informed that the payment was withheld by SEEPZ SEZ Authority and outstanding balance would be cleared no sooner the payment is released by the SEEPZ SEZ Authority.

(e) The plaintiff thus addressed a notice to the defendant and the Development Commissioner SEEPZ SEZ and

called upon them to make the payment of outstanding amount along with interest at the rate of 18% p.a. As the demand was not met, the plaintiff was constrained to institute the suit for due amount under the RA Bills in accordance with the terms of the contract.

3. Commercial Summary Suit No.1230 of 2019 is instituted for recovery of a sum of Rs.3,29,68,393/- along with interest at the rate of 18% p.a. And Commercial Summary Suit No.1219 of 2019 is instituted for recovery of a sum of Rs.1,05,45,654/- along with interest at the rate of 18% p.a.

4. The defendant entered appearance upon being served with the writ of summons. Thereupon the plaintiff has taken out the summonses for judgment. An affidavit-in-reply is filed by the defendant. The defendant has sought an unconditional leave to defend the suit.

5. The substance of the defence sought to be put forth by the defendant is that the suit is untenable in the absence of SEEPZ SEZ as a party defendant as the work was executed for SEEPZ SEZ. It is the claim of the defendant that it had a limited role in the entire contract. It had invited the tender for and on behalf of the SEEPZ SEZ. Thus, the suit suffers from the vice of non-joinder of a necessary party. On this count itself, the defendant is entitled to an unconditional leave to defend the suit.

6. The defendant further contends that under the terms of the arrangement between the defendant and SEEPZ SEZ, the defendant was entitled to a commission at the rate of 3% p.a. of the project costs. The defendant thus cannot be held liable to pay the amount covered by the RA Bills.

7. On merits of the matter the defendant contends that there are serious discrepancies in the work executed by the plaintiff. The claim made by the plaintiff is far in excess of the amount certified by the Project Management Consultation appointed by SEEPZ SEZ. There is a genuine dispute about the execution of the work by the plaintiff in accordance with the terms of the contract. Thus, the question of liability of the defendant to pay the amount of RA Bills raised by the plaintiff warrants adjudication after evaluation of evidence. Consequently, unconditional leave to defend the suit be granted.

8. I have heard Mr. Ramamurthy, the learned Counsel for the plaintiff and Mr. Pandey, the learned Counsel for the defendant, at some length.

9. To begin with it would be apposite to note the facts which are not in dispute. The facts that defendant no.1 had invited tenders by public notice dated 7<sup>th</sup> January, 2017 and the bid of the plaintiff came to be accepted under the Letter of Intent dated 17<sup>th</sup> February, 2017 and the plaintiff accepted the offer by

submitting the letter of acceptance dated 18<sup>th</sup> February, 2017 are not put in contest. It is indisputable that a formal agreement came to be executed on 4<sup>th</sup> March, 2017 incorporating the terms and condition of the contract. The fact that the work order came to be issued on 4<sup>th</sup> March, 2017 specifying the scope of work, the period within which it was to be executed and the price thereof is also incontestible. It is incontrovertible that the plaintiff was paid the amount covered by 5<sup>th</sup> RA Bill.

10. The dispute seems to have arisen after the plaintiff raised 6<sup>th</sup> RA Bill on 8<sup>th</sup> December, 2017 and made a demand of Rs.3,22,76,410/- after adjusting the amount received upto 5<sup>th</sup> RA Bill and the advance. It is the claim of the plaintiff that M/s. Conspro Management Services, the Project Management Consultant had certified that the work covered by 6<sup>th</sup> RA Bill was satisfactorily completed and all test reports were satisfactory and in order. The relevant part of the certificate of the Project Management Consultant reads as under:

“This is certified that the work of R.A. Bill 06<sup>th</sup> is satisfactorily completed and having all test report are satisfactory and in order. Also quality of work and specification of work is found satisfactory. Hence the payment of 06<sup>th</sup> R.A.Bill recommended of Rs.3,27,83,820.47/-”

11. In the backdrop of the aforesaid facts, the defence sought to be raised by the defendant is required to be appreciated. The learned Counsel for the defendant would urge that the fact that

the work was executed for SEEPZ SEZ is rather indubitable. Inviting the attention of the Court to the notice inviting tender dated 7<sup>th</sup> January, 2017, wherein it was mentioned that the tenders were invited on behalf of the SEEPZ SEZ authority, an endeavour was made to draw home the point that the defendant had merely acted as an agent or project manager. To lend support to this submission, the learned Counsel for the defendant placed reliance on the certificate of payment issued by a M/s. Conspro Project Management Consultant to the effect that the client was Development Commissioner SEEPZ SEZ and in the pre-suit notice the plaintiff had specifically mentioned that the work had been executed on behalf of SEEP SEZ and NCCDF, the defendant, was only a tendering body and executing authority and not the original organisation for which the work was done. In this view of the matter, according to the learned Counsel for the defendant, the suit without impleading the SEEPZ SEZ is not competent.

**12.** The aforesaid submission is required to be appreciated in the backdrop of the fact that in the contract executed between the plaintiff and the defendant on 4<sup>th</sup> March, 2017, there is no mention that the defendant was merely an executing agency. Conversely, the contract gives an unmistakable inference that the defendant had executed the contract in its own right and

authority. What was the arrangement between the defendant and SEEPZ SEZ authority, hardly bears upon the privity of contract between the plaintiff and defendant. It is imperative to note that the stand of the defendant now sought to be urged that the payment for executed work was subject to release of the payment from SEEPZ SEZ Authority and/or Ministry does not find mention either in the tender notice, work order or the contract executed on 4<sup>th</sup> March, 2017. It would be contextually relevant to note that the SEEPZ SEZ authority vide its communication dated 4<sup>th</sup> June, 2018 has categorically informed the plaintiff that the plaintiff shall lodge its claim with the defendant as 75% of the contract amount has already been given to the defendant. The material on record, thus, indicates that it is too late in the day to urge that the defendant had merely acted as an executing agency or Project Manager and the defendant is not obliged to make the payment for the work which was executed in terms of the contract between the parties.

