

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 05.11.2020

Pronounced on : 23.11.2020

Coram

**THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN**

C.S.No.31 of 2017  
and  
A.No.289 of 2017

M/s.Metec Design and Construction  
Engineers India Pvt. Ltd.,  
(Formerly Known as Metch Design and Construction Engineer)  
Rep.by its Director  
Mr.Kamalakannan,  
No.1/460, Multi Industrial Estate,  
Gerugambakkam,  
Poror, Chennai – 600 122.

...Plaintiff

Vs

M/s.East Coast Construction and Industrial Ltd.,  
Rep.by its Managing Director  
No.4, Moores Road,  
Chennai – 600 008.

...Defendant

**Prayer:** This Civil Suit filed under Order IV Rule 1 O.S. Rules read with Order VII Rule 1 CPC, praying for a Judgment and Decree against the Defendant:

(a). directing the Defendant to pay Rs.2,04,45,480/- to the Plaintiff which includes the sum of Rs.23,23,257/- towards the dues against R.A.Bill No.10 raised by the Plaintiff, a sum of Rs.99,12,981/- towards testing and commissioning, retention amount and Final Bill R.A. Bill No.11 and Rs.82,09,242/- towards interest due for the delayed payment.

(b). directing the Defendant to pay further interest at the rate of 18% p.a. from the date of filing the suit till the date of realization.

(c). direct the defendant to pay the cost of the suit.

For Plaintiff - Dr.P.Vasu Devan

For Defendant - Ms.Ami Kataria

**JUDGMENT**

The Plaintiff, a company incorporated under the Companies Act, 1956, had filed the suit seeking Judgment and Decree against the Defendant, which is also a company incorporated under the Companies Act, 1956, for payment of a sum of Rs.2,04,45,480/- together with future interest at the rate of 18% per annum and for costs of the suit.

2.In the plaint it had been stated that the Plaintiff is engaged in the business of manufacturing and commissioning of Fire Fighting System for all types of building and industries. They were awarded a Letter of Intent dated 30.04.2001 by the Defendant for supply and erection of Fire Protection works for the construction of Tamil Nadu Legislative Assembly Building at Omandhur Estate, Anna Salai, Chennai, by Purchase Orders dated 07.01.2010, 13.07.2010, 07.08.2010, 18.08.2010 and 08.03.2011. It had been stated that the Plaintiff commenced execution of the work and had also completed the works in terms of the contract. They had thereafter, raised R.A bills 1 to 10 for the works executed by them.

3.It was stated that in the contract the Defendant had agreed to make payments under the following mode:-

- a).65% of the value of the work to be paid on prorata basis on receipt of equipment at site.
- b).20% will be paid on prorata basis against progressive erection.
- c).15% will be paid against further progressive erection.

4.It had been stated that however, the Defendant had not paid the amounts for the works executed and an amount of Rs.23,23,257/- was due and payable against R.A bill No.10, which was certified by the Defendant. It was also stated that though it had been agreed that the Defendant would retain 5% of the bill amounts as retention amount and which would be released at the end of the defects liability period, the Defendant actually retained 15% of the bill amounts against testing, commissioning and retention amount. It was stated that a sum of Rs.99,12,281/- is due and payable by the Defendant against the final bill, testing, commissioning and retention amounts.

5. It was stated that though the Purchase Order stipulated the time for completion of work within a period of three months, there were some delays and the Plaintiff completed the project on 11.05.2011. The final bill was also prepared and submitted to the Defendant on 04.07.2011. This was acknowledged but however, there was a delay in certifying the final bill. The Defendant wrote an E-mail dated 28.05.2012 that the final bill can be certified only after certification of the work done by their employer and held

back a sum of Rs.23,23,257/- against the R.A bill No.10 and Rs.99,12,281/- against the final bill, testing, commissioning and retention amounts.

6.The Defendant sent an E-mail dated 29.03.2013 attaching a letter dated 29.03.2013 signed by their Senior Manager (Contracts), wherein, it was stated that the process of recording the measurement for the final bill is in progress and would be completed soon. It was stated that after the final measurement are submitted and certified by their employer, the payments would be released. The Plaintiff claimed that they co-operated for completing the measurement of the works done. The measurement of the works executed was completed on 15.05.2013. The Plaintiff by E-mail dated 18.05.2013, called upon the Defendant to release the payment which was due to a sum of Rs.1,22,36,238/-. The Plaintiff claimed that they had written several letters subsequently, seeking payment of the amount due. The Plaintiff claimed that since the Defendant had not come forward to release the payment, they had no other option, but to file the suit, for the reliefs as stated above.

