HIGH COURT OF ANDHRA PRADESH

FRIDAY ,THE FIFTH DAY OF MAY

TWO THOUSAND AND TWENTY THREE

PRSENT

THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU

THE HONOURABLE SRI JUSTICE V SRINIVAS

COMMERCIAL COURT APPEAL NO: 7 OF 2018

Between:

1. M/S SRI SCL INFRATECH LTD (formerly srinivasa Constructions Ltd), Rep. by its Managing Director, D.V.Naidu, H.No.8-2-502/1/A, Jivi towers, 1st floor, road No.7, Banjara HIlls, Hyderabad - 500034.

...PETITIONER(S)

AND:

1. M/s V.R. Constructions, Class-I Contractors, Rep. by its Managing Partner, Ganta Rajasekhar Rao, Office at No.26/3317, Vedayapalem, Nellore.
2. Superintendent Engineer S.R.B.C. Circle-III, Nandyal, Kurnool District, andhra Pradesh.
3. State of AP Rep. by the District Collector and Magistrate, Kurnool, Kurnool District.

...RESPONDENTS

Counsel for the Petitioner(s): SRINIVASA RAO BODDULURI

Counsel for the Respondents: ARUN SHOWRI G

The Court made the following: ORDER

2023:APHC:14794

HIGH COURT OF ANDHRA PRADESH: AMARAVATI

HON'BLE MR. JUSTICE D.V.S.S. SOMAYAJULU

AND

HON'BLE MR.JUSTICE V.SRINIVAS

Commercial Court Appeal.No.7 of 2018

JUDGMENT: *(per D.V.S.S.Somayajulu, J)*

This appeal is filed questioning the judgment and decree dated 08.12.2017 passed in O.S.No.83 of 2017 by the Commercial Court-cum-Principal District Judge, Kurnool.

2. Sri B.Adinarayana Rao, learned senior counsel appeared for the appellant, whereas Sri N.Subba Rao, learned senior counsel appeared for the respondents.

3. Learned senior counsel for the appellant essentially argued that the judgment of the lower Court is against the settled principles of law. He points out that in the contract between the appellant and the 1st respondent, there is no condition for payment of escalation charges. In the parent contract between the appellant and the State, there is an escalation clause which is

not, however, included in the agreement between the plaintiff and defendant No.1. It is also pointed out that the pleading about the escalation in the suit is absolutely lacking and that the trial Judge committed an error in awarding escalation. It is, according to him, a matter of contract and the Court cannot award escalation on the grounds of equity or otherwise. He also points out that the claim made is essentially for alleged balance due, whereas escalation was awarded. He also argues that the documents filed do not amount to evidence in the eye of law and merely on the basis of some consolidated and typed statements, huge sums of money were awarded without considering the fact whether these documents actually constitute evidence or not. He also points out that in the ultimate conclusion, learned Judge did not discuss the quantum of the claim or about the manner in which it was proved. Merely on the ground that the main parent agreement contained an escalation clause and the appellant received the escalation from the State Government, the trial Judge awarded the amounts. He submits that this is totally contrary to law.

4. He also points out that the conclusions are at page 51 and 52 of the impugned judgment are clearly erroneous. Prior to that

he states there is a discussion on the various issues without leading to a legal conclusion. He also points out that although the issues were framed, the same are not answered. He points out that initially clear and cogent issues were framed and thereafter additional issues were also framed. Learned counsel points out that as per law, each of these issues must be answered properly and clearly, since they have a bearing on the final decision. In the end, these issues were not answered. This is a fatal flaw as per him. As far as interest is concerned, he contends that the issue No.5 is with regard to interest, but there is no discussion whatsoever about the "delay" or the quantum of interest. He submits that the pleading and proof about interest is not there. Merely on the basis of a tabular statement interest was awarded.

5. Learned counsel therefore submits that the impugned judgment is not in accordance with law and should be set aside. He also files a compendium of case law, which is referred to later in the judgment.

6. In reply to this, Sri N.Subba Rao, learned senior counsel argues that the issues were all considered and thereafter only the order was passed. He points out that the learned Judge discussed

the oral and documentary evidence before coming to the conclusions. He draws the attention of this Court to the various pages in the judgment where evidence of the witnesses and documents were also discussed and therefore, he submits that the impugned judgment cannot be commented upon only because all the issues were not separately answered. He submits that since issues 1 to 5 are interlinked, they were rightly clubbed together and a final order was passed. He also points out that admittedly from a reading of the evidence, there is a delay and therefore, he submits that it is within the competence of the Court to award interest. Learned counsel points out that almost five (5) witnesses were examined and 32 documents were marked for the plaintiff and another 17 documents were marked to the defendants. All of these were considered before the final order was passed. He points out that interest is essentially a discretionary remedy which can be awarded in case the delay is clearly visible.

