IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.03.2024

Pronounced on : .04.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.S. No.692 of 2017

M/s.URC Constructions (P) Ltd.,
represented by its Managing Director S.Palanisamy .. Plaintiff

/versus/

M/s.Food Corporation of India,
represented by its Assistant General Manager (Engg.) .. Defendant

Prayer: Civil Suit has been filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 and Section 151 of C.P.C. to pass a decree in favour of the plaintiff:

a)Directing the defendant to pay the plaintiff a sum of Rs.3,93,13,438.54/- along with further interest at 10% per annum from the date of filing of the suit till the date of payment.

b)directing the defendant to pay the costs of the suit to the plaintiff.

For plaintiff : Mr.P.J.Rishikesh

For defendant : Mr.Su.Srinivasan

JUDGMENT

This suit has been filed against the defendant for recovery of a sum of Rs.3,93,13,438.54 together with interest at the rate of 10% per annum from the date of filing of the suit till the date of payment.

2.The defendant had invited tenders for the 'Construction of Multi-Storied Regional office/District office building with ancillaries and services including internal/external electrification, public address system and fire alarms at FCI.FSO, Egmore, Chetpet, Chennai' at a cost of Rs.10,75,34,551.63/-. The dispute in this suit pertains to the same.

3.The plaintiff claims to be a leading Civil Engineering Contractor and they had participated in the tender process for the aforesaid building project and they had emerged as the successful bidder. The defendant had issued a letter of acceptance dated 02.12.2009 (Ex P.2) and an agreement was also executed between both the parties on 07.12.2009 (Ex.P2). The plaintiff claims that they had performed their part of the obligations under the Contract dated 07.12.2009 (Ex.P2). According to them, the defendant was not able to hand over the full site even though in the Notice inviting tender they had stated that '2A .. Site for the work is available'. According to the plaintiff, though the clearance for Canteen, Gym and Generator Room was given on 07.09.2010 as per Ex.P9, even after commencement of work, the defendant was not able to release the foundation drawings for excavation as per the plaintiff's letter dated 16.04.2010 (Ex.P.5). According to the plaintiff, in the Minutes of the Meeting dated 07.01.2011 (Ex.P.15), the defendant themselves had admitted to the delay in releasing the decisions for the list of items as requested by the plaintiff. It is contended by the plaintiff that even during the progress of work, the plaintiff had faced several hindrances, which were beyond their control and all the hindrances were caused only by the defendant, which ultimately delayed the completion of the project, causing huge losses to the plaintiff for which the defendant is solely responsible.

4.According to the plaintiff, they had sought for extension of time, only due to the delay caused by the defendant. According to the plaintiff, the defendant had granted extension of time to the plaintiff for completion of project on nine occasions. According to them, only on account of the hindrances at the site for which they are not responsible, the extensions were sought for. The plaintiff also claims that they had submitted a detailed letter to the defendant informing the various hindrances faced by them during the progress of the work upto February 2012 through their letter dated 11.02.2012 (Ex.P.35). According to the plaintiff, they had completed the work in all respects to the satisfaction of the defendant on 16.01.2013.

5.According to the plaintiff, despite completion of the work to the satisfaction of the defendant and for no fault on them, the defendant had unlawfully mulcted the plaintiff with liquidated damages for a period of 58 days despite the defendant unconditionally admitting to the delay of 533 days in executing the work. According to the plaintiff, 58 days disclosed by the defendant was not even recommended by the Engineer in Charge of the defendant, who was working and co-operating at the site, who is the competent person as per Clause 5 of the Contract for approving the extension of time. According to the plaintiff, the higher authority under Clause 2 of the Contract has the power to fix the compensation not for approving the hindrances and also extension of granting time. According to the plaintiff, unilaterally, the defendant has revised and reworked the extension of time without any prior intimation to the plaintiff. Therefore, the plaintiff claims that the levy of liquidated damages by the defendant based on the alleged delay of 58 days in completion of the work by the plaintiff is arbitrary and illegal. According to the plaintiff, having adjusted the liquidated damages arbitrarily and illegally, the said amount has to be refunded by the defendant.

6.The plaintiff also claims that as per the contract due to the delay on the part of the defendant in handing over the site and the subsequent hindrances caused by them, the plaintiff is also entitled for compensation for escalation towards price variation and they are also entitled for the costs over run as per the contract. The plaintiff has filed the suit seeking for recovery of a sum of Rs.3,93,13,438.54 together with interest as detailed hereunder:

Claim 1	Release of amount withheld in final bill including LD	Rs.71,08,357/-
Claim 2	Difference in amount certified in the extra/substituted items	Rs.59,44,965.98
Claim 3	Compensation for escalation towards price variation	Rs.87,49,520/-
Claim 4	Cost over run	Rs.78,26,322/-
Claim 5	Interest @ 10% from 25.03.2014 (date of final bill) to 30.06.2017	Rs.96,84,272.56

7.However, in the written statement, the defendant has raised the following defences for disputing its liability to the plaintiff:

a)The failure of the plaintiff to complete the construction in terms of the tender documents had caused inordinate delay in completing the project, resulting in a huge loss to the defendant;

b)The liquidated damages has been made for the period of delay. The delay of 58 days was not attributable to the defendant, but attributable to the plaintiff for which the liquidated damages has been levied;

c)The extra/substituted works were measured and paid as per Clauses 12.1 to 12.6 of the agreement;

d)There is no merit for calculating price escalation as per the escalation clause in the agreement;

e)The plaintiff is responsible for the 58 days delay. Further there is no cost-over run clause in the agreement and therefore, the said claim made by the plaintiff is unsustainable;

f)Since the defendant is not liable for the suit claim, the defendant is not liable to pay any interest as claimed in the suit.

8.Based on the pleadings of both the parties, the following issues were framed by this Court on 25.06.2019:

a)Whether the delay in executing the work is attributable to the defendant?

b)Whether the plaintiff has committed breach of the terms and conditions exposing themselves liable for damages?

c)Whether the liquidated damages imposed by the defendant was arbitrary and unjustifiable owing to the fact that the work was delayed due to the defendant?

d)Whether the plaintiff is entitled for any escalation charges as alleged in the plaint?

e)Whether the defendant breached the contractual provisions by wrongfully withholding amounts due to the plaintiff?

f)Whether the suit is barred by limitation?

g)Whether the plaintiff is entitled to claims as prayed for with interest at the rate of 18% per annum?

h)To what reliefs both the parties are entitled to?

9.The plaintiff's Authorised Representative V.Ganesan was examined as a witness (P.W.1) on the side of the plaintiff. He has also filed a proof affidavit reiterating the contents of the plaint. Through P.W.1, the following documents were marked as Exhibits:

Ex.P1 is the Board Resolution dated 07.07.2019

Ex.P2 is the letter of acceptance and contract along with conditions of contract dated 02.12.2009 and 07.12.2009

Ex.P3 is the letter from plaintiff to defendant dated 03.02.2010

Ex.P4 is the letter from plaintiff to defendant dated 08.02.2010

Ex.P5 is the letter from plaintiff to defendant dated 16.04.2010

Ex.P6 is the letter from plaintiff to defendant dated 30.07.2010

Ex.P7 is the letter from plaintiff to defendant dated 03.08.2010

Ex.P8 is the letter from defendant to plaintiff dated 10.08.2010

Ex.P9 is the letter from defendant to plaintiff dated 07.09.2010

Ex.P10 is the letter from plaintiff to defendant dated 22.09.2010

Ex.P11 is the letter from plaintiff to defendant dated 19.10.2010

Ex.P12 is the letter from plaintiff to defendant dated 20.12.2010

Ex.P13 is letter from plaintiff to defendant dated 21.12.2010

Ex.P14 is the letter from plaintiff to defendant dated 21.12.2010

Ex.P15 is the project review meeting (Minutes) involving both parties dated 07.01.2011