7.The suit had been filed in the Original Side of the Madras High Court and subsequently, on establishment of the Commercial Division, it had been transferred to the Commercial Division and the jurisdiction was determined on 05.12.2018. The Defendant was granted 30 days time from that date to file the written statement. However, for reasons best known, the written statement was not filed and on 07.11.2019, it was noted that though several opportunities had been granted, the written statement was not filed and therefore, the right to file the written statement was forfeited. The matter was then posted for recording of evidence on the side of the Plaintiff and the Defendant was granted permission to cross-examine the witness.

8.The Plaintiff examined as PW-1, S.Kamalakannan, Director of M/s.Metec Design and Construction Engineers India Pvt. Ltd., who filed his proof affidavit and also marked exhibits P1 to P13. In the proof affidavit, the averments in the plaint were again restated. Exs.P1, P2, P3 and P4 are the Service / Purchase orders placed by the Defendant on the Plaintiff. Ex.P6 is the copy of R.A. bill No.10 with the date of measurement on 25.03.2011. Ex.P10 is the letter addressed by the Defendant dated

29.03.2013. Ex.P12 is the copy of the Advocate notice dated 17.03.2016 and Ex.P13 is the copy of the postal acknowledgment card for the same.

9.The witness for the Plaintiff was cross-examined on behalf of the Defendant and primarily, the Defendant had questioned the witness on the issues of limitation and also on the fact that the works conducted by the Plaintiff should be certified by the PWD who would then release payment to the Defendant and who can then release payment to the Plaintiff.

10.Heard arguments advanced by Dr.P.Vasu Devan, learned counsel for the Plaintiff and Ms.Ami Katariya, learned counsel for the Defendant.

11.The points which arise for consideration are;

i).Whether the Plaintiff has discharged their burden of proof to establish the suit claim?

ii).Whether the letter dated 29.03.2013 by the Defendant can be considered as an acknowledgment of debt and liability?

iii).Whether the suit is barred by the law of limitation?

vi).Whether the Plaintiff is entitled for the suit claim together with interest @ 18% per annum?

v).What other relief are the parties entitled to?

The above cannot be termed as issues in the absence of the written statement.

**The points answered:**

12.The Plaintiff had filed the suit seeking a Judgment and Decree against the Defendant for a sum of Rs.2,04,45,480/- together with interest @ 18% per annum from the date filing the suit till the date of realization.

13.The necessity for institution of the suit arose owing to, according to the Plaintiff, breach by the Defendant of the payment terms in a contractual relationship between the Plaintiff and the Defendant for erection of Fire Safety Equipments in the then being constructed, Tamil Nadu Legislative Assembly Building at Omandhur Estate, Anna Salai, Chennai. A Letter of Intent dated 30.04.2001 had been issued by the Defendant. This Letter of Intent had not been filed as a document to the Plaint, but the

Defendant had not disputed or questioned the locus of the Plaintiff to institute the suit. The Plaintiff had filed the Purchase Orders placed by the Defendant. These have been marked as documents. These documents reflect that there was a contractual relationship between the Plaintiff and the Defendant.

14.The Plaintiff had also raised bills on the Defendant. The suit claim can be divided into two parts. The first part is with respect to R.A bill No.10, which is Ex.P6, under which a sum of Rs.23,23,257/- was claimed as payable by the Defendant. The second part is with respect to the retention amount by the Defendant in R.A bill No.11 and towards testing, commissioning and retention. The Defendant had not filed their written statement, but the fact that bills had been raised by the Plaintiff cannot be disputed. The fact that the Plaintiff had commenced the work and had executed the work also cannot be either disputed or denied.

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15.It is the common stand of both the parties, that the works had been completed as on 04.07.2011. The principal argument by the learned counsel

for the Defendant was that the entire contract was on a Back to Back principle namely, that the Plaintiff is a Sub-Contractor of the Defendant for the limited purpose of erection and commissioning Fire Safety Equipments in the said building. The works done by the Plaintiff will have to be measured and certified not only by the Defendant for release of payment, but also by the PWD who were the principal employers and who would release the payment in the name of the Defendant and who would then release further payment to the Plaintiff.

16.It was stated that there was a delay by the PWD in certifying the works done and in releasing payments to the Defendant and therefore, the Defendant could not honour their commitment to the Plaintiff. This argument put forth by the Defendant has to be rejected for the simple reason that the Service / Purchase order placed by the Defendant on the Plaintiff is not a tripartite agreement, but rather the bipartite agreement between the Plaintiff and the Defendant alone.

