Jaya Sarana Engineering Pte Ltd v GIB Automation Pte Ltd
[2009] SGHC 122

Case Number : Suit 1/2006

Decision Date : 20 May 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Teng Muan and Wong Khai Leng (Mallal & Namazie) for the plaintiff; N Kanagavijayan (Kana & Co) for the defendants

Parties : Jaya Sarana Engineering Pte Ltd — GIB Automation Pte Ltd

Damages – Assessment

20 May 2009 Judgment reserved.

Judith Prakash J:

Background

1 The defendant, GIB Automation Pte Ltd ("GIB"), is a contractor in the building industry. In 2004, it had a sub-contract to carry out certain works in relation to the installation of the fire alarm system at the Singapore Management University ("SMU"). There were two sites involved in the project: the Bras Basah site and the Victoria site. GIB further sub-contracted the work at the Bras Basah site to the plaintiff, Jaya Sarana Engineering Pte Ltd ("JSE"), in March 2004. The agreement was that GIB would pay JSE a lumpsum for all the work the latter was obliged to do under the sub-contract. Disputes subsequently arose between the parties and this action was started by JSE to recover the sum of $186,000 which it claimed was due under the sub-contract. GIB put in a counterclaim and also claimed a set-off in respect of the cost of labour that it had supplied for JSE's works. Hereafter I shall refer to the works that JSE was supposed to do as "the sub-contract works".

2 The action was tried before Sundaresh Menon JC ("the trial judge"). In his judgment delivered in April 2007, the trial judge made the following findings and orders:

(a) JSE had done some but not all of the work required of it under the contract and therefore it was granted interlocutory judgment for the balance of the contract sum due to it subject to an omission in respect of the work in fact done by GIB which was to be assessed and which could be set off against the balance contract sum;

(b) GIB was in breach of its obligations under the contract because it had not provided JSE with drawings that were reasonably necessary for JSE to carry out the works and therefore JSE was granted interlocutory judgment with damages to be assessed;

(c) GIB was liable to JSE for the costs of the work done in relation to AI/275 which were to be assessed; and

(d) JSE had failed to provide sufficient manpower which necessitated GIB doing so. GIB's entitlement was for a sum to be valued and this was to be set off against the balance contract sum as set out in sub-para (a) above. Except in this respect, GIB's counterclaim was dismissed.

3 The assessment hearing conducted pursuant to the above orders took place in October 2007 and in January 2008 before Assistant Registrar Chew Chin Yee ("the AR"). In July 2008, the AR

decided as follows:

(a) in respect of GIB's claim for $324,269.29 being the cost of work done which should have been done by JSE, GIB was awarded the sum of $173,530.75;

(b) in respect of JSE's claim for $26,712 works that were abortive due to the failure of GIB to supply relevant documents, JSE was awarded the sum of $18,893;

(c) in respect of JSE's claim for $6,600 being the cost of AI/275, JSE was awarded the full amount claimed; and

(d) in respect of costs, GIB was to pay JSE 80% of its costs in relation to the assessment hearing.

Being dissatisfied with the above decision except as to the award for the cost of AI/275, JSE appealed. I will consider the various heads of appeal in turn.

The claim for cost of labour

4 GIB had claimed the following as the costs it incurred in supplying labour to do the sub-contract works:

(a) its payment to the workers of Tay Keong Huat ("Tay") for the period from 28 December 2004 to 31 July 2005 amounting to $184,090.75;

(b) its payment to Summit Renovation Contractor ("Summit") for the sum of $43,650;

(c) its payment to its supervisor Chee Choon Peng ("Chee") for the period January 2005 to December 2005 amounting to $19,851.01;

(d) the cost of GIB's own workers for the period from November 2004 to December 2005 amounting to $119,477.53;

(e) its payment to one Ramaiyan Muthu in the sum of $7,650;

(f) payment to one Galmon (S) Pte Ltd in the sum of $9,605.46;

(g) payment to Multicable Manufacturing (S) Pte Ltd in the sum of $17,876.25.

The total amount claimed by GIB was $324,269.29.

