IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.09.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.107 of 2015

Mr.P.Mahalingam
Civil Engineering Contractor
21 Lakshmipuram Main road
Velachery, Chennai-600042

...Appellant/Plaintiffs

Vs.

1.The Superintending Engineer
Public Works Department
Building (Control & Maintenance) Circle
Chepauk, Chennai-600005

2.The Executive Engineer
Public Works Department
Building (Control & Maintenance) Circle
Chepauk, Chennai-600005

...Respondents/Defendant

PRAYER: Appeal Suit filed Under Order XLI Rule I Read with Section 96 of the Code of Civil Procedure against the Judgment and Decree of the III Additional City Civil Court, Chennai, dated 23.11.2012 passed in O.S.No.8999 of 2010.

For Appellant : Mr.M.K.Kabir
Senior Counsel
for M/s.T. Jayaraman

For Respondents : Mr.Edwin Prabhakar,
Government Advocate (CS)

JUDGEMENT

The unsuccessful plaintiff is the appellant before this Court, challenging the Judgment and Decree passed by the III Additional City Civil Judge, Chennai in O.S.No.8999 of 2010.

The parties for the ease of understanding are referred to in the same litigative status as before the Trial Court.

2. The facts in brief which are necessary for considering the dispute on hand is herein below extracted.

Plaintiff's Case:

3. The plaintiff has filed this suit for recovery of a sum of Rs.23,44,879/- together with the interest at 12% per annum from the date of the plaint till the date of realization. It is the case of the plaintiff that he had been awarded the contract for constructing a new emergency operation theater for the ante natal ward at the Government Women and Children Hospital (IOG) Egmore. The value of the contract was a sum of Rs.1,57,24,982/- and the contractor was given nine months time for completing the work and handing over the site. The agreement dated 27.01.2004 was entered into between the parties encapsulating the terms of the agreement. In compliance with the terms of the agreement, the plaintiff had deposited a sum of Rs.5,98,000/- towards the Earnest Money Deposit (EMD) and Security Deposit (SD). The site was handed over on 10.03.2004 and therefore as per the terms of the agreement the plaintiff was to complete the construction on or before 09.12.2004.

4. It is the case of the plaintiff that when he had tendered, the cost of steel was in the range of Rs.19,000/- per metric tonne and consequently, he had quoted for the tender. Thereafter, the price of steel had increased to a sum of Rs.28,000/- per metric tonne which further escalated to a sum of Rs.29,300/- which in effect increased the cost by 47%. He would submit that as per clause 5(3) of additional condition 1 and 14(vii) of the agreement where materials are supplied by the Department and price escalates then additional cost would be added. He would therefore submit that the reverse should be applied even in the case of the contractors.

5. It is his specific case that the demand for being compensated for the rise in price did not amount to an escalation of price but only a variation on account of the rising cost which was beyond the control of the plaintiff. The plaintiff would therefore submit that as per the agreement the quantity of steel that was to be supplied was 109 metric tonnes, which was concluded at the rate of Rs.19,000/- per metric tonne. The cost of steel fabrication was Rs.27,23,150/- for 109 metric tonnes. However, on account of the increase in price of steel to a sum of Rs.29,300/- per metric tonne, the differential cost (the increase) for 109 metric tonnes worked out to a sum of

Rs.12,79,879/- and adding the cost of fabrication the differential value worked out to a sum of Rs.16,99,879/. This factor was brought to the notice of the defendants vide the plaintiff's letter dated 10.09.2004.

6. However, the defendants by their reply dated 01.10.2004 cited chapter IV of the Transparency of Tender Act, 2000, to state that the price escalation would apply only to the contract which exceeded a period of eighteen months. In the instant case, the period was only nine months. This prompted the plaintiff to issue a legal notice dated 19.05.2006 stating that the Act would not apply to the facts of the instant case as admittedly the price of the steel has increased and the terms could not have been incorporated into the original contract.

7. He would also submit that there was about a three month gap between the date of acceptance of the tender, its communication, the signing of the agreement and the handing over of the site. Therefore, he would contend that the defendants are liable to pay a sum of Rs.16,99,879/- towards the differential cost and they were also liable to refund a sum of Rs.5,85,000/- towards deposit and a sum of Rs.1,60,000/- towards the final bill together with the interest at 12% on the said amount. Since the payments were not made, the plaintiff had come forward with the suit in question.