7. In the case on hand, he points out that the trial Court came to the conclusion that men, material and machinery were supplied by the plaintiff. In view of the escalation charges paid under the parent contract, the plaintiff was entitled to receive the same for

the men, material and machinery that he had in fact supplied for the execution of the work. Therefore, the payment of the principal sum is said to be justified. As far as the interest is concerned, the claim of interest at 24% is made and notices were issued demanding the interest. Therefore, learned counsel argues that the impugned order pertaining to interest is correct and is justified. In the brief written note submitted, it is submitted that the provisions of the Commercial Courts Act are applicable and that therefore interest is payable as the said Act prevails over the C.P.C. etc.

8. **COURT :-** This Court notices that the first defendant was awarded a work namely Earth work excavation/lining of canal and construction of structures on Sanjanamala sub-branch canal, majors, minors and sub-minors in Block No.X of Srisailam Right Branch Canal. Out of this, two sub contract agreements and two letters of intent for work of value of Rs.623 lakhs was given to the plaintiff. (Para 2 g of the judgment). Claiming certain amounts with interest the present suit was filed. The 1st defendant denied the claims.

9. After the pleadings were completed, the following issues were framed:

1.Whether the first defendant has calculated the payments due to the plaintiff for the work done in terms of the sub-contract agreement/completion certificate? If so, what is the gross amount payable to the plaintiff by the first defendant?

2. Whether the plaintiff is entitled to receive escalation charges as per the work agreement?

3. Whether the defendants committed default in making payments to the plaintiff periodically in accordance with the work agreement?

4. Whether the plaintiff proves the balance of payment due under the contract as at Rs.1,54,82,507/-?

5. Whether the plaintiff is entitled to receive interest against payments withheld by defendants?

6. Whether the plaintiff is entitled for a decree and judgment, as prayed for? If so, to what relief?

ADDITIONAL ISSUES:

1. Whether the first defendant completed the work allotted to him or not?

2. Whether the final bill of the entire work of the first defendant is passed or not?

3. If so, whether the first defendant is entitled for the final bill amount of Rs.31,44,569/- or not?

4.To what relief?

10. Issues 1 to 5 were discussed together by the learned single Judge. Ultimately, in para 25, she came to the conclusion that there is no dispute with regard to the payments made by the first defendant except the escalation charges and interest. Similarly, in the concluding portion of para 25, at internal page 47, the following is mentioned by the learned Judge:

> 'As the entire dispute is revolving with respect to the escalation charges, it is very important to discuss clauses in Ex.A.3 agreement'.

11. In the opinion of this Court Issues 1, 2 and 4 should be decided to award claim No.1. Issue 2 will have to be decided first and then 1 and 4 should have been dealt with in that order. The right to claim escalation and balance due should be decided first but this was not done.

12. This Court is the first appellate Court which can examine questions of fact. It is clear that despite the mandate of law including Order 20 Rule 5 and Order 14 Rule 2, the trial Court did not pronounce judgment on all the issues and answer them in seriatim. The issues in this case are not of such a type that the entire suit could be decided on one issue alone.

13. Considering the provisions of Order 41 Rules 23, 23-A and 24 as the evidence available is enough to decide the case, this Court is proceeding to decide the case by itself on the basis of the available evidence instead of remanding the matter. Neither party sought remand also.

14. This Court will have to decide the following points in the course of this appeal as these arise for decision.

(1) Whether the plaintiff is entitled to receive escalation charges and /or balance due as claimed
(2) Whether the amount claimed is proved?
(3) Whether the plaintiff is entitled to receive interest as claimed.

15. The important documents to be considered are: (1) Sub-contract agreements dated 25.01.2000 (Ex.A.3), (2) second sub-contract agreement dated 05.01.2001 (Ex.A.4), (3) the letters of intent dated 01.02.2000 (Ex.A.5) and (4) the second letter dated 10.02.2001 (Ex.A.6). These are the four works which are awarded to the plaintiff by the first defendant (appellant).