5 JSE argued that the sum claimed was excessive given that the total contractual value in respect of the sub-contract works was only $310,000. It also challenged the veracity of the figures presented. In the result, the AR disallowed most of GIB's claims. It should be noted that as far as Summit was concerned, the evidence showed that it had been employed to carry out the variation or additional works which GIB was asked to do from time to time pursuant to what were called "AIs" (Additional Instructions) given by the architect. The work covered by the AIs (hereinafter the "AI works") was not part of the sub-contract works and therefore the costs of doing the same could not be recovered from JSE.

6 The AR allowed the claim made for the cost of workers supplied by Tay to the extent of $173,530.75. This represented GIB's payment for Tay's workers for the period from December 2004 when they started work up to 15 May 2005. The AR explained his reasons thus:

> Chee had given evidence that he directed Tay's workers to do solely JSE's work. Based on the evidence and the prevailing circumstances at the time, I find it a reasonable inference that Tay's workers were retained for the sole purpose of rushing JSE's work. Given the substantial cost of using his workers, it was unlikely that GIB would have chosen to use them for other purposes, when it already had its own workers on the site. I therefore found that GIB is entitled to claim for the cost of manpower in respect of the workers supplied by Tay as a set-off against what it owed JSE for the balance contractual sum.
>
> Based on Tay's evidence, he stated that he conducted the works from 28 December 2004 to 15 May 2005. Chee also gave evidence that the contractual works finished around May 2005. I therefore allowed the costs of Tay's workers up to 15 May 2005. Based on his AEIC, this worked out to a figure of $173,530.75.

7 JSE argued that the AR's decision had been based on the following premises:

(a) that there was a distinction between the work done by GIB's workers and that done by Tay's workers;

(b) that all of Tay's workers had been instructed to do the sub-contract works while GIB's workers did other work; and

(c) given the substantial cost of using Tay's workers, it was unlikely that GIB would have chosen to use them for other purposes when it already had its own workers on site.

8 In JSE's submission, these premises were wrong and were not supported by the evidence tendered in court. In relation to the distinction between the work done by GIB's workers and Tay's workers, JSE referred to the following:

(a) Chee's evidence in his affidavit that he together with GIB's workers and Tay's workers had conducted all the conduit and wiring works and the cabling and installation of smoke detectors. He also said that both sets of workers were working on the installation works left undone by JSE and that after May 2005, all the said workers had conducted troubleshooting and checking in respect of the works carried out by JSE; and

(b) Chee's evidence in cross-examination that he had asked the GIB and Tay workers to do the sub-contract works. He had not been involved in the additional works.

JSE submitted that since Chee's evidence was all the workers he supervised did not carry out AI works, the AR had erred when he sought to make a distinction between GIB's workers and Tay's workers and then went on to make a finding that only Tay's workers were used to do the sub-contract works.

9 JSE next argued that the other witnesses for GIB did not make the distinction which the AR had. In this connection, Tay himself had not said whether the work his workers were assigned to do was part of the AI works or part of the sub-contract works. He did not know the nature of the works

that his workers had done: his evidence was that they had simply carried out GIB's instructions without having had sight of any contractual documents. Gan Chong Hick ("Gan"), GIB's managing director, who had also testified, had stated that he had instructed Chee to supervise GIB's workers and Tay's workers and also to do minor works involving nine AIs. There was therefore a clear inconsistency between his evidence and Chee's evidence.

10 Thirdly, the position of Chee that GIB's workers and Tay's workers did not carry out any of the AI works was incredible because:

(a) Chee had not seen the contract between GIB and the main contractor or the contract between JSE and GIB and therefore could not possibly know whether the works which he did were the sub-contract works or additional works assigned to GIB by the main contractor; and

(b) Chee's evidence was that he relied on Gan to tell him what to do. He therefore had no way of telling what kind of work he was doing.

JSE submitted that overall, the evidence of Chee could not be relied upon as it was evasive, incomprehensible and inconsistent with itself and with the evidence of the other witnesses.

