M/S.Karpara Project Engineering Vs.

M/S.Karpara Project Engineering Vs.

SooperKanoon Citation : sooperkanoon.com/910948

Court : Chennai

Decided On : Feb-28-2011

Judge : R.Banumathi; M.M.Sundresh, Jj.

Appeal No. : O.S.A. NO.113 OF 2004

Appellant : M/S.Karpara Project Engineering

Respondent : Bellarpur Industries Ltd. and ors.

Advocate for Def. : Mr.Krishna Srinivas, Adv.

Advocate for Pet/Ap. : Mr.R.Subramanian, Adv.

Judgement :
J U D G M E N T

1. This Appeal has been preferred by the unsuccessful plaintiff in so far as the dismissal of the Suit against the 3rd defendant/ 3rd respondent is concerned in C.S.No.623 of 1997 dated 17.07.2001.

The case of the appellant/plaintiff is as follows:

2.The appellant is a partnership firm doing business in the erection of boilers, power plants, etc. The first defendant / first respondent was in requirement of a substitution for its boiler. The third defendant entered into a contract with the first defendant for the supply, erection and commission of boiler units on a turnkey

basis. The appellant did the dismantling of the then existing boiler, apart from unloading, erection and commissioning of new boiler at the first defendant's Unit, on the basis of the contract given by the first defendant at the instance of the third defendant. The appellant also executed other works such as fabrication of main boiler components and works, which are incidental to the main erection work. The appellant was directed to postpone the work which commenced only in the month of December, 1992.

3.The third defendant has requested the first defendant to release the work order to the appellant. The draft copy of the work order was received by the appellant on 11.01.1993. The appellant found that the scope of the work detailed therein was not limited to those in the earlier enquiry of the third defendant and also beyond those offered in the quotation of the appellant. The appellant brought to the notice of the third defendant of the letter dated 11.01.1993. However, without any rectification, a work order was issued by the first defendant to the appellant on 19.01.1993. In the work order dated 19.01.1993, the consideration was fixed at Rs.50,00,000/-. The scope of the work detailed in Annexure-I to the said work order dated 19.01.1993, is beyond those specified in the offer dated 03.08.1992 given by the appellant. The issue was discussed with the defendants by the appellant and it was assured orally that the appellant is limited to those quoted by them i.e. of a total value of Rs.40,80,000/-. The assurance was also kept by the defendants, in so far as the works outside the quotation given by the appellant was entrusted and got done by the first defendant through other agencies and the said lumpsum payment of Rs.40,80,000/- alone was made to the appellant.

4.While executing the works, extra work had to be carried out by the appellant on a man hour basis on the following categories:

"a)Modification, rectification in consequence of design and fabrication faults.

b)Making good the short supplied small and miscellaneous items and

c)Creation of additional facilities as per requirements of the owners. The details in this regard are the following.

The supplier of the boiler viz. the 3rd defendant was to supply the components in a readily fit condition for erection, but due to variation in dimensions, specification or design faults etc. the products supplied were not in harmony with those erected or to be erected. In such events, further progress in erection or completion of boiler was possible only after the defects or deficiencies were rectified. Besides, the short supply of small items found or arisen during erection, had to be made good by the erection contractor (Plaintiff).

The plaintiff also had to comply with the requirement of the customer to create additional & better facilities suggested / demanded by the 1st defendant from time to time.

These works are of sporadic occurrence and the input varies from one to the other. These works are not also susceptible of measurements and the only way of ascertaining the reasonable cost of such works is to ascertain the man hours of efforts put in for such work. It is therefore the standard Engineering practice prevalent in such contracts to ask the contractors to do these works on man hours basis. The man hour rate quoted should include normal & over time wages, the cost of consumables, deployment of equipments needed for doing the work, supervision & incidentals etc. The cost of executing such extra works, thus arrived at is subject to review by the owner / contractor & also in discussions by the contractor with the owner or by the sub-contractor with the contractor/principal."

5.The third defendant accepted the extra work done by the appellant, but indicated in the settlement plan that the payment is due only from 2002 man hours in and by the letter dated 15.11.1994. It also indicated that the rate per man hour should be Rs.25/- instead of Rs.50/- as claimed by the appellant. Therefore, the claim of the appellant was accepted in part by the third defendant. However, the said contention of the third defendant is without any basis and it is also against the prevailing rate. The third defendant itself paid Rs.35/- per man hour to the appellant in the year 1998. The third defendant could not supply certain components for the boiler. Accordingly, the appellant was asked to fabricate and erect them. Under those circumstances, a sum of Rs.9,86,632.50 is due to the appellant. The amount due to the appellant from the defendants towards the extra

dismantling work was Rs.1,98,900/-. The third defendant in and by the letter dated 12.11.1994 has accepted the liability. However, the third defendant did not make the supply for the erection in time.

