
(2011) 08 MAD CK 0047
In the Madras High Court
Case No : O.S.A. No. 182 of 2008

Gannon Dunkerly and Company Limited	APPELLANT
Vs	
K. Amar Babu	RESPONDENT

Date of Decision : 10-08-2011

Acts Referred:

Citation : (2011) 08 MAD CK 0047

Hon'ble Judges : R. Banumathi, J;B. Rajendran, J

Bench : Division Bench

Advocate : Manohar Gupta, for Gupta and Ravi, for the Appellant; K. Rangesh, for Jayaram Associates, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Being aggrieved with the decree and judgment in C.S. No. 282 of 2000 dated 05.02.2007 directing the Defendant to

pay a sum of Rs. 13,92,200/-together with interest, Appellant-Defendant has preferred this appeal.

2. Briefly stated case of Plaintiff is that Defendant has been awarded the contract General Civil Work, Part III, Job No. 1 by the Tamil Nadu State

Construction Corporation Limited who were in turn awarded the contract by the Tamil Nadu Electricity Board, Anna Salai, Chennai-2 for General

Civil Works, Part III at North Madras Thermal Power Plant. Defendant engaged several petty contractors for doing the project work. Defendant

entered into oral contract with the petty contractors. Plaintiff is one of the petty contractors engaged by the Defendant from the year 1995 and

have entrusted General Civil Works to the Plaintiff. Defendant used to supply new materials like cement, E.C. Bag, T.R.S. Rod, Rail, M.S. Rod,

Str.Steel and Road Roller etc. In the usual course, after finishing the entrusted work, the final bill will be settled by the Defendant after deducting

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

liable to be returned to the Plaintiff. In that way, a sum of Rs. 13,83,120/-and Rs. 9,100/-are lying with the Defendant as security deposit from

31.03.1997. It is further averred that Plaintiff had finished all the works entrusted by the Defendant up to the Defendant's satisfaction and the bills

were also settled till 31.03.1997 except the security deposits retained by the Defendant. By their letter dated 31.03.1997 [Exs.P1 and P2],

Defendant has also confirmed the non-payment of security deposits. According to Plaintiff, inspite of repeated demands to settle the sums retained

by the Defendant, the Defendant failed and neglected to settle the same. On 18.03.2000, Plaintiff issued lawyer's notice [Ex.P3] to the Defendant

and though the notice was served upon the Defendant, the Defendant neither issued reply nor returned the security deposits. Hence, Plaintiff has

filed the suit for recovery of a sum of Rs. 13,92,220/- payable with interest.

3. Admitting the oral contract between the Plaintiff and Defendant, Defendant filed written statement stating that Defendant entrusted the work like;

(i) Excavation; (ii) PCC; (iii) Brick work and (iv) Plastering etc. to the Plaintiff. It was agreed between the Plaintiff and Defendant that all the terms

and conditions of the principal contract between Tamil Nadu Electricity Board and Tamil Nadu State Construction Corporation Limited which in

turn was applicable to the Defendant as sub-contractor was also applicable to the Plaintiff who is a petty contractor engaged by the Defendant

towards the execution of the General Civil Work, Part III. As principal contract between Tamil Nadu State Construction Corporation Limited and

the Tamil Nadu Electricity Board provides for security deposit and retention of certain amount from the bills in respect of various works, the

Defendant also retained 5% of the total bill amount as security deposit. According to Defendant, certain disputes arose between Tamil Nadu

Electricity Board, Tamil Nadu State Construction Corporation Limited and the Defendant, the work has come to stand still and the Defendant

could not receive money to the tune of Rs. 66 lakhs now lying with Tamil Nadu State Construction Corporation Limited retained by them as

retention/security deposit. Case of Defendant is that Plaintiff is entitled to claim retention amount retained by the Defendant in respect of various

bills for the works allotted to them only after the Defendant gets the retention amount retained by Tamil Nadu State Construction Corporation

Limited. Until the said amount is paid to the Defendant, the Plaintiff is not entitled to claim or demand the retention amount retained by the

Defendant. The suit is a pre-mature one and there is No. cause of action for the suit. Hence, prayed for dismissal of the suit.

4. On the above pleadings, the trial Judge framed the following Issues:

1. Whether the Plaintiff is entitled to the suit claim with interest at 18% per annum?

2. Whether the Plaintiff has completed the work allotted to them?

3. Whether the suit is premature for the reasons stated by the Defendant?

4. To what relief the Plaintiff is entitled?

5. Plaintiff Amar Babu examined himself as PW1. Exs.P1 to P3 were marked. No. oral evidence was adduced on the side of Defendant. By

consent, Exs.D1 to D5 were marked.