Ex.P16 is the letter from defendant to plaintiff dated 19.01.2011

Ex.P17 is the letter from plaintiff to defendant dated 21.03.2011

Ex.P18 is the letter from defendant to plaintiff dated 04.04.2011

Ex.P19 is the letter from plaintiff to defendant dated 02.05.2011

Ex.P20 is the letter from plaintiff to defendant dated 10.05.2011

Ex.P21 is the letter from plaintiff to defendant dated 10.05.2011

Ex.P22 is the letter from plaintiff to defendant dated 17.05.2011

Ex.P23 is the letter from plaintiff to defendant dated 23.05.2011

Ex.P24 is the letter from defendant to plaintiff dated 26.05.2011

Ex.P25 is the letter from defendant to plaintiff dated 03.06.2011

Ex.P26 is the letter from plaintiff to defendant dated 15.09.2011

Ex.P27 is the letter from plaintiff to defendant dated 26.09.2011

Ex.P28 is the letter from plaintiff to defendant dated 18.10.2011

Ex.P29 is the letter from defendant to plaintiff dated 18.10.2011

Ex.P30 is the letter from plaintiff to defendant dated 18.11.2011

Ex.P31 is the letter from plaintiff to defendant dated 18.11.2011

Ex.P32 is the letter from defendant to plaintiff dated 19.11.2011

Ex.P33 is the letter from defendant to plaintiff dated 23.12.2011

Ex.P34 is the letter from defendant to plaintiff dated 24.01.2012

Ex.P35 is the letter from plaintiff to defendant with annexures dated 11.02.2012

Ex.P36 is the letter from defendant to plaintiff dated 25.04.2012

Ex.P37 is the letter from plaintiff to defendant dated 27.04.2012

Ex.P38 is the letter from plaintiff to defendant dated 23.05.2012

Ex.P39 is the letter from defendant to plaintiff dated 25.05.2012

Ex.P40 is the letter from defendant to plaintiff dated 27.06.2012

Ex.P41 is the letter from plaintiff to defendant dated 13.07.2012

Ex.P42 is the letter from plaintiff to defendant dated 24.07.2012

Ex.P43 is the letter from defendant to plaintiff dated 27.07.2012

Ex.P44 is the letter from defendant to plaintiff dated 29.10.2012

Ex.P45 is the letter from defendant to plaintiff dated 26.11.2012

Ex.P46 is the letter from defendant to plaintiff dated 24.12.2012

Ex.P47 is the letter from plaintiff to defendant dated 16.01.2013

Ex.P48 is the letter from plaintiff to defendant dated 25.02.2013

Ex.P49 is the letter from plaintiff to defendant dated 04.03.2013

Ex.P50 is the letter from plaintiff to defendant dated 12.09.2013

Ex.P51 is the letter from plaintiff to defendant dated 29.01.2014

Ex.P52 is the order in original passed by the Commissioner of Central Excise dated 30.01.2014

Ex.P53 is the letter from defendant to plaintiff dated 18.02.2014

Ex.P54 is the letter from plaintiff to defendant dated 20.02.2014

Ex.P55 is the RTI information given by the defendant with enclosures dated 04.03.2014

Ex.P56 is the letter from plaintiff to defendant dated 21.04.2014

Ex.P57 is the final bill 25.03.2014

Ex.P58 is the letter from plaintiff to defendant dated 07.07.2014

Ex.P59 is the detailed letter from plaintiff to defendant with detailed enclosures with all workings for all claims dated 05.08.2014

Ex.P60 is the letter from plaintiff to defendant dated 15.09.2014

Ex.P61 is the order of this High Court in W.P.No.9059 of 2015 dated 22.04.2016

Ex.P62 is the letter from plaintiff to defendant dated 29.06.2016

Ex.P63 is the letter from plaintiff to defendant dated 04.07.2016

Ex.P64 is the letter from defendant to plaintiff with enclosures dated 19.08.2016

Ex.P65 is the letter from plaintiff to defendant dated 10.09.2016

Ex.P66 is the letter from plaintiff to defendant dated 02.11.2016

Ex.P67 is the legal notice from plaintiff to defendant dated 29.11.2016

Ex.P68 is the reply to legal notice by defendant's counsel dated 02.02.2017

Ex.P69 is the letter from defendant to plaintiff dated 21.03.2017

Ex.P70 is the letter from plaintiff to defendant dated 27.03.2017

Ex.P71 is the letter from defendant to plaintiff dated 30.03.2017

Ex.P72 is the letter from plaintiff to defendant dated 17.04.2017

Ex.P73 Working sheets for claim 1

a. Liquidated damages

b. Service tax deduction (Order of tribunal dated 30.01.2014)

c. Labour welfare cess - TN Notifications

d. Delay in releasing final bill.

Ex.P74 is the working sheet for claim 2 along with original enclosures

a. Fly ash bricks

b. Stainless steel works

c. False ceiling works

d. Curves structure steel

e. Extra lead for murrum

Ex.P75 Working sheet for claim 3 - Escalation

Ex.P76 Working sheet for Claim 4 - Cost overrun for site and administrative office - Hudson formula

Ex.P77 Working sheet for claim 5 - interest

10.The plaintiff's witness (P.W.1) was cross examined by the defendant's counsel. On the side of the defendant, they have not let in any oral or documentary evidence.

11.Heard Mr.P.J.Rishikesh, learned counsel for the plaintiff and Mr.Su.Srinivasan, learned counsel for the defendant.

12.Learned counsel for the plaintiff drew the attention of this Court to the relevant documents marked as exhibits and would submit that there is no delay on the part of the plaintiff in completing the project and therefore, the levy of liquidated damages by the defendant is arbitrary and unjustified. According to him, as seen from the communications sent by the plaintiff as well as from the extension of time granted by the defendant, it is clear that the plaintiff had faced several hindrances, which were beyond their control and is attributable only to the defendant, which resulted in losses suffered by the plaintiff. He would submit that the plaintiff faced the following delays:

a)Delay in releasing drawings;

b)Delay due to high ground water table;

c)Delay due to the non availability of Fe 500 Reinforcement Steel;

d)Delay in handing over of site;

e)Delay in not releasing the payments towards extra/non-tendered items;

f)Delay in other agency works like, AC duct, False Ceiling works etc.;

g)Delay in clearance/approval from the defendant for various finishing works like, wood work, flooring works, false ceiling works etc.;

h)Additional scope work allotment from the defendant etc.

13.Learned counsel for the plaintiff would submit that the delay of 591 days in completion of the project is solely on account of the defendant. The defendant, having granted extension of time for 533 days to the plaintiff on account of their own fault, cannot levy liquidated damages. According to him, as seen from Clause 5 of the Contract, the higher officers of the defendant were not competent to re-work the extension of time granted to the plaintiff from 591 days to 533 days. According to the plaintiff, the re-working of extension of time by the defendant claiming that there has been a delay of 58 days on the part of the plaintiff is unreasonable and illegal. Therefore, he would submit that the defendant has unlawfully levied liquidated damages for a sum of Rs.43,01,382/- from the plaintiff and they have also un-lawfully deducted the said sum from and out of the bills payable to the plaintiff.

14.According to the learned counsel for the plaintiff, the defendant, as an after thought, only to avoid releasing payments to the plaintiff towards extra/non-tendered items, has unlawfully come forward with a plea that there was a delay of 58 days by the plaintiff in completing the project. According to him, when the defendant had admitted three of the four cited heads of delays, the same would establish that the delay is solely attributable to the defendant. According to him, the averments made by the defendant in the written statement that there was a delay of 58 days on the part of the plaintiff in completing the project is false and un-substantiated. Learned counsel for the plaintiff would submit that the plaintiff had completed the work on 16.01.2013 and the final bill was submitted to the defendant on 23.04.2013 and therefore, he had sought compensation for delay through their letter dated 04.05.2013. According to him, only for the first time, the defendant had addressed a letter to the plaintiff dated 18.02.2014 (Ex.P53), which was a show cause notice calling upon the plaintiff to show cause as to why compensation should not be levied for the period of 58 days at the rate of 4% as determined by the competent authority, viz, General Manager (Engg.).

