
(2010) 05 MAD CK 0022
In the Madras High Court
Case No : A.S. No. 1092 of 2001

Rail India Technical and Economic Service	APPELLANT
Vs	
Tamil Nadu Small Industries Development Corporation Limited	RESPONDENT

Date of Decision : 19-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Citation : (2010) 05 MAD CK 0022

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : Maninarayanan, for the Appellant; T. Girish, for Srinath Sridevan, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Appellant/Defendant has preferred this Appeal as against the Judgment and Decree dated 30.11.1998 made in O.S. No. 7806 of 1996 passed by the Learned 8th Additional Judge, City Civil Court, Chennai.

2. The Trial Court, on an examination of oral and documentary evidence and on consideration of available material on record, had come to the resultant conclusion in directing the Appellant/Defendant to pay a sum of Rs. 53,700/- to the Respondent/Plaintiff and also directed the Appellant/Defendant to pay interest at 13.5% per annum for a sum of Rs. 37,500/- from the date of filing of the Suit till the date of payment together with procosts and accordingly, passed a Judgment. In regard to the other reliefs prayed by the Respondent/Plaintiff, the same were rejected by the Trial Court.

3. Before the Trial Court five issues and one additional issue were framed for Trial. On the side of the Respondent/ Plaintiff witness P.W.1 was examined and Exs.A.1 to A.22 were marked. On the side of Appellant/Defendant, D.W.1 and D.W.2 were examined and Exs.B.1 to B.36 were marked.

4. The Points that arise for consideration in this Appeal are:

1. Whether the Appellant/Defendant is liable to pay a sum of Rs. 1,35,000/- along with interest at 13.5% per annum as per First Agreement dated 27.6.1987 to the Respondent/Plaintiff?
2. Whether the Appellant/Defendant is liable to pay a sum of Rs. 1,50,000/- along with interest at 13.5% per annum as per Second Agreement dated 29.6.1988 to the Respondent/ Plaintiff?
3. Whether the Appellant/Defendant is liable to pay a sum of Rs. 37,500/- together with interest at 13.5% per annum as per Third Agreement dated 29.06.1988 to the Respondent/ Plaintiff?
4. Whether the Suit filed by the Respondent/Plaintiff is maintainable by virtue of Clause 9 which provides for an Arbitration as per Agreement?

5. Contentions, Discussions and Findings on Point No. 4:

According to the Learned Counsel for the Appellant/Defendant, as per Clause 9 of all the suit agreements an Arbitration is provided for, but the Respondent/Plaintiff had not resorted to the remedy of appointing an Arbitrator and also the Respondent/Plaintiff had not invoked the jurisdiction of the Court as per Clause 9 of the Suit Agreement with any specific averment and therefore, the Suit filed by the Respondent/Plaintiff is not maintainable in law.

6. In response, the Learned Counsel for the Respondent/ Plaintiff contends that the right to file a Suit before a competent civil forum is of a civil nature and as per Section 9 of the Civil Procedure Code, there is no express or implied bar for the Respondent/Plaintiff to file a civil suit before the appropriate forum and in the instant case, the Respondent/Plaintiff had made a claim as per three different Agreements dated 27.6.1987 and 29.06.1988 and claimed a relief of recovery of an amount of Rs. 4,53,744.37 paise with subsequent interest on 3,22,500/- at the rate of 13.5% per annum from the date of payment till the date of realisation etc. and therefore, the Suit filed by the Respondent/Plaintiff is perfectly maintainable in law.

7. It is to be pointed out that a plea of bar to jurisdiction of a Civil Court will have to be considered having regard to the contentions raised in the plaint and in this regard, the pleas disclosing cause of action and the reliefs sought for must be taken into account in entirety. Generally, the averments in the plaint will go to make up to show that the Suit is cognisable by a regular Civil Court as per decision in Laxminarayana Rao, Mangalore Vs. Janardhana Shettigara, .

8. In this connection, a perusal of Ex.A.1-Agreement dated 27.6.1987 entered into between the Respondent/ Plaintiff and the Appellant/Defendant, the Clause 9 under the caption "Arbitration" enjoins that the consultants hereby agree that any dues to the Corporation can be recovered by the Corporation under any of the statutes that are in force from time to time. Also the Clause 10 of the Ex.A.1-

Agreement refers to the jurisdiction of the Court at Madras if any dispute of difference that arise among the parties.

