**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO. 497 OF 2017**

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| APPELLANT :-<br>(Org.Plaintiff) | M/s. Ganesh Engineering Company, Through its Proprietor, Shri V. Manoharan S/o Veeran Swami, R/o. Ganesh Bhawan, Jaihind Nagar, Mankapur, Nagpur.<br>(On R.A.) |

...VERSUS...

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| RESPONDENT :-<br>(Org.Defendant) | Maharashtra State Electricity Transmission Co. Ltd., through its Executive Engineer, HVDCTL (O & M) Division, Chandrapur.<br>(On R.A.) |

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Mr.S.P. Kshirsagar, counsel for the appellant.
Mr. S.D.Zoting, counsel for the respondent.

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**CORAM : MANISH PITALE, J.**

**DATE OF RESERVING THE JUDGMENT: 06.11.2020.**

**DATE OF PRONOUNCING THE JUDGMENT: 15.12.2020.**

**<u>J U D G M E N T</u>**

The present appeal has been filed by the original plaintiff challenging judgment and order dated 27.04.2017, passed by the District Court, Nagpur, whereby an appeal filed by the respondent (original defendant) was allowed. According to the appellant, the impugned judgment and order deserves to be set aside and that of the Trial Court needs to be restored.

2. The facts leading up to filing of the present appeal are that the appellant filed a suit for declaration, recovery and damages against the respondent. According to the appellant, it had carried out works for the respondent, an electricity transmission company, under three tenders bearing numbers T-13, T-16 and T-17. It was stated that the respondent was expected to handover sites for carrying out the works free from impediments, but this was not done properly, as a result which the appellant had to suffer losses. It was further claimed that the progress of the work was hampered due to protests by cultivators resulting in idling of staff and labour of the appellant for which the

respondent was required to pay idling charges. The appellant also claimed that it was entitled to certain security deposit amounts. On this basis, the appellant prayed for a decree of Rs.80,95,925/- along with interest at the rate of 18% per annum.

3. The respondent not only filed its written statement opposing the claims made by the appellant, but it also filed a counterclaim in the aforesaid suit. It was claimed that in fact, the appellant was liable to pay certain amount to the respondent. The parties led evidence in support of their respective claims. The Trial Court considered the pleadings and evidence on record and while partly decreeing the suit, rejected the counter-claim. The Trial Court found that the appellant had proved its claims against the respondent and therefore, a direction was granted against the respondent to pay the amount claimed by the appellant along with interest at the rate of 6% per annum from the date of filing of the suit.

4. Aggrieved by the same, the respondent filed appeal before the District Court. By the impugned judgment and order, District Court allowed the appeal partly by setting aside the decree

passed by the Trial Court, but at the same time it was held that the respondent had failed to prove its counterclaim.

5. Aggrieved by the said judgment and order, the appellant filed the instant appeal wherein, on 03.08.2018, this Court framed a substantial question of law for consideration. On 23.07.2019, this appeal was admitted on the said substantial question of law. Thereafter, when this appeal was taken up for hearing on 19.10.2020, this Court heard the learned counsel for the rival parties and framed another substantial question of law for consideration. This appeal was then heard on 06.11.2020. The record was also perused with the assistance of the learned counsel for the rival parties.

6. The substantial questions of law read as follows:

> (i) The Trial Court on the basis of documentary evidence and especially the documents at Exhibits 69, 70, 72 to 74 having decreed the suit, whether the Appellate Court was justified in reversing that decree without coming to the conclusion that the said documents did not substantiate the case of the plaintiff?

(ii) Whether the Appellate Court was justified in holding that the appellant ought to have joined Ganesh Construction Company also as a party to the suit and in absence thereof the claim raised in respect of said entity could not have been entertained?

7. Mr S.P. Kshirsagar, learned counsel for the appellant submitted that the Appellate Court committed a grave error in setting aside the judgment and decree of the Trial Court and that both the substantial questions of law deserve to be answered in favour of the appellant. It was submitted that the appellant had placed on record voluminous documentary evidence, as also oral evidence to prove its claims. It was submitted that the Trial Court had referred to specific documents while upholding the claims of the appellant and that the Appellate Court failed to appreciate the said documents while passing the impugned judgment and order. It was submitted that when the works were being executed by the appellant, certain losses were suffered on account of the failure of the respondent in clearing the sites of the works and further that there was delay in execution of the works because of protests by cultivators, leading to idling of labour and staff of the appellant. It

was submitted that, as per the conditions of the tenders, the appellant was entitled to payment towards idling charges. It was also submitted that all these aspects were correctly appreciated by the Trial Court while directing the respondent to pay the amount claimed by the appellant along with interest at the rate of 6% per annum. According to the learned counsel for the appellant, the Appellate Court failed to appreciate the oral and documentary evidence on record in the correct perspective leading to perverse findings, thereby indicating that the first substantial question of law deserved to be answered in favour of the appellant.

