



A.S.No. 438 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 07.11.2023

Judgment Pronounced on : 29.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBRAMANIAN

And

THE HONOURABLE MR. JUSTICE N. SENTHILKUMAR

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Sree Ganesh & Co.,
a Registered Partnership Firm
represented by its Managing Partner
N. Ganesan. .. Appellant

Versus

1. The State of Tamil Nadu,
Represented by the Superintending Engineer (H),
Nabard and Rural Circle,
Maravaneri Extension,
Salem-636 007.
2. The Divisional Engineer,
(High Ways),
Nabard and Rural Roads,
Coimbatore. .. Respondents



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Appeal Suit filed under Section 96 and Order 40, Rule 1 of the Code of Civil Procedure against the Judgment and Decree in O.S.No. 95 of 2010, dated 20.12.2013, on the file of the II Additional District Judge, Salem.

For Appellant : Mr.T.R. Rajagopalan
Senior Counsel
For Mr.T.R.Rajaraman

For Respondents : Mr.T.Chandrasekaran
Special Government Pleader (Civil Side)

JUDGMENT

N. SENTHILKUMAR, J.

This First Appeal has been preferred against the Judgment and Decree in O.S.No.95 of 2010, dated 20.12.2013 passed by the learned II Additional District Judge, Salem.

2. The appellant/plaintiff has filed the suit in O.S.No. 95 of 2010 under Section 26 and Order 7, Rules 1 to 14 of the Code of Civil Procedure



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against the defendants 1 and 2 for directing the respondents/defendants to pay the suit amount with future interest amounting to Rs.44,60,919/-.

3. The case of the plaintiff is that the first defendant invited Tenders for construction of a High Level Bridge across Aliyar river near Aththupollachi including formation and improvement of approach road from Km 85/4 of Avinasi-Thiruppur-Palladam-Pollachi-Cochin Road, Via Meenakarai to Aathupollachi Km 0/0-3/2 and the plaintiff's tender was accepted by the first defendant. An agreement was entered between the plaintiff and the first defendant on 21.02.2007 in CR481A/06-07 for a value of Rs.3,65,59,759/-. The time for completing the work was 15 months and based on the agreement dated 21.02.2007, the plaintiff commenced the work as per schedule and the work was completed on 23.12.2008. After completion of work, the first defendant has issued the completion certificate to the plaintiff on 31.12.2008.

4. According to the plaintiff, a prohibitory order was passed by this Court in respect of sand quarrying from Paramiyam Depot in Akkaraipalayam Village. The Superintending Engineer, Public Works Department, has notified the same by way of Letter No.



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JDO/71B/662M/06, dated 12.12.2006. The designated quarry, which is situated at 82/8 Km in SH-19, from where gravel and Carted Earth were to be quarried was partly used as a road and hence gravel and carted earth could not be quarried to complete the construction. The same was also informed to the second defendant by the plaintiff through Ex.A8 and Ex.A11 dated 13.06.2008 and 07.08.2008. The plaintiff further submitted that according to the terms of the contract, the rates were fixed for (i) Sand Rs.256.00, (ii) Gravel and Carted Earth Rs.24.00 and (iii) Blue Metal and Rough Stone Rs.89.10, and such materials were not available from the designated quarries. As regards the prohibition order imposed by this Court regarding quarrying of sand from Parambiyam Depot and the same was notified by the Superintending Engineer, Public Works Department by way of letter in JDO/71B/662M/06, dated 12.12.2006. The plaintiff had collected the sand from Cauvery River bed in Kulithalai and Musri sand quarries, which is situated 140 kilo-metres away, with an extra additional distance of 54 kilo-metres from the original designated quarry, that is, Paramiyam Depot in Akkaraipalayam Village in Amaravathi River Bed.