Defendants' Case:

8. The defendants had filed a written statement inter alia denying the claim of the plaintiff by stating that the request was contrary to the terms of the agreement. The defendants would also submit that it was the plaintiff who had sought for extension of the period of contract nearly four times before finally handing over the site that too with a lot of defects for which the defendants had to be compensated.

9. It is also their case that the plaintiff / contractor had quoted his rates for the tender only after factoring the future escalation in cost. That apart, when the plaintiff had applied for an extension of time he had given a consent letter to the effect that he will not claim any extra rate, in case of the defendant granting an extension of time for the above work. Contrary to the said undertaking, the present suit has been filed. The defendants would therefore submit that the plaintiff is not entitled to the difference in escalation cost.

10. As regards the Security Deposit, it is the case of the defendants that the same was to be retained and paid to the

contractor only six months after the completion of the work or as soon as after expiration of such period of six months. The defendants had further stated that during this period they had noticed several defects which had also been pointed out to the contractor who had not taken steps to rectify the same and the defects are still pending.

11. As regards the question of releasing the EMD and SD the same would arise only when the plaintiff hands over the building without any noticeable defects within the shrinkage period (six months). Since in the instant case the defects had not been rectified, the plaintiff was not entitled to the EMD and SD as well. The final bill therefore could be made only after the rectification of the defects.

12. The learned III Additional Judge, City Civil Court, Chennai had framed the following issues:

1. Whether the defendants are liable to compensate the sum of Rs.16,99,879/- towards the escalation on steel rate?

2. Whether there was due under the final bill amounting to Rs.1,60,000/-?

3. Whether the Defendants are liable to refund the sum of Rs.5,85,000/- paid towards the deposit?

4. Whether the Plaintiff is entitled to suit claim as prayed for?

5. To what relief, if any the plaintiff is entitled to?

13. The plaintiff examined himself as P.W.1 and marked Ex.A.1 to Ex.A.5 and on the side of the defendants one Mr.Thangarajan, Assistant Executive Engineer of the PWD was examined as D.W.1 and Ex.B.1 to Ex.B.11 were marked.

14. The learned Judge on considering the evidence on record took a rather strange view that the suit filed against the 1st defendant was not maintainable as the suit ought to have been filed against the Governor of Tamil Nadu. The learned Judge had held that the terms of the agreement did not contemplate providing the contractor any amount towards escalation of costs. He had also observed that the plaintiff had not provided any document to support his claim that there has been an escalation in the rate of steel.

15. The learned Judge also held that the plaintiff had not proved that a sum of Rs.1,60,000/- was due towards the final

bill. With regard to the refund of the EMD and SD, the learned Judge relied on the case of the defendant that the defects had not been cleared and therefore held that the plaintiff was not entitled to any relief and consequently, dismissed the suit.

16. Challenging the said Judgment and Decree, the plaintiff is before this Court.

17. On hearing the arguments of the learned counsels which are herein below re-produced, the following points for consideration arise in this First Appeal.

(a) Whether the plaintiff is entitled to escalation of cost and has proved the same?

(b) Whether the plaintiff was entitled to the final bill and refund of the EMD and SD?

18. Mr.M.K.Kabir, learned Senior Counsel appearing on behalf of the plaintiff / appellant would submit that the plaintiff was entitled to the cost of escalation as admittedly the price of steel had gone up. Further, in the written statement, the defendants had admitted the receipt of a sum of Rs.3,15,000/- towards the EMD and SD and even this amount has not been ordered to be refunded especially when the work has been completed by the plaintiff.

19. He would submit that the defendants had contended that the final bill would be cleared if the defects were rectified. However, the learned Judge had gone on to hold that the defects had not been rectified. He would contend that the work completed by the contractor, namely, the plaintiff could be verified by the defendants by simply looking into the measurement book or the the M-Book, as it is in technical parlance. In fact, the defendants who had complained that the defects had not been rectified, had not produced the M-Book to show the details of the defects noted when the measurement was taken in the presence of the representative of the defendants. He would submit that the best evidence had been kept away from the Court and the learned Judge has totally ignored all these factors and proceeded to dismiss the suit.

20. Per contra, Mr.Edwin Prabhakar, learned Government Advocate would submit that the suit is bad since the Government has not been made a party and notice under section 80 has not been issued. Apart from this technical objection, the learned Government Advocate would submit that as per the terms of the

agreement, the plaintiff was not entitled to escalation cost. Further, the release of the final bill as well as repayment of the EMD and SD would come into play only when the plaintiff has handed over the operation theater defect free, which in the instant case, has not taken place. In support of his argument that the Government have not been made a party, learned counsel would rely upon Section 79 of the Code of Civil Procedure, which provides for how suits by or against the Government has to be framed.