16. Clauses 2, 7,8,9 and 10 of the sub-contract agreement are as follows:

2. The work shall be completed as per the specifications and terms stated in the tender agreements, and orders issued by the Department from time to time.

7. Payments to the Sub-contractor will be made from the bills received from time to time by the Principal Contractor from the Department. All deductions made from the gross bill amount concerning the work on 4R and sub-minors thereof will be deducted from the amount due to the Sub-contractor. (emphasis supplied)

8. All the machinery and material required for the work shall be entirely procured by the Sub-contractor. If any material or machinery is supplied to the Sub-contractor by the Principal Contractor the cost of the materials and the hire charges of machinery as due on that date will be recovered from the amount due to the Sub-contractor.

9. Further an amount at 1.1% towards T.D.S. and 7% towards commission to the Principal Contractor will be deducted from the gross amount due to the Sub-Contractor.

10. The work shall be completed to the milestones prescribed by the Department. Any penalties imposed by the Departmental authorities as per the agreement in respect of any defaults or defects in construction and execution of works etc., shall be borne by the Sub-contractor only and shall be deducted from the amount due to the Sub-contractor.

17. The clauses are identical in both the subcontract agreements. In the two letters of intent, Exs.A.5 and A.6, the

terms and conditions are linked to Exs.A.3 and A.4. No separate terms are entered into.

18. The main contract agreement between the appellant and the State is marked as Ex.B.1. Clause 47 of this agreement states as follows:

> 47. Price Adjustment.
>
> 47.1 Contract price shall be adjusted for increase or decrease in rates and price, labour, materials, fuels and lubricants in accordance with the following principles procedures and as per formula given in the contract data:
>
> (a) The price adjustment shall apply for the work done from the start date given in the contract data upto end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time, reasons attributable to the contractor.
>
> (b) The price adjustment shall be determined during each quarter from the formula given in the contract data.
>
> (c) Following expressions and meanings are assigned to the work done during each quarter.
>
> R = Total value of work done during the quarter it would include the value of materials on which secured advance has been granted, if any, during the quarter less the value of materials in respect of which the secured advance has been recovers any during the quarter. It will exclude value for works executed under variations for which price adjustments will be worked separately based on terms mutually agreed.

> 47.2 To the extent that full compensation for any rise or fall costs to the contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.

19. Similarly, a formula is also given in clause 4.7 and 8 for calculating escalation for labour component, cement component, fuel and lubricant components. For labour, the consumer price index is taken. For the cost of cement, the wholesale price index for cement as published by the Government of India, New Delhi is taken. For adjustment of petrol, oil and lubricants, the average official prices at IOC petrol pump at Banaganapalli is taken. These indexes and prices are pertaining to certain dates and detailed formula for this provided. The labour component of the entire contract is taken as 35%, cement as 19%, POL as 31% and other materials at 15%. Therefore, it is clear that for the calculation of the price adjustment, there is a detailed formula based upon certain price indexes etc.

20. It is also very clear that this term of price variation has not been included in two agreements or in the two work orders entered into between the parties. The written statement filed by

the defendant clearly stated that there is no agreement between the plaintiff and the defendant for payment of escalation charges. The first witness for the plaintiff also agreed (in the course of his cross-examination on 27.03.2011) that there is no specific clause in Exs.A.3 and A.4 for escalation charges. Issue No.2 is specifically to this effect -whether the plaintiff is entitled to receive escalation charges as per the agreement?.

21. In the absence of a clause in all the agreements between the appellant and the plaintiff, a question that arises at the outset for consideration is, whether the price variation clause in the parent agreement between the appellant and the State of Andhra Pradesh is incorporated in the four (4) agreements between the parties Exs.A.3 to A.6.

22. The law on the subject is sufficiently clear.

23. In ***Bank of India and another v. K.Mohandas and others***[1]**,** the following was held:

> 28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent

[1] (2009) 5 SCC 313

> conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.

24. In ***M.R.Engineers and Contractors Private Limited v. Som Datt Builders Limited*[2],** the Hon'ble Supreme Court discussed specifically about the incorporation of a clause from one contract to another. Paras 16 to 18 of this judgment are as follows:

> 16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or

[2] (2009) 7 SCC 696

borrowing specific portions of the said document for application to the contract.

17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract

> between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.

