



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.03.2021

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

A.S.No.83 of 2017

1. The Divisional Engineer (Highways),
Construction & Maintenance Division,
Kallakurichi.
2. The Superintending Engineer (Highways),
Construction & Maintenance Circle,
West Shanmugapuram, Villupuram.
3. The Chief Engineer (Highways),
Construction & Maintenance Wing,
Chepauk, Chennai-5.
4. The Secretary to Government,
Highways Department,
Secretariat, Fort St.George,
Chennai-9.

...Appellants/Defendants

Vs.

C.Saravanan,
S/o.Chandrasekaran
Proprietor and Contractor ,
Babuji Civil Construction

...Respondent/Plaintiff

PRAYER: Appeal Suit is filed under Section 96 of C.P.C against the judgment and decree of the Principal District Judge, Villupuram in O.S.No.170 of 2012 dated 10.06.2016.

For Appellants : Mr.Umesh Rao (G.A.)

For Respondent : Mr.R.Sunil Kumar

J U D G M E N T

The Appeal suit is filed by the State representing the Divisional Engineer, Highways Department, Kallakurichi and others.

2. The suit was filed by the contractor to declare that the alleged cancellation of contract as null and void; to declare



the action of withholding Rs.4,23,553/- payable to the plaintiff for the completion of culvert work as illegal, void and not enforceable and to release the EMD and FSD amount of Rs.2,28,500/- which was forfeited by the appellants.

WEB COPY

3. The case of the plaintiff as found in the plaint is that he is class 1 registered contractor of the Highways department and the proprietor of Babuji Civil Construction. He entered into an agreement for the award of work for widening the intermediate lane road to double lane road (IL to DL) in Villupuram Mambalapattu at the estimated cost of Rs.94.80 lakhs. As per the agreement, the work has to be done within a period of nine months and the first 30% of the work to be done within the first quarter, 75% of the work to be done in the second quarter and the total completion of work by the end of the third quarter. The plaintiff and the Highways department entered into the agreement to that effect on 30.07.2008.

4. As per the terms of the contract, the work should have been completed by 30.04.2009. When the contractor commenced the work of widening the lane on both sides, he found that the lane on one side is not available for widening, and this was brought to the notice of the Superintending Engineer, who inspected the site and issued the inspection note on 18.04.2009, admitting non availability of land on one side of lane. Therefore, it was decided by the Highways department to widen one side instead of widening the road on both sides. While fact being so, the Highways department illegally terminated the contract on 08.05.2009 for not completing the contract in time, contrary to their own inspection report regarding the progress in the work and non availability of the land on one side. Further alleging that, there is no progress of the work. Rs.5,000/- penalty per day was imposed to the contractor and the money payable to the contractor for the completed other works namely CD work for a sum of Rs.4,23,553/- was withheld in spite of passing the bill after deducting the tax at source. Therefore, the plaintiff filed suit challenging the termination order as illegal and the order of withholding money payable to the plaintiff/contractor for the completed culvert work as unauthorised and illegal. Direction to release the EMD amount and to pay damages for the loss caused due to breach of contract. The suit was filed with a specific plea that the dispute cannot be referred to Arbitrator, even though, there is arbitration clause, since the value of the dispute is above Rs.2,00,000/-.

5. The Highways department Divisional Engineer, who is the 1st defendant, filed written statement denying the averments made in the plaint. According to his statement, the work for widening the intermediate lane road to double lane road was originally awarded to the plaintiff, who is the proprietor of Babuji Civil



Construction. The agreement was executed on 30.07.2008 and the work site was handed over to the plaintiff on the same day i.e., 30.07.2008. He was supposed to complete the work by nine months as per the schedule mentioned in the contract. The contractor failed to complete the work as per the terms of agreement, inspite of several notice and intimation to commence and complete the work within the stipulated agreement period. Hence in the public interest, the agreement was determined on 08.05.2009. The existing width of the riding surface at the time of preparation of the estimation was 5.50 m from km 67/2 - 74/6. Hence both sides widening of 0.75 was proposed to maintain the existing centre camber properly. Further, the available right of way was 10 to 12 meter. Therefore, it was proposed for both sides widening with power roller compaction. Later, it was brought to the notice of the higher authorities that due to both sides box cutting work it was difficult for the two wheelers during the night hours and therefore, it was decided to carry on for widening the work on one side that is on left side between km 64/4 - 71/2 and on right side between km 71/2 - 74/6. The said decision was ratified by the Superintending Engineer, Highways department during his inspection on 18.04.2009. The determination order was issued to the plaintiff under proper intimation as per the guidance of PS and SSRB by registered post and the same was received by the plaintiff on 15.05.2009. The plaintiff who commenced the work of box cutting for widening of the road on 31.10.2008 and simultaneously done the CD work as per the recorded measurement book. Bill for Rs.4,23,553/- for the CD work was prepared and the amount kept under civil deposit. For the delay in completion of work and for default in contract fine imposed at Rs.5,000/- per day and a sum of Rs.2,62,000/- was recovered from the contractor as fine from the above bill amount. This was done as per the rules.

