



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.11.2022

Coram

THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A.No.235 of 2013 and S.A. No.685 of 2013
and C.M.P.Nos.1 of 2013 and C.M.P.No.11123 of 2016

In S.A. No.235 of 2013

M/s. Sri Balaji Associates,
Rep. by its Managing Partner,
E. Saravanan,
S/o. Eswaramoorthy,
415/A, Perundurai Road,
Opp. to Sathyamoorthy Hospital,
Erode.

.. Appellant

Vs.

Dr. S.S. Chinnuusamy

..
Respondents

In S.A. No.685 of 2013

Dr. S.S. Chinnuusamy
Appellant

..

Vs.

M/s. Sri Balaji Associates,
Rep. by its Managing Partner,
E. Saravanan,
S/o. Eswaramoorthy,
415/A, Perundurai Road,
Opp. to Sathyamoorthy Hospital,
Erode.

.. Respondents



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Common Prayer:- These Second Appeals are filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 13.08.2012 made in A.S.No.13 of 2012 on the file of Principal District and Sessions Judge, Erode modifying the Judgment and decree dated 24.11.2011 made in O.S.No.200 of 2010 on the file of II Additional Subordinate Judge, Erode.

Mrs. Hema Sampath
(For Senior Counsel Mr. P.Valliappan)
(Appellant in S.A. No.235 of 2013 and Respondent in S.A. No.685 of 2013)

Mr. Manish. P.
(For I.Abrar Md Abdullah)
(Appellant in S.A. No.685 of 2013 and Respondent in S.A. No.235 of 2013)

J U D G M E N T

The both Second Appeal arises out of the Judgment and decree dated 13.08.2012 made in A.S.No.13 of 2012 on the file of Principal District and Sessions Judge, Erode modifying the Judgment and decree dated 24.11.2011 made in O.S.No.200 of 2010 on the file of II Additional Subordinate Judge, Erode.

2. The Appellant in S.A. No.235 of 2013 is the plaintiff and the the



appellant in S.A. No.685 of 2013 is the defendant in the original suit in O.S.

No.200 of 2010. For the sake of convenience, the parties are referred to as per the rank cited in the said original suit.

3. The case of the plaintiff is that the plaintiff being a building contractor has undertaken to carry out certain works such as formation of roads, drainage and pathway in the Indian Public School run by the defendant. As per oral agreement between the plaintiff and the defendant, the defendant has entrusted the contract work to the plaintiff after receiving the provisional estimation from the plaintiff. In the estimation submitted by the plaintiff, he has quoted one bag of cement at Rs.250/- irrespective of the fluctuation in the rate. But, the defendant himself undertook to supply the required cement bags at the prevailing costs for the said contract work. At that time, the Public Works Department of Tamil Nadu had fixed the rate of cement at Rs.220/- per bag. As per the oral agreement, the plaintiff commenced the said work during the march 2008 and completed the same as early as on 31.10.2008. The total cost of the said contract work executed by the plaintiff came to Rs.53,14,706/-. The defendant through his supervisors, supervised the contract work and perused the accounts submitted by the plaintiff claiming a total sum of Rs.53,14,706/- for the said contract work and



promised to pay the same. However, the defendant has paid a total sum of Rs.42,00,000/- only from 06.05.2008 to 06.09.2009 after deducting TDS without giving balance amount. As per the oral agreement, the defendant has supplied cement bags to the tune of Rs.5,03,500/- as undertook by him during the execution of contract work. Out of Rs.53,14,706/-, the defendant has paid a total amount of Rs.47,03,500/- (Rs.42,00,000/- + R.5,03,500/-) including costs of cement bags supplied by the defendant leaving the balance amount of Rs.6,12,206/-. The plaintiff has given the quotation on 09.04.2008 to the defendant in person for the said contract work. Being satisfied with the said quotation, the defendant entrusted the contract work on the plaintiff. During the commencement of work, the defendant wanted to extend the length of north-south road beyond and outside the main gate of the School. Hence, the plaintiff is constrained to give the revised estimation dated 05.05.2008, wherein he has quoted the price of the cement per bag at Rs.250/- irrespective of the fluctuation in the rate and this amount excluded the taxes which shall be extra. So far as the laying of bituminous road for a total extent of 4,371 Sq.Mtr, the rate was fixed at Rs.165/- per Sq. Mtr, both in the estimation dated 09.04.2008 and 05.05.2008 and agreed the same by the defendant. However, the defendant having obtained an estimation from an engineer known to him, reduced the cost of the said bituminous road at