25. If the facts of the present case are examined against this legal backdrop, it is clear that the plaintiff and defendant No.1 were entering into agreements/orders starting from 25.01.2000 till 10.02.2001. None of these agreements/orders makes a reference of the escalation clause or the price variation clause either directly or indirectly. The said clause is not incorporated in Exs.A.3 to A.6. In fact, price variation is also distinct from escalation. Price variation could include both positive and negative components, whereas the escalation includes only a positive component only. Nothing is mentioned about escalation or about incorporation of the price variation clause. In Ex.A.3 dated 25.01.2000, the work was to be completed at the end of June, 2000 and in Ex.A.4 dated 05.01.2001, the work was to be completed by June, 2001. These two end dates were also adopted for Exs.A.5 and A.6 and no separate end date is fixed. Therefore, it is clear that the maximum period in which the plaintiff in the suit was to execute the work was about six (6) months only. They are short duration contracts.

In such short duration contracts, lack of escalation is the norm since the work is of short tenure.

26. Even if it is held that escalation is payable due to conduct, in the opinion of this Court, the calculation of escalation for the part of work executed by the plaintiff in the overall work had to be specified. As pointed out, at the outset, the total value of work awarded to the appellant/defendant by the State was Rs.24,73,00,848/- crores. Out of this, Rs.6.23 crores or Rs 623 lakhs is the value of the work awarded to the plaintiff by defendant No.1. If the claim for escalation is to be justified, the plaintiff would have to clearly and categorically prove the components of the price escalation/variation in line with the formula and also the extent of the price variation for the period in which the work was executed for the Rs.623 lakhs of worth of work i.e., plaintiff will have to prove the escalation due to them within the works awarded to them only. This Court does not find any pleading or proof to this effect. It is a fact that the defendants' witnesses accepted that they have received an escalation from the Government. Since the work awarded to the respondent/plaintiff was approximately 1/4th of the total work, a duty was cast upon

the plaintiff in the suit to prove the total quantum of escalation received and also the plaintiff's share out of the same. The manner in which the escalation was calculated and demanded is also necessarily to be proved. Each component has a different formula. Therefore, in the opinion of this Court, the petitioner was under an active duty to prove the claim as required under the price variation clause for the four works executed. This was unfortunately not done. All of this is stated since there is no admission of the sum due by the defendant No.1. There is in fact an express denial.

27. The claim No.1 in the plaint and in the evidence affidavit of P.W.1 is in the form of tabular statement claiming the net amount of Rs.1,54,82,507/-. This is claimed as "balance payment due" both in the plaint and in the evidence affidavit of PW.1.

28. Ex.A.18 is a document in which it is mentioned that the escalation amount out of the works awarded to plaintiffs comes to Rs.90,27,914/-. The trial Court relied upon this document for the award of claim of escalation. This can be found in internal page 30 of the judgment when PW.3's evidence is discussed, para 21 and also in the concluding line of para 24 and at internal page 49

of the judgment where Ex.A.18 is discussed and it is held that the price escalation is worked out to Rs.90,27,914/-.

29. Ex.A.18 is a consolidated list filed as a booklet and interestingly it is prepared by a Deputy Executive Engineer of the defendant Nos.2 and 3. Ex.A.18, which runs into 63 pages; is prepared and signed on certain pages by the Deputy Executive Engineer, who was examined as PW.3. It is not a copy of any document maintained in the regular course of construction nor does it appear to be based upon the records maintained by the plaintiff or the 2nd defendant. No objection was taken for its admissibility. No objection was taken on the issue of a defendant's officer being examined as a plaintiff's witness. In fact he was examined on commission as per the courts orders only. No objection was taken that it is a computer printout also. In these peculiar circumstances this Court has to examine the matter.

30. The first witness for the plaintiff himself said that it is a booklet prepared by the second defendant in his chief-examination itself. In his cross-examination on 23.07.2011, he states that Ex.A.18 was prepared by I.Basha, the Deputy Engineer and that it relates to the work done by the plaintiff. He also states further

that Ex.A.18 does not show that the plaintiff was referred to as the sub-contractor. He further agrees that he does not know when Ex.A.18 was prepared.

