

(2011) 03 MAD CK 0037
In the Madras High Court
Case No : A.S. No. 1019 of 2007

Gannon Dunkerly and Co. Ltd.

APPELLANT

Vs

D. Babu Reddy, Proprietor Srinivasa Constructions and Tamil
Nadu Construction Corporation Ltd.

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34

Citation : (2011) 03 MAD CK 0037

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : C. Manohar Gupta, for Gupta and Ravi, for the Appellant; Jayaraman Associates for R1, Rita Chandrasekaran, for Aiyar and Dolia for R2, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—This appeal is directed against the judgment and Decree dated 31.01.2006 and made in O.S. No. 3002 of 2001, on the

file of the learned Additional District Judge, Fast Track Court, Chennai by the first Defendant.

2. The facts, which are absolutely necessary for the disposal of the appeal are as under:

For easy reference, the Appellant herein may hereinafter be referred to as the first Defendant and the first Respondent and the second Respondent

herein be referred to as the Plaintiff and the second Defendant hereinafter wherever it occurs.

3. The Plaintiff filed the suit in O.S. No. 3002 of 2001, on the file of the learned Additional District Judge, Fast Track Court, Chennai, for the

recovery of a sum of Rs. 7,21,005/- from the first Defendant/Appellant herein

together with interest at the rate of 18% p.a. on Rs. 4,68,641.95

from the date of plaint till the date of its realisation.

4. The first Defendant is a company registered under the Indian Companies Act, 1956 and as such it undertakes civil projects throughout India.

The first Defendant had undertaken civil works at North Chennai Thermal Power Project, Ennore, Chennai-600 057.

5. The first Defendant had engaged the Plaintiff as petty contractor from the year 1995 and had entrusted general civil works to the Plaintiff. It is

usual course that after completion of the entrusted work, the final bill will be settled by the first Defendant, after deducting the cost of raw-

materials, power consumption and income tax etc., The first Defendant is used to retain 5% of the total bill amount as security deposit and as such,

a sum of Rs. 5,68,641.95 is lying with the first Defendant as security deposit from 31.03.1997.

6. The first Defendant had also paid a sum of Rs. 1,00,000/- towards refund of security deposit and the remaining amount of Rs. 4,68,641.95 has

to be paid back by the first Defendant towards security deposit as on 20.10.1997.

7. In spite of repeated demands made by the Plaintiff, the first Defendant had not come forward to settle the due and hence the Plaintiff was

constrained to issue a legal notice on 19.09.2000. On receipt of the legal notice, the first Defendant had replied stating that they would repay the

amount when they receive the payment from the second Defendant M/s. Tamil Nadu State Construction Corporation Limited, Chennai.

8. The first Defendant has to pay a sum of Rs. 4,68,641.95 towards security deposit and a sum of Rs. 2,52,363.67 towards interest and totalling

Rs. 7,21,005.62 rounded off to Rs. 7,21,005/-. Hence, the suit.

9. The first Defendant has contended that the suit is pre-matured and filed without any cause of action. The Tamil Nadu Electricity Board had

awarded the contract of general civil work Part III at NMTPP to the second Defendant.

10. The second Defendant had in turn awarded the said contract to the first Defendant. One of the main terms of the said contract between the first

Defendant and the second Defendant is that all terms of the contract between M/s. Tamil Nadu State Construction Corporation Limited and the

Tamil Nadu Electricity Board are in turn applicable to the Defendants herein.

11. The second Defendant, who is the main contractor had sublet the work to the first Defendant. The first Defendant herein had further sublet the contract on oral basis to various sub-contractors and the Plaintiff is one among them. Since the contract between the Plaintiff and the first Defendant was oral it was agreed specifically between the Plaintiff and the first Defendant that the conditions, which are applicable between the second Defendant M/s. Tamil Nadu State Construction Corporation Limited and the Tamil Nadu Electricity Board are applicable to the oral contract between the Plaintiff and the first Defendant towards the execution of the general civil work Part III.

12. It was also specifically agreed between the Plaintiff and the first Defendant that the retention of 5% of the total bill amount towards security deposit would be released after the first Defendant getting his retention amount from M/s. Tamil Nadu State Construction Corporation Limited.

13. As certain disputes were arisen between the Tamil Nadu Electricity Board and the second Defendant M/s. Tamil Nadu State Construction Corporation Limited, the first Defendant was not able to receive the money to the tune of Rs. 66,00,000/- (Rupees Sixty six lakhs only), which has been retained by the second Defendant as retention/security deposit.

14. The Plaintiff is entitled to claim the retention amount, which is retained by the first Defendant only after he gets the retention amount from the second Defendant M/s. Tamil Nadu State Construction Corporation Limited. Under this circumstance, the suit of the Plaintiff against the first Defendant is pre-matured and without any cause of action.

15. The second Defendant M/s. Tamil Nadu State Construction Corporation Limited has contended that the suit as against the second Defendant is liable to be dismissed as there is no privity of contract between the Plaintiff and the second Defendant, and no relief is also sought for against the second Defendant in the suit.

16. On the basis of the pleadings of the parties to the suit, the trial Court has formulated the following issues:

- i. Whether the Plaintiff is entitled to the suit claim?
- ii. To what relief, the Plaintiff is entitled?

