

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.572 of 2011

P.Selvam

...Appellant/Plaintiff

..Vs..

1.Union of India,
rep.by Chief Secretary,
Government of Union Territory
of Pondicherry.

2.Secretary Works,
Secretariat,
Public Works Department,
Pondicherry.

3.Executive Engineer,
Buildings and Road,
(Central Division)
Public Works Department,
Pondicherry.

...Respondents/Defendant

Prayer: This appeal is filed under Section 96 of C.P.C. against the decree and judgement dated 04.11.2009 in O.S.No.89 of 2006, on the file of the learned II Additional District Judge at Puducherry.

For Appellant : Mr.R.Thiagarajan

For Respondents: Mr.T.Kumaran AGP (Pondichery)

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Judgement

The plaintiff whose suit for damages was dismissed by the Trial Court with the direction to approach the authorities for refund of the Performance Guarantee amount and the Earnest Money Deposit is the appellant. According to the plaintiff, he was the successful bidder for the work of construction of Central Median from Venkatasubha Reddiar Statue to Indira Gandhi Square in Maraimalai Adigal Salai, Pondicherry. His tender for

Rs.41,70,493/- (Rupees Forty one lakhs seventy thousand four hundred and ninety three only) was accepted by the respondents/defendants and work order was issued on 28.06.2004. Though the agreement was required to be executed by the parties, the same did not materialise. According to the plaintiff, at the instance of the third defendant he had placed orders for certain materials worth a sum of Rs.1 lakh (Rupees One lakh only). He would also claim that he was suffering from serious illness and was treated by Dr.V.Muthurangam a Psychiatrist, therefore, he had sought for extension of time. He had also furnished a Performance of Guarantee in the form of Bank Guarantee through State Bank of Travancore, Pondicherry to the tune of Rs.2,08,525/- (Rupees Two lakhs eight thousand five hundred and twenty five only) apart from paying an earnest money deposit of Rs.79,614/- (Rupees Seventy nine thousand six hundred and fourteen only). Since the plaintiff was not able to commence the work, the third defendant by an order dated 13.08.2004 terminated the contract. According to the plaintiff the said termination is illegal and was done without giving an opportunity to complete the work. Therefore, the plaintiff would claim a sum of Rs.4,17,049.30 (Rupees Four lakhs seventeen thousand forty nine and paise thirty only) being 10% of the tender amount as damages, apart from claiming refund of the sum of Rs.2,08,525/- (Rupees Two lakhs eight thousand five hundred and twenty five only) realised by the defendants by invoking the Performance Guarantee and a sum of Rs.79,614/- (Rupees Seventy nine thousand six hundred and fourteen only) paid by him, an earnest money which was forfeited by the defendants while cancelling the contract on 13.08.2004.

2.The defendants would resist the suit contending that the cancellation was necessitated because of the failure on the part of the plaintiff to start the work inspite of repeated reminders dated 21.07.2004 and 26.07.2004. The claim of the plaintiff that the agreement could not be executed due to non availability of conditions was stoutly denied. Since, the plaintiff did not start the work even after repeated reminders, they were forced to cancel the contract and entrust the work with another person. It was also claimed that the forfeiture of EMD and invocation of the Performance Guarantee has been done as per the provisions of the Central Public Works Department manual. On the above pleadings, the learned II Additional District Judge, Puducherry framed the following issues:

- 1.Whether the plaintiff is entitled to claim a sum of Rs.7,05,180.30 with interest from the defendants 1 to 3, as prayed for?
- 2.Whether the defendants cancelled a contract with the plaintiff unilaterally?
- 3.Whether the failure of execution of work and agreement as stipulated by the defendants by the plaintiff is true?

4. Whether the defendants 1 to 3 are not liable to pay the suit claim to the plaintiff as prayed for?

5. To what relief the parties are entitled?

3. On the side of the plaintiff, 3 witnesses were examined, and Exs.A-1 to A-15 were marked. On the side of the defendants D.W-1 was examined and Exs.B-1 to B-5 were marked. On a consideration of the oral and the documentary evidence, the learned II Additional District Judge, Pondicherry came to the conclusion that the failure on the part of the plaintiff to commence the work, despite repeated reminders made by the defendants justified action of the defendants in cancelling the contract. The learned Additional District Judge also found that the third defendant has followed the rules and regulations while canceling the contract by his order dated 13.08.2004. The learned Additional District Judge also took note of the oral evidence of the plaintiff wherein he would admit that he should have signed the contract within 7 days from the date of the work order. The reason attributed by the plaintiff for not signing the contract was disbelieved by the learned Trial Judge. On the aforesaid findings, the learned Trial Judge came to the conclusion that the plaintiff is not entitled to a decree as prayed for in the suit. Further, the learned Trial Judge gave liberty to the plaintiff to make a representation to the third defendant for return of the performance guarantee amount and earnest money deposit forfeited under the impugned order dated 13.08.2004.

4. Aggrieved by the said judgment and decree, the plaintiff has come forward with this appeal. I have heard Mr.R.Thiagarajan, learned counsel appearing for the appellant, and Mr.T.Kumaran, learned Additional Government Pleader (Pondicherry) appearing for respondents. The following points arise for determination in the Appeal:

1. Whether the action of the defendants/respondents invoking the Performance Guarantee and forfeiting the Earnest Money Deposit is justified in the absence of a contract having been executed between the parties?