5. It is the further case of the plaintiff that the gravel and Carted



Earth were also collected from Palaiyur Village, which is situated at 20 kilo metres away, with an extra lead of 15 kilo-metres and Blue Metal and Rough Stones were purchased from Five Star quarry, with a lead of 30 kilo-metres and additional lead of 9 kilo-metres. Therefore, the plaintiff has furnished the excess expenditure incurred by him, which are as follows:-

Sl. No.	Description of Material	Qty / Difference in Cost of Conveyance	Total Cost of Conveyance
1	Metal	10605.82 cum @ Rs.57.90	Rs.614,077.00
2	Sand	4905.85 cum @ 237.50	Rs.1,165,139.00
3	Gravel	3040.28 cum @ 81.50	Rs.247,783.00
4	Carted Earth	29864.05 cum @ 81.50	Rs.2,433,920.00
	Total		Rs.4,460,919.00

6. The defendants 1 and 2 have submitted that, based on the contract agreement entered into between the plaintiff and the first defendant on 21.02.2007, the time to complete the said work was fixed as 15 months. One of the conditions specified in the tender itself is that the plaintiff should have to inform about the sources from Paramiyam Depot, where the plaintiff/Firm is intended to quarry the materials, and out of which, the plaintiff has not incurred any additional expenditure. The



defendants have specifically denied that the plaintiff has actually incurred any loss, as set out in Paragraph No.8 of the plaint which is follows:-

“8. The plaintiff submits that according to the contract the transport charges for collection of sand was Rs.256.00 but the actual cost involved was Rs.494.50p and there was an excess expenditure of Rs.237.50. Similarly as per contract, the transport charges for gravel was Rs.24.00 whereas the plaintiff incurred the expenditure of Rs.150.50 and there was an excess expenditure of Rs.81.50. Similarly according to the contract the rate for transportation of blue metal and rough stone was Rs.89.10 whereas by the collection of the materials from other sources the plaintiff was to pay Rs.147.00 and there was an excess expenditure of Rs.57.90. The plaintiff is herewith furnishing the particulars of the quantities of the materials collected and the excess expenditure incurred by the plaintiff.”

7. Further, the defendants have denied the receipt of notice dated 13.06.2008 and March 2009 issued by the plaintiff and the defendants had not received any notice in the month of March 2009. However, the defendants have received the notice dated 07.04.2009 and the 2nd defendant had sent a reply notice to the plaintiff stating that as per the agreement dated 21.02.2007, the plaintiff is not entitled any additional claim.



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8. Based on the above pleadings, the following issues were framed by the trial Court:-

(i) Whether the plaintiff is entitled to the extra cost incurred due to increase in the length of haul for collecting materials for the construction of high level bridge across Aliyar River ?

(ii) Whether the plaintiff is entitled to recover the suit claim ? and

(iii) To what relief, if any, the plaintiff is entitled to ?

9. Before the trial Court, PW1 and PW2 were examined and Exs.A1 to A21 were marked on the side of the plaintiff. DW1 was examined and Ex.B1 to Ex.B7 were marked on the side of the defendants.

10. Upon consideration of the above documents and the evidence on record, the learned trial Judge dismissed the suit. Aggrieved by the same, the plaintiff has preferred the present appeal.



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11. We have heard Mr.T.R. Rajagopalan, learned Senior Counsel assisted by Mr.T.R.Rajaraman, learned counsel appearing for the appellant/plaintiff and Mr.T.Chandrasekaran, learned Special Government Pleader (Civil Side) appearing for the respondents/defendants.

12. The learned Senior Counsel appearing for the appellant/plaintiff contended that the appellant/plaintiff issued a notice to the defendants on 13.06.2008 as per Ex.A8, narrating the additional expenditure incurred by the appellant/plaintiff for transportation from the subject place to complete the project. He further contended that, when this Court has prohibited, quarrying operations from the Paramiyam Depot in Akkaraipalayam Village, and the Superintending Engineer, Public Works Department, vide letter in JDO/71B/662M/06, dated 12.12.2006, prohibited the quarrying, the appellant/plaintiff had to complete the construction work and has procured the sand from different places. The defendants had not disputed the transportation of sand from the different quarries and this fact goes unchallenged by the defendants as per Ex.A18



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13. The learned Senior Counsel further drew our attention that, to complete the construction work as contemplated under the Tender, the plaintiff has transported the sand from different places and other designated places, namely, Kulithalai and Musri which is evident from Ex.P8. He further pointed out that, due to perennial flow of water at the time of construction, there was some delay in completing the project as per the scheduled time and the construction work was completed on all aspects on 23.12.2008.