6. Upon consideration of oral and documentary evidence, learned Judge held that Defendant having entrusted the work to the Plaintiff who had

completed the entrusted work is entitled for 5% of the retention amount retained. Learned Judge further held that under Exs.P1 and P2, Defendant

had conceded the retention of the amount viz., Rs. 13,92,220/-and irrespective of the fact whether Defendant had received 5% of the retention

amount from Tamil Nadu State Construction Corporation Limited or not, the Defendant is bound to return the amount to the Plaintiff. Learned

Judge further held that there is No. clause either in Ex.D1 or in other documents as if the sub-contractor will be entitled to refund of the retained

amount only after the return of the retained amount by the Tamil Nadu State Construction Corporation Limited.

7. Challenging the impugned judgment, Mr. Manohar Gupta, learned Counsel appearing for Appellant has contended that when admittedly, Tamil

Nadu State Construction Corporation Limited had not paid 5% of retention amount in respect of the work done to the Appellant, question of

Appellant being liable to pay the retention amount to the Plaintiff did not arise. It was further submitted that without appreciating the scope and

purport of the agreement, learned Judge erred in decreeing the suit. Learned Counsel would further contend that under Ex.D5-letter [13.05.2000],

Tamil Nadu State Construction Corporation Limited had clearly written to the Appellant the reason for not settling the final bill including the

retention amount and the learned Judge erred in not properly appreciating the evidence.

8. Mr. K.Rangesh, learned Counsel appearing for Respondent contended that Plaintiff had finished all the works entrusted to him by the Appellant

to its full satisfaction and the sums due to the Plaintiff have also been confirmed under Exs.P1 and P2. It was further submitted that the statement of

the Appellant that it would repay the retention amount only when it received its own retention amount from Tamil Nadu State Construction

Corporation Limited does not hold any legal sanctity and upon appreciation of evidence, the learned Judge has rightly decreed the suit along with

interest.

9. Upon consideration of the rival contentions, the point falling for consideration is Can the Appellant contend that it is not liable to pay the amount

so long Tamil Nadu State Construction Corporation Limited has not paid the amount.

10. It is an admitted fact and also proved by Ex.D2-agreement that Defendant has been awarded the contract General Civil Works, Part III for

the construction of North Madras Thermal Power Plant by Tamil Nadu State Construction Corporation Limited who were in turn awarded the

contract by Tamil Nadu Electricity Board. It is also an admitted fact that Defendant in turn sublet the contract orally to various sub-contractors

including the Plaintiff. It is also an admitted fact that Plaintiff had finished all the works entrusted by the Defendant and the bills were also settled till

31.03.1997, excepting the security deposit retained by the Defendant. It is averred that Defendant used to retain 5% of the total bill amount as

security deposit and the same is liable to be returned to the Plaintiff. It is clearly averred that the common practice is that after finishing the

entrusted work, final bill will be settled by the Defendant after deducting the cost of materials, power consumption and income tax etc.

11. Ex.D2 is the agreement of contract entered into between Tamil Nadu State Construction Corporation Limited and the Defendant on

10.03.1995. Ex.D1 is the agreement between Tamil Nadu Electricity Board and Tamil Nadu State Construction Corporation Limited on

04.04.1997 for General Civil Works Part III at NMTPP. Clause 4 of the agreement [Ex.D1] deals with retention of 5% of the value of work

done. Clause 4 of Ex.D1-agreement reads as under:

4. The contractor agrees for withholding by the Board an amount equivalent to 5% (five percent) of the value of work done, by recovery from

each intermediate bill towards retention amount which will be released to the contractor after expiry of the guarantee period.

Under Ex.D2-the contractor viz., Tamil Nadu State Construction Corporation Limited has sublet the work to the Appellant-Defendant. One of the

main terms of the said contract between Tamil Nadu State Construction Corporation Limited and the Appellant is that "...all terms and conditions

of the contract between Tamil Nadu Electricity Board and Tamil Nadu State Construction Corporation Limited are in turn applicable to the

Defendant...". The said contract provides for security deposit and retention of 5% of the total bill amount from the bills in respect of the various

works as security deposit. Clause 4 of Ex.D2-agreement reads as under:

4. Retention Amount: Besides the initial Security Deposit mentioned in Para 3.0 above 5% (Five percent) of the value of work done shall be

deducted from each of your running bills towards additional Security Deposit till the completion of the entire work as per Clause 5.1, Section E of

Specn. This 5% retention amount will be refunded after the completion of the maintenance/guarantee period of 12 (Twelve) months.

12. In his evidence, PW1-Amar Babu has stated that the contract work was completed by 31.03.1997 and on 31.03.1997, Defendant addressed

a letter [Ex.P1] stating that the balance amount of Rs. 13,83,120/-is due and payable to the Plaintiff. On the same date 31.3.1997, Defendant sent

another letter [Ex.P2] confirming that the balance amount of Rs. 9,100/-is due and payable to the Plaintiff. PW1 has stated that the total amount

due and payable by the Defendant is Rs. 13,92,220/-. Evidence of PW1 is corroborated by Exs.P1 and P2-letters in which the Defendant has

confirmed the credit balance of Plaintiff as on 31.03.1997 as Rs. 13,83,120/- [Ex.P1] and Rs. 9,100/-[Ex.P2] respectively. In Ex.P1, the

Defendant has stated as "our book balance show the Credit balance of Rs.