2. Whether the dismissal of the suit in Toto particularly in the light of the admission of DW-1 that the defendants did not suffer any loss due to the non performance of the contract by the plaintiff is justified?

5. Mr.R.Thiagarajan, learned counsel appearing for the appellant, would contend that the non performance was caused due to the fact that the defendants did not make available the conditions of the contract to enable the plaintiff to sign the

contract as required under the work order dated 28.06.2004. He would also submit that the illness suffered by the plaintiff which is beyond his control had caused the delay. Therefore, the plaintiff cannot be held liable for the failure which was due bonafide reasons. The learned counsel realising the difficulty in pressing claim for damages would contend that the appellant would atleast be entitled to refund the sum of Rs.2,08,525/- (Rupees Two lakhs eight thousand five hundred and twenty five only) realised by the defendants by invoking the Performance Guarantee and a sum of Rs.79,614/- (Rupees Seventy nine thousand six hundred and fourteen only) deposited by him as an earnest money. The learned counsel would also rely upon the judgment of this Court in K.N.Keerthi Rao .v. The General Manager, Southern Railways and another reported in [2002-3-L.W.271], in support of the contention that, in the absence of regular contract having been entered into between the parties and in absence of proof of loss suffered by the defendants, the plaintiff would be entitled to the limited relief of recovery of the amount representing the Performance Guarantee and the earnest money.

6.Per contra, Mr.T.Kumaran, learned Additional Government Pleader (Pondicherry) appearing for respondents would submit that the failure to execute the contract was only because of the conduct of the plaintiff, therefore he cannot take shelter under his own mistake. The learned counsel would also rely upon the Clauses in the CPWD manual which provide for forfeiture of the Performance Guarantee as well as the earnest money deposited, in case of failure on the part of the contractor.

7.It is the admitted case that a regular contract was not executed between the parties pursuant to the work order dated 28.06.2004. According to the plaintiff the failure is due to the fact that the defendants did not provide him the conditions of contract and the fact he fell sick and was treated by psychiatrist. Though the above claim of the plaintiff is stoutly disputed by the defendants, the fact remains that the contract was not executed. The order of cancellation dated 13.08.2004 proceeds on the footing that the agreement has been executed, infact it refers to the Clause 3 of the agreement and the provisions of Sub Clause 3(a), 3(b) and 3(c) which have been invoked. Clauses 3(a), 3(b) and 3(c) of the unexecuted agreement provide for forfeiture of Performance Guarantee and the earnest money. The evidence of DW-1 shows that the defendants have not suffered any loss due to the non performance, expecting the fact that the work was delayed by a few weeks. In K.N. Keerthi Rao's case referred to supra, this Court has held that mere acceptance of a tender without signing of an agreement

would not amount to a concluded contract. The absence of loss by the alleged default on the part of the plaintiff was also taken note of by this Court. In the case on hand also we have only the work order issued by the defendants to the plaintiff and no contract has been entered into. As such I have to conclude that there is no concluded contract between the parties. Even as per the conditions or guidelines in the CPWD manual forfeiture of Performance Guarantee or the earnest money would arise only when there is a concluded contract between the parties. May be the non execution of the contract was due to the fault of the plaintiff but that alone, in the absence of in proof as to the loss suffered by the defendants, would not entitle the defendants to invoke the Performance Guarantee and forfeit the Earnest Money. I am therefore of the considered opinion, that the plaintiff is entitled to refund of the sum of Rs.2,08,525/- (Rupees Two lakhs eight thousand five hundred and twenty five only) realised by the defendants by invoking the Performance Guarantee as well as the sum of Rs.79,614/- (Rupees Seventy nine thousand six hundred and fourteen only) being the earnest money forfeited by the defendants.

8. In view of the aforesaid findings, the judgment and decree of the Trial Court dismissing the suit in its entirety requires modification, and the judgment and decree of the Trial Court will stand modified as follows:- The suit will stand decreed for a total sum of Rs.2,88,139/- (Rupees Two lakhs eighty eight thousand one hundred and thirty nine only), being the amount of Performance Guarantee realised by the defendants, and the earnest money forfeited by the defendants. Since, I have found that the plaintiff is also guilty of non performance, the plaintiff would be entitled to interest on the said sum of Rs.2,88,139/- (Rupees Two lakhs eighty eight thousand one hundred and thirty nine only) from today, at the rate of interest 6% per annum till date of payment. I am not inclined to allow claim interest for the entire period taking note of the conduct of the plaintiff.

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9. In the result, the appeal partly allowed the judgment and decree of the Trial Court will stand modified. The suit in O.S.No.89/2006 will stand decreed for a total sum of Rs.2,88,139/- (Rupees Two lakhs eighty eight thousand one hundred and thirty nine only) with interest 6% per annum from today, till date of payment. In other aspects, the judgment and decree of the Trial Court are confirmed. The liberty given to the plaintiff to approach the authorities for refund will stand deleted. There shall be no order as to costs in this appeal.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

KP

Index: Yes/No
Internet: Yes/No

To
The II Additional District Judge,
Puducherry.

copy to

The Section Officer
VR Section
High Court Madras

+1 cc to Government Pleader sr 1699
+1 cc to Mr.R.Thiagarajan Advocate sr 856

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