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IN THE HIGH COURT OF JUDICATURE AT MADRAS

15.07.2021

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.625 of 2008

M/s.Jayashri Constructions.
rep. by its Power of Attorney,
K.Vijayakumar,
117-B, Kovalan Street,
Teacher's Colony, Erode-11. ... Appellant/Plaintiff

Vs.

- 1.M/s. Perfect Engineering
Associates Pvt. Ltd.,
(Hydrali Engineer) rep. by
its Power Agent,
Gautham M.Shah, Mahar House,
15, Cawasji Patel Street,
Fort, Mumbai.
2. M/s.Shah Technical Consultants Pvt. Ltd.,
rep. by its Director Gautham M.Shah,
No., IInd Cross Street,
West CIT Nagar, Chennai-35. ... Respondents/Defendants

PRAYER: Second Appeal filed under section 100 of the Civil Procedure Code against the judgement and decree of the learned Principal District Judge of Erode District at Erode in A.S.No.62/2006 dated 12.03.2007 reversing the judgment and decree of the learned I Additional Subordinate Judge, Erode in O.S.No.116/2004 dated 18.11.2005.

For Appellant : Mr. S.Kaithamalai Kumaran

For Respondents : Mr. Arun Kumar

JUDGEMENT

The plaintiff is the appellant before this Court. The Second Appeal is filed challenging the judgment and decree in A.S.No.62 of 2006 of the learned Principal District Judge, Erode, in and by which, the learned Judge has reversed the judgment and decree of the learned I Additional Subordinate Judge, Erode, in O.S.No.116 of 2004. The parties are referred to in the same litigative status as before the trial Court.



2. The brief facts which culminated in filing of the above Second Appeal are as follows:

The plaintiff had filed the above suit seeking recovery of a sum of Rs.4,63,534.50 with interest at the rate of 12% p.a. on the principal sum of Rs.3,45,749.50. The said amount was due for the work undertaken by the plaintiff as a sub contractor for the defendants. The defendants herein who are the registered contractors of the TWAD Board, had entered into a contract with the plaintiff on 12.03.2001, whereunder the defendants had entrusted the plaintiff with the sub contract for the work awarded to them by the TWAD Board to construct CWSS (Construction of Collection Well-cum-Pump house). The plaintiff would submit that as per the terms of agreement, the work was to commence on 12.03.2001 and be completed by 31.09.2001. The defendants had undertaken to pay the dues in four installments and each installment was to be restricted to the value of the work carried out by the plaintiff.

3. The plaintiff would submit that they had started the construction work on 12.03.2001 as agreed. However, all of a sudden, on 27.04.2001, the Project Directors had instructed them to stop work. The plaintiff, on the very same day, i.e. on 27.04.2001, issued a letter to the second defendant listing out the actual work that they had completed and the expenditure incurred therein and called upon the defendants to make the payment. The plaintiff would submit that despite several demands, the payment did not come forth, though the defendants agreed to pay the expenditure incurred by the plaintiff. The plaintiff was therefore constrained to issue a legal notice on 18.01.2002, calling upon the defendants to pay a sum of Rs.3,45,749.50 with 18% interest. The defendants who received the said notice, had not bothered to repay the same. The plaintiff also came to learn that the defendants had received the earnest money deposit from the TWAD Board. Therefore, left with no other alternative, they have come forward with the above suit.

4. The defendants had filed a written statement inter alia contending that payments could be made to the defendants only if the work is approved by the TWAD Board and the payment is sanctioned to the defendants. They would quote the terms of the agreement in this regard. It was also the duty of the plaintiff to obtain such certification from the Board. The defendants would further submit that the letter of expenses was not in accordance with the rates earlier agreed upon between the plaintiff and the defendants and there was no clarity on how the plaintiff had arrived at the said figure. The defendants would further submit that on the basis of the rates as agreed and the quantity that the plaintiff claimed to have done only a sum of Rs.1,91,291/- was due. Even this amount would become payable



only when the quantity measurement is recorded and confirmed by the TWAD Engineer as stipulated in the work order / agreement under the head 'running bills'. Therefore, they sought for dismissal of the suit.

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5. Before the trial court, the plaintiff had examined three witnesses on the their side and marked exhibits A1 to A21 in support of their case. On the side of the defendants, one witness was examined and Exhibits B1 to B7 were marked.