Rs.41/- per Sq. Mtr. which is capricious, illegal, and against the principal of natural justice. Such estimation cannot at all be a basis for putting forth a counter claim. In spite of repeated demands and as well as through mediators, the defendant failed to pay the balance amount. Prior to the institution of the suit, the plaintiff issued a statutory notice to the defendant on 03.09.2009 demanding the balance amount of Rs.6,12,206/- with interest thereon. The defendant in his reply dated 26.09.2009 has made counter claim to the tune of Rs.2,67,881/- from the plaintiff. Hence, the plaintiff has filed the original suit in O.S. No.200 against the defendant for recovery of the balance amount of Rs.6,12,206/- from the defendant.

4. The case of the defendant is that on several discussions and by oral contract, it was agreed by the plaintiff to execute the contract work entrusted by the defendant at the rates mentioned in the abstracts sent by the defendant enclosed with the reply notice dated 26.09.2009 to the plaintiff for his notice dated 03.09.2009. He contended that the provisional estimation submitted by plaintiff is false and vague and also without the details of date and rates in his notice dated 03.09.2009. The alleged estimation dated 09.04.2008 and the revised estimation dated 05.05.2008 are also false and after thought and raised by the plaintiff in his re-joinder only on 03.10.2009.



is original dated 07.08.2009 which has been corrected by the plaintiff. The correction of the said dates itself proves the false nature of plaintiff's bill details for the alleged balance claim of Rs.6,12,206/- The abstracts and the unit rates enclosed with the plaintiff's notice dated 03.09.2009 are also false. It is never alleged in the plaintiff's notice that the unit rates for the work done are those mentioned in the enclosed abstracts. The defendant had sent a suitable reply dated 26.09.2009 disputing the allegations contained in the said notice and enclosing his abstract estimate for the work done at Rs.46,70,386/- and also the valuation report dated 14.09.2009 of M/s. New Premier Constructions. The defendant has also denied that the quotation dated 09.04.2008 for total civil work and revised quotation dated 05.05.2008 for extension of road given by the plaintiff. Further, the cost of Rs.1.19 lakhs with an unit rate of Rs.7,000/- for the work of the chamber of 17 Nos. is not admitted as true. The said chamber work is not oral contract and it is also not mentioned in the said notice as part of the work and in the abstracts except the details of bill. Further, the chambers were put up by the defendant on his own arrangement and cost. The road was put up by the plaintiff were started breaking immediately and there are many patches in the roads making very difficult to ply all vehicles from and to school. The defendant immediately contacted the plaintiff and requested to rectify the said errors. The plaintiff



never turned up and hence defendant was constrained to engage an approved surveyor M/s. New Premier Constructions, Erode to survey independently for the work done and assess its quality. The said Surveyor assessed the work done by the plaintiff for Rs.46,48,000/- and for repairing the damages at Rs.1,79,211/- by his valuation report dated 14.09.2009. Hence, the plaintiff has to repay the excess amount of Rs.88,670/- received from the defendant and along with cost of Rs.1,79,211/- to the defendant towards repairing the damages in the work done totalling a sum of Rs.2,67,881/- (Rs.88,670/- +1,79,211/-). Thus, the defendant denied the liability of the suit claim of Rs.6,12,206/- claimed by the plaintiff by way of counter claim of Rs.2,67,881/-.

5. The Plaintiff and his site engineer were examined as P.W.1 and P.W.2 respectively and Ex.A1 to Ex.A14 were marked on the plaintiff's side. On the defendant's side, the Chief administrator of the School was examined as D.W.1 and others were examined as D.W.2 and D.W.3 and Ex.B1 to Ex.P8 were marked. Both sides adduced the evidence with regard to construction of work, estimation of work, purchase of cement bags and exchange of notice.