31. P.W.3 is Syed Illiaz Basha. He is an Officer of the defendant-State who was examined on commission. Initially, he stated that Ex.A.18 is the general abstract of work done by the plaintiff as prepared by him at the request of both the parties. It comprises items of work done by the plaintiff including the works falling outside the jurisdiction. He also agrees that it is an arithmetical job based upon the measurements recorded in the M-book. All of these are stated by the witness in his chief-examination. In his cross-examination, he agrees that he does not know which sub-contractor executed the work held by defendant No.1 and whatever he said is as per the version supplied by the sub-contractor only. He also further admits that Ex.A.18 does not contain the date on which the abstract was prepared. It was typed outside the Office, where typewriting is present and he did not type the same. He further admits that the particulars may have been typed in the computer center, but he cannot say the person by whom these particulars were typed. He also admits in

the subsequent cross-examination that he did not sign from pages 7 to 14, 16 to 22, 23 to 29, 31, 32, 34, 36 to 41 and other pages. He further agrees that he signed at the end of these pages because they are a concluding page. In the concluding part of his cross-examination, he states that he did not obtain any permission to prepare the abstract of the quantity of work from the Office records. He also states that as an official, he is not entitled to issue any extracts of the Office records to third parties, but he prepared the abstract at the oral request of both the parties. Ultimately, in the further cross-examination, after the re-examination, he agrees that Ex.A.18 is requested to be given at the instance of the plaintiff and plaintiff alone filed the same into Court.

32. This Court notices that except this document, which is a typed extract prepared outside the Office and typed by a person whom the witness does not know, there is no other document filed to prove the claim of Rs.90,27,914/- towards the escalation charges. The original data/record on which this was based is not a part of the record. Plaintiff never summoned/exhibited the original measurements for the work done. Ex.A.18 is not

supported by an official measurement. In the opinion of this Court, the submission made by the learned senior counsel for the plaintiff that there is no ground to award this claim because of a lack of pleading and evidence is eminently justified. The plaintiff did not prove that he had actually incurred these expenses by paying the changed/higher rates for labour, material etc., etc. or that the calculation is in accordance with the formula indicated in the main agreement. The lower Court in the opinion of this Court was under an active duty to consider this evidence in its proper perspective and in line with Issue No.1 before awarding the same. Unfortunately, the Court believed the typed loose sheets which were filed as 'evidence' and awarded a huge claim of Rs.90,27,914/-. The intrinsic worth of this document; whether it amounts to 'evidence' etc., is not examined by the trial Judge.

33. The trial Court was apparently swayed by the idea that the appellant/defendant received some escalation charges from the State and awarded this amount, but the Court overlooked the fact that there is no evidence to prove that this figure of Rs.90,27,914/- is a part of the escalation received by the appellant/defendant from the State Government. If the State

Government had paid escalation for the portion or the quantum of work executed by the plaintiff, then the plaintiff could have argued that this exact amount must be refunded to him, but the same was not done. The work executed by the 1st defendant is far far larger than the components given to the plaintiff. In fact, in the concluding portion of the judgment, the learned trial Judge notices that DW.1 admitted that he received the price escalation for the work done by him including the works executed by the plaintiff. The proportion or the percentage of the same that is payable in turn is, however, not spelt out anywhere. Yet the trial Judge awarded this huge claim.

34. One other aspect that has come up during the course of the submission made by the defendants is that at one stage they had paid one particular amount for escalation In the written statement, it is, however, stated that this was done as a special case. Learned senior counsel for appellant has cited the judgment reported in ***Sharma and Associates Contractors Private Limited v. Progressive Constructions Limited***[3]**.** In this case also, the question of contracts, sub-contracts, incorporation of

[3] (2017) 5 SCC 743

terms etc. was discussed. Ultimately, in para 15, the following was held:

> 15. We are conscious of the fact that though the respondent has been able to get the benefit of enhanced rate in respect of Items 1 and 6 and is able to retain the same thereby depriving the appellant to get this benefit. However, in a matter of contract where the parties have to stick to be governed by the provisions of the contract entered into between them, equity has no role to play. Insofar as the contract between the appellant and the respondent is concerned, the appellant was satisfied with "escalation" clause. The respondent, while entering into contract with HSCL ensured that enhancement of rates by the principal employer i.e. NHPC in favour of HSCL will enure to the benefit of the respondent PCL as well. The appellant, however, could not successfully negotiate this aspect with the respondent in the absence of any such clause/arrangement in the contract entered into between the appellant and the respondent. As the contract between the appellant and the respondent deals only with escalation, the appellant has to be satisfied with the same.

35. The Hon'ble Supreme Court clearly held that in such cases 'equity' had no role to play and it is the terms of the contract alone that will prevail. Therefore, even if there is one payment towards escalation, the same will not justify the award of the entire claim.

