

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.02.2022
PRONOUNCED ON : 08.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

AS.No.673 of 2014

1. P.Mahalingam (died)
2. M.Jagadeshwari
3. M.Jayashree
4. M.Krithika
5. M.Raghuraman

. . . Appellants

(Appellants 2 to 5 brought on record as LRs of the deceased sole appellant vide order of this Court dated 23.07.2020 made in C.M.P.No.1407 of 2018 in A.S.No.673 of 2014)

Vs

1. The Superintending Engineer
Highways Department,
Chennai Circle,
Guindy, Chennai - 600 025
2. The Divisional Engineer,
Highways Department,
Tiruvallur Division,
#170 Jawaharlal Nehru Road,
Tiruvallur - 602 001.

. . . Respondents

Prayer:- This Appeal Suit has been filed, under Order 41 Rule 1 read with Section 96 of C.P.C., against the judgement and decree, dated 29.10.2013, passed in O.S.No.11974 of 2010, by the XVIII Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.M.K.Kapir
Senior Advocate
for Mr.T.Jayaraman

For Respondents : Mr.B.Tamil Nidhi
Additional Govt. Pleader

JUDGEMENT

This Appeal Suit has been filed against the judgement and decree dated 29.10.2013 passed in O.S.No.11974 of 2010 by the XVIII Additional Judge, City Civil Court, Chennai.

2. The case of the appellants, in a nutshell as set out in the plaint is as follows:-

2.1. On 08.10.2003, the 1st appellant entered into an agreement bearing No.CR1/2003-2004 with the respondents for construction of four minor bridges at KM 7/0-9/0 (at KM 7/4, 7/8, 8/242 and 8/8) of Pallavaram-Thoraipakkam Road. The site was handed over to the 1st appellant on 23.01.2004 and the period of completion contemplated under the agreement was twelve months from the date of handing over of the site i.e., on 23.01.2005. The 1st appellant paid a sum of Rs.49,000/- towards the Earnest Money Deposit and a sum of Rs.1,04,000/- towards Security Deposit.

2.2. When the 1st appellant commenced execution of earth work, the earth from the opposite side (undisturbed portion), started caving in due to the nature of the soil and the work could not be completed. The 1st appellant informed the respondent that unless the loose soil is removed, the work could not be progressed. The respondents also inspected the site on 25.01.2004. Consequently, a new agreement was entered on 03.05.2005. In the meanwhile, the 1st appellant completed the work to the tune of Rs.4,33,550/-. Despite entering into a new agreement, the old agreement was not closed because no final bill was prepared and signed by the parties. The 1st appellant wrote several letters to the respondents for payment of the above sum. However, the same was not settled by the respondents, resulting in the filing of a suit in O.S.No.11974 of 2010 on the file of XVIIIth Additional Judge, City Civil Court, Chennai, seeking recovery of total sum of Rs.6,14,550/-.

3. The case of the respondents, in a nutshell, as set out in the written statement, is as follows:-

3.1. The defendants floated a tender for construction of the four minor bridges at KM 7/0-9/0 (at KM 7/4, 7/8, 8/242 and 8/8) of Pallavaram - Thoraipakkam Road. Being the successful bidder, the said tender bearing registration No.CR1/2003-2004 was given to the 1st appellant. Since the soil condition was not conducive for the scope of the work and the design was subsequently changed after making through investigation by the respondents, the agreement was entered between the parties on 08.10.2003. However, the site was handed over to the 1st appellant only on 23.01.2004. As per the agreement condition,

(Clause 109.1 of PS.SSRB) the 1st appellant's obligation is to start the work within a period of 10 days since the handing over the site. During the execution of the work, the earth caved in and the soil was found to be slushy and it was like a very soft clay. Therefore, the work could not be proceeded with. The 1st appellant's inability and in-experience in doing the work has resulted in heavy loss to the Department. The 1st appellant and the respondents entered into a second agreement on 03.05.2005 and took over the site for execution and left away leaving the balance work. Even after several requests made by the 2nd respondent to the 1st appellant to re-commence the balance work, he failed to do so. As a result, the said rectification work, amounting to a sum of Rs.28,95,138/- was carried out by another third party contractor. As far as the Highway contractors are concerned, they are governed by Standard Specifications for Road and Bridge Rules (in short 'SSRB Rules'). As per the SSRB Rules No.103.3, the tenderers are required to inspect the site i.e., the site inspection will be treated as the conclusive evidence that the bidder has to examine and satisfy as to all the conditions and contingencies. However, the 1st appellant, without following and adhering to the progress schedule, failed to execute the work, which ultimately resulted in the termination of the contract and a fresh estimate was prepared and technically sanctioned for Rs.84,00,000/- under "TUFIDCO scheme".