11 JSE also criticised the AR's finding that given the cost of using Tay's workers, it was unlikely that GIB would have chosen to use them for other purposes. It submitted that the AI works were based on agreed rates, and were not lumpsum works like the sub-contract works. It asked whether a party would deploy its most expensive workers to do incomplete works in respect of which a claim would have to be made against the defaulting sub-contractor rather than use the more expensive workers for AI works which it would be paid for separately. It also submitted that the AR had presumed that Tay's workers were more costly than GIB's own workers and that that presumption had not been proven. Even if it had been, it did not follow that GIB would have deployed them to do the sub-contract works rather than AI works. GIB would have been entitled in law to make a claim for any workers it supplied and it would be more sensible for it to claim against the main contractor rather than JSE as the main contractor would be more likely to have the means to settle the claim. It would therefore be more likely that GIB used Tay's workers to do the AI works rather than the sub-contract works.

12 I should state that the final argument made by JSE as set out in [11] above is not convincing. There was no evidence that the AI works would be paid for on the basis of the rates charged by Tay's workers. Further, the fact that the amounts paid to Tay could be set off against the lumpsum owed to JSE under the sub-contract would make it easier to recover those amounts than to claim them from the main contractor for the AI works in respect of which a rate would have to be agreed with the main contractor who was not likely to want to pay high rates.

13 In response, GIB supported the AR's findings. It highlighted that the contract sum between it and the main contractor for all work done, including the AI works and the sub-contract works, had been finalised at $560,660. The final account issued by the project consultant valued the AI works at $59,690. Bearing in mind the relatively low quantum of the AI works, counsel submitted that Tay's workers could not have been employed for such a long period on simply carrying out the AI works. The other main points raised by GIB were:

(a) it was clear that workers supplied by GIB had done a substantial portion of the sub-contract works because:

(i) JSE had left most of the sub-contract works incomplete: as at 30 December 2004, its work was certified as only 20.6% complete;

(ii) JSE had acknowledged eight workers sent by GIB to site on 18 February 2005 and that these workers were performing the sub-contract works;

(b) GIB had not succeeded in its claim of $119,477.53 which was the cost of supplying its own workers and therefore had suffered a loss despite the assessment;

(c) the AI works were only done in July and August 2005 and therefore the amount awarded by the AR which was in respect of work done by Tay's workers before 15 May 2005 was for work needed to complete the sub-contract works;

(d) JSE had not challenged the evidence of Ms Tan Siew Geok, GIB's administration and finance manager, as to the amounts it had paid Tay between 28 December 2004 and 15 May 2005, and further had not challenged Ms Tan and Tay on their evidence that the rates for provision of manpower were reasonable and within market rates;

(e) it was clear from the cross-examination of Tay that JSE accepted that he and his workers had been engaged to work at the Bras Basah site on a daily basis during the period in question;

(f) Gan's evidence that he engaged Tay to conduct the incomplete sub-contract works was accepted by the AR and JSE's own worker and witness Krishnan Venugopal ("Venugopal") had confirmed that Chee had been present at the site every day from January 2005 to April 2005; and

(g) the AR had the benefit of hearing the witnesses and observing their demeanour and he had made reasonable inferences on a balance of probabilities in coming to his conclusions.

14 I must also mention that the suggestion that JSE made was that, at the most, the amount to be awarded to GIB as the labour cost incurred by it to do JSE's incomplete works was $3,145. This figure represented the time cards of GIB's workers signed by Venugopal. I find that figure to be extremely low in view of the amount of work left undone by JSE.

15 As stated above, the AR found that substantial amounts of work in relation to the sub-contract works were done by GIB's workers. This finding was based on the 30 December 2004 certification of the amount of work completed by GIB and on JSE's acknowledgement that eight workers had been sent by GIB to the site on 18 February 2005 to do JSE's work. JSE disagreed that it had only completed 20% of the sub-contract work in December 2004 and asserted that GIB's workers had only done its sub-contract works for two weeks in January 2005. In court, however, its counsel in trying to establish that JSE had done substantially more work put the following question to Gan:

> Q [put] Defendant paid Plaintiff in February and March the sums of $49,500 and $10,000 because they know that the Plaintiff has done more than 40% of the work?

