



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgement :
09.01.2020

Date of Pronouncing
Judgment : 03.02.2020

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The Honourable Mr. Justice M.M. Sundresh
and
The Honourable Mr. Justice Krishnan Ramasamy

Original Side Appeal No.108 of 2019
and
C.M.P.No.9926 of 2019

The Government of Tamil Nadu,
Highways Department,
rep. by the Divisional Engineer (H)
Chennai Metropolitan Development Plan Division-1,
Near Guindy Road Over Bridge,
Guindy, Chennai - 600 032. ...Appellant/Plaintiff

Vs.

M/s. Jenefa Constructions,
Civil Engineering Contractor,
rep. by its Partner, M.Arunachalam.
No.39, Chinnathambi Street,
Chennai - 600 001. ... Respondent/Respondent

Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent, against the fair and decreetal order dated 07.06.2017, made in C.S.No.283 of 2010, on the file of the Original Side of this Court,.

For Appellant : Mr.M.Sricharan Rangarajan,
Special Government Pleader (CS)

For Respondent : Mr.P.Subba Reddy

J U D G E M E N T

Krishnan Ramasamy, J.

This Original Side Appeal has been filed against the order passed by the learned Single Judge of this Court, in C.S.No.283 of 2010, dated 07.06.2017.



2. The defendant in the above suit is the appellant herein. The respondent/plaintiff filed the Civil Suit for the following relief:-

i) Directing the defendant to pay the plaintiff a sum of Rs.1,43,84,102/-, together with further interest at 18% p.a. on the principal sum of Rs.1,13,93,348/- from the date of the suit till the date of realization.

ii) Directing the defendant to pay the cost of the suit.

2.1 The respondent/plaintiff laid the above suit by virtue of eight claims, and under claim No.E, the respondent/plaintiff requested for payment for the construction of three culverts and the right side of the road box cutting and GSB laid for the work done by the plaintiff at Rs.17,09,330/-. The plaintiff has completed the above work, and therefore, he laid the claim E) for a sum of Rs.17,09,330/-. The defendant's representative, i.e. the Assistant Divisional Engineer (H) CMDP, Sub Division, Chennai 32, by his letter No.1/2008/VEN/ADE-V, dated 23.06.2008, has admitted as follows:-

'' On inspection of site, it is found that DBM was completed over the existing width portion from K.M.0/0 -2/0 and GSB has been completed in right side box cutting portion from K.M. 0/0-2/0. Out of six culverts, three slab culverts at K.M. 0/2, 0/8, and 1/8 have been completed. ''

2.2 By referring to the above letter, respondent/plaintiff laid its claim stating that they have carried out the above work. But payment for box cutting and GSB laid down on the right side of the road from K.M.0/0 -2/0 and for the construction of three culverts, they have not been paid by the defendant. Hence, the respondent/plaintiff demanded a sum of Rs.17,09,330/- along with interest for the above work done by the plaintiff to the defendant.

2.3 Whereas, the defendant filed a written statement stating that they have paid proportionate amount to the respondent/plaintiff for the work done as per the entries in the 'M' Book. Further, the appellant/defendant contended that for all the work that had been completed by the plaintiff, and on request of the plaintiff, explanation was made and correspondingly, the completed work was entered in the 'M' book. Altogether, Rs.17,00,000/- approximately has been made to the plaintiff, and as such, the claims made vide A, B, C, D, 'E' 'F' 'G' and 'H' are illegal and totally denied.

2.4 The learned Single Judge, after going through the pleadings and evidence, framed the following 11 issues:-

"1. Whether the defendant has handed over



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free site for widening the road till the date of termination of contract (25.08.2008) ?

2. Whether the defendant can terminate the contract when the contract / agreement was not in force / alive ?

3. Whether the plaintiff is entitled to get refund of EMD amounting to Rs.57,500/- FSD Rs.1,74,500/- (BG) and the retention money of Rs.87,180/- (Total Rs.1,44,600 + 1,74,500 BG) ?

4. Whether the imposition of fine for Rs.11,000/- and recovered the same from the running bill by the defendant is illegal ? If so to what relief the plaintiff is entitled ?

5. Whether the plaintiff is entitled to claim Rs.21,67,238/- from the defendant being the difference in cost incurred by the plaintiff consequent to abnormal price hike and escalation of price for the work done by the plaintiff ?