15.Learned counsel for the plaintiff would submit that the plaintiff had replied to the said show cause notice through their reply dated 20.02.2014 (Ex.P54) objecting to the levy of liquidated damages by the defendant. Learned counsel for the plaintiff also drew the attention of this Court to the RTI application submitted by the plaintiff's employee (PW1) to the defendant through their letter dated 14.02.2014 requesting the particulars pertaining to the contract, which is the subject matter of the dispute in this suit. Learned counsel for the plaintiff also drew the attention of this Court to the reply dated 04.03.2014 (Ex.P.55) sent by the Public Information Officer of the defendant, who has confirmed the following facts:

a)The work was certified and physically completed on 16.01.2013;

b)The reply also enclosed the internal communication of the defendant dated 25.02.2013, which was concerning the grant of extension of time to the plaintiff;

c)The AGM (CE)-1 and AGM (CE)-II have certified that the plaintiff is not responsible for any loss incurred by the defendant due to the delay and recommended that extension of time may be granted upto 31.01.2013 without levy of compensation vide letter dated 24.12.2012 marked as Ex.P.46.

16.Learned counsel for the plaintiff drew the attention of this Court to paragraph No.23 of the written statement and would submit that the defendant had made bald allegations contrary to the statement of the Public Information Officer in the RTI reply dated 04.03.2014. According to the learned counsel for the plaintiff, the internal communication enclosed along with the RTI reply makes it clear that the plaintiff is not at fault for the delay. However, according to the learned counsel for the plaintiff, the General Manager (Engg.) of the defendant, on 07.02.2014, without ascribing any reasons, after a lapse of almost one year from the date of completion, handing over submission of final bill, has directed levy of compensation on the plaintiff at Rs.43,01,382/- for the alleged 58 days delay.

17.According to the learned counsel for the plaintiff, as per Clause 5 of the contract, the General Manager (Engg.) is not a competent person to determine any delay. But it is only the Executive Engineer, who is empowered to make recommendation with regard to the delay. According to him, as per Clause 5 of the contract (Ex.P2), the extension of time granted to the plaintiff by the Executive Engineer, i.e. the AGM (Engg.) is final and binding. Therefore, according to him, recommendations made by the AGM (Engg.)/Executive Engineer on 04.03.2014/Ex.P.55 is final and binding on the defendant as well as the plaintiff in terms of Clause 5 of the conditions of contract.

18.Learned counsel for the plaintiff would also submit that Clause 5 of the terms and conditions of the contract also does not use the words ‘Provisional Extension of time’. Only for the first time in the written arguments filed by the defendant, the said expression has been made. According to him, for liquidated damages to be levied, there is a contractual mandate i.e. only in the case of 'avoidable hindrances' and if the plaintiff has not provided reasonable grounds for the delay.

19.Learned counsel for the plaintiff would further submit that the defendant's primary basis to arrive at the conclusion that 58 days of delay was attributable to the plaintiff is allegedly based on the hindrance register maintained by the defendant and the cement register, which according to them, was signed by both the parties. However, both the documents were not produced by the defendant in this suit and therefore, the delay of 58 days, claimed by the defendant on the part of the plaintiff in completing the project is un-substantiated.

20.Learned counsel for the plaintiff also drew the attention of this Court to the notice issued by the plaintiff's counsel to the defendant under Order XI Rule 5 of the Code of Civil Procedure calling upon the defendant to produce the cement register and hindrance register, which the defendant relies upon for the purpose of establishing the delay on the part of the plaintiff. Despite the notice to produce sent by the plaintiff, the defendant failed to produce the documents, i.e., cement register and hindrance register. Therefore, according to the learned counsel for the plaintiff, an adverse inference will have to be drawn against the defendant by holding that the delay is entirely attributable only to the defendant.

21.Learned counsel for the plaintiff would also submit that the defendant has not let in any oral or documentary evidence. Excepting for marking Ex.D1, no other document was filed by the defendant and they have also not let in any oral evidence. Having not rebutted the plaintiff's case by letting in oral and documentary evidence, an adverse inference will have to be drawn that there was no reasonable cause for any delay in completion of the project. Learned counsel for the plaintiff would submit that the defendant has withheld the following amounts illegally:

A.Total amount withheld in Final Bill – Rs. 71,08,357/-

B.Liquidated Damages of Rs. 43,01,382/-

C.Service Tax Deductions – Rs. 9,79,848/-

D.Labour Welfare Cess – Rs. 10,18,373/-

E.Delay in releasing of Final Bill – Interest Rs. 8,08,754/- calculated from 24.04.2013 to 25.03.2014.

22.Learned counsel for the plaintiff would submit that the Service Tax Deduction made by the defendant amounting to Rs.9,79,848/- is also unjustified for the following reasons:

a)The defendant has erroneously deducted Service Tax based on Clause 36 (i) of the conditions of contract. The said clause is dealing only with 'Sales Tax' or any other Tax on materials and no other form of taxes or Cess;

b)The Service Tax is a Tax on the services rendered by the plaintiff to the defendant and as such is not contemplated within the scope of Clause 36 of the Conditions of Contract.

Therefore, according to him, Service Tax Deductions made by the defendant is arbitrary, illegal and un-justified.

23.Learned counsel for the plaintiff also drew the attention of this Court to the order of the Commissioner of Central Excise dated 31.01.2014 (Ex. P.52), wherein it has been made clear that the defendant, being a Government body, the service rendered to such a body is exempted from payment of Service Tax. He would also submit that the order dated 31.01.2014 passed by the Commissioner of Central Excise (Ex.P.52) has attained finality and binding on the defendant. He would also point out that the defendant themselves have admitted the said document vide S.No.51 in their affidavit of admission and denial of documents dated March 2019, filed before this Court.

24.Learned counsel for the plaintiff would also submit that even assuming the defendant had paid the Service Tax to the Tax Authorities on behalf of the plaintiff, the burden of proof to show that such a payment was made is on the defendant. Having not let in any oral or documentary evidence, the defendant has miserably failed to prove their statement that they had paid the Service Tax on behalf of the plaintiff.

25.Learned counsel for the plaintiff would submit that Labour Welfare Cess deduction of Rs.10,18,373/- is also arbitrary, illegal and un-justified. He would submit that the terms and conditions of the contract does not stipulate payment of Labour Welfare Cess by the plaintiff and therefore, the Labour Welfare Cess is not applicable for the present contract. Hence, he would submit that the burden of proof is once again on the defendant to show that the deducted amount of Rs.10,18,373/- towards Labour Welfare Cess was (a)done with just cause and (b)was infact paid to the authorities. Having not let in any oral or documentary evidence, the defendant has miserably failed to prove that they have wrongfully deducted Rs.10,18,373/- towards Labour Welfare Cess.

26.Learned counsel for the plaintiff would also submit that to the best of the plaintiff's knowledge, there is no enactment, by name, Tamil Nadu Construction Labour Welfare Act and the only enactment similar to the one cited by the plaintiff is 'The Building and Other Construction Workers' Welfare Cess Act, 1996'.

27.With regard to the claim for interest on delayed payment is concerned, the learned counsel for the plaintiff would submit that the claim for Rs.8.08 lakhs in the suit towards Interest on Delayed Payment is justified for the following reasons:

a)Final bill was submitted by the plaintiff on 25.04.2013. However the defendant made the payment only on 25.03.2014 as per Ex.P.57;

b)Last extension of time for the completion of project by the plaintiff was granted by the defendant till 31.01.2013;

c)The plaintiff submitted the final bill on 23.04.2013 after completing the work on 16.01.2013;

d)Clause 7 of the conditions of contract mandates that the payment must be made within six months in case of final bill above Rs.2 lakhs;

e)The plaintiff is entitled to claim interest on the delayed payment since the final payment was made only on 25.03.2014;

f)Though the final bill was submitted by the plaintiff on 25.04.2013 itself, there has been a delay of 183 days after the lapse of six months from the date of submission of the final bill to make the payment by the defendant.