6. The Trial Court after hearing both sides and considering the oral and documentary evidence, by Judgment and decree dated 24.11.2011 decreed the suit in favour of the plaintiff as prayed for. Being aggrieved by the aforesaid Judgment and decree dated 24.11.2011, the defendant has filed First appeal in A.S. No.13 of 2012 before the Principal District and Sessions Judge, Erode. The First Appellate Judge, after hearing both sides and having considered the facts and circumstances of the case, held that the plaintiff has proved the estimation and the revised estimation by Ex.P10 and Ex.P11 and also held that the defendant has not established that contract work was done incomplete by the plaintiff and also the excess payment and costs of repairing the damages. Hence, the First Appeal No.13 of 2012 was partly allowed by Judgment and decree dated 13.08.2012 after modifying the Judgement and Decree dated 24.11.2011 passed by the Trial Court granting a decree for less 25% in the original claim amount of Rs.6,12,206/- with interest at the rate of 7.5% per annum. Accordingly, the defendant is directed to pay a sum of Rs.4,59,155/- together with interest at 7.5% per annum from 08.10.2009 till the date of realization with proportionate costs. Being not satisfied with the aforesaid Judgment and decree dated 13.08.2012, the plaintiff has filed the Second Appeal in S.A.No.235 of 2013 before this Court contending that the Lower Appellate Court having accepted the plaintiff's case entirely, without



ascertaining the proper reasons reduced the 25% out of total claim of the plaintiff and hence it is liable to be set aside. On the other hand, the defendant has filed another appeal in S.A. No.685 of 2013 before this Court contending that the Lower Appellate Court failed to take note of the fact that even though the plaintiff has not produced any proper accounts to prove his claim as well as Ex.A10 and Ex.A11 are also xerox copies which are inadmissibility evidence, the suit is decreed in favour of the plaintiff and hence it is unjust and liable to be set aside.

7. In the Second appeal in S.A. No.235 of 2013 filed by the plaintiff, the following question of law is framed:

a) Whether the Lower Appellate Court is correct in law in reducing 25% of the decree amount granted by the Trial Court after finding all the issues in favour of the appellant?

b) Whether the Lower Appellate Court is correct in law holding that apart from Ex.A10 & A11, there is no other document to prove the agreement between the parties, by eschewing Exhibits A1 to A9, A12 to A14 and the oral evidence of P.W.1 and P.W.2



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c) Whether the Lower Appellate Court is correct in law in not considering the admissions made by D.W.1 to D.W.3, which would establish the case of the appellant?

c) Whether the Lower Appellate Court is justified in law in drawing adverse inference against the appellant for non-production of the originals of Ex.A10 and Ex.A11, which are with the respondents, who failed to produce the same in spite of notice to produce?

8. In the Second appeal in S.A. No.685 of 2013 filed by the defendant, the following question of law is framed:

a) Whether the Lower Appellate Court failed to analyze the accounts produced by the plaintiff and gave its finding on its correctness, even though the defendants disputed the accounts in the written statement?

b) Whether the Lower Appellate Court was right in taking into account Ex.A10 & Ex.A11 when the same are xerox copies and therefore inadmissible in evidence overlooking Section 65,65B,66 and 85B, of the Indian Evidence Act, 1872?



c) Whether the Lower Appellate Court was right in

holding that the plaintiff has proved his claim based on accounts and other documentary evidence solely on probabilities and finding defects in the case of the defendant?

d) Whether the Lower Appellate Court was drawing an adverse inference against the appellant for non-production of the originals of Ex.A10 and Ex.A11 when the same have been categorically denied by the appellant.