6. Whether the plaintiff is entitled for payment of Rs.17,09,330/- for the work done from the defendant ?

7. Whether the plaintiff is entitled for a sum of Rs.5,26,308/- as profit earnings prevented by the defendant to complete the entire work by the plaintiff by way of illegal termination ?

8. Whether the plaintiff is entitled to claim Rs.68,34,972/- against the defendant towards loss of profit and over heads due to prolongation of contract?

9. Whether the plaintiff is entitled to payment of interest on one or more of the claims ? If so, what rate and from which date ?

10. Whether the plaintiff is entitled to cost ?

11. To what relief if any the plaintiff is entitled to ?"



2.5 Out of aforesaid eleven issues, issue Nos.1, 2, 3, 4, 5, 7 and 8 are decided in favour of the appellant/defendant and insofar as the Issue Nos.6, 9, and 10, the same were decided in favour of the respondent/plaintiff. Consequently, the learned Single Judge partly allowed the suit claim, whereby, the respondent/plaintiff is entitled for a sum of Rs.17,09,330/- from the appellant/defendant with interest at 9% p.a. from the date of plaint till the date of realization. Aggrieved over the same, the appellant/defendant has preferred the present Appeal.

3. When the Original Side Appeal is taken up for hearing, both the learned counsel for the parties submitted that the present Appeal has been instituted only with regard to claim No.E and H pertaining to issue Nos.6 and 9 respectively, for, in respect of the said claims alone, the learned Single Judge decided in favour of the respondent/plaintiff holding that the appellant/defendant is liable to pay to the respondent/plaintiff a sum of Rs.17,09,330/- with interest at the rate of 9% p.a. from the date of the plaint till the date of realisation. As far as all other issues are concerned, the learned Single Judge dismissed the suit claim and the respondent/plaintiff also not preferred any Appeal against the dismissal of the suit claim Nos.A, B, C, D F, and G.

4. Since the challenge in this Appeal is only with regard to claim No.E and H concerning Issue Nos.6 and 9, we are not adverting to the other facts of the case and it would be apposite to refer to the findings rendered by the learned Single Judge in regard to Issue No.6 and 9, which are extracted hereinbelow:-

Issue No.6 :

The plaintiff claims that he has completed Granular Sub Base work from km 0/0 to 2/0 and out of six culverts, three culverts at km 0/2, 0/8 and 1/8 have been completed and for that work Rs.17,09,330/- has to be paid by the defendant. The defendant's officer in his letter to the plaintiff, dated 23.06.2008, which is marked as Ex.P.4 confirms the completion of the above work, which reads thus:

"On inspection of site, it is found that DBM was completed over the existing width portion from Km. 0/0-2/0 and GSB has been completed in right side box cutting portion from Km. 0/0-2/0. Out of six culverts, three slabs culverts at Km. 0/2, 0/8



dealing with this aspect, held that the delay was not attributable to the appellant and the termination of the contract by the appellant is valid and while answering Issue Nos.1, 2, 3, 4, 5, 7 and 8 in favour of the appellant/defendant, erroneously, decided Issue No.6 in favour of the respondent/plaintiff. The learned Single Judge failed to give any weightage for the work done by the subsequent contractor, and thereby, the loss incurred to the appellant.

5.3 The learned Special Government Pleader further contended that though the learned Single Judge considered the documents and deposition of witnesses and came to the right conclusion that termination of the agreement is valid and forfeiture of EDM and security deposit to be in accordance with law, despite the same, has directed the appellant to pay the respondent/plaintiff a sum of Rs.17,09,330/- along with 9% interest from the date of the plaintiff till the date of realization.

5.4 The learned Special Government Pleader further contended that the appellant as per the entries made in the 'M' Box, the appellant is liable to pay a sum of Rs.7,59,195/-, whereas, the claim made by the respondent/plaintiff is for Rs.17,09,330/-. Further, in support of his contention, he referred to clauses 109.07 and 109.09 of SSRB Rules, wherein, it is stated as follows:-

'109.07 Provisions in case of absolute determination of contract:-

If the Engineer shall in the exercise of the power contained in P.S.109.05, and for any of the reasons set forth in paragraphs (a) to (f) therein determine the contract, then, the following provisions shall take effect.