6.The first defendant in and by letter dated 30.07.1993 asked the appellant to stop the work. Thereafter, the appellant was directed to proceed with the further work. Therefore, the work was withheld due to the delay caused by the fault of the first defendant. Because of the unilateral stop work instruction given by the first defendant, the appellant has incurred loss as the work was completed in the month of August 1994. The delay was not at all attributed to the appellant. Hence, the appellant is entitled to recover a sum of Rs.19,25,000/- from the first defendant and the third defendant is also liable for the same. Since the amount due to the appellant has not been paid by the defendants, a legal notice was issued towards recovery of the sum of Rs.41,50,192/- with 18% interest per annum. Since, the legal notice sent to the first defendant earlier did not evoke any response it was followed by another legal notice to defendants 1 and 2. Hence, the appellant was constrained to file a suit for recovery of a sum of Rs.62,66,790/- and also interest at the rate of 18% per annum on the principle sum of Rs.41,50,192/-

The case of the third defendant is as follows:

7.The third defendant has filed a written statement stating that the Suit as filed is one without jurisdiction, as the work was done in the State of Orissa. The third defendant is only a certifying agent and the contract was entered into between the first defendant and the appellant for dismantling and erection of boilers and not with the third defendant. The third defendant is not the authority to make any payment. Hence, the suit is liable to be dismissed for mis-joinder of parties.

8.The third defendant obtained the tender from the first defendant for designing, entering, manufacturing and supplying of the boilers. The third defendant is requested to execute the dismantling of the old boiler and to erect a new one. The appellant submitted the quotation to the third defendant and work order dated 19.01.1993 was issued by the first defendant to the appellant, which was acknowledged and accepted by it. The appellant carried out the work on the basis of the contract given by the first defendant. The appellant carried out the work,

which is not up to the standards as seen from the letter of the third defendant dated 18.06.1994. This resulted in the additional cost. The contract between the first defendant and the appellant was entered into, in view of the fact that the third defendant did not have the erection branch and recommended the case of the appellant and hence, the first defendant directly awarded the work to it. Therefore, the third defendant has got nothing to do with the contract of the erection or dismantling of the boiler. The appellant quoted only for Rs.40,80,000/- for erection work, though the total work order was Rs.50,00,000/-. The appellant informed its inability to attend other works and hence, the same was awarded to other agencies.

9.The third defendant has recommended extra man hours to the first defendant by the letter dated 12.11.1994. The said recommendation was only a gesture of goodwill and the previous contract awarded by the third defendant to the appellant has nothing to do with the present contract on hand. The third defendant supplied raw materials for free fabrication as per the direction of the first defendant being a part of the erection contract. The third defendant was only supervising the work and certifying the same for billing purposes. The letter dated 12.11.1994 issued by the third defendant does not speak of any settlement of liability, as it is in no way responsible for the so called extra work. The letter dated 12.11.1994 is only an offer for consideration. The stop of work was due to the financial difficulties experienced by the first defendant, over which the third defendant has no axe to grain.

10.The third defendant is not liable for any payment against any claim of the appellant. The payments were made by the third defendant against the running of the certifying agent. Hence, the third defendant prayed that the suit will have to be dismissed.

Findings of the Trial Court:

11.Before the learned single Judge, the first defendant was set exparte. The appellant filed 22 documents in support of his case and examined one witness as P.W.1. No documents have been marked on behalf of the third defendant and no witness has been examined on its side. The learned single Judge has framed the

following issues: "1.Whether the plaintiff is entitled to a sum of Rs.62,66,790/- from the defendants and their assets jointly and severally?

2.Whether it is correct that there is no relationship between the third defendant and the plaintiff as contended by the third defendant?

3.Whether this Court has got territorial jurisdiction to try the suit?

4.Whether the first defendant alone is liable to satisfy the claim of the plaintiff?

5.To what relief, the plaintiff is entitled to?"

12.The learned single Judge on a consideration of the documents, evidence coupled with the oral evidence available on record has granted a decree as prayed for, against the first defendant and dismissed the suit against the third defendant holding that there is no privity of contract between the appellant and the third defendant. Challenging the said judgment and decree of the learned single Judge in dismissing the suit against the third defendant, the present appeal has been filed.