28.Learned counsel for the plaintiff would submit that, with regard to the claim on difference in amount certified in extra/substituted items amounting to Rs.59,44,965.98, the defendant has to pay for execution of additional, altered or substituted items at prevailing market rates, as per clause 12 of the Contract. The said clause 12(v) clarifies that Engineer incharge shall determine the rate or rates on the basis of prevailing market rates and pay the contractor accordingly. Hence, the plaintiff submitted rates analysis to the Engineer incharge i.e. AGM as per Clause 2(e) of definitions in the conditions of the contract and they are detailed below:

a)Item No.1: Fly Ash Brick Masonry Work - Rs.17,67,877.80;

b)Item No.2: Salem Stainless Steel - Hand Rail - Rs.6,64,929.83;

c)Item No.3: False Ceiling Rs.6,51,465.44;

d)Item No.4: Curved Surface for single glazing and double glazing work: Rs.25,44,090.29;

e)Item No.5:Extra Lead for Moorum - Rs.3,16,602.62;

Total : Rs.59,44,965.98

29.Learned counsel for the plaintiff would further submit that the plaintiff is entitled for compensation for escalation towards price variation as per the price variation clause contained in the terms and conditions of the contract. According to him, the price variation clause available in the contract allows for reimbursement to the contractor for escalation as a result of coming into force of any fresh law or statutory rule or order (but not due to any changes in Sales Tax). According to him, in the price of the materials incorporated in the works and to wages of labour and the increases exceeds 10% of the price and or wages which were prevailing at the time of receipt of tender for the work. According to him, in terms of price escalation as per the break up of the claim towards price escalation submitted by the plaintiff to the defendant through their letter dated 05.08.2014 marked as Ex.P.59, a sum of Rs.87,49,520/- is due and payable by the plaintiff towards compensation for escalation towards price variation.

30.Learned counsel for the plaintiff would submit that the plaintiff is entitled for Cost over run at Rs.78,26,322/-. According to him, since the tender value of the work was Rs.10,75,34,551.63 and time allowed to complete the work was 18 months, the plaintiff has to be compensated under Section 73 of the Indian Contract Act, 1872 for the cost over run met by them during the period of extension. The plaintiff has explained their extra expenditure then and there through their letters. The defendant themselves had admitted in their written statement that there was a delay of 533 days, which is not attributable to the plaintiff and therefore, the plaintiff is entitled for the cost over run charges amounting to Rs.78,26,322/-.

31.Learned counsel for the plaintiff would submit that the plaintiff is entitled for the interest at the rate of 10% per annum i.e., from 25.03.2014 to 30.06.2017 in respect of the above claims made by the plaintiff, as the plaintiff has been deprived of the use of the above amount. Learned counsel once again reiterated that the plaintiff is entitled for all the claims made in the plaint, totally amounting to Rs.3,93,13,438.54.

32.Learned counsel for the plaintiff contends that the suit has been filed within the period of limitation. The defendant had rejected all the claims of the plaintiff through their letter dated 30.03.2017 (EX.P.71). Since the detailed order was passed by the Executive Director only on 30.03.2017 on all the grievances raised by the plaintiff, the suit filed by the plaintiff in July 2017 is well within the period of limitation.

33.Learned counsel for the plaintiff had relied upon the following authorities:

i)Anil Rishi v.Gurbaksh Singh reported in 2006 (5) SCC 558;

ii)Narayan Govind v. State of Maharastra reported in 1977 (1) SCC 133;

iii)Rathakrishnan v. S.Velammal reported in 2019 SCC Online Mad 6580;

iv)Vidhyadhar v. Manikrao reported in 1999 (3) SCC 573;

v)Hind Construction v. State of Maharashtra reported in 1979 (2) SCC 70;

vi)State of Rajasthan v. Chandra Mohan Chopra reported in AIR 1971 Rajasthan 229;

vii)Mc Dermott v. Burn Standard reported in 2006 (11) SCC 181.

34.Relying upon the aforesaid decisions, the learned counsel for the plaintiff would submit as follows:

a)The plaintiff, having discharged their burden of proof, an adverse inference can be drawn against the defendant as they have not let in any oral or documentary evidence to disprove the contentions of the plaintiff;

b)The defendant, having granted extensions, they cannot unilaterally deduct a sum of money towards liquidated damages;

c)An adverse inference can be drawn against the defendant if the documents sought for by the plaintiff through their notice to produce by the defendant;

d)In order to do complete justice, pendete lite interest can be awarded and therefore, the plaintiff is entitled for both pendete lite and post judgment interest;

e)The plaintiff is entitled for Cost Over Run, based on Hudson Formula.

35.On the other hand, the learned Standing Counsel for the defendant would submit as follows:

a)The plaintiff had sought for nine extensions from the defendant for completion of their contract, which will go to show that the plaintiff was responsible for the delay and the delay is not attributable to the defendant;

b)The extension letters issued to the plaintiff, which have been marked as exhibits clearly show that the defendant had reserved the right to claim liquidated damages from the plaintiff for the extensions granted at the request of the plaintiff;

c)Admittedly, based on the provisional extension granted by the defendant, the plaintiff completed the project and handed over possession to the defendant only on 16.01.2013 with a delay of 591 days;

d)As per clause 2 of the contract marked as Ex.P2 (Letter of Acceptance and Contract) if the contract value is more than Rs.25,00,000/-, then the General Manager (Engineering) alone is empowered to levy damages or compensation;

e)As per clause 2 of the Contract, time is the essence of the contract. The General Manager (Engineering) has found that there was a total delay of 591 days of which the plaintiff has given reasonable explanation and sufficient reason for the delay of 533 days and the remaining 58 days delay was unexplained and no proper explanation was given. Therefore, the plaintiff was levied with the liquidated damages for the un-explained delay of 58 days amounting to Rs.43,01,382/-. The plaintiff has failed to prove that the delay in execution of the work is attributable to the defendant.

36.Admittedly, the contract was completed by the plaintiff only on 16.01.2013. The plaintiff, by their reply dated 23.05.2012 (Ex.P38) have themselves admitted that they had completed only 95% of the work and they had assured that the balance work will be completed within a period of another 60 days and had requested the defendant not to take any action under clause 3-a and 3-b of Ex.P2 and further requested the defendant to grant final extension of time upto 30.07.2012. Therefore, the plaintiff has only committed breach of contract in not completing the project on time.

37.Learned Standing Counsel for the defendant drew the attention of this Court to the cross examination of the plaintiff’s witness, in particular, with regard to answers given by the plaintiff's witness to question Nos.101, 102, 105, 107, 170, 171 and 172 and would submit that as seen from the said answers, it is clear that the plaintiff is unable to prove beyond reasonable doubt with regard to the breach of contract alleged by the defendant on the plaintiff.

38.With regard to the levy of liquidated damages by the defendant is concerned, learned Standing Counsel for the defendant would submit that the plaintiff has not been able to establish through evidence that the levy of liquidated damages is not in accordance with the terms of contract or the plaintiff has not committed any breach of contract. He referred to answers given by the plaintiff's witness PW.1, during the course of cross examination by the defendant's counsel to question Nos. 16, 17, 20, 49, 50, 51, 63, 64 and 67.

39.Learned Standing Counsel for the defendant also drew the attention of this Court to the Service Tax withheld by the defendant. He drew the attention of this Court to the answers given by the plaintiff in respect of the Service Tax claim to question Nos.131, 132, 134, 135, 138, 139, 141, 144, 146, 157, 159, 161, 212, 214 and 278 and would submit that the defendant is entitled to claim Service Tax from the plaintiff.

40.Learned Standing Counsel for the defendant would submit that the defendant is entitled to claim Labour Welfare Cess of Rs.10,18,373/- from the plaintiff as per Clause 19 of the contract. According to him, as per the said clause, it is obligatory on the part of the contractor/plaintiff to pay the Labour Cess and compliance of various procedures under the Labour Contract Act. In support of the defendant's stand, the learned counsel for the defendant drew the attention of this Court to the answers given by the plaintiff's witness to question Nos.117, 118, 123, 124, 126, 127, 186, 187, 188 and 213.

41.Learned Standing Counsel for the defendant would submit that the plaintiff has not submitted the final bill in accordance with the terms of the contract (Ex.P.2). Hence, the Engineer incharge took measurements for the work done by the plaintiff in the presence of the contractor, whose counter signature to the measurement list will be sufficient to prove the deficiencies of the plaintiff in its work. The plaintiff in accordance with Clause 7 of Ex.P.2 has not chosen to furnish the list of disputed items and detailed reason for the protest. Hence, the defendant vide letter dated 08.10.2013 requested the plaintiff to furnish the list of disputed items and furnish the reason for protest. But the plaintiff has not chosen to file any reply till 19.02.2014. On 19.02.2014, the plaintiff without disputing about the rates arrived by the defendant as per Ex.P.2, signed as "rates are not acceptable" in all the statements. The plaintiff has not chosen to furnish or to produce before this Court about the certificate of completion or the acknowledged copy of the final bill. Therefore, the plaintiff has not proved that there is a violation of Clause 7 and therefore, they are not entitled to claim interest.