6. The above statement of the 1st defendant adopted by the defendants 2 to 4. In sum and substance, it is contended that as per the terms of contract the site was handed over to the contractor/plaintiff on 30.07.2008. The contractor commenced the work only on 31.10.2008. He has not completed the work within nine months period fixed under the term of contract. Hence the fine collected from the money payable to the contractor for the culvert work and from the EMD. It is also contended by the defendants that, since the plaintiff failed to complete the work, the work was handed over to another contractor to complete the work. The plaintiff is liable to pay the Highways department which has incurred loss and damages due to the belatedly execution of the work. The Highways department is not liable to pay any compensation to the default contractor. The department is entitled to withhold the money payable to the contractor for his culvert work and forfeit the EMD amount. The contractor after seeking extension of time admitting his delay in



completing the work as per time schedule cannot plead breach of contract by the Highways department.

7. The trial Court based on the pleadings formulated the following issues:

1. Whether the alleged cancellation of contract order dated 08.05.2009 is illegal, void and unenforceable?

2. Whether the recovery of a sum of Rs.4,23,553/- from the bill amount by the 1st defendant is illegal, void and unenforceable?

3. Whether the plaintiff is entitled to get cash, the EMD and FSD amount of Rs.2,28,500/-?

4. Whether the plaintiff is entitled to claim damages to the tune of Rs.16,49,794/-?

5. Whether the 1st defendant committed any breach of contract as alleged by plaintiff?

6. To what relief if any is the plaintiff entitled?

8. Before the trial Court, the plaintiff was examined as PW.1. 10 exhibits were marked. On behalf of the defendant, the Divisional Engineer, Highways department, Kallakurichi examined was as DW.1. Four exhibits were marked to support the defendants case.

9. After appreciating the evidence, the trial Court granted the following relief:

(a) The cancellation of contract dated 08.05.2009 based on the Extension of time application purported to have been issued by the plaintiff dated 11.04.2009 declared as illegal, void and unenforceable due to breach of contract committed by the defendants by not handing over of entire site within 60 days;

(b) The unauthorised action of 1st defendant in having effected recovery from the culvert bill to a tune of Rs.4,23,553/- declared as illegal, void and not enforceable;

(c) The forfeited amount of Rs.2,28,500/- being the EMD and FSD and directed to be released;

(d) The withheld amount of CD work culvert bills amounting to Rs.4,23,553/- ordered to be released;

The trial Court declined to grant the relief to pay compensation of Rs.16,49,794/- for the breach of contract committed by the defendants.

10. Aggrieved by the judgment and decree, the defendants have preferred the present civil appeal. The trial Court judgment and decree assailed by the defendants on the ground that the trial Court failed to note that the contract between the appellants/Department and the respondent/contractor dated 30.07.2008 is a time bound contract. The work should have been completed on or before 30.04.2009. Wherein, the plaintiff had



commenced the work for widening the road only on 26.09.2008 for which the measurement took place on 31.10.2008. The very commencement of the work was delayed and never completed within the time fixed.

WEB COPY

11. If the work site was not handed over to the plaintiff, it was always open to quit from the contract and claim refund of EMD. Contrarily in this case having taken possession of the site and commenced the work belatedly and after seeking extension of time the defense taken by the plaintiff that road space not available for widening is a lame excuse for not completing the contract within stipulated time. The Court below failed to apply its mind that there was no compulsion on the part of the contract to do the work without taking possession of the site and it failed to take note of the fact that as per the terms of the contract, the contractor, who has committed breach is liable to forfeit his EMD as per SSRB rules 109 (6).

12. The Court below failed to take note of the fact that the contractor done the culvert work not as per the schedule and there was a huge gap between 31.01.2008 to 09.05.2008 about five months and 10 days in commencing the work. The work for extension of the road was estimated as Rs.1,14,22,178/- out of which, the plaintiff had done work worth only Rs.4,23,553/-. In other words, the work done by the contractor is only 3.7% of the total estimated work awarded. While so, the lower Court without proper appreciation of the fact had granted the relief as prayed under A to D.

13. The trial Court misunderstood the facts of the case and believed the case of the plaintiff that the work site was not handed over to the plaintiff. The Court below not properly considered Ex.B1 to Ex.B5, which goes to show that the plaintiff is not entitled for any relief and he breached the contract by not widening the road within the time prescribed. The forfeiture of EMD and withholding the money payable to the plaintiff / contractor was done after due termination of the contract. The work done by the respondent/plaintiff is worth only Rs.4,23,553/- out of which, for not completing the work within the time prescribed, he is liable to pay a fine of Rs.2,62,000/- as per the rules. Hence the Court below ought not to have ordered release of bill amount and refund of EMD amount, ignoring the loss caused to the department due to the delay in completion of the work and the fine levied.

