

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 3 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO. 990 OF 2019**

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Sanjay Vaghji Rathod

... Plaintiff

Versus

Government of India & Ors

...Defendants

Mr. N.D. Jaywant, for Plaintiff.

Mr. Yogesh Bhate i/b Dharmesh Joshi, for Defendant Nos. 1
and 3.

Mr. Ashutosh Shukla, for Defendant No. 2.

CORAM: N. J. JAMADAR, J.

DATED : 11 AUGUST, 2022

ORDER:-

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.12,51,73,033.77/-, comprising of Rs.9,92,23,670.65/-, being outstanding amount of running bills raised in respect of the works contract and Rs.2,59,49,363.12/-, being the interest component.
2. The material averments in the plaint can be summarised as under:

(a) The plaintiff deals in the business of construction under the name and style of M/s Sanjay construction. The

defendant Nos.2 and 3 are the instrumentalities of Government of India, defendant no.1.

(b) The defendant No.2 had floated a tender on behalf of defendant No.3 for structural repairs and allied civil work of SDF Building Nos.1 to 6 and Gems & Jewellery Building Nos.1, 2 and 3 in the premises of defendant No.3. The plaintiff had submitted a tender. On 17th February, 2017, the defendant No. 2 issued a letter of intent, to award the contract for structural repairs to SDF Building Nos.1, 2, 3 and 4 at the premises of defendant No.3, to the plaintiff. Eventually, on 20th March, 2017, an agreement came to be executed between the plaintiff and defendant No.2, incorporating the terms and conditions. Vide communication dated 15th November, 2017, the defendant No.2 revised the scope of work order and the revised costs of the work was pegged at Rs.25,33,93,331/-. The defendant No.3 appointed M/s Tekburo Engineering Pvt. Ltd. as Structural Consultants and M/s Conspro Management Services as Project Management Consultants for the said work.

(c) The plaintiff claims that the plaintiff executed the work in accordance with the terms of the contract and raised running bills from time to time. As the payments of the running bills were not forthcoming there was exchange of correspondence between

the plaintiff and defendant No.2, on the one part, and defendant No.2 and defendant No.3, on the other part. The plaintiff asserts that the payments in respect of R.A. bills dated 20th March, 2017, 19th April, 2017, 5th May, 2017, 6th June, 2017, 22nd August, 2017, 11th September, 2017 and 2nd December, 2017 (Exhibits-L to L6) to the plaintiff remained outstanding. A final bill was raised by the plaintiff on 23rd May, 2018, for a sum of Rs.18,76,619.59/-. It is further averred that the Project Management Consultant has certified that the work was satisfactorily executed. Even IIT, Mumbai, who carried third party audit, certified that the structural as well as non-structural repair work was satisfactorily executed by the plaintiff.

(d) The plaintiff made repeated demands by addressing series of communications. The defendant No.2 informed the plaintiff that the approval was awaited from the concerned Ministry of Government of India which controls the affairs of defendant No.3, and the payment would be made after the requisite approval. Since an amount of Rs.9,92,23,670.65/-, remained outstanding, the plaintiff addressed notices to the defendants including one under the provisions of Section 80 of the Code of Civil Procedure, 1908. As the demand was not met despite service of notice, the plaintiff was constrained to institute

this suit for recovery of the aforesaid amount along with further interest.

3. The defendants entered appearance upon being served with the writ of summons. Thereupon, the plaintiff took out a summons for judgment. The defendant Nos. 1 and 3 have resisted the claim by filing an affidavit of Executive Assistant to the Development Commissioner and Estate Manager in the office of Development Commissioner, defendant No.3, and have sought an unconditional leave to defend the suit.

4. At the outset, the tenability of the suit is assailed on the ground that there is no privity of contract between the plaintiff and defendant No. 3. The suit is thus stated to be bad for mis-joinder of the parties. The defendant No.3 has thereafter adverted to the circumstances in which the defendant No.2 came to be appointed as a Project Management Consultant for defendant No.3. The substance of the defence of defendant No.3 is that the tender was floated by defendant No.2, works contract was also executed by defendant No.2 and, at the instance of defendant No.2, the defendant No.3 has released partial payment towards the entire works contract. It later transpired that the appointment of defendant No.2, by the then Development Commissioner of

defendant No.3, was not in consonance with the rules and, therefore, a vigilance enquiry was initiated.

