

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON :20.06.2018
PRONOUNCED ON:09.07.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.2063 of 2004
and
C.M.P.No.17581 of 2004

- 1.The District Collector
Office of the District Collector,
Cuddalore District.
- 2.The Additional Collector (Development),
District Rural Development Agency,
Cuddalore. Appellants/Defendants

Vs.

M/s.Chettinadu Cement Corporation
By its Managing Director,
No.630, Anna Salai,
Chennai. Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree made in A.S.No.120 of 2003 dated
30.04.2004 on the file of the Principal District Judge,
Cuddalore confirming the Judgment and Decree made in O.S.No.50
of 2001 dated 31.03.2003 on the file of the II Additional Sub
Court, Cuddalore.

For Appellants : Mrs.A.Madhumathi
Additional Government Pleader (CS)

For Respondent: Mr.M.Praveen Kumar

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and
decree dated 30.04.2004 passed in A.S.No.120 of 2003 on the
file of the Principal District Court, Cuddalore confirming the
judgment and decree dated 31.03.2003 made in O.S.No.50 of 2001
on the file of the II Additional Sub Court, Cuddalore.

2. The parties are referred to as per the rankings in the
trial court.

3. Suit for declaration and refund of money.

4. The Second Appeal has been admitted on the following substantial questions of law.

(i) Whether both the Courts below had erred in not appreciating the fact that when the contract itself stipulates a quantified sum that shall be forfeited for the breach of contract the question of proof of loss suffered due to the breach does not arise when the same is against the law laid down by the Apex Court in 2003 (5) SCC 705?

(ii) Whether the Courts below had erred in not appreciating the fact that a written acceptance of the tender was admittedly received by the respondent as evidenced vide his letter dated 09.07.1998?

5. The case of the plaintiff in brief is that the second defendant on behalf of the Governor of Tamil Nadu received tender notice for the supply of delivery of cement under the rate contract for 1998-1999 from the plaintiff and others on 06.05.1998 and as per clause 3 of the tender form, each tenderer must pay a partition fee of a sum of Rs.2,00,000/- in favour of the second defendant and as per clause 3.3 of the tender form, only on receipt of the written communication of acceptance of the tender, if the tenderer backs out from the rate contract, his partition fee will be forfeited to the Government and the form II accompanying the tender disclosed that the partition fee may be retained in the office as security deposit for the due fulfillment of the contract and accordingly, it is stated that the plaintiff submitted his tender form along with Demand Draft for Rs.2,00,000/- drawn in favour of the second defendant dated 05.05.1998 on 06.05.1998 and after the receipt of the same, the second defendant sent a telegram on 09.05.1998 for negotiated the cement rate contract on 12.05.1998 at 5.30pm at the Collector's Campus office at Cuddalore and directed the plaintiff to bring the revised lowest rate offer. The plaintiff on 11.05.1998 informed the second defendant that they are not revising their rates and they are firm on their quoted rates and the second defendant again convened another meeting on 15.06.1998 for the final negotiation and by letter dated 11.06.1998 the plaintiff informed about its inability to reduce the price quoted in the tender. Again the second defendant asked the plaintiff to attend the office on 01.07.1998. The first defendant has approved the offer of the plaintiff and two other companies for the supply of cement and passed orders and the plaintiff was asked to execute an agreement immediately with the second defendant on or before 06.07.1998 as otherwise the

order was liable to be deemed to be canceled. In view of the production constraints and due to unavoidable circumstances, the plaintiff expressed its inability to sign the agreement and wanted the refund of the partition fee of Rs.2,00,000/- vide their letter dated 09.07.1998 and thereafter the first defendant canceled the order placed with the plaintiff by way of his proceedings dated 15.07.1998 and the plaintiff thereafter, requested the second defendant for the refund of the partition fee and the second defendant directed the plaintiff to send a reply offering explanation as to why the plaintiff backed out from the commitment, failing which, the deposit amount would be forfeited. Thereafter, the plaintiff renewed its offer to supply cement on 17.12.1998, but no reply has been received. Inasmuch the second defendant did not return the participation fee as claimed by the plaintiff, legal notice was issued to the defendants and despite the same, inasmuch as the defendants did not return the refund amount and as the retainment of the participation fee of Rs.2,00,000/- is unconscionable on the part of the defendants which would amount to penalysing the parties and the said clause being illegal, void and unenforceable in law as per the Contract Act and the defendants have not incurred any loss on account of any act of the plaintiff and even if they had incurred any loss, they could only deduct suitable amount after establishing the same and liable to refund the balance amount and without adhering to the above principles, inasmuch as the defendants had failed to refund the participation fee of the plaintiff as demanded and according to the plaintiff, he has been necessitated to institute the suit for appropriate reliefs.