42.Learned Standing Counsel for the defendant also drew the attention of this Court to the answers of the plaintiff's witness (P.W.1) during the cross examination to the question Nos.197, 198, 199, 200, 207, 211, 223, 226, 232, 233, 234, 257, 258, 265, 267, 270 and 273. According to him, as seen from the answers, the plaintiff has not proved that there is a violation of clause 7 of the contract.

43.Learned Standing Counsel for the defendant drew the attention of this Court to the answers given by the plaintiff's witness (P.W.1) to question Nos.32, 265, 312, 315, 316, 319, 320, 323, 326, 327, 340, 341, 342, 345, 346, 347 and 349. According to him, from the answers given by the plaintiff's witness (P.W.1), it is clear that the plaintiff was unable to produce single documentary proof with respect to Fly Ash and they have attempted to mislead this Court as if the same was certified by the defendant but not settled. Similarly, the plaintiff has not chosen to file any proof or document with respect to expenses incurred for acquiring Salem Stainless, False Ceiling, Curved Surface for Single Glazing and Double Glazing work and extra lead for moorum, for which the claim has been made. Admittedly, the plaintiff had not submitted the Final Bill, but had submitted the Final Bill only after the settlement of the Final Bill. Hence, the claim of the plaintiff as addressed to the defendant on 05.08.2014 has to be rejected. Therefore, the claim is an after thought and the plaintiff has not proved the case for compensation through oral and documentary evidence.

44.Learned Standing Counsel for the defendant, in support of his submission, drew the attention of this Court to the answers given by the plaintiff's witness (P.W.1) during the cross examination to question Nos.279, 370, 372, 374, 393, 414, 415, 416, 420, 422, 425, 431 and 437, with regard to the claim for compensation towards cost for escalation of labour and material on account of price variation. According to him, admittedly, the plaintiff had not submitted the Final Bill, but had submitted the Final Bill only after the settlement of the Final Bill. Hence, the claim of the plaintiff as addressed to the defendant on 05.08.2014 has to be rejected. Therefore, the claim is an after thought and the plaintiff has not proved the case for compensation through oral and documentary evidence.

45.The claim of compensation towards cost over run at the site and administrative cost at Rs.78,26,322/- by adopting Hudson Formula has not been proved through evidence. In support of the said submission, learned Standing Counsel for the defendant drew the attention of this Court to the answers given by the plaintiff's witness during the cross examination to question Nos.446, 447, 16, 21, 460, 461, 464, 465, 467, 468, 472 and 474. The plaintiff has not established that the defendant has committed breach of contract and on account of the same they have suffered damages. The burden of proof squarely lies on the plaintiff to establish that they have sustained loss and damages due to breach of contract committed by the defendant. Hence, the defendant is not liable to pay any interest to the plaintiff as claimed in the suit.

Discussion:

46.The following facts are un-disputed:

a)Nine extensions were sought for by the plaintiff from the defendant for completing the contract. The said extensions were also granted by the defendant;

b)In none of the extension requests made by the plaintiff, the plaintiff had admitted that there was a delay on their part in executing their work. The extension request letters made by the plaintiff to the defendant are dated 19.05.2011, 18.10.2011 (Ex.P.28), 18.11.2011 (Exs.P.30 & 31), 23.12.2011, 23.01.2012, 27.04.2012 (Ex.P.37), 23.05.2012 (Ex.P.38), 24.07.2012 (Ex.P.42), 24.08.2012, 11.12.2012 (Ex.P.35) and 12.12.2012;

c)The extensions granted by the defendant to the plaintiff through their letters for completion of the work are dated 03.06.2011 (Ex.P.25), 18.10.2011 (Ex.P.28), 19.11.2011 (Ex.P.32), 23.12.2011 (Ex.P.33), 24.01.2012 (Ex.P34), 25.04.2012 (Ex.P.36), 25.05.2012 (Ex.P.39), 27.06.2012 (Ex.P.40), 27.07.2012 (Ex.P.43), 25.08.2012, 24.09.2012, 29.10.2012 (Ex.P.44), 26.11.2012 (Ex.P.45), 24.12.2012 (Ex.P.46);

d)In none of the extension letters issued by the defendant, they have blamed the plaintiff for any delay on their part in completion of the work. However, at the same time, they have reserved their right to claim liquidated damages;

e)The contract was completed by the plaintiff on 16.01.2013;

f)The defendant has not let in any oral or documentary evidence before this Court to disprove the contentions of the plaintiff;

g)The defendant failed to produce the hindrance and cement registers despite a request having been made by the plaintiff through the plaintiff's notice to produce;

h)The AGM (CE-I) and AGM (CE-II) of the defendant have certified that the plaintiff is not responsible for the delay and hence not responsible for any loss incurred by the defendant and they have also recommended that extension of time may be granted to the plaintiff upto 31.01.2013 without any penalty/ compensation;

i)Only on 18.02.2014, marked as Ex.P.53, the General Manager (Engg.) of the defendant has imposed liquidated damages for 58 days of Rs.43,01,382/- for the alleged 58 days delay on the part of the plaintiff in completing the work even though the work was completed by the plaintiff as early as on 16.01.2013;

j)The contract entered into between the plaintiff and the defendant, which is the subject matter of the dispute, does not stipulate payment of service tax by the plaintiff;

k)Clause 36 of the Contract stipulates payment of Sales Tax or any other tax on materials, which cannot be equated to service tax, which is payable for the services rendered and it has no connection with the materials supplied.

47.Clause 19 of the Contract makes it clear that the contractor shall comply with the provisions of the Building and other Construction Workers (Regulation of employment and conditions of service) Act 1996 and the Building and other Construction Workers Cess Act, 1996. The defendant has deducted a sum of Rs.10,18,373/- towards Labour Welfare Cess from and out of the Final Bill submitted by the plaintiff. The said sum of Rs.10,18,373/- has been calculated at 1% of the contract value.

48.Clause 7 of the contract also stipulates that the Final Bill shall be submitted by the contractor within one month of the date fixed for completion of the work or on the date of the certificate of completion furnished by the Engineer-in-charge and payment shall be made within three months if the amount of the contract plus that of the additional items is upto Rs.2 lakhs and in six months if the same exceeds Rs.2 lakhs of the submission of such bill.

49.The plaintiff has claimed interest for the delayed payment since according to them, the defendant failed to pay their Final Bill before the period of six months from the date of submission of the Final Bill. The defendant has also not accepted the payment for the extra/substituted items, as per the rates quoted by the plaintiff through letter dated 05.08.2014 (Ex.P59).

50.As per the Price Variation Clause of the contract, the contractor is entitled to reimbursement in case there is any escalation of price of the materials as a direct result of coming into force of any fresh law or statutory rule or order (but not due to any changes in Sales Tax) in the price of material incorporated in the works and OT wages of labour and the increase exceeds 10% of the price and/or wages, which were prevailing at the time of receipt of tender for the work.

51.The contract does not provide for Cost Over Run claim like for instance, the payment incurred by the contractor on account of the delay towards maintenance of their staff upto the actual completion of work. Costs Over Run claim was also not made by the plaintiff prior to the levy of liquidated damages by the defendant. The contract also does not specifically provide payment of interest for the delayed payments though it stipulates that payments will have to be made either before two months if the claim is less than Rs.2 lakhs and before six months if the claim exceeds Rs.2 lakhs.