5. On the merits of the claim, the defendant No.3 contends that the third party inspection carried out by IIT, Mumbai has revealed that there were several deficiencies in the work executed by the plaintiff. Thus, the plaintiff cannot be said to have executed the works contract in conformity with the terms and conditions of the contract. Therefore, the question as to whether the plaintiff is entitled to recover the amount of the bills raised by the plaintiff for the works contract, the quality of which was found to be inferior, raises a triable issue. Hence, unconditional leave to defend the suit be granted.

6. The defendant No.2 has also filed an affidavit-in-reply and sought an unconditional leave to defend the suit. It is contended that the defendant No. 2 is a Multi State Co-operative Society registered under the Multi-State Co-Operative Societies Act, 2002 and works under the aegis of the Ministry of Agriculture. The role of defendant No.2 was only that of a Project Management Consultant. The defendant No.2 was to receive a fee of 3% of the project value for rendering the services as a Project Management Consultant to defendant No.3. It had floated the tenders, executed the agreement and issued work orders in the capacity of an agent

of known principal. Therefore, the action against the defendant No.2 is legally infirm.

7. I have heard Mr. Jaywant, the learned Counsel for plaintiff, Mr. Yogesh Bhate, the learned Counsel for defendant Nos. 1 and 3, Mr. Ashutosh Shukla, the learned Counsel for defendant No.2, at length.

8. To start with, it may be apposite to note uncontroverted facts. The fact that the defendant No.2 was acting as a Project Management Consultant for the defendant No.3 is incontrovertible. The floating of the tender by defendant No. 2 for structural repairs and allied civil work of SDF Building Nos. 1 to 6 and Gems & Jewellery Building Nos.1, 2 and 3 in the premises of SEEPZ-SEZ, the defendant no.3, is incontrovertible. Nor is it in dispute that the plaintiff's bid for structural repairs and allied civil works of SDF 1, 2, 3 and 4 buildings came to be accepted, under the letter of acceptance dated 17th February, 2017 (Exhibit-C). Indisputably, the said acceptance was preceded by the approval granted by the defendant No.3 vide communication dated 16th February, 2017 (Exhibit-B) addressed to the General Manger of the defendant No.2. Armed with the said approval and consequent to the acceptance conveyed by the plaintiff, it is incontestable that, an agreement dated 20th March, 2017, came to

be executed between the plaintiff and defendant No.2. Issuance of the revised work order vide communication dated 15th November, 2017 (Exhibit-E) is also incontestable. Evidently, the parties are not at issue over the fact that the plaintiff executed the work in accordance with the agreement and revised work order. Raising running bills and part payment therefor are also not much in contest.

9. It seems that the disputes arose between the parties when the amount covered by the running bills (Exhibit L to L6) remained outstanding. The claim of the plaintiff that out of the total costs of Rs.23,72,16,934.64/-, he was paid a sum of Rs.12,72,69,206/-, and an amount Rs.9,92,23,670.65/-, remained outstanding has not been seriously controverted.

10. In the aforesaid backdrop, the quality of the defences sought to be raised by the defendants warrants consideration. At the outset, it is interesting to note that both defendant Nos. 2 and 3 contend that there was no privity of contract between the plaintiff and the respective answering defendant and the contract was between the plaintiff and the defendant(s) other than the answering defendant.

11. Mr. Ashutosh Shukla, the learned Counsel for the defendant No.2 would urge that the defendant No.2 had merely acted as an

agent of the defendant No.3. The defendant No.2 was a Project Management Consultant and was to receive a consultancy fee of 3 % of the contract value. Mr. Shukla, invited the attention of the Court to the provisions contained in Sections 194 and 195 of the Indian Contract Act, 1872 to bolster up the submission that the appointment of the plaintiff by the defendant No. 2 to execute the work for defendant No.3 was of such a nature that the plaintiff himself became an agent of defendant No.3. Emphasis was laid on the illustration (a) appended to Section 194 of the Indian Contract Act, 1872.

12. For a proper appreciation, Sections 194 and 195 of the Indian Contract Act, 1872, are extracted below.-

“194. Relation between principal and person duly appointed by agent to act in business of agency.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him. —Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

Section 195: Agent's duty in naming such person.

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is

not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds."