9. In the instant case on hand, the Clause 9 of Ex.A.1- Agreement dated 27.6.1987 under the caption "Arbitration" has only made mention of that the Appellant/Defendant (Consultant) hereby agree that any dues to the Corporation can be recovered by the Respondent/Plaintiff under any of the statutes that are in force from time to time and therefore, it is quite candidly clear that the said clause has not specifically referred to going before the Arbitrator and since the present Suit is breach of the Agreement/ Contract coupled with the recovery of said amount from the Appellant/Defendant, the same is perfectly maintainable in law and well within the cognisance of a Civil Court viz., the Trial Court and when the Respondent/Plaintiff has alleged that its legal right has been infringed certainly the present Suit is maintainable in law as per Section 9 of the CPC and as such, the point is answered against the Appellant/Defendant.

10. Finding on Point No. 1: According to the Appellant/Defendant, the Respondent/Plaintiff has to pay a sum of Rs. 1.5 lakhs and pay the same in instalment as per Clause 5 of Ex.A.1-Agreement dated 27.6.1987 and that the Respondent/Plaintiff has paid a sum of Rs. 1.35 lakhs. But the Respondent/Plaintiff has failed to reveal certain facts in regard to the Appellant/Defendant having performed its part of the contract and that the Appellant submitted detailed Project Reports for about 20 units out of 25-30 units agreed under the Agreement and also sufficient number of copies have been sent to the Respondent/Plaintiff as per the letters including the letter dated 30.06.1989 wherein the Respondent /Plaintiff has accepted to its satisfaction of the Reports submitted by the Appellant/Defendant and also assured to pay the balance of Rs. 15,000/- due to the Appellant, if 5 more copies of Reports are sent to it and the sum of Rs. 1.35 lakhs paid by the Respondent/Plaintiff to the Appellant/Defendant is not in lumpsum but on various belated instalments.

11. It is the further contention on the side of the Appellant/Plaintiff that due to impracticability of the works under the Agreement and due to the contract of the party subsequent to the Agreement, the time is not the essence of the contract and that the Appellant/Defendant has submitted the Project Report for 17, while the Agreement was in 25-30 and in fact, the Respondent/Plaintiff by its letter dated 20.02.1989 and other letters including the one letter dated 23.1.1989 have expressed its satisfaction and sufficiency of the Project Reports submitted by the Appellant/Defendant and therefore, in view of the performance of the contracts by the Appellant/Defendant, the claim of Rs. 1.35 lakhs already paid to the Appellant/ Defendant by the Respondent/Plaintiff is not valid in law because of the other reason that the Respondent/Plaintiff by its letter dated 30.09.1987 extended the time of the contract at the request of the Appellant/Defendant by his letter dated 27.8.1987.

12. Per contra, the Learned Counsel for the Respondent/ Plaintiff submits that as per Ex.A.1-Consultancy Contract Agreement dated 27.6.87 a consolidated fee of

Rs. 1.50 lakhs for the services rendered will have to be paid by the Respondent/Plaintiff Corporation to the Appellant/Defendant and 25% of the amount will have to be paid at the time of assigning or acceptance of the offer, 50% will have to be paid after the submission of draft final report and 25% of the amount after the submission of the final report and as per the conditions of the Agreement, the Appellant/Defendant paid a sum of Rs. 37,500/- towards the advance of Rs. 25% on 9.7.1987 and a total sum of Rs. 75,000/- on 13.11.1987 and on 02.02.1988 and upto 02.02.1988 the Appellant/Defendant has received a sum of Rs. 1,12,500/- and later on 30.09.1988 the Appellant/Plaintiff has been paid a sum of Rs. 22,500/- and in all, the Appellant/Plaintiff has received a total sum of Rs. 1,35,000/-.

13. Added further, the Learned Counsel for the Respondent/Plaintiff contends that though as per Agreement, the final reports will have to be submitted on or before 1.9.87, the Appellant/Defendant has sought for extension of time and the Respondent/Plaintiff sought a clarification by means of letter dated 14.12.88 and the Appellant/Defendant by its reply on 21.12.1988 offered the clarification and on 23.1.1989 the Respondent/Plaintiff has asked the Appellant/ Defendant to provide details in regard to the source of availability of raw materials and the same has been replied by the Appellant/Defendant on 13.2.89 and therefore, there has been a breach on the part of the Appellant/Defendant in regard to the fulfilment of the contract and consequently the Respondent/Plaintiff is entitled to call for the return of the said amount for not adhering to the terms of Agreement and also due to a breach thereof.

14. It is the evidence of D.W.1 (Accountant of the Appellant/Defendant) that the Respondent/Plaintiff is possessing the right of extending the time for Agreement and through Ex.A.18 letter dated 27.8.1987 the Appellant/ Defendant has asked for extension of time and the Respondent /Plaintiff send a reply Ex.A.19 dated 2.9.1987 stating that the Appellant/Defendant should submit its final report before 30.09.1987 and though the Respondent/Plaintiff as per Ex.A.20 letter dated 08.01.1989 addressed to the Appellant/ Defendant has, among other things, stated the Appellant/ Defendant has not made any formal request for extension of time etc., the Appellant/Defendant has not written a reply to that letter.