It is also not pleaded and proved that escalation was paid in part in various other bills submitted by the plaintiff and that by their conduct the defendants are estopped from denying escalation now.

36. In that view of the matter, this Court has to hold that there is absolutely no pleading or acceptable evidence to prove the claim of Rs.90,27,914/-, which is so simply awarded by the learned trial Judge.

37. The balance amount of the claim after 'escalation' is Rs.6454593 lakhs since the claim No.1 is for Rs.1,54,82,507/-. The difference between these two figures is also not borne out by the record. Other than the consolidated sheets, there is no material available to prove this part of the claim. There is no admission in the evidence either for this claim of Rs.64,54,593/- to be awarded. Even otherwise, PW.2 in the course of his cross-examination on 08.12.2012 admitted that the sum due according to them is Rs.1,43,64,477/- and not Rs. 1,54,82,507/-. This was also overlooked by the trial Court.

38. The basis/proof of this claim as can be seen from the plaint and the evidence of PW.1 is a tabular statement. Supporting data for the work done and the balance due is not proven by evidence

as was necessary to come to a conclusion that the claim is justified. Neither the oral evidence nor the documentary evidence is enough to show that the amount of Rs.64,54,593/- is due and payable. The nomenclature of the claim as 'payment due for work done' and as 'escalation' also was overlooked. Issues 1 and 4 should have been answered by the Court by looking into the pleadings and evidence. This was not done. The probative value of Ex.A.18 was not at all considered properly by the trial Court. Nobody paid any attention to the fact if Ex.A.18 is primary evidence or is secondary evidence and consequently to its mode of proof etc. It is a computer printout also. It was however received in evidence without any objection. These points are therefore merely mentioned.

39. This Court has to conclude against the respondent for both points 1 and 2 and hold that the amount claimed is not proved and the plaintiff is not entitled to the same claim. The entire finding of the trial Court is totally erroneous and it is set aside.

40. **INTEREST:-** The other important issue the learned senior counsel for the appellant raised is about interest awarded. It is pointed out that the claim for interest is Rs.1,91,0,097/- and this

was included in the total claim amount which came to Rs.2,73,92,605/-.

41. Learned senior counsel points out that despite the lack of evidence and pleadings, claim for interest was simply awarded by accepting the petitioner's figures. He points out that till para 27 of the impugned judgment, the discussion is about the first claim only. Issue No.5 is about interest. The same was not answered in the entire judgment. Despite the issue being framed, learned counsel points out that there is discussion or finding on the rate, period or the entitlement. He points out that as per the agreement payment to plaintiff is to be made after defendant No.1 receives payment from the department. Even the witness for the respondent admitted that as per the terms of the agreement, the defendant has to make payment to the plaintiff only after receiving the payment from defendant No.2. He refers to the cross-examination on 06.10.2012 which is as follows:

> Question: How many bill payments are promptly made?
>
> Answer: I cannot answer as to when D.2(Govt.) made payments to D.1 and what amount of delay intervened between payment by D.2 to D.1 and payment by D.1 to our firm.

It is true that on receiving payments by D.1 from D.2, D.1 has to make our payment in terms of the agreement.

Question: How do you state that the payment was made with delay?

Answer: I state because we furnished the bill for payment on the work done by us to D.1 asking for payment. After receiving our bill for payment, D.1 delayed by 15 days, one month etc.

Question: Whether D.1 is under obligation to make payment on receiving your demand for bill payment?

Answer: It is true D.1 is not under obligation to make the payment under our bill for money on our demand as the same is not stipulated in the terms of agreement. It is true that D has to make payment to us for our bills only on receiving the same from D.2.

It is not true to say that there was no delay in making payments to our firm by D.1 as per the terms of the agreement.

It is true that D.1 made final payment for the work done by us of Rs.30,00,373/- by 13.06.2005 through D.1 not received final payment from D.2.

It is true that our firm did not file any documentary proof as to borrowing finance at exorbitant rate of interest between 24% to 36%.

It is not true to say we have not borrowed any amounts as there was no delay in making payments by D.1 to us.

42. He also refers to the cross-examination on 08.12.2012 as follows:

> It is also not true that the firm is not entitled to receive interest of Rs.1,19,10,097/- as detailed at the rate of 18%.
>
> It is not true to say that the claims made in the suit either towards balance payment on the work done by us or towards the interest are not sustainable in view of the entire payments made through 18 bills for the quantity of work done by us and the same received by us soon after the completion of the said works.