14. The learned counsel for the appellants has also filed written argument, wherein, it is stated that the trial Court has not framed any issues regarding the allegations of impossibility of performing the contract. According to the appellants, under Section 16 of the Indian Contract Act, whenever an agreement is



frustrated and if the frustrated portion is removed and the remaining portion of the contract has been performed, the law mandates that the remaining portion of contract is to be performed. It has been contended that the plaintiff cannot say that it is impossible to widen the portion of road. When widening on one side of the road is possible, he should have widened the road atleast on the one side, which was possible. The Court cannot rely upon the averment made in the affidavit, since they are not evidence as defined under Sections 3 and 4 of the Indian Evidence Act. The Court cannot presume that the plaintiff has approached the Additional Divisional Engineer and the Assistant Engineer based on the averments made in the affidavit. The agreement on behalf of the Government was entered between the Superintending Engineer and the plaintiff. The plaintiff never approached the Superintending Engineer regarding the non availability of space.

15. The trial Court failed to appreciate that the original agreement dated 30.07.2008 was 'novated' at the instant of the Superintending Engineer on 18.04.2009. Under Section 62 of the Indian Contract Act, if the parties to the contract agree to substitute a new contract, the original contract need not be performed. Therefore, when the scope of the original contract for widening the road on either side within the period of nine months expired on 30.04.2009, but the contract was novated to the extent that instead of two sides widening, he has to perform widening of one side, but there was not mentioned about the extension of time. Therefore, the work ought to have completed within the time prescribed under the original contract. If the plaintiff was not ready to accept the novation, then he ought to have protested on or before 30.04.2009. Having failed to do so, the appellants have every right under the contract to cancel the contract.

16. In the written argument, it is also stated that the plaintiff is not entitled for a sum of Rs.4,23,553/- with reference to the culvert bill for the reason that the said work is part and parcel of the original work agreement on 30.07.2008. Being the composite work, if the failure to complete the entire work within the time frame, the plaintiff cannot claim money for the culvert work and segregate to perform the culvert work alone and treated it as independent contract.

17. This Court finds in the written statement, grounds of appeal and in the written arguments, the appellants had taken certain plea factually inconsistent. Further new plea not pleaded are raised in the appeal. However, being Court of first appeal, this Court bound to consider whether the defence raised by the appellants are legally and factually sustainable.



18. Point for determination is (i) Whether the trial Court properly considered the evidence before it to hold that the termination order of the appellant dated 08.05.2009 is illegal, void and unenforceable? and; (ii) Whether the Court below declaring the non-payment of culvert bill to the tune of Rs.4,23,553/- is illegal, void and unenforceable and the direction to release the said amount and to refund the EMD amount is proper in law?

19. The case of the plaintiff is that he entered into a work contract in the Highways Department for extension of road by 1.5 mtrs i.e., .75 mtr on either side between km 64/4 - 74/6 along Villupuram Mambalapattu road. The contract is for widening intermediate lane road (5.5 mtrs) to double lane road (7 mtrs). The estimation for the said contract is Rs.94.80 lakhs. The plaintiff was allotted the contract with 25% margin. It is the case of the plaintiff that the existing road when handed over to them for work found not sufficient to work on either side and that was brought to the notice of the department and meanwhile, the culvert work, which is a part of the contract of the road widening commenced and completed. The measurement for the said work was completed on 11.05.2009. The Divisional Engineer had also prepared the final bill as far as the culvert work is concerned and proposed for sanctioning the money on 26.10.2009. However, the work for widening of road could not be taken up due to non availability of land and after causing inspection of the site, the Superintending Engineer, Highways department, Villupuram Circle, on 19.04.2009 issued proceedings stating that there is land available on one side alone for widening. For adequate compaction, one side widening may be taken. Even this decision was not communicated to the plaintiff. Therefore, he was not in a position to commence and complete the work within the time prescribed under the contract, which is marked as Ex.B1.

20. The case of the appellant is that the site was handed over to the contractor/plaintiff as early as on 30.07.2008 and several remainders were sent to him to complete the work as per the time schedule, but he has failed to commence the work and complete the same within the time frame. Admitting the change in the terms of contract regarding widening the road on one side by proceedings of the Superintending Engineer letter dated 18.04.2009, the appellant contends that even if the principle of novation is applied as per the modified terms, the extension on one side should have been completed by the plaintiff within the time prescribed.