15. A perusal of Ex.B.8-Letter dated 13.9.1988 of the Respondent/Plaintiff addressed to the Appellant/Defendant shows that the balance copies of DPRs on Common Service Facilities Centre have been submitted on 9.9.88 and in regard to the payment of final 25% of the Consultancy fee, the Appellant/Defendant has been directed to give the Respondent/Plaintiff an understanding stating that it will provide all necessary clarification/additional information that may be called for by the Plaintiff from time to time from the Appellant/Defendant on the DPRs prepared by it for the Functional Estate on Leather Goods, for the implementation of the scheme and that the payment will be made on the receipt of the same.

16. As per Ex.B.9-Letter dated 23.9.1988 the Respondent/ Plaintiff has informed the Appellant/Defendant among other things stating that "as per Clause 5 (3) of the Agreement, SIDCO has to release the final 25% of the consultancy fee after submission of all final DPRs by the consultant and since the consultant has to provide necessary clarification/additional information that may be called for by SIDCO from time to time on the DPRs prepared by the Appellant/Defendant and that the consultant has given an undertaking, as per its letter dated 14.9.88, it has now been decided to release 15% of the consultancy fee and accorded sanction for the payment of Rs. 22,500/- to the Appellant/Defendant towards part payment of final instalment of the consultancy fees.

17. That Apart, it transpires from Ex.B.9-Letter dated 23.9.1988 of the Respondent/Plaintiff that so far the Respondent/Plaintiff has paid 75% of the consultancy fee for the consultant as per letter dated 29.1.1988 and now the consultant as per letter dated 14.7.1988 has requested to release the final 25% of the fee they have submitted all the DPRs including the Report on Common Service Facility Centre.

18. In Ex.B.17-Letter dated 24.5.1990 the Respondent/ Plaintiff has informed the Appellant/Defendant stating that the Appellant/Defendant has to prepare and submit DPRs on leather goods covering 25-30 viable manufacturing units in SSI Sector. But till date, the Appellant has not submitted DPRs 10 copies on each product for 17 products only and further that as per the Agreement, the Appellant/Defendant has to submit 15 copies of DPR on each product and therefore, the Appellant/Defendant's request for final payment of Rs. 15,000/- will be considered only after completing the assignments, given to it in full.

19. It cannot be gainsaid that in Ex.A.1-Agreement dated 27.6.1987 between the Respondent/Plaintiff and the Appellant/Defendant, there is no authority provided to the Respondent/Plaintiff to withhold a portion of the payment subject to the clarification and additional information being provided by the Appellant/Defendant, as opined by this Court. Further, notwithstanding the fact that Clause 3 of the Ex.A.1-Agreement dated 27.6.1987 speaks of the Appellant/Defendant should submit the final report, neatly bound (15 copies) along with necessary designs and drawings, process techniques, technology and other support details on or before 1.9.1987.

20. Inasmuch as the Respondent/Plaintiff as per Ex.A.19-letter dated 2.9.1987 has extended the time period till 30.9.1987 and even on 2.2.1988 when the Respondent/Plaintiff has paid 50% of the amount, this Court inevitably comes to the definite conclusion that time mentioned in Ex.A.1-Agreement dated 27.6.1987, it is not liable to return the sum of Rs. 1,35,000/- together with interest at 13.5% to the Respondent/Plaintiff as claimed and the point is answered accordingly in favour of the Appellant/Defendant.

21. Finding on Point No. 2:

Clause 3 in Ex.A.2-Agreement dated 29.6.1988 entered into between the

Respondent/Plaintiff and Appellant/ Defendant speaks of that the Appellant/ Defendant (consultant) should submit their draft DPRs neatly bound (3 copies) and the final reports (15 copies) along with necessary designs and drawings, process techniques, technology and other support details on or before 30.9.88 and 31.10.88 respectively and in case there is any delay, the Appellant is liable to pay at the prevailing rate, interest and in default to pay on the stipulated date, is also liable to pay penal interest, as charged by the Corporation on the amount received by the consultant etc. However, in Ex.B.21-Letter dated 12.2.91 addressed by the Appellant/Defendant's General Manager to the Respondent/Plaintiff's Chairman and Managing Director, it is mentioned that a request is made to kindly arrange to release an amount of Rs. 65,000/- (Rs. 50,000/- towards Building Hardware and Rs. 15,000/- towards Leather assignment) and further, it is brought to the notice of the Respondent/Plaintiff that already the Appellant/Defendant submitted Eighteen Building Hardware Products vide Lr. No. IDD/SIDCO/BH/90 dated 20.11.90 and also that they are submitting ten copies of remaining tow products.