(a) earnest money taken as security and additional security deposit at the time of execution of the agreement shall stand forfeited to the Government.

b) The total amount with hold PS :: 110-10 and the value of such work as may have been executed but not paid for and all other sums of money that may then be due or becoming due from the department to the contractor shall cease to be due or become due.

109.09 Rights and Liabilities:-

After termination of the contract in full, the Engineer shall determine what



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amount, if any, is recoverable from the contractor on completion of the works or in case of the work or part of the work is not to be completed, the loss, or damage suffered by the Department. In determining this amount, the credit shall be given to the contractor for the value of the work executed by him upto the time of cancellation. The value of contractor's materials taken over and incorporated in the work, and use of machinery belonging to the contractor.

Any excess expenditure incurred or to be incurred by the Department in completing the works or part of the works or the excess loss or damage suffered or may be suffered by the Department as aforesaid after allowing such credit shall be recovered from any moneys due to the contractor on any account and if such moneys are not sufficient, the contractor shall be called upon in writing to pay the same within 30 days of the notice given to that effect by the Engineer.

If the contractor fails to pay the sum within the aforesaid period of 30 days, the Engineer shall have the right to sell any or all of the contractor's unused materials, constructional plants implements, temporary buildings etc. and apply the proceeds of sale thereof towards the satisfaction of any sums due from the contractor under the contractor and in accordance with the provisions.

Any sums in excess of the amounts due to the Department and unsold materials, constructional plant etc., shall be returned to the contractor."

5.5. By referring to the above rules, the learned Special Government Pleader contended that the contract was terminated, and therefore, the appellant/defendant is not liable to pay any amount. Further, he referred to the judgment of the Hon'ble Supreme Court, reported in 2018 (11) SCC 508, in the case of Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Ltd. (PSPCL) and another, and the decision of the Hon'ble Supreme Court in Civil Appeal No.2153 of 2010, in the case of M/s.Dyna Technologies Pvt. Ltd. Vs. M/s. Crompton Greaves Ltd., in support of his contention. Therefore, the learned Special Government Pleader contended that the learned Single Judge failed to consider all these aspects. Further, when the learned



Single Judge held that the contract was rightly terminated, wrongly came to the conclusion that the appellant is liable to pay Rs.17,09,330/-with 9% interest towards part of the work completed by the respondent/plaintiff. Therefore, findings of the learned Single Judge in this regard are liable to be set aside.

6. On the other hand, Mr.P.Subba Reddy, the learned counsel for the respondent submitted that the respondent/plaintiff made eight claims out of which, only two claims, viz. claim No.E and H were allowed. However, the respondent/plaintiff has not preferred any appeal against the judgment dated 07.06.2017, passed in the Civil Suit, and he would contend that, in the letter, dated 25.08.2008, they have admitted the pending work and they have also admitted that as per the 'M'book, the remaining amount is due. However, all the work have not been entered into the 'M' BOOK. Therefore, amount entered into the 'M' book cannot be taken into consideration. Apart from that, for the amount to be payable to the respondent/plaintiff by the appellant/defendant, as referred to vide letter dated 23.06.2008, the appellant/defendant has not disputed the claim of the respondent/plaintiff. Even in the written statement, the appellant/defendant has made only bald denial, and there was no specific denial.

6.1 The learned counsel further contended that the appellant/defendant has not specifically mentioned anything about the work that the respondent/plaintiff has done and the exact amount paid by them. The learned Single Judge considering all these aspects and taking into consideration of statement of the plaintiff and based on Exhibit-P4, letter of the defendant's officer to the plaintiff, dated 23.06.2008, has rightly allowed the claim Nos.E and H, awarding a sum of Rs.17,09,330/- along with 9% interest. However, he fairly submitted that as per SSRB Rules, they are entitled for interest, but the appellant/defendant wantonly retained the amount, which forced the respondent/plaintiff to approach the Court and file the suit for recovery of money. The learned counsel further submitted that, even in the pleadings as well as in the deposition of D.W.1, the completion of the work is admitted and inspite of categorical admission of the completion of the work in the letter, dated 23.06.2008, the appellant/defendant failed to repay the amount. Therefore, he contended that the learned Single Judge has considered all these aspects and allowed the claim Nos.E and H and decided issue Nos.6 and 9 in favour of the respondent/plaintiff and the same requires no inference of this Court.