14. The learned Senior Counsel further pointed out that the Tender was originally given to one M/s.P.S.Construction Limited and the said contractor was not able to execute the work, and therefore, the previous contract was terminated and fresh tender was invited, whereby the appellant/Firm submitted their Tender, which was accepted and the work entrusted to them with a revised estimated cost 27.31%, above the estimated rate, because the cost of sand, Carted Earth, gravel and blue metals have been escalated and time was taken for preparation of tender schedule and awarding the contract.



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15. The learned Senior Counsel further contended that, based upon Ex.A18 receipt of purchase of sand from Kulithalai and Musri sand quarry in Cauvery River Bed, emphasis was laid as per Ex.P19 specification report, which would go to show that the plaintiff had collected and transported the sand from Kulithalai and Musri to the construction site and the same was also duly intimated by the plaintiff to the defendants by way of their letter dated JDO/71B/662M/06, dated 12.12.2006. Exs.A14 and A15 would clearly go to show that the plaintiff had informed the respondents about the additional/extra cost of Rs.44,60,919/-.

16. The learned Senior Counsel would point out that the appellant/plaintiff had submitted the details of materials which were procured from Five Star quarry, as per Ex.A6, which will go to show that the blue metal and other materials were procured from far off places. That by itself would demonstrate that the plaintiff is entitled for additional claim.



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17. Per contra, Mr.T.Chandrasekaran, learned Special Government Pleader (Civil Side) appearing for the respondents/defendants categorically denied receipt of the letter dated 13.06.2008. According to him, as per Ex.A10 postal receipts are dated 26.06.2008 and 27.06.2008, but the seal of the first respondent herein (Superintending Engineer, Nabard), is dated 25.06.2008 and it is hard to believe as to how they could send the letter with Postal Department Seal, showing the dates as 26.06.2008 and 27.06.2008 and the postal receipts show the date as on 25.06.2008 and this demonstrates that the plaintiff had not sent any notice as per Ex.A8, dated 13.06.2008. The respondents/defendants have also vehemently contended that the relevant portion of the contract which reads as follows:-

“107-2. Source of materials.- All materials shall be obtained from the sources designated in the contract. The excavation of materials from sources designated in the contract shall be under the direction of the Engineer at all times insofar as selection of material or exact location of excavation as involved.

If sources previously approved are found to be unacceptable at any time and fail to produce the materials satisfactory to the Engineer, the Contractor shall furnish materials from other approved sources. The Contractor



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will not be reimbursed for any extense in developing the new source, **but allowance or deduction will be made as the case may be, for the increase or decrease in cost due to an increase or decrease in the length of haul.”**

(emphasis supplied)

clearly mandates that the plaintiff is bound to take (i) Aggregates and rough stone, (ii) Sand, (iii) Gravel and (iv) Carted Earth, all of which have to be collected from the designated places.

18. The learned Special Government Pleader would submit that the Ex.A6 statement issued by the Five Star Metals Private Limited, Moochamkundu, Govindapuram, Palakkad, to Sri Ganesh & Co., Ledger Account for the period from 01.10.2007 to 28.01.2008 totally a sum of Rs.1,70,500/-, from 01.02.2008 to 29.02.2008 totally a sum of Rs.1,18,900/- and another one commencing from 01.02.2008 to 29.03.2008 toally a sum of Rs.2,15,900/- regarding the purchase of gravel and carted earth and rough stone and therefore, the total amount which has aggregated to the tune of Rs.5,05,300/- cannot be taken into consideration.

19. We have considered the rival submissions of the parties.



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20. The Tender was awarded to the plaintiff and according to the tender conditions, (i) Aggregates (ii) Sand (iii) Gravel (iv) Carted Earth and rough stone, had to be collected from the Parambium Depot and other designated places. However, this Court was pleased impose ban on quarrying sand from the Parambium Depot and the Superintending Engineer, Public Works Department, had notified the same, by his letter No.JDO/71B/662M/06, dated 12.12.2006. While that being the situation, Ex.A18 will demonstrate that the appellant/plaintiff was left with no other option, but to draw the sand from Kulithalai and Musri to complete the process and to justify the same, he has produced the bills vide Ex.A21 series which were not disputed by the defendants herein.