It can be seen therefore that, even on its own case, JSE had completed less than 50% of the work

that it had contracted to do. In addition, JSE's own witness admitted that Chee, who supervised both GIB's own workers and Tay's workers, had been on site every day between January and April 2005. Taking that evidence together with the undisputed evidence that Tay's workers were there during the same period (in fact the evidence was that they were there until about July 2005) and the fact that the accounts of the project showed that in the end GIB was paid only some $59,690 for AI works and this was about ten percent of the total amount paid to GIB for the project, it cannot be denied that GIB must, through its own and Tay's workers, have completed at least half, if not substantially more, of the sub-contract works.

16 A difficulty with the AR's finding was that, as JSE pointed out, Chee had drawn no distinction between the work done by GIB's own workers and that done by Tay's workers. There was also some doubt as to whether these two sets of workers had during the period between January and May 2005 worked only on the sub-contract works or had also worked on AI works. Chee claimed that all the work done in this period was shown by coloured markings in a particular sketch. This evidence was, however, not really reliable as his account of when the marks were made conflicted with evidence given by Gan and Tay who had also contributed to the markings.

17 On the other hand, I agree with the AR's finding that JSE had overstated its case by claiming that the additional workers supplied by GIB had only assisted in the sub-contract works for two weeks in January 2005. This claim was not consistent with the amount of work left undone by JSE. Nor was it consistent with documentary evidence that showed that GIB's workers had been engaged on the sub-contract works in February 2005. To award GIB only some $3,000 or so for workers whose time cards had been signed by Venugopal would not reflect the actual cost incurred by GIB in doing the sub-contract works. It must also be remembered that whilst there were AIs issued in 2004 and early 2005, the main concern that GIB had during the first half of 2005 was to complete the sub-contract works because, as Gan emphasised in his evidence, if GIB was late, it would have to pay a heavy price in damages to the main contractor. It was because GIB itself did not have enough workers to carry out the sub-contract works in the first place that it had awarded the sub-contract to JSE. Clearly, when JSE failed to perform, GIB had had no alternative but to hire another sub-contractor to provide the necessary labour. On several occasions in late 2004, GIB had warned JSE in writing that if it did not supply sufficient workers, GIB would have to procure the same and charge the cost of so doing to JSE. Gan was also able to explain why the labour costs after December 2004 had been so high and, apparently, inconsistent with the original lump sum of $310,000 which GIB was to pay JSE for all the sub-contract works. His explanation, which was coherent and convincing, was that because the sub-contract works were so far behind schedule, other portions of the main building works had been completed by other contractors and the blockages created by the completed works led to extra work and time being required to install the ducting and cables for the fire alarm system.

18 In the result, GIB's claim for workers alone amounted to $119,477.53 (for its own workers) and $184,090.75 (for Tay's workers). The AR allowed it only $173,530.75 for Tay's workers. I have already said that I do not accept JSE's contention that GIB would use the more expensive workers for the AI works and its own (allegedly less expensive) workers for the sub-contract works. As a matter of logic, this argument does not make sense. Further it was in GIB's interest to concentrate as many workers as possible on completion of the sub-contract works so as to prevent the imposition of a penalty. The question of recovery of the cost of the workers would have taken second place when it came to allocating who should do what. There was also no evidence that GIB's own workers were very much cheaper than Tay's workers. Gan in his testimony emphasised several times his desire to complete the sub-contract works on time. He testified that he had brought Chee in from another project specifically to supervise the completion of the sub-contract works by the Tay and GIB workers. That evidence was not controverted. Bearing in mind that that was his mission, it is not surprising that Chee did not distinguish between the two sets of workers. He was also clear that after May 2005, the workers had

been mainly doing troubleshooting and rectification of defects. In these circumstances, I consider that the AR was correct to find that during the period in question, Tay's workers must have been concentrating on completing the sub-contract works and that therefore GIB was entitled to recover the cost of employing them.

19 I believe that GIB's own workers must also have spent some time on the sub-contract works but since there was insufficient evidence to show exactly how much time they spent on these works and it was clear from Gan's evidence that Chee had been responsible for minor works in respect of nine AIs, I am not able to apportion the time they spent on these AI works as opposed to the time they spent on the sub-contract works. In any case, GIB did not appeal against the AR's refusal to allow it to recover any part of its own workers' costs.