13. At the outset, before adverting to appreciate the aforesaid submission, it would be imperative to note that an identical challenge raised by the defendant No.2 in Summons for Judgment No.52 of 2019 in Commercial Summary Suit No.1237 of 2019 and Summons for Judgment No.51 of 2019 in Commercial Summary Suit No.1230 of 2019 and connected matter, instituted by the other contractors, arising out of the very same approval granted by defendant No.3 dated 16th February, 2017, in respect of the same project, was repelled by this Court. In fact, in the said suits, the defendant No.2 herein was the sole defendant and the defendant Nos. 1 and 3 herein were not impleaded as party defendants to the said suits.

14. It is pertinent to note that the defence that there was no privity of contract between the plaintiff and defendant No. 2

did not see the light of the day till the affidavit-in-reply came to be filed on behalf of the defendant No.2. Conversely, as is evident from the undisputed facts noted above, the tender was floated by the defendant No.2, the work orders were issued by defendant No.2 and the agreement incorporating terms and conditions of the contract was also executed by defendant No. 2. The agreement between the plaintiff and defendant No. 2 does not give an indication that the defendant No. 2 was merely an executing agency. On the contrary, from the perusal of the documents on record an inference becomes sustainable that contract was executed by the defendant No.2 in its own rights and authority.

15. For the foregoing reasons, I am afraid to accede to the submission on behalf of the defendant No. 2 that it had merely named an agency to act for the principal in the business of agency and thus the plaintiff became an agent of the principal. The jural relationship between the plaintiff and defendants, especially, defendant no.2, does not seem to be governed by the provisions contained in Sections 194 and 195, extracted above.

16. The submission on behalf of the defendant Nos.1 and 3 that there was not privity of contract between the defendant Nos.1 and 3 and the plaintiff is equally fallacious. As indicated above, the defendant No. 2 after carrying out the exercise of tendering the work had submitted the proposal to award the contract to the agencies selected by it, to the defendant no.3. Vide communication dated 16th February, 2017 (Exhibit-B), the defendant No.3 approved the said proposal indicating the distinct projects to be entrusted to different agencies and total costs of the works. Indisputably, the work was executed by the plaintiff at the premises of defendant No.3. In the circumstances, the claim of the defendant Nos.1 and 3 that it had no concern with the contract executed by defendant No. 2 with the plaintiff cannot be said be a *bona fide* defence. What accentuates the situation is the fact that the defendant Nos. 2 and 3 both appear to be, in a sense, agencies of the State. Yet the defendant Nos. 2 and 3 endeavoured hard to shift the onus on each other.

17. This take me to the second plank of the defence of deficiency in the work executed by the plaintiff. It would be contextually relevant to note that the defendant No. 2 does not profess to contend that the work executed by the plaintiff was either unsatisfactory or of inferior quality. In contrast the defendant asserts that the work carried out by the plaintiff was satisfactory and the Project Management Consultant appointed by defendant No.3 had also certified the said fact. Even IIT, Mumbai, the third party auditor, had also found the work satisfactory.

18. Evidently, a cleavage emerges in the defences of defendant Nos. 2 and 3. The aforesaid stand of defendant No.2 that the work carried out by the plaintiff was in conformity with the work order and terms of the contract detracts materially from the endeavor of the defendant No.3 to seek leave to defend on the ground that there were deficiencies in the work executed by the plaintiff.

19. Nonetheless, I am inclined to briefly appraise the worth of the said defence sought to be urged on behalf of the defendant No.3. First and foremost, the said defence did not

see the light of the day till the affidavit-in-reply came to be filed. Secondly, it is imperative to note that the M/s Conspro Management Services, the Project Management Consultant appointed by defendant No.3 had certified vide letter dated 23rd October, 2018, that the entire work was completed as per scope of tender and the requirement of the client. The said certificate reads as under.-

“It is certified that the work of above captioned work is satisfactorily (100%) completed. All test report are satisfactory and are in order the same have been already submitted to you. Additionally the quality of work and specification of work are found satisfactory. As the Tender conditions a third party audit for the quality was also carried out through IIT Mumbai and the report of satisfactory completion is also available with you.

We request to you please issue **Work Completion Certificate** to the contractor for the work “Structural Repairs and allied civil works of SDF 1 to 4 Buildings.” Physically work has been completed as per scope & requirement of client in all aspects & full financially payment is balance as you well aware.”