17.The only condition laid down towards payment as seen from

Ex.P1 is as follows:

*“8.Payment terms:*

*a).Mobilisation advance, if required, shall be provided for 10% of the contract value against Bank Guarantee for an equivalent amount and on receipt of acceptance of the work order with VAT and Service Tax, Registration Certificate duly self attested. Interest will be charged at 14.5% per annum and shall be recovered from the first 6 running bills.*

*b).65% of the value of work will be paid on pro rata basis on receipt of equipments at site.*

*c).20% will be paid on pro rata against progressive erection.*

*d).15% will be paid against satisfactory testing and commissioning, handing over of the system to our client. Submission of As Built Drawings, guarantee and warranty certificates, operation manual, training of personnel authorized by our client.*

*9.Retention Amount:5% value of each of the bill will be retained as retention amount and will be released at the end of the defects liability period of one year as authorized by the client.”*

18.It has been mentioned in Ex.P1, that the client is PWD and that the payment shall be made for the actual quantity of the work carried out and certified by PWD as per the unit rates. However, the contract as such is only between the Plaintiff and the Defendant. Even if there has been delay in payment by PWD to the Defendant, the Defendant should honour their commitment to the Plaintiff and later get that amount from the PWD. The reasons advanced for withholding the payment to the Plaintiff have to be rejected.

19.Ex.P10 has been the subject matter of much discussion by the learned counsels. It is an original letter dated 29.03.2013 sent by the Defendant to the Plaintiff. It is as follows:

*“Ref: Your mail dated 27.03.2013.*

*This had reference to your mail cited under reference. We wish to bring the following for your kind information.*

*As already informed during the meeting had with*

*you earlier this week, the process of recording of measurements for the final bill is in progress and will be completed soon. Our site staff might have already contacted you regarding this so that the detailed measurements can be submitted to the Department.*

*We request you to kindly co-ordinate with the site team and give necessary details as required by them so that the final bill can be processed and submitted to the Department.*

*We hope that our payment will be received soon after the final measurement are submitted and certified by the client.*

*We assure you that payments will be released as soon as the funds are received from our client.*

*We request you to kindly bear with us till such time.”*

20.The learned counsel for the Defendant stated that this cannot be termed as an acknowledgment of debt. The learned counsel relied on ***AIR 1961 SC 1236, Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prasad Chamaria and Others***. The issue in that case was a claim based on mortgage. The amounts were repaid on the mortgagee and mortgagor had

also acknowledged liability. The letter which was sought to be pressed as admission or acknowledgment of debt was as follows:

“13. ....

*My dear Durga Prasad,*

*Chandni Bazar is again advertised for sale on Friday the 11<sup>th</sup> instant. I am afraid it will go very cheap. I had a private offer of Rs.2,75,000/- a few days ago but as soon as they heard it was advertised by the Registrar they withdrew. As you are interested why do not you take up the whole. There is only about 70,000 due to the mortgagee – a payment of 10,000 will stop the sale.*

*Yours sincerely,  
sd-  
J.C.Galstaun.”*

21.The Hon'ble Supreme Court had been held as follows:

“15. ....

*The tenor of the letter shows that it is addressed by Respondent 2 as mortgagor to Respondent 1 as puisne mortgagee, it reminds him of his interest as such mortgagee in the property which would be put up for*

*sale by the first mortgagee, and appeals to him to assist the avoidance of sale, and thus acquire the whole of the mortgagee's interest. It is common ground that no other relationship existed between the parties at the date of this letter, and the only subsisting relationship was that of mortgagee and mortgagor. This letter acknowledges the existence of the said jural relationship and amounts to a clear acknowledgment under Section 19 of the Limitation Act. It is conceded that if this letter is held to be an acknowledgment there can be no other challenge against the decree under appeal. In the result the appeal fails and is dismissed with costs."*

22.It is seen that even the Hon'ble Supreme Court had actually held that the letter is an acknowledgment of the existence of jural relationship and the amounts to a clear acknowledgment under Section 19 of the Limitation Act.

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23.In the instant case, the acknowledgment is more striking. Ex.P10 has as the subject "*the construction of new Tamil Nadu Legislative*

*Assembly Building*". The reference is "mail" of the Plaintiff "dated 27.03.2013", it ends with, the "payments will be released as soon as funds are received by the clients".

24.The crucial aspect is that the Defendant has acknowledged that payments are due and payable to the Plaintiff herein.

25.Section 18 of the Limitation Act, is as follows:

*"18. Effect of acknowledgment in writing. (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*

*(2) Where the writing containing the acknowledgment is undated, oral evidence may be*

*given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*

*Explanation.-For the purposes of this section,- (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right, (b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."*

26.The conditions stipulated are satisfied. The acknowledgment was dated. It was made in writing. It was addressed to the Plaintiff. It was addressed by a person competent to acknowledge liability. It referred to the

subject matter.