52.Though the compensation towards Cost Over Run was claimed by the plaintiff through their letter dated 04.03.2013, (Ex.P.49), neither the quantum of Cost Over Run nor the full particulars were given. The plaintiff had also not claimed any compensation towards a)extra/ substituted items amounting to Rs.59,44,965.98; b)compensation for escalation on account of price variation amounting to Rs.87,49,520/-; and c)compensation for Cost Over Run amounting to Rs.78,26,322/- prior to the submission of the Final Bill by them and only for the first time after the defendant intimated the plaintiff through their Final Bill dated 25.03.2014 that they have deducted liquidated damages, service tax and labour welfare cess, the plaintiff has estimated the compensation towards the alleged aforesaid losses through their letter dated 05.08.2014, marked as Ex.P.59.

53.In the case on hand, the AGM (CE) and AGM (Elect) of the defendant have certified that the plaintiff is not responsible for any loss incurred by the defendant due to the delay and both of them have recommended that the extension of time may be granted to the plaintiff upto 31.01.2013 without any levy of penalty/compensation. They have also categorically stated in their Certificates dated 04.03.2014 (Ex.P.55) that the delay was beyond the control of the contractor (plaintiff). However, only after a lapse of almost one year from such a certification, given by the AGMs, GM (Engineering) of the defendant without referring to the recommendations of all the Field Officers of the defendant, which includes the AGM (CE) and AGM (Elect) without issuing any prior notice to the plaintiff, has arbitrarily recorded by his Minutes dated 07.02.2014 that due to the extension of time granted to the plaintiff upto 31.01.2013, the defendant is entitled to deduct Rs.43,01,382/- by way of liquidated damages on account of the un-justified delay of 58 days in completion of the work by the plaintiff.

54.Admittedly, till the completion of the work by the plaintiff on 16.01.2013, the plaintiff was not informed by the defendant about any delay on their part in completing the work. More so, the delay of 58 days is claimed by the GM (Engg.) through his letter dated 08.10.2013, which has been signed on 07.02.2014 and is marked along with RTI information given by the defendant as Ex.P55 dated 04.03.2014.

55.Clause 5 of the contract deals with extension of time for completion of the work and the procedure to be followed. It reads as follows:

> *'If the contractor shall desire an extension of time for completion of work on the grounds of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer within 30 days of the date of hindrance on account of which he desires such extension as aforesaid and the Executive Engineer shall, if in his opinion (which shall be final) reasonable grounds be shown therefore, authorise such extension of time, if any, as may in his opinion, be necessary or proper. Such an extension of time shall be without prejudice to the Corporation's right to claim damages or compensation against the contractor for the delay in execution of or completion of the work in time.'*

56.In the case on hand, the extension of time has been granted only by the Executive Engineer of the defendant to the plaintiff on nine occasions. The extension of time can be granted under Clause 5 on the ground that the plaintiff has been unavoidably hindered in the execution of the work or on any other grounds. The defendant, considering the request of the plaintiff favourably, has granted extensions. In none of the letters granting extensions of time, the defendant has blamed the plaintiff for any delay in completion of the work.

57.As per Clause 5 of the Contract, there is no reference to GM (Engg.) to be the competent person for determination of any delay. When the Executive Engineer is empowered to make recommendation with regard to the delay, the extensions of time granted to the plaintiff by the Executive Engineer viz. the AGM (Engg.) and AGM (Elect.) is final and binding. The General Manager (Engg.) may be an higher authority to AGM (Engg.), but the GM (Engg.), as per Clause 2 of the Contract, has power only to fix the compensation and he is not the competent person with regard to approving hindrances and also granting extensions of time. Clause 5 of the terms and conditions of the contract extracted supra, also does not use the words 'Provisional Extensions of Time'.

58.The extensions of time having been granted and that too when the Executive Engineers, who are the Field Officers, have certified that there cannot be any levy of penalty/compensation from the plaintiff upto 31.01.2013 and when the plaintiff had completed the work as early as on 16.01.2013, the question of deduction of liquidated damages does not arise. The delay of 58 days determined by the GM (Engg.) as per his Communication dated 18.02.2014, Ex.P.53 is arbitrary and without any basis. The defendant has arrived at a conclusion that there was 58 days delay on the part of the plaintiff in completing the work based on the hindrance register and cement register, which according to them was signed by both the parties. Despite the plaintiff requesting the defendant to produce the hindrance register and the Cement register through a notice to produce, the defendant failed to produce the same. The defendant has also not let in any oral and documentary evidence in this suit and the hindrance register and the cement register have also not been marked as exhibits on the side of the defendant to prove their contention.

59.The defendant's General Manager (Engg.) while arriving at a conclusion that there has been a delay of 58 days on the part of the plaintiff in completing the work, has himself admitted that there was a delay of 533 days for which the plaintiff is not responsible. There cannot be an arbitrary determination of delay without hearing the plaintiff that too when the Field Officers of the defendant had earlier certified that there is no delay on the part of the plaintiff and they have also recommended for not levying penalty/compensation on the plaintiff provided that the project is completed on or before 31.01.2013.

60.Admittedly, the project was completed by the plaintiff on 16.01.2013. Having called upon the defendant to produce the copy of the hindrance register as well as the copy of the cement register, which are the basis for the alleged delay of 58 days on the part of the plaintiff in completing the project, the defendant has failed to produce the same. Despite such a request, the defendant has neither given a copy of the hindrance register and the cement register to the plaintiff nor have they let in oral and documentary evidence by marking the hindrance register and the cement register as an exhibit on their side. Therefore, an adverse inference is drawn that the delay is entirely attributable only to the defendant. The defendant has also not let in any oral or documentary evidence to disprove the claim of the plaintiff that there is no delay on their part, which is also supported by documentary evidence in the form of certifications given by the Field Officers of the defendant that there is no delay on the part of the plaintiff. The defendant has deducted Rs.43,01,382/- towards liquidated damages for the alleged 58 days delay on the part of the plaintiff. Since it has been conclusively established by the plaintiff that there is no delay on their part, the deduction of Rs.43,01,382/- made by the defendant towards liquidated damages is arbitrary and illegal and necessarily the said amount will have to be re-funded.

61.Coming to the next claim made by the plaintiff, viz. unlawful deduction of service tax amounting to Rs.9,79,848/- is concerned, the said deduction is also unjustified for the following reasons:

a)Clause 36 of the contract, which is the basis of deduction by the defendant deals only with Sales Tax or any other tax on materials and any other form of tax or cess. Clause 36 of the Contract is re-produced hereunder:

'(i)Sales tax or any other tax on materials in respect of this contract shall be payable by contractor and Corporation shall not entertain any claim whatsoever this respect.

(ii)In pursuance to or under any law such notification or order any royalty, cess fees or the like becomes payable by the Food Corporation of India and does not at any time become payable by the contractor to the State Government/local authorities in respect of any material used by the contractor in the works in such a case it shall be lawful for the Corporation and it will have a right to be entitled to recover the amount paid in the circumstance aforesaid, from the dues of the contractor.

"The rates quoted by the contractors shall be inclusive of Sales-tax and no Sales-tax shall be payable in addition to the contracted cost. In cases, where the local States tax enactment provide for the deduction of Sales tax at source, the same will be deducted at that rates specified in such enactment from the bills of the contractors and deposited with the Sales-tax authorities without any liability on FCI" '

b)Service Tax is a tax on the services rendered by the plaintiff to the defendant, whereas Clause 36 of the conditions of contract extracted supra does not deal with service tax as it deals only with Sales Tax or any other tax on materials;

c)The Commissioner of Central Excise dated 31.01.2014 (Ex.P52) has also made it clear that the defendant being a Government Body, the service rendered to such a body is exempted from payment of Service Tax. The order dated 31.01.2014 (Ex.P52) passed by the Commissioner of Central Excise has also attained finality and is binding on the defendant;

d)Though the learned Standing Counsel for the defendant contends that the said order dated 31.01.2014 (Ex.P52) is for a particular period and may not apply to the plaintiff's case, this Court is of the considered view that when the defendant has not let in any oral or documentary evidence to disprove the contention of the plaintiff that they are exempted from payment of service tax as per the Order dated 31.01.2014 of the Commissioner of Central Excise, marked as Ex.P.52, necessarily this Court will have to accept the contentions of the plaintiff that the Service Tax deductions made by the defendant is arbitrary, illegal and unjustified;

e)The plaintiff has discharged their initial burden as per the provisions of Section 101 of the Indian Evidence Act through their oral and documentary evidence that there cannot be any Service Tax deduction by the defendant and if the defendant claims that the service tax deduction is legal, they ought to have let in oral and documentary evidence to disprove the contentions of the plaintiff, which they have miserably failed to do so in the case on hand. Therefore, this Court is of the considered view that the deduction of Service Tax, amounting to Rs.9,79,848/- by the defendant from and out of the payments due and payable to the plaintiff is arbitrary, illegal and unjustified.