43. In reply to this, learned senior counsel for the respondent justifies the award of interest and points out that no specific ground is raised in the grounds of appeal about the award of interest and arguments are advanced. It is also pointed out that interest is a discretionary remedy and as delay has occurred, the payment of interest is justified. He also relies on the Commercial Courts Act to justify the claim for interest.

44. As per law, pre-suit interest can only be awarded as per the contract (express or implied) or some statutory provision or mercantile usage. It is not awarded as a matter of course

(***Central Coop. Bank Ltd. V. Kamalaveni Sundaram[4])*** The clauses in the deed of sub-contract agreement clearly state that payments to the sub-contractor will be made for the bills received from time to time by the principal contractor from the department (clause 7). There is no clause for payment of interest. Clause 7 does not prescribe or fix the period for the payment by the defendant No.1 to the plaintiff. Hence the payment has to be made in a "reasonable" period. A reading of the plaint shows that the pleading about interest is at page 9 of the plaint and a tabular form is included in para 18. This is denied in the written statement in para 19. Both the figures and the delay in making payment are denied. The following passage from the decision of ***Secretary, Irrigation Department, Govt. of Orissa vs. G.C. Roy***[5] is apposite for deciding this:

> 43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to

[4] (2011) 1 SCC 790

[5] 1992 (1) SCC 508

award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

45. Although it is a decision with reference to arbitration, it is a decision of a Constitution Bench dealing with the important question of interest on payment due etc.

46. In these circumstances, this Court is of the opinion that the trial Court had a duty to examine whether there was 'delay' or 'deprivation' in the actual payment and then proceed further. To decide on delay and/or deprivation, the Court had to decide as to what was a reasonable period in this case to pay the amount due and then decide if delay occurred. In addition, the Court had to see on what basis the claim was made (as per contract/as per statute or on usage).

47. The cross-examination of P.W.2 on 22.09.2012 assumes importance here. For example, with regard to the second bill pertaining to L.S.5, the witness deposed as follows:

> The 2nd bill pertaining to LS5 and part dated 13.01.2000 was for the gross amounts of Rs.23,23,244/- paid by D.2 to D.1 on 09.02.2000 and out of the gross we were paid Rs.16,29,218/- on 10.02.2000 by way of cheque bearing No.915521. The said amount was paid after due recoveries to a tune of Rs.6,94,026/-. The said cheque was also encashed and fruits enjoyed by us.

48. With regard to the 3rd bill, he deposed as follows:

> The 3rd bill pertaining to LS.6 and pat dated 09-03-2000 for the gross amount of Rs.40,63,292/- was paid by D.2 to D.1 on three different dates viz, 10-09-2000, 16-3-2000, 25-5-2000 & 25-5-2000 out of which out of Rs. 29,19,021/- was paid to us on three different dates viz., 13-03-2000, 23-03-2000, 27-05-2000 and 27-05-2000. Out of which the 1st two payments were through two cheques Nos.915558 and 915595 for Rs.9,00,000/- and Rs.7,00,000/- respectively. The 3rd payment on 27-05-2000 was through D.D. No. 248709 for Rs.9,00,000/-. The 4th payment through D.D.No.248710 for Rs.4,19,021/-. So, the net payment paid to us after due recoveries of Rs.11,44,271/-. All this amount credited to our account and enjoyed by us.

49. With regard to 4 to 8 bills he deposed as follows:

The 4th bill for LS and part dated 24-5-2000 for gross amount of Rs. 10,35,670/- paid by D.2 to D.1 on 25-05-2000 and 22-06-2000. Out of which D.1 Paid to us Rs.7,39,354/- after due deductions of Rs.2,96,316/- as per the terms of the sub-contract. The said amount of Rs.7,39,354/- was paid to us by two D.D.Nos.242715 and 248731 for Rs.2,50,000/- and Rs.4,89,354/- very well on 29-05-2000 and 26-06-2000 respectively. The 5th bill pertaining LS 10 and part dated 26-09-2000 for gross amount of Rs.10,86,034/-paid by D.2 to D.1 on 03.10.2000. Out of which an amount of Rs.6,52,953/- was paid to us on 04-10-2000 after making deductions as per the terms of sub-contract agreement. The 6th bill pertaining to LS 11 and part dated 10.01.2001 for the gross amount of Rs.1,01,559/- paid by D.2 to D.I 2001on 15.01.2001. Out of which a net amount of Rs.73,782/- was paid to us by way of D.D.No.775078 dated 22.01.2001. The same was credited in our account and enjoyed by us.