20. Satisfactory completion of the work has been certified by the Project Management Consultant appointed by defendant No.3 in clear and unambiguous terms. Moreover, the Project Management Consultant has also adverted to the fact that in accordance with the conditions of the contract, IIT Mumbai, the third party auditor, carried out the audit and found the work satisfactory.

21. Mr. Bhate, the learned Counsel for the defendant Nos. 1 and 3 attempted to wriggle out of the situation by canvassing a submission that the report of IIT Mumbai, the third party auditor, points out defects in the work executed by the plaintiff.

22. As the defendant Nos. 1 and 3 endeavored to cling to the report of IIT Mumbai, to bolster up the defence of deficiency in service it may be expedient to extract relevant part of the concluding remarks and recommendations of IIT Mumbai. They read as under.-

“1. The structural as well as non-structural repair work executed by the Agencies is found to be satisfactory, in general.

2. Comparing to the damage in the buildings, exhaustive structural and non-structural repairs of the buildings had been carried out by the agency.

3. The structural and non-structural repair works in the buildings had also been carried out at the places which were appearing to be good at the time of initial audit & inspection and were not considered in the initial estimate.

4. It is strongly recommended to execute Plaster work on top priority of the treated structural Elements, as keeping the treated Structural Elements open to atmosphere will result in failure of the treatment.

5. In order to enhance the life of the building, it is further strongly recommended to take up the balance Structural repair work of External and Internal faces of all buildings on top priority without further loss of time by using micro concrete, Epoxy Grouting, new reinforcement if required, shear keys and E-Glass fibre wrapping of 900 gsm, where loss of cover concrete is more than 25 mm and for loss of cover concrete up to 25 mm, the Structure shall be Repaired by using Polymer modified mortar and also execute the Plaster work on top priority of the treated surface, as keeping the treated surface open to atmosphere will result in failure of the treatment.”

23. On a plain reading of the aforesaid remarks, I am afraid, the defendant Nos. 1 and 3 can draw any support and

sustenance from the aforesaid remarks to buttress the defence that the third party auditor reported that there were deficiencies in the work executed by the plaintiff. Clause 1 and 2, extracted above, unequivocally certify that the work executed by the agencies was found to be satisfactory and exhaustive structural and non-structural repairs of the building had been carried out by the agencies. Clause 4 undoubtedly refers to the necessity to execute Plaster work, on top priority. Clause 5 is of recommendatory nature. However, it would be impermissible to read the aforesaid remarks in such a fashion as to infer that the work executed by the plaintiff was not found to be satisfactory.

24. Both the defences sought to be raised on behalf of the defendants, in the circumstances of the case, can not be said to be either a positive or a fair and reasonable defence. It seems that the real reason for non payment of the bills raised by the plaintiff was the *inter se* dispute between the defendant Nos. 2 and 3, over the very appointment of the defendant No. 2 as the Project Management Consultant. An issue seems to have arisen regarding the validity of the

appointment of defendant No.2, purportedly on account of breach of GFR rules, and the said matter is being examined from vigilance angle. This dispute is wholly irrelevant for the determination of the controversy at hand, especially in the context of the fact that the plaintiff had executed the entire work under the terms of the contract and it has been duly certified to be satisfactory by the Project Management Consultant as well as third party auditor.

25. The conspectus of aforesaid discussion is that none of defences sought to be raised by the defendants is of such nature as to warrant an unconditional leave to defend the suit. The claim of the plaintiff comprises outstanding amount of the bills and interest thereon. It is pertinent to note that there is no clause in the contract for payment of interest in the event of delay in payment of the amount R.A. bills. The rate at which the defendants are liable to pay interest would thus be a matter for adjudication. Hence, it would be appropriate to grant leave to the defendants to defend the suit on the condition of deposit of the principal outstanding amount.

26. Hence, the following order.

ORDER

- (i)** Leave is granted to the defendant Nos. 1 to 3 to defend the suit subject to the defendants depositing in this Court a sum of Rs.9,92,23,670.65/-(Nine Crores Ninety Two Lakhs Twenty Three Thousand Six Hundred and Seventy and Sixty Five paisa only-) within a period of eight weeks from today.
- (ii)** If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file their written statement within a period of 30 days from the date of deposit;
- (iii)** If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex parte* decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

The summons for judgment stands accordingly disposed of.

[N. J. JAMADAR, J.]