21. The next contention of the appellant is that, the blue metal was procured from the Five Star Quarry at Palakkad as per Ex.A6. But there is no evidence to show that Ex.A6 is the bill to establish that they have purchased or procured the same for the purpose of construction under the above tender.

22. As rightly pointed out by the learned Senior Counsel appearing for the appellant/plaintiff the letters dated 07.04.2009 and



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March 2009 i.e., Exs.A14 and A15 would go to show that the appellant herein have explained the escalation cost and additional cost that were incurred to complete the construction. Similarly, making a demand to pay the additional income as per Ex.A8 also strengthens the case of the appellant. As discussed earlier, there are bills which would establish that Ex.A18 is for transportation of sand from Kulithalai and Musri to the construction site. Though it is the claim of the appellant that Ex.A21, would establish the case of the appellant on the details for the procurement of blue metal for the purpose of construction, we are unable to rely upon the Ex.A21 as there is no reference that the material was procured for the purpose of this construction. Though the respondents have denied the receipt of notice issued by the plaintiff dated 07.08.2008, it is evident from Ex.A16 viz., a letter from the second respondent to the plaintiff's counsel pointing out that the appellant has not followed the Tender conditions and also the appellant had not raised such claim for the additional cost and the appellant/plaintiff had incurred and the same cannot be taken into account. The appellant, as per Exs.A14 and A16, had narrated all these circumstances which warranted procurement of materials from far off places. Though the letter issued by the second respondent as per Ex.A16



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by way of Letter No. 707/2009/DO/dated 01.06.2009. It is only a denial without any basis. Clause 107-2 of the contract provides for allowance for increase or decrease in cost due to increase or decrease in the length of the haul.

23. Therefore, we are not inclined to accept the contention as well as the objections raised by the respondents for the simple reason that, Ex.A18 would demonstrate that sand was quarried from different locations, namely, Kulithalai and Musri. At the same time, we are of the opinion that there are no ample materials to establish that (i) Aggregates and rough stone, (ii) Gravel and (iii) Carted Earth, were transported from other places apart from the designated sites.

24. It is clear that the respondents have miserably failed to make note of the order passed by this Court imposing a ban on any quarrying activities at Parambiyam Depot, which is also evident from the letter of the Superintending Engineer, Public Works Department through his letter No. JDO/71B/662M/06, dated 12.12.2006. Having accepted the Tender conditions which has a time frame, the appellant/plaintiff has produced



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sufficient materials by way of Ex.A18, dated 31.06.2012 which would go

to show that sand was transported from Kulithalai and Musri Depots.

DW1 in his cross-examination has admitted that there was a ban imposed by this Court as evidenced by the Letter in JDO/71B/662M/06, dated 12.12.2006 issued by the Superintending Engineer, Public Works Department regarding quarrying in the Parambiyam Depot.

25. Therefore, we are inclined to allow this appeal partly to the extent the claim of transportation of sand, to the tune of Rs.11,65,139/-.

26. Though it was pointed out by the learned Senior Counsel appearing for the appellant that the appellant had procured blue metal from Five Star Quarry by way of Ex.A6, that by itself will not indicate the blue metal was procured for the purpose of construction under the tender in question. We are unable to rely upon Ex.A6 and the claim cannot be accepted.

27. Accordingly, this Appeal Suit is partly allowed. The judgment and decree in O.S.No. 95 of 2010, dated 20.12.2013 on the file of the II



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Additional District Judge, Salem, are set aside. There will be a decree for payment of a sum of Rs.11,65,139/- [Rupees Eleven Lakh Sixty Five Thousand and One Hundred Thirty Nine Only] in favour of the appellant/plaintiff-Firm together with interest at the rate of 9% per annum from the date of institution of the suit till the date of decree and thereafter, @6% per annum from the date of decree till the date of realization of the entire amount. There shall be no order as to costs in this appeal suit.

[R.S.M., J] [N.S., J]

29.11.2023

Index: Yes/No

Speaking order: Yes/No

Neutral Citation: Yes/No

MSM

To

1. The II Additional District Judge,
Salem.
2. The Section Officer,
V.R. Section, High Court, Madras.



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**R. SUBRAMANIAN, J
and
N. SENTHILKUMAR, J**

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Pre-Delivery Judgment in
A.S.No. 438 of 2014

Delivered on
29.11.2023



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