

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.931 of 2011

M/s.Asrani Tubes Private Limited,
Represented by its Director,
Asrani Complex,
No.179, M.G.Road,
Secunderabad.

... Appellant/Defendant

Vs.

Tamil Nadu Water Supply
and Drainage Board,
Rep. by its Managing Director,
Having office at
No.31, Kamarajar Salai,
Chepauk, Chennai-600 005.

... Respondent/Plaintiff

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.03.2007 in A.S.No.566 of 2005 on the file of the Principal Court, City Civil Court, Chennai, against the judgment and decree dated 21.02.2005 in O.S.No.3767 of 2002 on the file of the VII Assistant City Civil Court, Chennai.

For appellant : Mr.T.N.Sugesh

For respondent : M/s.S.Eraskne Leo

JUDGMENT

The defendant is the appellant herein. The respondent/plaintiff filed the suit for the breach of contract committed by the appellant/defendant in the suit, in which, the defendant filed a counter-claim claiming refund of security deposit together with interest. The trial Court dismissed the suit and allowed the counter-claim. Aggrieved by the judgment and decree of the trial Court, both the plaintiff and the defendant preferred respective appeals insofar as that portion that went against them. Both the First Appeals were taken up together for disposal. In the appeals, the suit claim was partially allowed. Insofar as the defendant's counter-claim is concerned, the first appellate Court partly allowed the appeal. Aggrieved by the partial grant of relief in the suit, the

present Second Appeal is preferred by the defendant.

2. The defendant who is the appellant herein, submitted that the plaintiff issued tender notice inviting supply and delivery of casing pipes and that the defendant was engaged in the manufacture of pipes and tubes and participated in the tender. Being successful in the tender and agreeing for the rate of contract, a communication dated 04.05.1999 was issued by the plaintiff, on which contract was valid upto 31.03.2000. Subsequently, agreement was entered into for supply and delivery of pipes. The pipes have been supplied periodically and necessary bills have been submitted by the defendant to the plaintiff with necessary certificate. As per the contract, the amount has got to be settled within 30 days and the amount was also paid, but belatedly after two months and the actual payment was made after 96 days and not within the time stipulated in the contract. The payment was made on 02.12.1999 and 28.12.1999. In the meantime, on 29.11.1999, second order was placed for supply of casing pipes and the communication was received by the defendant and supplies have been made on 28.12.1999. The amount due under the first order was also paid on 28.12.1999 before the pipes were supplied. The purchase order dated 04.02.2000 was received by the defendant on 09.02.2000 and on 01.03.2000, the appellant/defendant informed the respondent/plaintiff that payment due in respect of the second order, dated 29.11.1999, was still outstanding, as the materials have been supplied as early as on 28.12.1999. Since the payment was not forthcoming, the defendant sent a letter seeking for cancellation of orders without penalty and also sought for return of EMD for Rs.1,00,000/- given as security deposit on 22.05.1999 and another sum of Rs.96,000/- on 27.09.2001 to the fresh tender which has been cancelled. The defendant made counter-claim for liquidated damages and submitted that the entire amount has been paid, but however, there was a delay, which has been admitted in evidence. It is further contended that the plaintiff is the person who is aggrieved by the act of the defendant in not supplying the materials and having caused prejudice to the plaintiff, the defendant has no right whatsoever to claim the security deposit with interest.

3. The trial Court, after considering the evidence, oral and documentary, framed three issues and held that the plaintiff is not entitled to invoke the penalty or for liquidated damages and that the payment had been made belatedly. The trial Court further held that the defendant was entitled to get refund of Rs.96,000/- with interest at 6% per annum from 16.08.2000. The suit was dismissed with regard to the other issues. However, the relief of counter-claim to the extent of Rs.96,000/- with proportionate costs, was decreed.

4. Aggrieved by the above judgment and decree of the trial Court, both the plaintiff and the defendant preferred respective First Appeals insofar as the rejection of part of their respective claims. The first appellate Court partly allowed the appeal preferred by the defendant holding that the plaintiff is entitled to the liquidated damages of Rs.62,818.40 and the said amount has to be adjusted in the security deposit of Rs.1 lakh returnable by the plaintiff to the defendant. With regard to the appeal preferred by the plaintiff, the same was also allowed in part, holding that the plaintiff has to pay the defendant a sum of Rs.1,27,182/- together with interest @ 9% per annum from the date of the plaint till the date of decree and thereafter, at 6% per annum till realisation of the amount, with proportionate costs. Aggrieved by the finding in partially allowing the appeal and granting relief to the plaintiff, the defendant has preferred this Second Appeal.