9. The learned counsel for the plaintiff/appellant in S.A.No.235 of 2013 would submit that there is no basis for modifying the decree by reducing 25% from the amount decreed by the Trial Court while Ex.A10 and Ex.A11- estimations have been admitted by the defendant and therefore, there cannot be any reduction in the decree. Having rejected all the contentions raised by the defendants, the Lower Appellate Court has finally modified the decree granted by the Trial Court holding that apart from Ex.A10 and Ex.A11, there is no material to show the nature of agreement between the parties, by overlooking the other documentary and oral evidence. Further, it has been submitted that the defendant was served with notice to produce the original estimations under Ex.A10 & Ex.A11, but he failed to



produce the same and therefore, adverse inference ought to have been drawn against the defendant. Hence, the Judgment and decree dated 13.08.2012 passed by the learned Appellate Judge, is liable to be set aside.

10. The learned counsel for the defendant/appellant in S.A. No.685 of 2013 would submit that the Lower Appellate Court erred in law granting a decree for recovery of an amount reducing 25% out of total suit claim when the plaintiff had failed to prove his case beyond reasonable doubt since the Ex.A10 and Ex.A11 were xerox copies which were forged and fabricated one and further those documents did not contain any details of the so called Chamber Work. It has been further submitted that the Lower Appellate Court has erred in coming to the conclusion that the Originals of Ex.A10 and Ex.A11 have been handed over to the defendant, when its existence and validity is disputed categorically and the Chambers have been constructed by the plaintiff only based on the evidence of D.W.1. Hence, the Judgment and decree dated 13.08.2012 made in A.S.No.13 of 2012 passed by the First Appellate Court is liable to be set aside.

11. Heard the learned counsel for both parties and perused the materials available on record.



12. Having considered the submissions advanced by the learned counsel for both parties, it reveals the fact that as per the oral agreement between the plaintiff and the defendant, the said contract work was entrusted by the defendant to the plaintiff. This fact is admitted by both the parties. According to the plaintiff, he has completed the work as per the oral contract. During the work in progress, the defendant had paid a sum of Rs.42,00,000/- to the plaintiff on various occasions and there was a balance amount after deduction of cost of cement bags being supplied by the defendant side. However, the defendant has denied the estimation and the revised estimation under Ex.A10 and Ex.A11 respectively attached with the notice issued by the plaintiff which is forged one and having lack of particulars. Further, despite it is not admissibility of evidence which has been produced without any supporting document, the Court below erroneously decreed the suit only based on the Ex.A10 and Ex.A11. Both the Trial Court and the Lower Appellate Court relying upon the estimation and the revised estimation under Ex.A10 and Ex.A11 which are xerox copies, fixed the liability on the defendant. Admittedly, the Ex.P10 and Ex.P11 have been prepared by the plaintiff for the contract work entrusted by the defendant and the same was handed over to the defendant. After having handed over the original estimation on contract work to the defendant, the plaintiff would have only



xerox copy of the same. However, the defendant strongly denied that the Ex.A10 and Ex.A11 were prepared for the purpose of the case. At the same time, the learned counsel for the plaintiff has rightly pointed out that during the pendency of the suit proceedings, the plaintiff has issued the notice on the defendant requesting to produce the original estimation and the revised estimation which were marked as Ex.A10 and Ex.A11. The same was not complied by the defendant. Hence, the available xerox copies of the same has been produced before the Trial Court. Hence, it is not acceptable of the contention raised by the defendant that the Ex.A10 and Ex-A11 were prepared for the purpose of the said case. Further, the defendant has disputed the rate mentioned in the Ex.A10 and Ex.A11 for carrying out the contract work. But, the said contract work was supervised by the D.W.3 at the instance of the defendant. Furthermore, the defendant produced the quantity of work and abstract of contract work issued by M/s. New Premier Constructions, sent to the plaintiff by way of reply notice dated 26.09.2009, before the Trial Court. With regard to quantity of work shown in Ex.A3-final bill given by the plaintiff, the defendant has not disputed all the work and the quantity of each work as shown in the final bill under Ex.A3 and in the abstract attached with Ex.A5, has been accepted. Except the chamber work, the quantity of work and other work has been accepted by the defendant.