21. Section 79 (b) would state that where the suit is by or against the State Government the authority to be named is the State. Therefore, the present suit filed against the Superintending Engineer, PWD and the Executive Engineer, PWD is contrary to the terms of the Section 79 of the Code of Civil Procedure.

22. He would also draw from the provisions of Order XXVII Rule 5(A), which provides that where suits are instituted against a Public Officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government has to be made as a party to the proceedings. In support of the said arguments he would rely on the following Judgments.

(a) AIR 2010 SC 2617 - The District Collector, Srikakulam and Ors.Vs. Bagathi Krishna Rao and Ors.

(b) 1999 (6) SCC 667 - Common Cause, A Registered Society Vs. Union of India (UOI) and Ors.

(c) 1997 (9) SCC 544 - State of Punjab and Ors. Vs. Sadhu Ram.

23. Heard the counsels and perused the records.

24. Before considering the suit on merits, it is necessary to consider the technical objection that has been raised by the learned Government Advocate, which plea, though not taken before the Trial Court is a legal issue which can be raised even in the Appellate Court. Section 79 of the Code of Civil Procedure provides for suits being filed against or by the Government and in such cases describing the person / Authority who had to be added as a party. Admittedly, in the instant case, the suit is one based on a contract entered into between the defendants and the plaintiff. The suit is not against the State. Therefore, the argument that the suit is in violation of the provisions of Section 79 of the Code of Civil Procedure does not hold water.

25. The next plea taken by the learned Government Advocate is that the provisions of Order XXVII Rule 5(A) has been given a go by. Order XXVII, deals with the suits by or against the Government or Public Officers in their official capacity. Under this Order Rule 5(A) provides as follows:

> "Order XXVII Rule 5A – Government to be joined as a party in suit against a public officer. - Where a suit is instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party to the suit."

26. A reading of the above provision would indicate that where the suit is instituted for damages against a Public Officer for any act done by him in his official capacity, then, in such cases, the Government has to necessarily be added as a party. The reasons for impleading the Government is, by reason of the fact that if compensation is ordered by the Court then it is the Government who has to comply with the Decree. Therefore, they have to necessarily be heard before orders are pronounced.

27. Admittedly, the present case is not one where the suit is filed claiming damages for any of the act done by the defendants in their official capacity. On the contrary, the suit is one claiming the amounts due to the plaintiff under an agreement. Therefore, the provisions of Order XXVII rule 5(A) may not apply in the instant case.

28. Now, coming to the issue of refund of amounts under the head of escalation, as rightly pointed out, the terms of the agreement does not contemplate the payment of escalation cost. That apart, the plaintiff vide letter dated 06.12.2004 had categorically stated that he shall not claim any extra rate during the time of the extension period. Having done so, the plaintiff cannot now turn around and claim the said amount. Therefore, the finding of the Court below that the plaintiff is not entitled to escalation cost appears to be just and does not require any reconsideration by this Court. The first point for consideration is held against the appellants / plaintiffs.

29. The amount due towards the final bill and the EMD and SD has not been disbursed to the plaintiff on the ground that the defects had not been rectified. However, a perusal of Ex.B.2 would indicate that the defects that had been pointed out was with reference to the dampness in the walls above the lintel at all floors and plastering at the junction of sunshade and external wall. A list of the defects were also enclosed in a

letter dated 03.05.2006 addressed by the 2nd defendant to the plaintiff. The building has thereafter been taken possession and admittedly is now being put to use for which it had been constructed.

30. The plaintiff has submitted that he has set right all the defects and thereafter submitted his claim. Though the defendants have pleaded that the defects have not been rectified there is no detail given as to the defects still remain unattended. The plaintiff had been called upon to rectify the defects as early as in the year 2006 and he has also rectified the defects. That apart, the best evidence, namely, the M-Book has been kept away from the Court and therefore, an adverse inference has to be drawn for its non-production.

31. In these circumstances, the second point for consideration is answered in favour of the plaintiff and the defendants are directed to compensate the plaintiff under the head of final bill and towards refund of EMD and Security Deposit. The claim with reference to the escalation of cost i.e., a sum of Rs.16,99,879/- is disallowed. The First Appeal is therefore partly allowed to the above extent. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kan/shr
To
The III Additional City Civil Judge
City Civil Court, Chennai

+1 CC to The Government Pleader sr 50959.

A.S.No.107 of 2015

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