13.The learned single Judge was pleased to hold that the third defendant was only a certifying agent recommending the bills claimed by the appellant on the first defendant. There is no privity of contract between the appellant and third defendant. Ex.P-4 work order is a document entered into between the appellant and the first defendant. P.W.1 has admitted in the evidence that all payments have been made by the first defendant and not by the third defendant. There is no written contract between the appellant and the third defendant. Ex.P-13 clearly spells out the fact that the bills raised by the appellant have been rooted through the third defendant on its recommendations / certifications. P.W.1 has admitted that the legal notice issued under Ex.P-18 was only making a claim against the first defendant and no claim was made against the third defendant. Such a claim was made against the third defendant in Ex.P-17 dated 29.12.1995. Therefore, the learned single Judge was pleased to dismiss the suit against the third defendant holding that there is no evidence to show the privity of contract between the appellant and the third defendant and hence, the claim cannot be maintained

against the third defendant. However, while dismissing the suit against the third defendant, the learned single Judge has rejected the jurisdictional issue raised by the third defendant. Accordingly, a decree was passed against the first defendant.

Submissions of the learned Counsels:

14.Mr.R.Subramanian, learned counsel appearing for the appellant submitted that the learned single Judge has not considered the scope of Ex.A-11 in which the third defendant has accepted a part of the liability. The non consideration of Ex.P-11 by the learned single Judge which is very important to decide the suit would make the judgment and decree liable to be set aside. The third defendant has not given any reply to the legal notices sent. No one has been examined on behalf of the third defendant in support of its case. The scope of turn key agreement between the defendants 1 and 3 has not been considered. The nature of agreement between the defendants 1 and 3 also has not been considered. Admittedly, the appellant has done the extra work for which the payment will have to be made.

15.The learned counsel further submitted that an arbitration is pending between the appellant and the first defendant. Therefore, inasmuch as the exact amount payable by the third defendant having not quantified by the learned single Judge, the judgment and decree will have to be set aside, either by directing the matter to be decided afresh by the learned single Judge or by directing the third defendant to take part in the arbitration proceedings pending between the appellant and the first defendant. Accordingly, the learned counsel submitted that the appeal will have to be allowed.

16.Per contra, Mr.Krishna Srinivas, learned counsel appearing for the third defendant submitted that as found by the learned single Judge there is absolutely no evidence to show that there is any sort of contract between the appellant and the third defendant. Admittedly, Ex.P-4 has been executed between the appellant and the first defendant. The third defendant is only a certifier, recommending sanctioning of the bill by the first defendant. Ex.P-11 is only a letter indicating the result of the settlement talk. He does not say that the third defendant is liable to pay the amount. All along the appellant has been making the demand against the

first defendant as seen from Exs.P-13, 14 and 17.

17.The learned counsel further submitted that till the issuance of the second legal notice, no claim has been made against the third defendant and only in Ex.P-19 a claim has been made for the first time by the appellant against the third defendant. Any payment in extra work can only be claimed against first defendant and not against the third defendant. The appellant has not produced any material to show that the third defendant was liable to pay any amount. There is no necessity for the Court to go into the details between the defendants 1 and 3. It is the appellant who has to prove his case and the mere fact that none has been examined on behalf of the third defendant, will not amount to accepting the case of the appellant. There is a contradiction between the two legal notices. The appellant cannot seek as a matter of right that the arbitration proceedings will have to include the third defendant in the absence of any arbitratal agreement covering the third defendant. Therefore, the learned counsel submitted that the appeal will have to be dismissed.

17-A.Upon consideration of the judgment, evidence and materials on record and submissions the following points arise for determination in this appeal.

1.Whether there is no privity of contract between appellant/plaintiff and the 3rd defendant? Whether third defendant is only the certifying authority?

2.Whether the plaintiff is entitled to claim any amount from the 3rd defendant?

3.To what relief the parties are entitled to?

CONCLUSION

18.Admittedly, Ex.P-4 work order has been executed between the appellant and the first defendant. The amount mentioned therein has been duly paid by the defendants. It is the case of the appellant itself that all the payments have been made by the first defendant. P.W.1 in his evidence has categorically admitted the above said fact. The third defendant is only a certifying agent and approving the bills as claimed by the appellant against the first defendant.

19.Ex.A-11 is a letter dated 12.11.1994 sent by the third defendant to the appellant. It has been stated in the said letter that a settlement plan is enclosed which is a best it can work out. A perusal of the above said letter would clearly show that the said letter was sent in pursuant to the discussion had by the third defendant with the first defendant. Ex.P-11 will have to be seen in the context of the subsequent communications. It is seen from Ex.P-13 dated 09.01.1995 which is a letter sent by the appellant to the first defendant that the appellant has specifically stated therein that all the bills arising out of the contract between the appellant and the first defendant have been routed through the third defendant for their recommendations / certifications. However, the disputed claim which is the subject matter of the suit was apprehended by the appellant that it may not certified and forwarded to the first defendant by the third defendant. Therefore, bypassing the usual procedure, the bill was directly raised on the first defendant by the appellant.