6. The trial Court, on a consideration of the oral and documentary evidence, proceeded to decree the suit as prayed for. Challenging the same, the defendants had filed A.S.No.62 of 2006 on the file of the Principal District Court, Erode. The learned District Judge reversed the judgment and decree of the trial Court primarily on the finding that as per the terms of the agreement entered into between the parties, which has been marked as Ex.A4, payments that were due to the plaintiff was to be paid only after the inspection and certification by the TWAD authorities. The learned Judge had also proceeded to observe that the Site Engineer of the plaintiff who was examined as PW2, had deposed that the work mentioned in Ex.A18, i.e., the measurement book, was not covered in the work agreement. The learned Judge also observed that there was an impossibility of performance and therefore, the plaintiff was not entitled to the decree. Challenging the same, the plaintiff is before this Court.

7. The Second Appeal was admitted on the following Substantial Questions of Law:

(a) Is the Lower Appellate Court justified in dismissing the entire suit especially when the defendants/respondents admits the liability to the tune of Rs.1,91,291/-?

(b) When admittedly the appellant had no privity of contract with TWAD Board, is the Lower Appellate Court justified in holding that as the appellant did not get an approval of the work done from the TWAD Board, the suit to recover the amount for the work done is not maintainable?

8. Mr.Kaithamalai Kumaran, learned counsel appearing on behalf of the plaintiff would submit that despite the fact that the defendants had admitted their liability to the tune of a sum of Rs.1,91,291/-, the Appellate Court had proceeded to dismiss the suit in its entirety. He would further argue that the Appellate Court has failed to appreciate Ex.A18 which is a measurement book, has been certified by the Engineer belonging to the TWAD Board. This certification would be sufficient to



constitute the certification as contemplated in the agreement entered into between the plaintiff and the defendants. He would further submit that the learned District Judge has not considered the documents and evidence from its correct perspective. The Appellate Court has also made special pleadings like impossibility of performance which was not pleaded by the defendants. Therefore, the judgment requires to be reconsidered and set aside.

9. Per contra, Mr. Arun Kumar, learned counsel appearing on behalf of the respondents would submit that the appellate Court has rightly construed and understood the terms of the agreement entered into between the parties and considering the fact that the claim was not keeping in with the agreed terms, the learned District Judge had rightly set aside the judgment and decree of the trial Court and there was no necessity to revisit the said judgment and decree.

10. Heard the learned counsel and perused the records.

11. The Appellate Court has reversed the judgment and decree of the trial Court primarily on the contention that there has not been any certification of the works done by the plaintiff as provided in the agreement Ex.A4. However, a perusal of Ex.A18, would clearly show that each day's work has been checked, verified and certified by the Engineer of the TWAD Board. This clearly satisfies the criteria of certification provided under Ex.A4 agreement. The quantity of work done by the plaintiff can also be assessed from mere perusal of these documents. That apart, the appellate Court had observed that the plaintiff had exceeded the scope of work provided under Annexure 1A. Once again, when the work done as certified in Ex.A18, is compared with the work contemplated under Annexure 1A, it is clear that the plaintiff has only followed the schedule provided to them under Annexure 1A of the agreement. The learned Judge has not explained as to why he has not even taken note of the admitted liability of the defendants. The defendants have also received back the Earnest Money deposited by them with the TWAD Board, despite which they have not sought to compensate the plaintiff who is but a sub broker. The trial Court has considered each and every evidence in arriving at its judgment. The appellate Court has not adverted to the admissions of DW1, while considering the evidence and documents. There is no dispute that the plaintiff has executed the work on behalf of the appellant. The only ground on which the defendants justified the non-payment to the plaintiff is on the ground that the work has not been certified by the TWAD Board. A perusal of the Ex.A18 falsifies this claim.

12. In view of the above, the questions of law are answered in favour of the plaintiff. Accordingly, the Second Appeal is allowed and the judgment and decree of the learned Principal



District Court, Erode, in A.S.No.62 of 2006 is set aside and the judgment and decree of the learned Additional Subordinate Court, Erode in O.S.No.16 of 2004, is hereby confirmed. No order as to costs.

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SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

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To,

- 1.The Principal District Court,
Erode.
- 2.The I First Additional Subordinate Court,
Erode.

+1cc to M/s.Sampath Kumar & Associates, Advocate Sr.33718
+1cc to M/s.S.Kaithamalai Kumaran, Advocate Sr.33616

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srg 26/11/2021