4. Based on the pleadings, the following issues were framed by the Trial Court:-

1. Is it true that the suit by the plaintiff is not maintainable?

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

3. To what relief the plaintiff is entitled?
Before the trial Court, on the side of the appellants, Ex.A1 to Ex.A8 were marked and PW.1 was examined. On the side of the respondents, Ex.B1 to Ex.B11 were marked and DW.1 was examined. After trial the trial Court partly allowed the suit vide judgement and decree dated 29.10.2013. Aggrieved by the same, this Appeal Suit has been filed by the 1st appellant.

5. The learned counsel for the Appellants submitted that the 1st appellant entered into an agreement with the respondents on 08.10.2003 for construction of four minor bridges. The respondents handed over the site to the 1st appellant on 23.01.2004. As per the agreement, the period of completion of work would lapse on 23.01.2005. When the 1st

appellant commenced execution of the earth work, suddenly, the earth from the opposite side (undisturbed portion), started caving in, which was due to the nature of soil. Therefore, the 1st appellant was unable to proceed with the work. The respondents also inspected the site on 25.01.2004 and confirmed the same.

5.1 Thereafter, a fresh agreement was drawn, but for the 1st agreement, the respondents have not paid any amount for the work done by the 1st appellant. Hence, he sent a letter dated 11.02.2004, which was marked as Ex.A3 and a reminder letter dated 23.06.2006 to the respondents requesting them to pay the balance amount. But the respondents have not responded to the same. Thereafter, the 1st appellant sent a notice dated 27.01.2007 (Ex.A5). Even then, there was no reply from the respondents. With no other option, the 1st appellant sent a legal notice dated 02.07.2007 (Ex.A6). All these facts are not denied by the respondents. But the lower Court failed to appreciate the same and negatived that claim. The respondents failed to file the M-Book. Hence, adverse inference should be drawn against the respondents.

5.2. In this case, the Court below has not properly appreciated the facts and in the absence of denial by the respondents to Ex.A3 to A6, the Court below should have allowed the suit. But, without properly appreciating the rules and the documentary evidence, the lower Court partly decreed the suit. Hence, the learned counsel for the appellants prays for allowing this appeal.

6. The learned counsel for the Respondents submitted that, it is an admitted fact that the respondents entered into an agreement with the 1st appellant for construction of four minor bridges, and the tender was given to the 1st appellant, being the successful bidder. Since the soil found there was slushy and as it was very soft clay, the work could not be proceeded further. Thereafter, a fresh agreement was entered with the 1st appellant. Because of the 1st appellant's inability, the work was not done successfully, which resulted in heavy loss to the Department. The suit is vexatious one. The lower Court, after perusal of all the documents and evidence came to the proper conclusion that the suit is liable to be dismissed in part. Hence, he prayed for dismissal of this appeal.

7. The point that arises for consideration in this appeal is as to whether the judgement of the trial Court is sustainable in law and on facts?