The 7th bill pertaining to LS 12 and part dated 23-03-2001 for gross amount of Rs.58,89,009/- was paid by D.2 to D.1 on 31.03.2001. Out of which a net amount of Rs.40,37,575/- was paid t us on 31.03.2001 by way of cheque No.822968 after due deductions in terms of sub-contract. The said cheque was credited to our account and we enjoyed the fruits.

The 8th bill pertaining to LS 14 and part dated 30.05.2001 for gross amount of Rs.64,33,917/- paid by D.2 to D.1 on 02.06.2001 and on 09.07.2001. out of which a net amount of Rs.42,64,868/- is paid to us on 02.06.2001 and 12.07.2001 by way of cheque Nos.5888 and 4933 after due

deductions in terms of the agreement. In fact an excess amount of Rs.57,024/- was paid to us.

50. These answers are reproduced to show that in certain cases the payment was made immediately or soon thereafter. For example, for the 2nd bill, Rs.23,23,244/- was paid to defendant No.1 on 09.02.2000 and a sum of Rs.16,29,218/- was paid on 10.02.2000 after deducting the recoveries. In the 5th bill, it is admitted that defendant No.2 paid the money to defendant No.1 on 03.10.2000 and the amount was paid to the plaintiff after deduction on 04.10.2000. In the 8th bill, it is seen that payment was received by defendant No.1 on 02.06.2001 and 09.07.2001. The amount was paid to the plaintiff on 02.06.2001 and 12.07.2001. In the 13th bill, payment was received by defendant No.1 on 06.09.2002 and on the same day, the amount was paid to the plaintiff through cheque No.487453. All these figures are visible from a cross-examination of P.W.1 on 22.09.2012. Similar facts and circumstances are there with regard to other bills also.

51. In the light of this evidence, this Court is of the firm opinion that the plaintiff had to prove and the trial Court had a duty to analyze the details of payment of each of the bills to determine

whether there was any delay in payment. Since time was not fixed for making the payment, the plaintiff had to prove and the Court had also to decide/fix what was the "reasonable time" and then examine if the said payments were not made within a reasonable time. The Court deciding the case is a court of first instance and it had to decide on the delay, the rate of interest and then award the same. Case by case/bill by bill analysis should have been done before awarding the interest. Liability to pay and eligibility to receive interest must both be pleaded and proved. The learned Judge simply awarded the entire amount due as interest and thereafter awarded further interest on the said sum.

52. Rate of interest was also awarded at 18%. It is not clear on what basis interest was awarded at 18%. Legally speaking, interest can be awarded under a statutory provision like Interest Act, 1978 or under the C.P.C. The C.P.C. deals with payment of interest at the lending rate while the Interest Act deals with payment of interest at the deposit rate. This is again a matter of pleading and proof. Interest rates fluctuate and are not static. Therefore, some evidence is necessary along with pleading.

53. In the case on hand, since there was no agreed term in the contract, the plaintiff was under an active obligation to prove the interest that is payable. Both the amount claimed and the legal basis for interest have to be established. Despite the lack of pleading and proof, a huge sum of Rs.1,91,0,097/- was awarded and thereafter interest thereon was also awarded from the date of the suit till the date of the decree.

54. In view of the law on the subject, this Court is of the opinion that the trial Court committed a gross error in awarding interest without any discussion, without considering the pleadings, the evidence on the matter and the applicable law.

55. Hence point No.3 is also answered in favour of the appellant and the finding of the trial Court on interest is reversed.

56. Consideration of the evidence as a whole does not reasonably justify the conclusions reached by the trial Court. In this Court's conclusion, even the plaintiff failed to properly plead and prove the case. The trial Court awarded amounts without proper appreciation of the pleadings/evidence and law. All the findings of the trial Court are reversed/set aside.

57. Hence, the appeal is allowed and the judgment and decree dated 08.12.2017 in O.S.No.83 of 2017 is set aside. No order as to costs. As a sequel, the miscellaneous petitions if any shall stand dismissed.

_____

D.V.S.S. SOMAYAJULU,J

_____

V.SRINIVAS,J

Date: 05.05.2023

Note: L.R.Copy be marked.

KLP