In order to establish their respective cases, the parties to the suit went on trial. Mr. D. Babu Reddy was examined as PW1 and during the course

of his examination Exs.A1 to A5 were marked. On the other hand, one Mr. Madhavan was examined as DW1 and during the course of his examination Exs.B1 to B6 were marked.

17. On appreciation of the oral and documentary evidences and other related facts, the trial Court has found that the Plaintiff is entitled for the suit

claim ie. Rs. 7,21,005/- together with interest at 18% on Rs. 4,68,641.95 from the date of plaint till the date of its realization with cost.

Accordingly, the suit is decreed on 31.10.2006. Being aggrieved by the judgment and decree, the first Defendant stands before this Court with this appeal.

18. Mr. C. Manohar Gupta, learned Counsel for the first Defendant/Appellant, while advancing his arguments has not denied the contractual

liability of the first Defendant/Appellant towards the Plaintiff/first Respondent. He has fairly considered that 5% of the total bill amount towards

security deposit has been retained by the first Defendant and that the Plaintiff is entitled to receive the amount from the first Defendant only after the

first Defendant getting back the retention amount, which is being retained by the second Defendant M/s. Tamil Nadu State Construction

Corporation Limited.

19. It is the contention of the second Defendant that there was no breach of contract with the Plaintiff and that for the non payment of dues by the

first Defendant to the Plaintiff, as alleged by the Plaintiff, this Defendant could not be held responsible as they are not a party to the transaction,

which took place between the Plaintiff and the first Defendant.

20. The learned Counsel appearing for the second Defendant has also submitted that the second Respondent/second Defendant has been

unnecessarily imp led in the suit.

21. This Court has carefully considered the submissions made on behalf of the parties to the appeal. It is obvious to note here that the first

Defendant has not all denied the suit claim. The contract between the Plaintiff and the first Defendant has also not been denied. The retention

amount of 5% of the total bill amount towards security deposit by the first Defendant has also not been denied. Under this circumstance, the

contention projected on behalf of the first Defendant that the retention amount of 5% would be released only after the first Defendant gets it's

retention amount from the second Defendant M/s. Tamil Nadu State Construction Corporation Limited is not discernable.

22. On perusal of the materials available on record, it is revealed that the Plaintiff has completed the entrusted work and all the bills, which were due to the Plaintiff, have been settled by the first Defendant excepting the retention amount and therefore the trial Court had proceeded to decree the suit as prayed for directing the first Defendant to pay a sum of Rs. 7,21,005/- together with further interest at 18% on Rs. 4,68,641.95 from the date of plaint till the date of realisation with cost.

23. In this connection, the learned Counsel for the first Defendant/Appellant has submitted that the calculation of interest at 18% seemed to be exorbitant and that it might be reduced to 12% p.a.

24. Countering this argument, the learned Counsel for the Plaintiff has submitted that the claim of interest at the rate of 18% has not been disputed by the first Defendant/Appellant even at the stage of filing their written statement and that it is not proper on the part of the first Defendant to come forward with such a plea belatedly at the appeal stage.

25. Admittedly, the first Defendant has not disputed the claim of interest at the rate of 18% in the written statement. When such being the case, this is not the appropriate stage to object the calculation of interest. However, as contemplated u/s 34 of the CPC this vide discretion in ordering interest on the actual amount which was due prior to the filing of suit. Hence, this Court deems 12% interest would be reasonable on Rs.

4,68,641.95 from the date of plaint till the date of realisation.

26. Having regard to the submissions made on behalf of parties to the appeal and on appraising the evidences on record, this Court is of the view that the judgment and Decree of the trial Court does not require any interference of this Court, excepting in respect of interest as detailed above.

27. When the appeal came up for admission, this Court has granted interim stay in respect of the judgment and Decree passed by the trial Court in

O.S. No. 3002 of 2001 on 14.09.2007. Subsequently, an application in C.M.P. No. 1 of 2008 was taken out by the Plaintiff/first Respondent to

vacate the order of the interim stay granted by this Court on 14.09.2007. While making the order of interim stay absolute, on 03.11.2008, this

Court has directed the first Defendant/Appellant to deposit 50% of the decretal

amount to the credit of O.S. No. 3002 of 2001 on the file of the trial Court, within a period of six weeks from the date of receipt of a copy of this Order.

28. In pursuant to the Order dated 03.11.2008 in C.M.P. No. 1 of 2008, the first Defendant had also deposited a sum of Rs. 3,60,503/- and this

amount was also withdrawn by the Plaintiff. Since there was wrong calculation on the part of the first Defendant/Appellant, he had to deposit the

balance amount of Rs. 2,98,526/- out of the total amount of Rs. 12,94,810.64. The first Defendant/Appellant had sought two weeks of further

time to deposit the above said amount. Accordingly, two weeks further time was also granted by this Court by Order dated 03.02.2010 and made

in M.P. No. 1 of 2010.

29. The above facts would clearly indicate that the first Defendant/Appellant has not actually disputed the claim of the Plaintiff.

30. In the result, this appeal is dismissed and the judgment and Decree dated 31.01.2006 and made in O.S. No. 3002 of 2001, on the file of the

learned Additional District Judge, Fast Track Court, Chennai is confirmed with slight modification in respect of calculation of interest. As observed

in Paragraph No. 25, the Appellant/first Defendant is directed to pay a sum of Rs. 7,21,005/-together with interest at 12% per annum on Rs.

4,68,641.95 from the date of plaint till the date of realisation with cost.