With regard to the Chamber work, the defendant denied that the Chamber work is done by the plaintiff. On the other hand, the defendant independently has done that work on his own costs. During the evidence, the A.W.1 admits that chamber work was also constructed by the plaintiff. Therefore, the contention of the defendant that with regard to the construction of the said Chambers falls by his own witness and the same was admitted by the Court below. Furthermore, the defendant submitted that he supplied 2010 bags of Cement for the said contract work and the same was not denied by the plaintiff. Only after deduction of cost of cement bags, the plaintiff is claiming the remaining balance amount of Rs.6,12,206/- out of total cost of contract work since it has been supplied by the defendant on his own costs. Therefore, in all aspects of the plaintiff, the liability of the defendant is based on the admissibility of Ex.A10 and Ex.A11 even though which are xerox copies, proved by the plaintiff that the original of the Ex.A10 and Ex.P11 have been handed over to the defendant at the time of producing quotation for carrying out the contract work. Hence, the Courts below decreed the suit relying upon the Ex.A10 and Ex.A11 is fair and justifiable one and hence, no interference is warranted by this Court. Thus, the substantial questions of law framed in S.A. No.685 of 2013 -A to D are answered accordingly.



12. Another contention raised by the defendant is that proper account was not produced by the plaintiff. As pointed out by the learned counsel for the plaintiff is that the contract work was entrusted to the plaintiff based on the oral agreement entered into between the plaintiff and the defendant. It is also admitted by the defendant. Under such circumstances, the production of accounts as claimed by the defendant does not apply to the facts of the case. In spite of that, the plaintiff before commencement of contract work has submitted the estimation and the revised estimation and the same was accepted by the defendant. Based upon that only, the contract work was started by the plaintiff and after completion of said work, the Ex.A3 final bill has been handed over to the defendant. If at all, it is incomplete of contract work, the defendant ought not to have paid the amount, but paid Rs.42,00,000/- on many occasion during the pendency of the work. Hence, the complaint of incomplete work done by the plaintiff is not acceptable one and accordingly, the Courts below have rightly appreciated the same. Furthermore, the abstract submitted by the defendant with regard to contract work through the chartered Engineer-D.W.3 was not acceptable since he is no way connected with the said contract and he was not aware of the oral agreement entered between the plaintiff and the defendant. Further, as D.W.3 is the close relative to the defendant, his



evidence is tainted with interest for which reason, the Courts below have not accepted the evidence of D.W.3. Further, the defendant has not proved his contention of the excess payment which is said to be paid to the plaintiff and incomplete contract work done by the plaintiff as well as the cost of the repairing charges for the damages work. Hence, the Trial Court rightly appreciated all the facts of the case and dismissed the counter claim of the defendant and decreed the suit in favour of the plaintiff. However, the Lower Appellate Judge independently analysed all the oral and documentary evidence and appreciated the same in favour of the plaintiff and however in the conclusion portion reduced 25% out of original suit claim stating that the revised estimation is only approximate one and hence, the plaintiff is not entitled to 25% out of total suit claim and only 75% of the suit claim is only entitled to the plaintiff. It is also reduced the rate of interest from 9% to 7.5% for the claim amount. With regard to the reduction of interest, even it is admissible one, as far as the reduction of 25% out of the total suit claim is concerned is not acceptable one without any reasoning. Hence, the finding of the reduction of 25% out of the total claim is liable to be set aside. Thus, the Substantial questions of law framed in S.A. No.235 of 2013 -A to D are answered accordingly.



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13. In view of the aforesaid observations, the Second Appeal in S.A. No.235 of 2013 filed by the plaintiff is allowed and thereby the suit in O.S. No.200 of 2010 is decreed as prayed for. The Second Appeal in S.A. No.685 of 2013 filed by the defendant is dismissed as not maintainable. No Costs. Consequently, connected miscellaneous petition is closed.

29.11.2022

Index : Yes/No

Internet : Yes/No

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To

1.Principal District and Sessions Judge, Erode.

2.The II Additional Subordinate Judge, Erode.



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T.V.THAMILSELVI, J.

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Pre-Delivery Judgment in
S.A.No.235 of 2013 and S.A. No.685 of 2013
and C.M.P.Nos.1 of 2013 and C.M.P.No.11123 of 2016

29.11.2022