5. Heard both sides and perused the materials available on record.

6. The substantial question of law that arises for consideration in this Second Appeal is as to whether the plaintiff is entitled to liquidated damages when there is breach of contract on his part.

7. It is vehemently contended by the learned counsel for the respondent/plaintiff that the entire issue has been considered by both the Courts below and there is no substantial question of law involved in the Second Appeal. He also drew the attention of this Court to the specific finding rendered by the trial Court in paragraph 14 of its judgment and submitted that there was a convincing reply given by the plaintiff to the defendant, as could be seen from Ex.A-3 and that the defendant, inspite of the said communication, did not supply the goods for the third order. Therefore, the penalty clause under Clause 14(1) and (2) of the contract/agreement can be invoked, when the supply is not made within the time stipulated in the contract. Learned counsel for the plaintiff further drew the attention of this Court to the judgment of the first appellate Court, wherein the said finding has been reiterated and it was further held that the plaintiff will be entitled to liquidated damages and as per Clause 6(1), the amount payable by the defendant to the plaintiff, has to be adjusted and the remaining security deposit has to be refunded by the plaintiff. He would further submit that if at all any one who is aggrieved, it is the plaintiff who is aggrieved, and not the defendant, as there is a total breach of contract committed by the defendant and having violated the contract/agreement, the plaintiff should not be a premium to the defendant to the counter-claim sought for by the defendant in the suit.

8. In reply, learned counsel for the appellant/defendant submitted that there is a breach of agreement/contract by the plaintiff in not paying the amount due within the time stipulated under Ex.A-2 agreement, and that the defendant has supplied the goods based on two orders within the time, even though there was a belated payment for the first order, even though the trial Court has held that the plaintiff has given a convincing reply as no payment was made by the plaintiff based on the second order for which the supply has been made, and the defendant is entitled to the relief of counter-claim and as could be seen from Exs.B-1 to B-4, there was an inability to make the supply by the defendant, as the payments for the earlier supplies have not been made. Learned counsel for the appellant/defendant further contended that both the Courts below ought not to have granted the relief to the plaintiff, as the entire clause in the agreement had been given a go-bye by the plaintiff and that even though the time is considered as an essence of contract/agreement, the totality of the circumstances have got to be taken into account for the purpose of granting the relief and that when the defendant has made supply in the earlier two occasions, and that there is every justification on the part of the defendant in not supplying for the third time when no payment was made within the time stipulated in the second order made in November 1999. Learned counsel also drew the attention of the Court to paragraphs 11, 12 and 15 of the trial Court's judgment and also the judgment of the appellate Court in paragraph 36 in erroneously granting the relief of liquidated damages and holding that the defendant would be entitled to only the balance amount from the security deposit.

9. In this regard, it is worthwhile to quote Section 51 of the Indian Contract Act, which reads as follows:

" Section 51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform: When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

10. A reading of Section 51 of the Indian Contract Act would make it very clear that a promisor need not be bound to perform his part of the contract, unless the reciprocal promisee was ready and willing to perform his part of the contract. As there was a delay on the part of the plaintiff in making payment, even though the same has been admitted and subsequently paid, the action of the defendant in not supplying the goods, cannot be said to be at fault, even though it has been vehemently contended by the learned counsel for the plaintiff that the question of law cannot be answered against

the plaintiff and in favour of the defendant, as the issue had been dealt with by both the Courts below and that as both are at fault, the proportionate relief had been granted to both parties, and further, on a reading of Section 51 of the said Act, it would make it clear that as there was delay on the part of the plaintiff in performing his part of the contract within the time stipulated in Ex.A-2 agreement, there is every justification on the part of the appellant/defendant in not adhering to the contract, in view of Section 51. The substantial question of law is answered accordingly.

11. The Second Appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

CS

TO

1. The Principal Judge, City Civil Court, Chennai.
2. The VII Assistant Judge, City Civil Court, Chennai.

+ 1 cc to MR. T.N. Sugesh, Advocate SR.20380
+ 1 cc to Mr.S. Eraskine Leo, Advocate Sr.20292

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