8. It was further submitted by the learned counsel for the appellant that the second substantial question of law also deserved to be answered in favour of the appellant for the reason that failure to join Ganesh Construction Company as a plaintiff before the Trial Court was not a fatal defect. It was further submitted that the proprietor of both the entities i.e. Ganesh Engineering Company and Ganesh Construction Company was one and the same person, which respondent was fully aware of. It was further submitted that the respondent had exchanged communications

with Ganesh Construction Company, knowing fully well that the proprietor was the same person. It was further submitted that, in the facts of the present case, non-joinder of Ganesh Construction Company as a plaintiff was at worst a curable irregularity and that in any case, since the decree could not be said to be wrong on merits resulting in any injustice, failure to join Ganesh Construction Company as a plaintiff would not enure to the benefit of the respondent. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **Kuldeep Kumar Dubey Vs. Ramesh Chandra Goyal** reported in **(2015) 3 SCC 525** and judgment of this Court in the case of **Subhash Vithalrao Gatlewar Vs. Dattatraya Keshavrao Shinde** reported in **2005(1) Mh.L.J. 43**. On this basis, it was submitted that the appeal deserved to be allowed and the decree passed the Trial Court was required to be restored.

9. On the other hand, Mr. S.D. Zoting, learned counsel for the respondent, submitted that the Appellate Court had correctly appreciated the oral and documentary evidence on record. It was submitted that the documents on which the Trial Court relied and

which are mentioned in the first substantial question of law framed by this Court, in no manner supported the claims of the appellant. It was submitted that such documents were alleged bills raised by the appellant, but, there was nothing to show that these bills were ever received by the respondent. They were denied by the respondent and therefore, such one sided documents could never be proof of the claims of the appellant. It was further submitted that the appellant failed to produce any evidence on record to prove its claim pertaining to idling charges as no details of the Labour or staff kept idle, were ever placed on record. The Appellate Court found that the witness of the appellant had admitted the contents of the measurement book and that therefore, the claims of the appellant were unsupported. It was further submitted that the Appellate Court found number of admissions given by the witness of the appellant indicating that all the amounts due had been paid to the appellant. On this basis, it submitted that the first substantial question of law was required to be answered in favour of the respondent.

10. It was further submitted on behalf of the respondent

that the second substantial question of law also needs to be answered in favour of the respondent because the law required the defendant to raise objection with regard to non-joinder of necessary party at the first instance, which respondent herein had actually done in written statement filed before the Trial Court. It was submitted that once such an objection was taken at the outset and the appellant failed to take corrective measures in that regard, the appellant could certainly not make any successful claim for and on behalf of Ganesh Construction Company, which admittedly was a separate entity from the appellant i.e. Ganesh Engineering Company, the original plaintiff. On this basis, it was submitted that the Appellate Court was justified in holding that no claim could be granted in respect of the party which was not a plaintiff. It was also submitted that on merits, the evidence and material on record demonstrated that the appellant had miserably failed to place on record material in support of its claims. On this basis, it was submitted that the appeal deserved to be dismissed.

11. Heard the learned counsel for the rival parties and perused the documents and material on record. The suit filed by

the appellant in the present case was for recovery of specific amounts on the basis that the respondent had failed to fully satisfy the payments due to the appellant for the works executed on behalf of the respondent. It was obviously for the appellant to place on record oral and documentary evidence to prove such claims. The respondent never denied the fact that the appellant was engaged for executing certain works. But, It was the specific stand of the respondent that final payments were made for the works that were got executed from the appellant. It was the case of the respondent that proper measurement books were maintained on which the representative of the appellant had duly signed upon verification and that therefore, no further claim could be raised by the appellant.