**13.** The defence of discrepancies and deficiencies in the work executed by the plaintiff stands on a much weaker foundation. After raising 6<sup>th</sup> RA Bill the plaintiff addressed not less than a dozen letters/reminders calling upon the defendant to make the payment of outstanding amount. The defence that the work was

not executed by the plaintiff in accordance with the terms of the contract and to the satisfaction of the defendant did not see the light of the day till the affidavit-in-reply came to be filed. Had the work been not executed in accordance with the terms of the contract and to the satisfaction of the defendant, the defendant would not have maintained a stoic silence till filing the affidavit-in-reply.

14. On the contrary, the reply which is given by the Estate Manger/DDC SEEPZ SEZ Authority on 14<sup>th</sup> August, 2018 adverts to a completely different aspect of the matter. It reveals that in the meeting of the Authority held on 11<sup>th</sup> May, 2018 a view was expressed that the appointment of the defendant, in the 30<sup>th</sup> Authority Meeting, was under examination by Vigilance Section of Ministry of Commerce and Industry as an issue was raised whether GFR Rules were followed in appointing the defendant. It was further mentioned therein that the further payment to NFCD will be subject to approval of Committee and concurrence of the Ministry of Commerce and Industry, New Delhi.

15. From the aforesaid communication, it becomes evident that the amount payable to the plaintiff was withheld as an issue arose of the very appointment of the defendant as the Project Manager Consultant, in terms of the earlier resolution of

the Authority. To add to this, the communications dated 24<sup>th</sup> August, 2018 and 14<sup>th</sup> September, 2018 are conspicuously silent about the alleged deficiencies in the work executed by the plaintiff. Moreover, in the letter dated 23<sup>rd</sup> October, 2018, the M/s. Conspro Management Services, the Project Management Consultant again reiterated that the entire work was completed as per the scope of tender and the requirement of client. It refers to the fact that the third party audit for the quality was also carried out through IIT Mumbai and the report of satisfactory completion of the project is also submitted to the defendant.

16. The aforesaid documents, if considered in juxtaposition with the fact that no dispute was ever raised about the work having been not executed in accordance with the terms of the contract, lead to an inference that the defence now sought to be raised is neither a positive nor a fair and reasonable defence. It is true that, the letter of appointment of the defendant dated 1<sup>st</sup> October, 2016, caps the payment to be made to the defendant by a SEEPZ SEZ Authority for rendering the services as a Project Management Consultant at 3%. The circumstances, in which the defendant came to be appointed as Project Management Consultant and the reasons for withholding the further payment to the defendant by the said Authority may have a bearing on

the capacity of the defendant to make the payment. However, those circumstances do not absolve the defendant from discharging its liability under the terms of the contract after satisfactory execution of the work. The plaintiff cannot be left in the lurch for the alleged irregularity and impropriety in the appointment of the defendant by SEEPZ SEZ Authority. The assertion of the plaintiff in the pre-suit notice that the work was executed for SEEPZ SEZ does not detract materially from its claim. A communication addressed to SEEPZ SEZ, in desperation and after making repeated demands to the defendant cannot be pressed into service to wriggle out of an obligation under a binding contract. It does not qualify as an unequivocal admission. Even otherwise admissions are not conclusive.

17. The upshot of aforesaid consideration is that the defendant is not entitled to an unconditional leave. What should be the quantum of deposit? It is pertinent to note that there is no clause in the contract for payment of interest in the event of delay in release of the amount of RA Bills. The rate at which the defendant shall pay interest is thus a matter for adjudication. Hence the defendant is entitled to conditional leave to defend the suits subject to deposit of the principal amount in each of the suits.

18. Hence the following order:

**SJ 52 of 2019 in Comm. Summ. Suit No.1237 of 2019**

- (I) (i) Leave is granted to the defendant to defend the suit subject to the defendant depositing in this Court a sum of Rs.3,42,28,633/- (Rs.Three crore Forty-two lakhs Twenty-eight thousands Six hundred thirty-three only) within a period of eight weeks from today;
- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file its written statement within a period of four weeks from the date of deposit;
- (iii) If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

**SJ 51 of 2019 in Comm. Summ. Suit No.1230 of 2019**

- (II) (i) Leave is granted to the defendant to defend the suit subject to the defendant depositing in this Court a sum of Rs.2,54,04,776/- (Rs.Two Crore Fifty-four

lakhs Four thousand Seven hundred seventy-six only) within a period of eight weeks from today.

- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file its written statement within a period of four weeks from the date of deposit;
- (iii) If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

**SJ 53 of 2019 in Comm. Summ. Suit No.1219 of 2019**

- (III) (i) Leave is granted to the defendant to defend the suit subject to the defendant depositing in this Court a sum of Rs.81,30,553/- (Rs. Eighty-one lakhs Thirty thousands Five hundred fifty-three only) within a period of eight weeks from today.
- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file its

written statement within a period of four weeks from the date of deposit;

- (iii) If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

19. The summonses for judgments stand accordingly disposed of.

**[N. J. JAMADAR, J.]**