21. This Court is unable to countenance this submission for the reason that the contract dated 30.07.2008 indicates that the work should be completed within nine months (i.e.) by 30.04.2009, whereas, the Superintending Engineer of the



department, after inspection had found that there is no possibility of widening of the road on both sides and therefore, suggested for widening the road on one side. This decision was taken by the department only on 18.04.2009. That being the fact, even assuming that the said decision was communicated to the contractor, it is highly impossible for the contractor to complete the work within 12 days i.e., by 30.04.2009. If the principle of novation is applied, then the department cannot penalise the contractor for not completing the work as per the time prescribed under old agreement.

22. The case of the plaintiff that on entering into the agreement, he had commenced the work and completed the culvert work successfully to the satisfaction of the department and the costs of the work as per the final bill is Rs.4,23,553/- is supported by documentary evidence. This amount as well as the EMD amount Rs.2,25,000/- paid by the plaintiff can not be withheld by the department for non performing the part of the work. When it proved solely due to the impossibility of performance and it is candidly admitted by the Superintending Engineer of the Department vide his proceedings dated 18.04.2009, which is marked as Ex.A5.

23. The Divisional Engineer of the Department was examined as DW.1 and in the cross examination, he admits that to widen the existing road by 0.75 mtr, there must be 1.8 mtrs land available to carry on the work and in the site there was no sufficient land to work for extension. Also he admits that Ex.A5 was issued by the Superintending Engineer on 18.04.2009 and this decision to extend the road on one side was taken 11 days before the expiry of the time prescribed under the contract. He also admits that if there is a change in the specifications of the work, then the parties should have entered into a supplementary contract and in this case, the department has not entered into supplementary contract.

24. From the admission of the Divisional Engineer, in his evidence, it is clear as crystal that the plaintiff was not able to perform the contract as per the terms of their agreement, because of the non availability of space and the same has been admitted by the Superintending Engineer in his letter Ex.A5. In the written argument, the appellants have stated that under Section 62 of the Indian Contract Act, if a part of an agreement is impossible to perform it becomes void and at the same time, the parties are mandated to perform the remaining part of the contract, which is possible to perform. There cannot be any contra opinion about this principle and in this case, the plaintiff has proved that the construction of the culvert work, which is the part of the work was possible to perform, therefore, he has completed the culvert work whereas widening



the road of either side was impossible and therefore, he has not commenced the work.

25. The trial Court has rightly appreciated the evidence and ordered to pay the money to the plaintiff as per the final bill Ex.A6 and also return EMD amount of Rs.2,25,000/- which alleged to have been forfeited by the appellants for breach of contract. In fact the trial Court had disallowed the prayer for damages, the presumptive loss of profit claimed by the plaintiff. It is to be noted that the estimation of the work prepared by the department has not based on the ground reality and therefore, after nine months, when they received complaint from the Public, and the Traffic police beside the Press reports that the incompleteness of the road work causing inconvenience to the public, the Superintending Engineer had made local inspection and made statement that there is no space available on either side for widening.

26. To show as if the contractor had agreed to complete the work by 30.06.2009, the appellants had marked a letter purported to have been written by the contractor. The said letter Ex.B3 is dated 11.04.2009. The contractor had denied the authorship and the signature found in it. The perusal of the letter Ex.B3 indicates as if the contractor agreed to commence the road widening work by 30.05.2009 and complete both the road widening and the culvert work by 30.06.2009. It is not signed by the contractor, but his name is written in capital letters. The contractor also denies the genuineness of the letter and he has specifically stated that he is not sought for extension of time. In fact, the space to widen the road is not available, even according to the department of the Superintending Engineer, there is no need for the contractor to give an undertaking letter seeking extension of time as found Ex.B3. Thus it is very clear that the appellants in order to cover up their lapse of not making site inspection before inviting tender for widening the road had created fake document and also terminate the agreement illegally and withheld the money payable to the contractor as a knee jerk reaction to the public resentment. The money what is claimed and decreed in the suit schedule work is the money payable to the plaintiff for the work done and sanctioned, for the culvert work and the EMD paid by him.

27. This Court finds that the trial Court, after considering the evidence particularly Ex.A5 and the fake document produced by the appellants Ex.B3, has held against the appellants and directed them to release Rs.4,23,553/- payable for the culvert work and Rs.2,28,500/- the EMD and FSD withheld by the appellants, after declaring that the termination notice dated 08.05.2009 as illegal, void and unenforceable. This Court on appreciating the evidence holds that there is no error in the



judgment and the decree of the trial Court and the same is confirmed.

28. In the result, the Appeal Suit is dismissed. No order as to costs.

WEB COPY

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rpl

To

1. The Principal District Judge,
Villupuram.
2. The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.R.Sunilkumar, Advocate, S.R.No.21154

A.S.No.83 of 2017

SSD(CO)
RGA(07/10/2021)