62.With regard to the third claim in Claim I, viz. the wrongful deduction of Rs.10,18,373/- towards Labour Welfare Cess by the defendant is concerned, the relevant Clause 19, which the defendant relies upon under the contract for the said deduction, reads as follows:

> *'The Contractor shall obtain a valid licence under the contract labour (R&A) Act, 1970 and the contract labour (Regulation and Abolition) Central Rules 1971, before the commencement of the work and continue to have a valid licence until the completion of the work. The contractor shall also abide by the provision of the child labour (Prohibition and Regulation Act 1986).*
>
> *The contractor shall also comply with the provisions of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Building and other Construction Workers Welfare Cess Act,*

1996.

Any failure to fulfill these requirements shall attract the penal provisions of this contract arising out to the resultant non-execution of the work.'

63.As per the above said Clause, it has been made clear that the contractor (plaintiff) shall comply with the provisions of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Building and other Construction Workers Welfare Cess Act, 1996. The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996 mandates the contractor to pay Labour Welfare Cess.

64.During the course of cross examination of the plaintiff's witness (P.W.1) while answering to question No.213, wherein a specific question was put to P.W.1 showing the letter dated 08.12.2016 issued by the defendant to State Bank of India regarding the proof of remittance of Labour Welfare Cess of Rs.10,18,373/- to the Manual Workers General Welfare Fund of Tamil Nadu, though P.W.1 has denied the said document, the fact that the defendant has remitted a sum of Rs.10,18,373/- towards Labour Welfare Cess and the plaintiff being under an obligation to pay the Labour Welfare Cess as per Clause 19 of the contract and there is no contra evidence provided by the plaintiff to disprove that they are not liable to pay the Labour Welfare Cess, this Court is of the considered view that the deduction of Rs.10,18,373/- on the plaintiff towards Labour Welfare Cess by the defendant is justified and legal.

65.With regard to the claim of the plaintiff that there was a delay in releasing the payment by the defendant towards the final bill submitted by the plaintiff is concerned, this Court, based on the evidence available on record, does not find any delay on the part of the defendant in releasing the payments for the following reasons:

a)Though the plaintiff in his plaint has pleaded that the plaintiff did submit the final bill prior to the levy of liquidated damages through the order of the defendant dated 18.02.2014, the plaintiff's witness (P.W.1) has himself admitted during his cross examination, while giving answer to question No.270 that the plaintiff did not submit the Final Bill within the period of one month from the completion of work;

b)The plaintiff has also not produced any acknowledgement from the defendant for having received the said Final Bill and therefore, the plaintiff has not discharged their burden of proof that the Final Bill was infact submitted to the defendant and there was a delay on the part of the defendant to make the payment to the plaintiff towards the Final Bill. Therefore, the question of payment of interest amounting to Rs.8,08,754/- calculated from 24.04.2013 to 25.03.2014 claimed by the plaintiff does not arise as it is un-justified.

66.Based on the aforesaid discussion, the following findings are rendered by this Court:

a)The plaintiff is entitled to recover a sum of Rs.43,01,382/-, which has been wrongfully deducted by the defendant towards liquidated damages from and out of the payments payable to the plaintiff as the plaintiff has been able to prove beyond reasonable doubt that they are not responsible for the delay in completing the work;

b)The plaintiff is also entitled for the recovery of a sum of

Rs.9,79,848/- for the wrongful deduction of Service Tax from and out of the payment payable by the defendant to the plaintiff as the plaintiff is not liable to pay Service Tax since the contract does not stipulate payment of Service Tax and the plaintiff has also proved through the order of the Commissioner of Central Excise that the plaintiff is exempted from payment of Service Tax as the defendant is a Government body;

c)The plaintiff is not entitled for the refund of Rs.10,18,373/- deducted by the defendant towards Labour Welfare Cess as the defendant has rightfully deducted the said amount since the contract enables them to do so and further they have also paid the said amount as seen from the payment challan, which has also not been disproved by the plaintiff through oral and documentary evidence;

d)The plaintiff is also not entitled for the delay in releasing the Final Bill by the defendant amounting to Rs.8,08,754/- as the plaintiff has not proved through oral and documentary evidence that they had submitted the Final Bill to the defendant. On the other hand, the defendant has proved that the Final Bill was never submitted by the plaintiff. Hence, the plaintiff is not entitled for any interest for the alleged delay in releasing the payments by the defendant towards the Final Bill;

e)The plaintiff is also not entitled for the difference in amount for the extra/substituted items amounting to Rs.59,44,965.98 as no conclusive evidence is available on record to prove that the plaintiff had infact incurred such a sum on account of the delay on the part of the defendant. The plaintiff had also intimated the defendant about the difference in amount incurred by them on account of the interest for the extra/substituted items only on 05.08.2014 marked as Ex.P.59, after the defendant had intimated the plaintiff that they had deducted sums towards Liquidated Damages, Service Tax and Labour Welfare Cess through their Final Bill dated 25.03.2014, (Ex.P.57) therefore, this claim is only an after thought and is an inflated claim;

f)The plaintiff is also not entitled for any compensation for escalation towards price variation amounting to Rs.87,49,520/-. No such claim was made by the plaintiff immediately after the work was completed by them i.e. on 16.01.2013. Only for the first time on 05.08.2014, Ex.P.59, such a claim was made by the plaintiff after the receipt of the intimation from the defendant by their communication dated 25.03.2014 that they have deducted certain sums of money from and out of the payments payable to the plaintiff towards liquidated damages, service tax and labour Welfare Cess. The claim for a sum of Rs.87,49,520/- towards compensation for price variation is also an after thought and is also an inflated claim;

g)The plaintiff is also not entitled for a sum of Rs.78,26,322/- towards Cost Over Run. The contract does not provide for any such payment. It is to be noted that the plaintiff has made a formal claim for Rs.78,26,322/- towards Cost Over Run only for the first time after the receipt of the letter dated 25.03.2014, wherein the defendant had communicated the plaintiff that they have deducted certain sums of money towards liquidated damages, Service Tax and Labour Welfare Cess, the claim for Cost Over Run has been mentioned by the plaintiff through their letter dated 04.03.2013, without quantifications and reasons. Therefore, the claim of Rs.78,26,322/- made by the plaintiff towards Cost Over Run is also an after thought and is an inflated claim, for which the plaintiff is not entitled;

h)However, being a commercial transaction, the plaintiff is entitled for interest in respect of the sums of money, which this Court has determined that the defendant is liable to pay.

67.This Court, after giving due consideration to the bank rate of interest prevalent at this point of time, awards interest at the rate of 6% per annum from 25.03.2014, being the date of final bill of the defendant, till the date of payment by the defendant.

68.For the foregoing reasons, the issues framed by this Court are answered in the following manner:

Issue No.1: The delay for completion of the work is not attributable to the plaintiff, but is attributable to the defendant alone.

Issue No.2: The plaintiff has not committed breach of the terms and conditions of the contract exposing themselves liable for damages.

Issue No.3) The liquidated damages imposed by the defendant is arbitrary and unjustifiable as the delay in completion of the work by the plaintiff is attributable solely to the defendant.

Issue No.4) The plaintiff is not entitled for any escalation charges as the said claim has been made by the plaintiff only as an after thought and is an inflated claim.

Issue No.5) The defendant has breached the contractual provisions by wrongfully withholding the amounts due to the plaintiff.

Issue No.6) The suit is not barred by limitation since the suit has been filed within three years when the defendant rejected the plaintiff's request for payment of the wrongfully deducted amounts by the defendant's letter dated 30.03.2017.

Issue No.7) The plaintiff is entitled for interest at the rate of 6% per annum from 25.03.2014 being the date of the Final Bill till the date of payment.