22. In this connection, it is useful to refer to Ex.A.16-Letter dated 16.11.90 of the Respondent/Plaintiff addressed to the Appellant/Defendant wherein it is mentioned that as per the agreement payment, the Appellant/Defendant was paid 25% advance of Rs. 50,000/- on 13.7.88 and 50% of fee i.e. Rs. 1,00,000/- on 1.12.89 and that not even a single report was submitted by the Appellant/Defendant within the stipulated period and that the first batch of four draft DPRs were submitted by the Appellant only on 6.1.89 and further, the project reports were prepared by the Appellant only for 20 individual manufacturing units but as per the agreement it should be for 30 to 35 individual units and added further, the report on Common Service Facility was not prepared and submitted and only one copy of draft DPR for each individual product was submitted by the Appellant as against 3 copies mentioned in the agreement and final DPRs were yet to be received by the Respondent/Plaintiff and therefore, since the Appellant/Defendant has not acted as per the terms of the contract agreement, the Agreement dated 29.6.89 has been terminated and the Appellant/Defendant has been called upon to repay the amount of Rs. 1,50,000/- with interest at the rate of 13.5% per annum from the date of receipt of the amount till the date of settlement etc.

23. In the present case, the Respondent/Plaintiff has paid the 50% advance of Rs. 1,00,000/- on 1.12.89 and therefore, it is candidly clear that time is not the essence of contract and consequently, this Court holds that the Appellant/Defendant has not violated the Agreement-Ex.A.2 dated 29.6.88 and in that view of the matter, it is held that the Respondent/Defendant along with interest at 13.5% per annum and accordingly, the point is answered in favour of the Appellant/Defendant.

24. Finding on Point No. 3:

It is the case of the Respondent/Plaintiff that in regard to the Sectoral study on

Engineering Industry the Appellant/Defendant has been paid with an advance of Rs. 37,500/- and the time fixed for submission of draft reports and final reports under the Agreement is 30.9.88 and 31.10.88 and since the Appellant/Defendant has not done anything and more so, when Ex.A.16-Termination Notice dated 16.11.90 has been issued to the Appellant/Defendant terminating the agreement and demanding the repayment of the sum received as advance of Rs. 37,500/- on 15.7.88 the Respondent/Plaintiff is entitled to claim the amount with interest at the rate of 13.5% per annum by way of damages from the payment till the date of realisation.

25. Per contra, the stand of the Appellant/Defendant is that under the third Agreement dated 29.6.1988 the time is not the essence of contract and at no time before 7.12.90 the Respondent/Plaintiff has raised an issue of the time factor. But the Appellant/Defendant admits the receipt of advance of Rs. 37,500/- paid by the Respondent/Plaintiff under the Agreement for Sectoral study on Engineering Industry and that the Respondent/Plaintiff's conduct is responsible the delay in performing its part of the contract by the Appellant/Defendant and therefore, the Appellant/ Defendant is not liable to pay the sum of Rs. 37,500/- along with interest at 13.5% per annum. In this regard, the Trial Court has committed an error in accepting the case of the Respondent/Plaintiff in regard to the sum of Rs. 37,500/- together with interest at 13.5% per annum.

26. At this stage, it is significant for this Court to make a mention that the Appellant/Defendant's advisor in the letter dated 27.8.87 addressed to the Respondent/Plaintiff's Chairman has among other things mentioned that "the Part II of the report containing the detailed Project reports for the various identified products are under preparation and in view of the fact that there is delay in getting full particulars from Japan about the machinery, it requests for extension of time upto 30.9.1987.

27. When the Appellant/Defendant has not performed anything in regard to the work of Sectoral study on Engineering Industry and when it has received a sum of Rs. 37,500/-, then it is not open to the Appellant/Defendant to take a contra stand in this regard and in law, it is bound to pay a sum of Rs. 37,500/- together with interest at 13.5% per annum [the rate of interest at 13.5% per annum cannot be said to be unreasonable, usurious or an excessive one inasmuch as the terms of the Agreement provides for the interest and the penal interest for the delayed payment as agreed to by the parties and therefore, the Appellant/Defendant cannot be absolved of its liability] and accordingly, this Court holds that the Appellant/Defendant is liable to pay a sum of Rs. 37,500/- together with interest at 13.5% per annum from the date of payment till the date of realisation along with procosts and the point is answered in favour of the Respondent/Plaintiff.

28. In the result, the Appeal is dismissed, leaving the parties to bear their own costs. Resultantly, the Judgment and Decree of the Trial Court dated 30.11.1998 in O.S. No. 7806 of 1996 is confirmed for the reasons assigned by this Court in

this Appeal. Considering the facts and circumstances of the case, the parties are directed to bear their own costs.