8. In this case, PW1 deposed that he was the successful tenderer for the construction of four minor bridge. The value of the construction was estimated at Rs.84,57,529/-. Thereafter, an agreement was entered between the 1st appellant and the respondents on 08.10.2003. Pursuant to the same, the 1st appellant has paid a sum of Rs.49,000/- towards the Earnest Money Deposit and a sum of Rs.1,04,000/- towards the Security Deposit. The respondents handed over the site to the 1st appellant on 23.01.2004. As per the agreement, dated 08.10.2003, the period for completion would lapse on 23.01.2005. The 1st appellant further stated that when he commenced the execution of work, earth from the opposite side started caving in. This was due to the nature of the soil. Hence, the work cannot be proceeded with. The site was inspected by the respondents on 25.01.2004. Then a fresh agreement was drawn on 03.05.2005, but the agreement dated 08.10.2003 was not closed and no final bill was prepared. The respondents should pay the value of the work done. He stated that he had completed the work to the tune of Rs.4,33,550/-. He also paid a sum of Rs.49,000/-, towards EMD and a sum of Rs.1,04,000/- towards the Security Deposit. In addition to the above, he also paid a Rs.28,000/- between 25.01.2004 and 23.05.2005 to safeguard the materials. Totally an amount of Rs. Rs.6,14,550/- was due but the same was not settled by the respondents. Thereafter, he sent letters dated 23.06.2006 (Ex.A4) and 27.01.2007 (Ex.A5) requesting the respondents to pay the remaining amount. Since there was no reply from the respondents, the 1st appellant sent a notice dated 27.07.2007 (Ex.A6) and the same was acknowledged by the respondents.

9. In this case, DW1 deposed that an agreement was entered into between the 1st appellant and the respondents on 08.10.2003. Because of the sluggish soil, the work could not be proceeded with. Then, a fresh agreement was entered between the same contractor on 23.05.2005. The 1st appellant's inability in doing the work has resulted in heavy loss to the Government. In spite of repeated reminders by the Department/ 2nd respondent, the 1st appellant could not complete the work. Further, he stated that the Highways contractors are governed by the SSRB Rule 103.3. The 1st appellant failed to follow it. Thereafter, the contract was terminated, which is legal. The 1st appellant's claim is incorrect and not substantiated either by oral or documentary evidence. The respondents are not liable to pay any amount as claimed by the appellants and the any claim made by the appellants is liable to be rejected.

9.2 Dw1 further deposed that the 1st appellant has failed to carry out the rectification work which was carried out by another contractor and the same has caused loss to the Department.

9.3 In this case, on a perusal of Ex.A3 dated 11.02.2004 it reveals that no signature and enclosures is found in that document. As far as Ex.A4 dated 23.06.2006 is concerned, it was sent with a delay of 28 months. The appellants have not stated as to how they have sent these two letters and also not explained regarding the delay. On perusal of Ex.A5 dated 27.01.2007, the signature of the 1st appellant is not found in the letter and the acknowledgement has also not been filed. Thereafter, 1st appellant sent a notice Ex.A6 dated 02.07.2007 to the respondents.

9.4 In this case, the 1st appellant stated that to safeguard the materials he has paid a sum of Rs.28,000/- between 25.01.2004 and 25.03.2005. To prove the same he has not filed any documents. In this case, the burden of proof lies on the appellants but the appellants have not filed any enclosures or calculation memo. In this case, the respondents relied on PS No.103.3 of SSRB, Rules, which clearly states that,

"103.03 Examination of Plans, Specifications, Special Provisions and site of work:-

The bidder is required to examine carefully the site of the work, source of materials of the proposals, plans, specifications, special provisions and contract forms for the work contemplated it will be construed that the bidder has investigated and is satisfied as to the conditions to be encountered for performing the work as scheduled or as at any time altered in conformity with PS. 105.05 and as to the Character, quality and quantities of work to be performed and materials to be furnished including increase and decrease and as to the requirements of contract. It is mutually agreed that submission of tender shall be considered conclusive evidence that the bidder has made such examination and is satisfied as to all the conditions and contingencies."

10. In this case, the appellants have not whispered anything about this Rule. In this case, the lower Court perused all the records and documents and came to a proper conclusion. No interference is required in this appeal. The point for consideration is answered accordingly in favour of the

respondents. This appeal is liable to be dismissed. Accordingly, appeal is dismissed confirming the judgement and decree of the trial Court. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

gba

To

1. The Superintending Engineer,
Highways Department,
Chennai Circle,
Guindy, Chennai - 600 025.
2. The Divisional Engineer,
Highways Department,
Tiruvallur Division,
No 170 Jawaharlal Nehru Road,
Tiruvallur - 602 001.

+1cc to Mr.T.Jayaraman, Advocate, S.R.No.32938

AS.No.673 of 2014

PMK[co]
NSK/29/07/2022