20 For the reasons given above, I dismiss the appeal in respect of the AR's finding that GIB is entitled to set off $173,530.75 as the cost of Tay's workers during the relevant period against the amount that it owes to JSE.

The claim for abortive works

21 At the assessment, the AR awarded JSE $18,893 as money owed to it for abortive works. The original claim put forward by JSE for such works was $26,712. Referring to paras 45 and 48 of the judgment of the trial judge, the AR held that JSE would be entitled to damages in respect of works it had done and *later had to redo* because proper drawings had not been given to it. He then considered the work items claimed by JSE as set out in Venugopal's affidavit of evidence-in-chief. He held that the description there of the work done showed that JSE was seeking to claim damages for two categories of work done: first the abortive works and second works which JSE claimed was not part of the sub-contract works but which it had carried out on the instructions of the site supervisor. The AR disallowed the claim for works falling in the second category and rejected JSE's argument that it had done such extra works because there were no approved drawings available and it had not been able to ascertain the actual scope of the sub-contract works.

22 On appeal, JSE argued that the AR's award was wrong. First, the sum of $18,893 was incorrect because, even on GIB's own submissions, the amount due was $19,123. Second, it contended that the original amount of $26,712 should have been awarded and that the AR had made a mistake in holding that the trial judge had directed that JSE would only be entitled to damages in respect of work that it had done, and later had to redo, because of the lack of proper drawings.

23 Referring to paras 45 to 48 of the judgment, JSE argued that it was not part of the ratio of the trial judge's decision that JSE was entitled only to damages in respect of work that was aborted because of the lack of proper drawings. Instead the cited paragraphs of the judgment showed that the trial judge had made no attempt to define the meaning of "abortive" work but had only explained that the scope of the assessment was in respect of loss suffered as a result of GIB's failure to furnish proper drawings to JSE. JSE further submitted that whether or not the work done was "additional" or "abortive" work would really be an exercise in semantics. Since the trial judge made no attempt to define the meaning "abortive" work, it was his intention that the scope of the assessment should include all work which had to be done or redone as a result of the breach by GIB in failing to furnish proper drawings to JSE. In this regard, Venugopal had given evidence that each and every item claimed in his affidavit was caused by GIB's failure to furnish proper drawings to JSE. Thus, all that work fell within the relevant category and the full sum of $26,712 should be allowed.

24 In response, GIB submitted that the AR had correctly excluded the additional items as he had made close reference to and been guided by the judgment of the trial judge. In addition, the AR had

expressed the view that the additional works might not be properly classified as "damage" arising from GIB's breach in failing to provide proper drawings. It was at most work for which JSE might be able to claim against GIB independent of the sub-contract works.

25 In coming to a decision on this part of the appeal, it is necessary to reconsider exactly what was decided by the trial judge. In paras 45 to 48 of his judgment, the trial judge stated:

> 45 … As amended, the plaintiff now pleaded in its statement of claim that there was an implied term in the contract that the defendant would do all things necessary and reasonable to enable the plaintiff and its workers to perform the contract. It further averred that the defendant had breached the said term by failing to furnish to the plaintiff the approved shop drawings. This breach of the defendant's obligation resulted in works which the plaintiff had done but which later had to be aborted and re-done when the proper drawings were made available. The effect of the amendments to the further and better particulars was that a distinction was drawn between abortive works and "additional works" – the latter being what I have termed "variation works" in this judgment.
>
> 46. In the light of these amendments, no real objection could be taken with the plaintiff's pleading and I turn to the substantive issues. In my view, there was such an implied term in the contract as pleaded by the plaintiff: see *Jet Holding Ltd & ors* V *Cooper Cameron (Singapore) Pte Ltd & Another and other Appeals* [2006] 3 SLR 769 at [89]. To be fair, there was also no dispute that the defendant was obliged to provide plaintiff with the approved shop drawings.
>
> 47. The real argument was over whether or not the drawings the defendant had provided the plaintiff were approved shop drawings. In my view, that turned out to be immaterial. This was because the defendant's managing director, Mr Benjamin Gan, accepted under cross-examination that other drawings, apart from those that the defendant had provided the plaintiff which were also the only ones produced in evidence, would have been required for the plaintiff to fulfil its obligations under the contract. In other words, Mr Gan accepted that the plaintiff could not have done its work properly without some other drawings. Although Mr Gan appeared to suggest during cross-examination that the plaintiff did have these other drawings available to them, this was not mentioned in his affidavit of evidence-in-chief. Nor were these drawings produced in court despite their importance to the defendant's case. I therefore find that not all the required drawings had been provided to the plaintiff and/or its sub-contractors. I should make it clear that given the nature of the defendant's case, which was that the plaintiff had all the drawings it needed, I did not think it was open to the defendants, at the same time, to maintain that the plaintiff ought not to have commenced the work based on the drawings it did have.
>
> 48. In my judgment, the defendant was therefore in breach of its obligations under the contract. It remains for the plaintiff to prove, in the assessment of damages said to have been sustained on account of each piece of abortive work was in fact caused by the defendant's breach. I therefore, enter interlocutory judgment for the plaintiff in this respect with damages to be assessed.

26 Looking at those paragraphs of the judgment, it would appear that JSE did not argue before the trial judge that in addition to work that was done and subsequently had to be redone when proper drawings were given, it had also done additional work which was not part of the sub-contract works because of the lack of proper drawings. Before the trial judge, JSE's case was limited to its claim for work that had to be redone because of the lack of drawings. I agree entirely with the interpretation that the AR gave to the judgment: what was to be assessed was the cost to JSE of redoing work which had to be redone or undone because the original drawings were inadequate. The judgment did

not deal with additional work that JSE allegedly did by mistake thinking that it was part of the sub-contract works. Accordingly, JSE's appeal on this portion of the award cannot be allowed except that the amount awarded should have been $19,123 and not $18,893 which latter figure must have arisen from a computational error.

Costs

27 The AR ordered GIB to pay JSE 80% of the latter's costs of the assessment. JSE is not satisfied with that award. Before me, it submitted that full costs should have been awarded to it. Further, GIB's conduct throughout the assessment proceedings had not been *bona fide* in that it had:

(a) failed to give disclosure of the documents (in particular the AIs);

(b) artificially inflated its losses; and

(c) made claims without any basis and then abandoned them on the first day of the hearing.

JSE submitted that the court should have taken the above factors into consideration in respect of costs and should have awarded it full costs on the standard basis.

28 The AR heard arguments on costs before making his award. He did not, however, give any reason for the same.

29 GIB contended that the AR's order on costs should not be disturbed. It pointed out that the trial judge's decision was that JSE had done some but not all the sub-contract works and as it had not provided sufficient manpower, GIB had to do so. He had ordered that GIB should have its costs valued and that it would then be entitled to set off the same against the sum of $186,000 due to JSE under the sub-contract.

30 The AR had decided that GIB's costs amounted to $173,530.75 and that this amount was to be set aside against the $186,000 leaving an amount of $13,069.25 payable to JSE. In the light of this decision, it was GIB that had largely succeeded in its claim against JSE and therefore JSE was not entitled to full costs and it was correct for the AR to give it only 80% of its costs.

31 I agree that the AR's award on costs should not be disturbed. The assessment was really to find out what damages GIB had sustained by reason of JSE's breach of contract. In the result, GIB was able to show that the amount due to it was substantial and not far from the amount that it had to pay JSE. GIB therefore succeeded very substantially in its claim. The fact that the AR awarded JSE as much as 80% of its costs must have been because he took into account the factors mentioned in [27] above and in particular the fact that GIB's other claims for labour costs (apart from those paid to Tay) were disallowed. If it had not been for those factors, JSE would in my view, have recovered a much lower percentage of costs or may even have had to pay some costs.

Conclusion

32 In the result, JSE's appeal must be dismissed except that the award for $18,893 is set aside and replaced with an award of $19,123. GIB shall have the costs of the appeal as taxed if not agreed.