7. We have heard the submissions of the learned counsel for both sides and perused the materials on record. In view of the same, the points that arise for consideration in the Appeal are as follows:-

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i) Whether the contract, dated 28.02.2006, entered into between the appellant and the respondent, is determined as per clause 109.07 SSRB Rules ?

ii) Whether the appellant is entitled to invoke clause 109.07 (b) SSRB Rules, without determination of the contract?

iii) Whether the claim No.E pertaining to Issue No.6 decided by the learned Single Judge in favour of the respondent/plaintiff is correct?

and

iv) Whether the interest awarded by the learned Single Judge is in accordance with Clause 109.05 of SSRB Rules?

Point No.i), ii) and iii)

8. There is no dispute on the fact that the contract was awarded in favour of the respondent/plaintiff by the appellant/defendant. As per the contract, the respondent/plaintiff is supposed to complete the work within six months time i.e. 28.08.2006, from the date of handing over of possession. No doubt, even though the contract was entered into in the year 2006, the work was not completed even after the expiry of stipulated period of six months till 2008. By mutual consent, the contract period was extended from time to time. Though time was the essence of the contract, the respondent/plaintiff was able to complete only 20% work till 2008 and despite extension of time. Certainly, the respondent/plaintiff is entitled to the payment to the extent of completion of the work, if the contract is not determined in accordance with clause 109.07 SSRB Rules. As per the said clause, the appellant/defendant is expected to determine the contract. In case, if the contract is determined by an Engineer, as stated in clause 109.07, then, following provisions shall take effect:-

(a) earnest money taken as security and additional security deposit at the time of execution of the agreement shall stand forfeited to the Government.

b) The total amount with hold PS ::



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110-10 and the value of such work as may have been executed but not paid for and all other sums of money that may then be due or becoming due from the department to the contractor shall cease to be due or become due.

9. On perusal of the averments in the plaint, written statement and the documents marked on the side the respondent/plaintiff, and the deposition of witnesses on the side of both the parties, we are not able to get any information about the determination of the contract in terms of clause 109.07 SSRB Rules. When such be the position, we are of the considered view that the appellant/defendant cannot take benefit of SSRB Rules vide Clause 109.07 and 109.09. Therefore, without determination of the contract by the appellant, the benefits available under clauses 109.07 and 109.09 will not accrue to the appellant/defendant.

10. Therefore, it is crystal clear that the contract, dated 28.02.2006 entered into between the appellant and the respondent has not been determined as per clause 109.07. Hence, invoking clause 109.07 (b) either to withhold any outstanding amount or thereby, to retain the amount payable by the appellant to the respondent will arise only subsequent to the determination of the contract. Hence, we are of the view that, without determination of the contract, the appellant is not entitled to invoke clause 109.07 and 109.09 (b) SSRB Rules.

11. In the present case, the appellant/defendant failed to determine the contract. Hence, we are of the considered view that the findings rendered by the learned Single Judge, with regard issue No.6, covering claim No.E in favour of the respondent/plaintiff is not required to be interfered with by us.

Point No.iv)

12. Insofar as the interest awarded by the learned Single Judge, it is relevant to reproduce clause 110.10 of SSRB Rules, which is as follows;-

110.10 Interest on Dues :- "the contractor shall not be entitled to interest upon any guarantees bond, or payments in arrear, nor upon any balance, which may on the final settlement of his accounts, be found to be due to him.



12.1 On perusal of the above said clause, it is clear that no interest requires to be paid for any outstanding amount and when the same is under dispute. When such being the case, without considering clause 109.05, as agreed by both the parties, since they are bound by the terms of the contract, the learned Single Judge awarded interest at the rate of 9%, which is totally against the agreed terms of the contract by the parties. Therefore, we are of the view that interest awarded by the learned Single Judge is contrary to the clause 109.05 and the same is liable to be set aside. Accordingly, we hold that respondent/plaintiff is not entitled to claim any interest. Hence, the interest awarded by the learned Single Judge to the extent of 9% is set aside.

13. In the result, the Original Side Appeal is partly allowed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

To

The Sub Assistant Registrar (Original Side),
High Court, Madras.

+1cc to the Special Government Pleader Sr.8059
+3cc to M/s.P.Subba Reddy, Advocate Sr.8068

Original Side Appeal No.108 of 2019

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