69.For the foregoing reasons, the defendant is liable to pay the plaintiff a sum of Rs.52,81,230/- as detailed hereunder:

Withheld Liquidated damages	-	Rs.43,01,382/-
Service Tax deduction	-	Rs. 9,79,848/-

Total	-	Rs.52,81,230/-

70.As the claims, viz., a)Release of amount withheld in final bill, b)Difference in amount certified in the extra/substituted items, c)Compensation for escalation towards price variation and d)Cost over run are in the nature of un-liquidated damages, the plaintiff will have to prove not only the material facts, but also the actual amount of damages sustained by them. Simply stating that there was a breach of contract committed by the defendant will not suffice for the plaintiff to claim damages under the aforesaid heads. Further the aforesaid claims have been made by the plaintiff only as an afterthought after receiving intimation from the defendant that they have deducted certain sums of money towards Liquidated Damages, Service Tax and Labour Welfare Cess. For proving that the plaintiff suffered un-liquidated damages, the plaintiff will have to let in oral and documentary evidence, which will conclusively prove their claim for un-liquidated damages. No evidence is available on record to prove that the plaintiff had suffered losses on account of the aforesaid heads, which are in the nature of un-liquidated damages and further, those claims have been made only as an afterthought and are inflated claims.

71.In the result, this suit is partly decreed with costs in favour of the plaintiff by directing the defendant to pay the plaintiff a sum of

Rs.52,81,230/- together with interest at the rate of 6% per annum from 25.03.2014 being the date of the final bill till the date of payment.

.04.2024

Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
vga

List of Witness:

Mr.V.Ganesan (PW1)

List of the Exhibits marked on the side of the plaintiff:-

Ex.P1 is the Board Resolution dated 07.07.2019

Ex.P2 is the letter of acceptance and contract along with conditions of contract dated 02.12.2009 and 07.12.2009

Ex.P3 is the letter from plaintiff to defendant dated 03.02.2010

Ex.P4 is the letter from plaintiff to defendant dated 08.02.2010

Ex.P5 is the letter from plaintiff to defendant dated 16.04.2010

Ex.P6 is the letter from plaintiff to defendant dated 30.07.2010

Ex.P7 is the letter from plaintiff to defendant dated 03.08.2010

Ex.P8 is the letter from defendant to plaintiff dated 10.08.2010

Ex.P9 is the letter from defendant to plaintiff dated 07.09.2010

Ex.P10 is the letter from plaintiff to defendant dated 22.09.2010

Ex.P11 is the letter from plaintiff to defendant dated 19.10.2010

Ex.P12 is the letter from plaintiff to defendant dated 20.12.2010

Ex.P13 is letter from plaintiff to defendant dated 21.12.2010

Ex.P14 is the letter from plaintiff to defendant dated 21.12.2010

Ex.P15 is the project review meeting (Minutes) involving both parties dated 07.01.2011

Ex.P16 is the letter from defendant to plaintiff dated 19.01.2011

Ex.P17 is the letter from plaintiff to defendant dated 21.03.2011

Ex.P18 is the letter from defendant to plaintiff dated 04.04.2011

Ex.P19 is the letter from plaintiff to defendant dated 02.05.2011

Ex.P20 is the letter from plaintiff to defendant dated 10.05.2011

Ex.P21 is the letter from plaintiff to defendant dated 10.05.2011

Ex.P22 is the letter from plaintiff to defendant dated 17.05.2011

Ex.P23 is the letter from plaintiff to defendant dated 23.05.2011

Ex.P24 is the letter from defendant to plaintiff dated 26.05.2011

Ex.P25 is the letter from defendant to plaintiff dated 03.06.2011

Ex.P26 is the letter from plaintiff to defendant dated 15.09.2011

Ex.P27 is the letter from plaintiff to defendant dated 26.09.2011

Ex.P28 is the letter from plaintiff to defendant dated 18.10.2011

Ex.P29 is the letter from defendant to plaintiff dated 18.10.2011

Ex.P30 is the letter from plaintiff to defendant dated 18.11.2011

Ex.P31 is the letter from plaintiff to defendant dated 18.11.2011

Ex.P32 is the letter from defendant to plaintiff dated 19.11.2011

Ex.P33 is the letter from defendant to plaintiff dated 23.12.2011

Ex.P34 is the letter from defendant to plaintiff dated 24.01.2012

Ex.P35 is the letter from plaintiff to defendant with annexures dated 11.02.2012

Ex.P36 is the letter from defendant to plaintiff dated 25.04.2012

Ex.P37 is the letter from plaintiff to defendant dated 27.04.2012

Ex.P38 is the letter from plaintiff to defendant dated 23.05.2012

Ex.P39 is the letter from defendant to plaintiff dated 25.05.2012

Ex.P40 is the letter from defendant to plaintiff dated 27.06.2012

Ex.P41 is the letter from plaintiff to defendant dated 13.07.2012

Ex.P42 is the letter from plaintiff to defendant dated 24.07.2012

Ex.P43 is the letter from defendant to plaintiff dated 27.07.2012

Ex.P44 is the letter from defendant to plaintiff dated 29.10.2012

Ex.P45 is the letter from defendant to plaintiff dated 26.11.2012

Ex.P46 is the letter from defendant to plaintiff dated 24.12.2012

Ex.P47 is the letter from plaintiff to defendant dated 16.01.2013

Ex.P48 is the letter from plaintiff to defendant dated 25.02.2013

Ex.P49 is the letter from plaintiff to defendant dated 04.03.2013

Ex.P50 is the letter from plaintiff to defendant dated 12.09.2013

Ex.P51 is the letter from plaintiff to defendant dated 29.01.2014

Ex.P52 is the order in original passed by the Commissioner of Central Excise dated 30.01.2014

Ex.P53 is the letter from defendant to plaintiff dated 18.02.2014

Ex.P54 is the letter from plaintiff to defendant dated 20.02.2014

Ex.P55 is the RTI information given by the defendant with enclosures dated 04.03.2014

Ex.P56 is the letter from plaintiff to defendant dated 21.04.2014

Ex.P57 is the final bill 25.03.2014

Ex.P58 is the letter from plaintiff to defendant dated 07.07.2014

Ex.P59 is the detailed letter from plaintiff to defendant with detailed enclosures with all workings for all claims dated 05.08.2014

Ex.P60 is the letter from plaintiff to defendant dated 15.09.2014

Ex.P61 is the order of this High Court in W.P.No.9059 of 2015 dated 22.04.2016

Ex.P62 is the letter from plaintiff to defendant dated 29.06.2016

Ex.P63 is the letter from plaintiff to defendant dated 04.07.2016

Ex.P64 is the letter from defendant to plaintiff with enclosures dated 19.08.2016

Ex.P65 is the letter from plaintiff to defendant dated 10.09.2016

Ex.P66 is the letter from plaintiff to defendant dated 02.11.2016

Ex.P67 is the legal notice from plaintiff to defendant dated 29.11.2016

Ex.P68 is the reply to legal notice by defendant's counsel dated 02.02.2017

Ex.P69 is the letter from defendant to plaintiff dated 21.03.2017

Ex.P70 is the letter from plaintiff to defendant dated 27.03.2017

Ex.P71 is the letter from defendant to plaintiff dated 30.03.2017

Ex.P72 is the letter from plaintiff to defendant dated 17.04.2017

Ex.P73 Working sheets for claim 1

a. Liquidated damages

b. Service tax deduction (Order of tribunal dated 30.01.2014)

c. Labour welfare cess - TN Notifications

d. Delay in releasing final bill.

Ex.P74 is the working sheet for claim 2 along with original enclosures

a. Fly ash bricks

b. Stainless steel works

c. False ceiling works

d. Curves structure steel

e. Extra lead for murrum

Ex.P75 Working sheet for claim 3 - Escalation

Ex.P76 Working sheet for Claim 4 - Cost overrun for site and administrative office - Hudson formula

Ex.P77 Working sheet for claim 5 - interest

.04.2024

vga

ABDUL QUDDHOSE, J.

vga

Pre-delivery judgment in
C.S. No.692 of 2017

.04.2024