12. Therefore, the appellant as the plaintiff was expected to place on record documentary and oral evidence in support of its claims. But, a perusal of the material on record shows that while specific figures and amounts were claimed by the appellant in the plaint and details were said to have been stated in schedules-A and B appended to the plaint, no such schedules were actually

filed. This was specifically admitted in cross examination by the witness who deposed on behalf of the appellant. In the absence of such schedules being appended to the plaint, the appellant could not have led evidence in support of its claims regarding specific amounts due from the respondent. Even otherwise, a perusal of the evidence and material on record shows that documentary evidence is not available to support the claims of the appellant regarding additional expenses incurred due to failure on the part of respondent to make the work sites available without hindrance. There is absence of oral and documentary evidence to support the claim regarding idling charges. It is not brought on record as to the details of the labour and staff who were kept idling at the sites. No labour or other connected person was examined on behalf of the appellant to prove such claims and therefore, there appears to be deficiency in the pleadings as well as evidence adduced on behalf of the appellant before the Trial Court.

13. A perusal of the material on record also shows that crucial admissions were given by the witness who appeared on behalf of the appellant to the effect that the entire contents of

measurement books maintained by the respondent were proper and correct. In fact, the measurement books were duly verified and signed on behalf of the appellant. Such measurement books were the basis for calculation of amounts due to the appellant and accordingly, payments were made. The appellant appears to have failed to place on record sufficient material to indicate that further amounts were due from the respondent.

14. In the context of the first substantial question of law framed by this Court, it is necessary to peruse Exhibits-69, 70, 72, 73 and 74. It appears that the Trial Court relied upon such documents to render findings in favour of the appellant and therefore, it needs to be examined whether such documents were enough to prove the claims of the appellant. Exhibit-69 is a bill pertaining to erection of a tower, also referring to certain idling charges and losses suffered due to wastage. Exhibit-70 pertains to a bill concerning erection of tower which was shifted from one place to the other. Exhibit-72 is also similar to Exhibit-70, while Exhibit-73 is an advance receipt, in which the date is blank and other particulars are also blank. Exhibit-74 is a communication

sent by superintending engineer of the respondent to the appellant referring to a change in the scope of work on the basis of assurances given by the appellant. In this communication, the appellant was also requested to give weekly progress reports directly to the officer, further stating that other terms and conditions would remain the same.

15. It is relevant that there is no endorsement of the respondent showing receipt of bills at Exhibits-69, 70, 72 and 73. This is relevant because the respondent has completely denied liability to make any further payments or receipt of any specific bills from the appellant in respect of the claims made on behalf of the appellant in the plaint. In the face of such denials, it was necessary for the appellant to have proved that these bills were indeed submitted to the office of the respondent. It was necessary to place further evidence on record on behalf of the appellant to make good its case that such bills were raised by it and that the amount stated therein was payable by the respondent. In the absence of any evidence to support the claims of the appellant, the said documents certainly do not take the case of the appellant any

further. Insofar as Exhibit-74 is concerned, it is indeed a communication sent on behalf of the respondent to the appellant with regard to some change in the execution of the work, but the said communication informs the appellant that weekly progress reports need to be submitted to the respondent with regard to progress of the work being executed by the appellant. This document in itself cannot lead to a conclusion that specific amounts claimed by the appellant were justified. As noted above, the witness who deposed on behalf of the appellant admitted that all measurement books were shown to the representative of the appellant, which were duly verified and signed, thereby showing that payments were made to the appellant on the basis of the scope of the work executed by the appellant. Therefore, it appears that the Trial Court could not have relied upon the said documents to hold that specific amounts claimed by the appellant had been duly proved.

16. Taking into consideration the entire documentary material and the admissions given on behalf of the appellant, it becomes clear that the appellant failed to conclusively prove

specific amounts claimed from the respondent. The absence of details and proof regarding all the heads under which specific claims were raised on behalf of the appellant demonstrates that the Trial Court could not have granted the decree in favour of the appellant. Thus, the first substantial question of law needs to be answered in favour of the respondent, as this Court finds no perversity in the findings rendered by the Appellate Court and Exhibits-69, 70, 72, 73 and 74 could certainly not take the case of the appellant any further.