13,83,120.00 [Ex.P1] (Rupees Thirteen Lakhs eighty three thousand one hundred twenty only) as on 31.03.97. We request you kindly confirm by return post within 10 days, failure to the above, we confirm that the balance shows in our record was correct". Like wise, in Ex.P2, Defendant has confirmed the credit balance of the Plaintiff at Rs. 9,100/- totalling Rs. 13,92,220/-. As per the two communications [Exs.P1 and P2], Rs. 13,92,220/- is due and payable. As recited in Exs.P1 and P2, it should be construed and confirmed that the Defendant is liable to pay a sum of Rs. 13,92,220/- to the Plaintiff towards the work done.

13. Stand of Defendant is that Tamil Nadu State Construction Corporation Limited has not paid the sum of Rs. 66 lakhs who retained the amount and therefore, Defendant is not liable to pay or return the security deposits retained by them to the Plaintiff. Learned Counsel for Appellant has submitted that in terms of Clause 4 of Ex.D1, Tamil Nadu State Construction Corporation Limited has clearly agreed that an amount of 5% of the value of the work done will be retained and which will be released by Tamil Nadu State Construction Corporation Limited only after the expiry of the guarantee period. It was further submitted that when admittedly, Tamil Nadu State Construction Corporation Limited has not paid the amount to the Appellant, 5% of the retention amount in respect of the work done, the question of Appellant being liable to pay the retention amount to the Respondent/Plaintiff does not arise.

14. In support of his contention, learned Counsel for Appellant has drawn our attention to the letter sent by the Defendant on 31.5.2000 [Ex.D5] to the Tamil Nadu State Construction Corporation Limited requesting to release Rs. 66,16,637/- stating that Tamil Nadu State Construction Corporation Limited has already received the retention payment from Tamil Nadu Electricity Board very long back. In its letter dated 28.05.2004 [Ex.D3], Tamil Nadu State Construction Corporation Limited has stated that Defendant agreed to execute 5% of additional works and in spite of several request by Tamil Nadu State Construction Corporation Limited as well as Tamil Nadu Electricity Board, Defendant has not done the additional work as agreed and because of which, final bill has not been settled by the Tamil Nadu Electricity Board. The relevant portion of the said letter dated 28.05.2004 [Ex.D3] reads as under:

In this connection TNSCC Ltd have written to the Superintending Engineer/ NMTPP, that we are in a position of doing only 5% of the value of the work in excess of the Agreement value from the total value of (Rs. 13.29 + 0.66) Rs. 13.95 crore. After getting a due consent from your side for the execution of the same at the Agreement rates.

At that time you have accepted for execution of this 5% additional works, further you have not done it inspite of several requisition by TNSCC Ltd. as well as by TNEM. Because of this our final bill has not been settled by TNEB.

Under such circumstances, unless our final bill is settled by TNEB, we are not in a position to settle the final bill and release of retention amount and security Deposit and EMD does not arise now.

15. It is seen from the above that since the Appellant-Defendant had not executed the agreed 5% additional work final bill was not settled by

TNEB and therefore, Tamil Nadu State Construction Corporation Limited was not in a position to settle the final bill and release the retention

amount retained. Since the Plaintiff has satisfactorily completed the work, the intese dispute between the Appellant and Tamil Nadu State

Construction Corporation Limited cannot be the reason for withholding 5% of the retention amount due to the Plaintiff. It is pertinent to note that

Appellant has not taken any steps to recover the retention amount from Tamil Nadu State Construction Corporation Limited. Therefore, the

contention of the Appellant that it would repay the retention amount only when it received its own retention amount from Tamil Nadu State

Construction Corporation Limited cannot be countenanced.

16. Upon appreciation of the evidence, learned Judge rightly held that under Exs.P1 and P2, Defendant had conceded the retention amount of Rs.

13,92,220/-and irrespective of the fact that whether Defendant received 5% of the retention amount or not, it is the bounden duty of the

Appellant/Defendant to return the same to the Plaintiff. The findings of the learned Judge is based upon the materials and evidence on record and

the judgment of the learned Judge is well reasoned one.

17. Insofar as interest, the learned Judge has awarded 12% interest per annum from 18.03.2000 till the date of plaint and thereafter at 9% p.a.

Since the Plaintiff being the sub-contractor under the Defendant and having

completed the work, Plaintiff is entitled to claim interest for Rs.

13,92,220/-(rounded off to Rs. 13,92,200/-) and the rate of interest awarded by the learned Judge cannot be said to be excessive warranting

interference.

18. In the result, this appeal is dismissed. Consequently, connected M.Ps. are closed. No. costs.