27. One aspect which has been repeatedly pointed out by the learned counsel for the Defendant is that Ex.P10 is not an original copy and that it is an extract from an E-mail and therefore in the absence of the certificate under Section 65(B) of the Evidence Act, the document cannot even be looked into by the the Court. Unfortunately, the document which has been marked as Ex.P10 is an original letter sent by the Defendant to the Plaintiff. Therefore, this objection cannot withstand the scrutiny of the Court. It is an admission of liability.

28. The learned counsel for the Defendant drew the attention of this Court to the cross-examination of the witness for the Plaintiff.

*“Q7: As per Ex.P1 the word executed by the Plaintiff should be to the satisfaction of the Defendant's client namely PWD, Chennai. What do you say?”*

*A: Yes.*

*Q8: It is right to say that Exs.P1 to P5 is a back to back to contract depending on satisfaction and certification of PWD?*

*A: Yes. Back to back to contract with some terms and conditions.*

*Q9: As per clause-3 contained at inner page-12 of Ex.P1, is it correct to state that the payment shall be made for the actual quantity of made carried out and certified by PWD?*

*A: Yes”*

29.As repeatedly pointed out, the onus was on the Defendant to pay the Plaintiff for the works done and thereafter, recover it from the PWD. It is on record, that the final certification of the works done had also been completed. Therefore, an obligation on the Defendant to make good, the

payment was cast upon the Defendant, in view of the contract between the parties.

30.It has also been alleged by the Plaintiff that while the terms of the payment indicated that 5% alone should be retained by the Defendant, as retention money, the Defendant had retained 15% of the amount. A claim is also made on that ground.

31. I hold that the limitation period would commence only from the date of acknowledgment namely, 29.03.2013. The plaint had been presented on 24.03.2016 within the period of three years. The limitation stood renewed by the acknowledgment of the Defendant under Ex.P10. The work could have been completed earlier, but within three years period from the date of completion of the work, the Defendant, by Ex.P10, had again acknowledged their liability. Therefore, the limitation starts to run from the date of such acknowledgment namely, Ex.P10 dated 29.03.2013.

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32.The suit being a Commercial Dispute, claim of interest @ 18 % per annum is justified. It is nearly 10 years, since the date of completion of

the work by the Plaintiff and the Plaintiff had not been paid their legitimate claims by the Defendant.

33.In view of these facts, the points which had arisen for consideration namely, discharge of burden of proof by the Plaintiff, acknowledgment of liability by the Defendant, the point of limitation, and whether the Plaintiff had established their claim and the rate of interest are all answered in favour of the Plaintiff.

34.In view of the above reasons, the suit is decreed, with costs as prayed for. Consequently, the connected application is closed.

35.Insofar as the costs are concerned, in view of the fact that the defendant had shown scant regard for the sanctity of the judicial proceedings by deliberately not filing the written statement, I hold that the plaintiff is entitled to costs as determined under the amended Section 35 of the Code of Civil Procedure as applicable to the Commercial Division of the High Court.

36.Registry is delegated by the Court to determine the costs as per the Bill of Costs submitted by the plaintiff in accordance with Section 35 CPC as amended by the Commercial Courts Act 2015. The plaintiff is specifically entitled to the fees and expenses of the witnesses, the legal fees and expenses incurred and for any other expenses incurred in connection with the judicial proceedings and also for recovery of the actual Court fees paid into Court.

23.11.2020

Index:Yes/No  
Internet:Yes/No  
Speaking/Non Speaking Order  
smv

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**List of Witness in C.S.No.31 of 2017**

P.W.1 – (S.Kamalakaran)

**List of Exhibits:**

- 1.Ex.P1 – original Service order issued by defendant dated 07.01.2010.
- 2.Ex.P2 – original Purchase order issued by defendant dated 13.07.2010.
- 3.Ex.P3 – original Service order issued by defendant dated 07.08.2010.
- 4.Ex.P4 – office copy of the Service order issued by defendant dated 18.08.2010.
- 5.Ex.P5 – original Service order issued by defendant dated 08.03.2011.
- 6.Ex.P6 – certified copy of the R.A. bill No.10 dated 25.03.2011.
- 7.Ex.P7 – certified copy of the Final Bill dated 04.07.2011.
- 8.Ex.P8 – office copy of the letter from plaintiff dated 23.09.2011.
- 9.Ex.P9 – office copy of the E-mail letter sent by defendant to plaintiff dated 28.05.2012.
- 10.Ex.P10 – original E-mail attachment letter sent by the defendant dated 29.03.2013.

- 11.Ex.P11 – office copy of the letter from plaintiff to defendant dated 08.01.2015.
- 12.Ex.P12 – office copy of the Legal Notice issued by plaintiff dated 17.03.2016.
- 13.Ex.P13 – office copy of the postal acknowledgment card dated 20.03.2016.

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**C.V.KARTHIKEYAN,J.,**

smv



Pre-delivery Judgment made in

C.S.No.31 of 2017

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