17. Insofar as the second substantial question of law is concerned, the learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of **Kuldeep Kumar Dubey Vs Ramesh Chandra Goyal** (*supra*) and judgment of this Court in the case of **Subhash Vithalrao Vs Dattatraya Shinde** (*supra*), to contend that even if Ganesh Construction Company was not a co-plaintiff in the suit filed by the appellant, it was merely an irregularity, which was curable and that it could not be said to be fatal to the claims of the appellant. The said judgments were concerned with a situation where there was mis-description

of parties and on facts, the Court found that those were cases of mere irregularities, causing no prejudice to the defendant and that therefore, the defendant could not take benefit of the same.

18. In the present case, the facts are such that in the plaint amounts were claimed not only for the works that were executed by the appellant pertaining to two specific tenders, but claims were also made in respect of a tender that was floated not by the appellant but by Ganesh Construction Company. The Trial Court found that it did not matter that the said Ganesh Construction Company was not a co-plaintiff. But, it is crucial that the who witness deposed on behalf of the appellant admitted in the cross examination at the outset that Ganesh Construction Company and the appellant i.e. Ganesh Engineering Company were two different companies. This admission is absolutely crucial in the facts of present case. It becomes clear that the two being separate legal entities, any claim of recovery against the respondent would have to be made specifically by the two separate entities. One of the tenders admittedly pertained to works executed by Ganesh Construction Company and therefore, the appellant Ganesh

Engineering Company could not have maintained such claim in the suit filed before the Trial Court. It becomes clear that in order to maintain the suit for recovery on behalf of Ganesh Construction Company, the said entity ought to have been a co-plaintiff and party in the suit filed before the Trial Court. There cannot be any doubt about the fact that in the facts and circumstances of the present case Ganesh Construction Company was a necessary party.

19. In this regard, it is relevant to refer to the position of law in respect of the stage at which an objection with regard to non-joinder of necessary party ought to be taken by the defendant. A perusal of the pleadings in the present case shows that the respondent in its written statement itself took a specific objection with regard to failure on the part of the appellant to join Ganesh Construction Company as a co-plaintiff. It was specifically stated that since tender No. T-13 pertained to Ganesh Construction Company, the claim sought to be raised on behalf of the appellant Ganesh Engineering Company in respect to the said tender was not maintainable. Despite such a specific objection taken in the written statement filed on behalf of the respondent, the appellant

failed to take any corrective measures and no steps were taken to add Ganesh Construction Company as a co-plaintiff. In this regard it would be relevant to refer to judgment of the Supreme Court in the case of **Church of Christ Charitable Trust Vs Ponniamman Educational Trust** reported in **(2012) 8 SCC 706**. It has been held that when a plaintiff persists in not impleading a necessary party in spite of objection, the consequences of non-joinder shall follow. This shows that in the present case the Appellate Court was justified in holding against the appellant in this regard.

20. The contentions sought to be raised on behalf of the appellant before this Court that the proprietor of the two entities was the same and therefore, failure to make Ganesh Construction Company a co-plaintiff was a mere irregularity, cannot be accepted for the reason that no evidence was led in that respect by the appellant before the Courts below. It was only orally argued before this Court that the proprietor of the two entities was the same. In the face of the specific objection taken in the written statement on behalf of the respondent, failure on the part of the appellant to take corrective measures must lead to its logical

consequences. Therefore, the Appellate Court was justified in holding against the appellant in this regard.

21. Reliance placed on judgments in the case of **Kuldeep Kumar Dubey Vs Ramesh Chandra Goyal** (*supra*) and **Subhash Vithalrao Vs Dattatraya Shinde** (*supra*) is also misplaced. In those cases the Court found on facts that there were curable irregularities and that irregularities ought not to lead to reversal of the decree. Reference was made to Section 99 of the Code of Civil Procedure, 1908 (CPC). But, in the present case, failure to add Ganesh Construction Company as co-plaintiff, despite specific objection taken in the written statement, was not a mere irregularity, but, it was a substantial defect which was not cured by the appellant. Proviso to Section 99 of the CPC is significant because it states that nothing in the said Section shall apply to non-joinder of necessary party. Therefore, reliance placed on the said judgments on behalf of the appellant can be of no consequence. Hence, the second substantial question of law is also answered against the appellant.

22. This Court has perused the material on record and it is

found that the Appellate Court correctly interfered with the decree granted by the Trial Court. As the substantial questions of law framed by this Court have been answered against the appellant, the present appeal is found to be without any merit. Accordingly, it is dismissed. There shall be no order as to costs.

**JUDGE**

Ghanshyam Khunte

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