20.The above said fact would clearly clinch the issue against the appellant inasmuch as in its own words it has admitted clearly in writing that bills have been raised on the first defendant with the recommendations / certifications of the third defendant. It is pertinent to note that the entire suit claim has been raised by the appellant on the first defendant by annexing the same under Ex.P-13 dated 09.01.1995. Similarly, Ex.P-14 dated 11.02.1995 also states that the claim of the appellant has not been recommended so far by the third defendant. The said letter was also addressed by the appellant to the first defendant with a request to settle the claim. The first defendant has also made a reply under Ex.P-15 dated 13.04.1995 stating that the matter has been discussed with the third defendant and the claim of the appellant is excessive. A further letter dated 29.12.1995 was sent by the appellant under Ex.P-17 stating that the genuine claims made by the appellant for Rs.41.42 lakhs was not certified by the third defendant and the subsequent meeting between the appellant and the defendants 1 and 3 did not yield any result. In the said letter, the appellant has made a request to settle the claim expeditiously.

21.The above said facts would clearly indicate that the appellant knew the fact that the third defendant is nothing but a certifying agency and approving the bills raised

on the first defendant. On the contrary, there is absolutely no evidence on record to support the contention of the appellant that there existed a contract with the third defendant. Therefore, we do not find any illegality or error in the order of the learned single Judge in holding that there is no privity of contract between the appellant and the third defendant. Hence, in the absence of any contract between them, the question of payment does not arise for consideration. Further, it is to be seen that the alleged damages caused by the third defendant was also not proved on record.

22.The other contention of the learned counsel for the appellant that the third defendant has not examined itself before the Court, also cannot be countenanced. It is settled law that it is for the plaintiff to prove its case. When the appellant specifically alleges that there is a contract between itself and the third defendant, it has to prove the same in the manner known to law. Further, the evidence of P.W.1 coupled with Ex.P-13, 14 and 17 clearly establish the fact that the third defendant was only a certifying agent and nothing more. The other contention of the learned counsel for the appellant that the learned single Judge ought to have gone into the turn key arrangement between the defendants 1 and 3 and the contract entered into between them also does not merit acceptance. What is between the defendants 1 and 3 has no relevancy to the subject matter of the suit. The plaintiff cannot expect the defendants to place before the Court the agreement entered into between them which has got no relevancy to the suit filed. When the plaintiff filed the suit for recovery of money based upon the agreement between the plaintiff and the defendant No.1, the third defendant it has to prove its case. 23.As submitted by the learned counsel for the third defendant that till the issuance of the two legal notices dated 11.04.1996 and 21.03.1997, the appellant has not made any claim on the third defendant. The very same claim which is the subject matter of the suit was specifically made against the first defendant alone. A perusal of the claim made under Ex.P-13 and the claim made in the plaint as well as the first legal notice would exemplify the fact that it has been made only against the first defendant consistently. In fact, the grievance of the appellant till the issuance of Ex.P-19 legal notice dated 21.03.1997 was that the third defendant was not co-operating in certifying the bills raised by the appellant. It is also to be seen that Ex.P-18 legal notice dated 11.04.1996 was sent by the appellant against the first

defendant alone making the very same claim. Only a copy has been marked to the third defendant. Thereafter, for the first time, a demand has been made against the third defendant under Ex.P-19 dated 21.03.1997. Therefore, we are of the view that except Ex.P-19, legal notice, there is absolutely no material to fix the liability on the third defendant.

24.We also find that, Exs.P-18 and 19 are mutual contradictory in nature, inasmuch as it has been specifically stated under Ex.P-18 that the claim was not settled by the first defendant due to the non co-operation of the third defendant to certify.

25.The final contention of the learned counsel for the appellant is that, considering the fact that an arbitration is pending between the appellant and the first defendant, a direction will have to be issued to include the third defendant also in the said arbitration also, cannot be countenanced. It is a trite law that an arbitrator will assume jurisdiction only in pursuant to an arbitraral agreement between the parties. Therefore, in the absence of any such arbitration agreement between the appellant and the third defendant, in our considered view the request made by the learned counsel for the appellant cannot be considered. Moreover, in view of the findings rendered above regarding the absence of any contract between the appellant and the third defendant, such a situation does not arise for consideration. However, we make it clear that the dismissal of this appeal will not have any bearing on the pending arbitration between the appellant and the first defendant.

26.In the result, the appeal is dismissed. The judgment and the decree rendered in C.S.No.623 of 1997 dated 17.07.2001 is hereby confirmed. However, considering the facts and circumstances of the case, there is no order as to costs.