6. The case of the defendants in brief is that the suit is not maintainable either in law or on facts and the plaintiff submitted a tender form along with the Demand Draft for Rs.2,00,000/- on 06.05.1998 and as per the tender notice, it is clearly established that written communication of the acceptance of tender amounts to a valid contract between the Governor of Tamilnadu and the tenderer for the execution of the work without any further or separate written agreement and only after knowing the conditions of the tender form, the plaintiff has accepted the same along with DD as above stated and accordingly the defendants directed the plaintiff to attend the office for negotiating the supply and delivery of cement and in this connection, a telegram had also been issued to the plaintiff on 30.06.1998 and on 02.07.1998, the first defendant had approved the offer of the plaintiff and asked the plaintiff to execute the agreement with the second defendant and despite the same, the plaintiff failed to execute the agreement not sent any reply and hence the defendants issued an order dated 16.05.1998 forfeiting the EMD amount and the case of the plaintiffs that there is no concluded contract between the parties is false and it is further false to state that the forfeiture of the

participation fee is arbitrary, illegal, void and unenforceable as per law. The plaintiff did not supply the cement as called for by the defendants and after the first defendant sent a letter to the plaintiff, forfeiting the EMD amount, the plaintiff on 17.12.1998 sent a letter to the first defendant offering to supply cement and therefore, it is found that the expression of the desire of the plaintiff in supplying the cement constitute a contract and it is valid in law and on account of the delayed supply of the cement, the work in question has been stalled and loss incurred by the defendants and the plaintiff is not entitled to make any claim in respect of the EMD amount and hence the suit is liable to be dismissed.

7. In support of the plaintiff's case, P.W.1 has been examined. Exs.A1 to A20 were marked. On the side of the defendants' Ex.D1 was marked. No oral evidence has been adduced.

8. The Courts below on an appreciation of the materials placed on record, both oral and documentary was pleased to decree the suit as prayed for. Impugning the same, the defendants have preferred the present Second Appeal.

9. It is not in dispute that the plaintiff accepting the tender notice issued by the second defendant, submitted the tender form along with the DD for Rs.2,00,000/- on 06.05.1998. The tender in question involves the supply and delivery of cement, and as per clause 3.1 of the tender notice, it is found that each tenderer must pay participation fee to the sum of Rs.2,00,000/- by way of DD in favour of the second defendant and as per clause 3.1, the participation fee will be refunded to the unsuccessful tenderer on intimation as detailed therein and as per clause 3.2, the participation fee will be retained in the case of the successful tenderer and will not carry any interest and it will be dealt with as provided in the conditions attached to the tender. Further, clause 3.3 of the tender notice reads as follows:

When a tender is to be accepted, the tenderer, whose tender is under consideration, shall attend the office of the Additional Collector (Dev.), District Rural Development Agency, Cuddalore on the date fixed by written intimation to him. If the tenderer fails to attend the office before the end of the specified period, his tender will not be considered. On receipt of written communication of acceptance of his tender, if the tenderer backs out from the Rate Contract, his participation fee will be forfeited to the Government. It shall be understood by the tenderer that on receipt of written communication of acceptance of tender, there emerges a valid contract between the Governor of Tamil Nadu and the tenderer,

for the execution of the work without any further or separate written agreement. For this purpose, the tender documents, i.e., the tender notice, tender offered by the contractor, General conditions to the contract, special conditions to contract, negotiation, correspondence, written communication of acceptance of tender etc., shall constitute a valid contract and will be the foundation of the rights of both the parties to the contract.

10. Thus, from the clause 3.3, it is found that the tenderer has to attend the office of the second defendant as regards the acceptance of the tender and further it is also found that on receipt of the written communication of acceptance of the tender, if the tenderer backs out from the rate contract, the participation fee will be forfeited to the Government. The clause further stipulates that it should be understood by the tenderer that on receipt of written communication of acceptance of tender, there emerges a valid contract between the Government of Tamilnadu and the tenderer for the execution of the work without any further or separate written agreement. The abovesaid clause further recites that for this purpose, the tender documents i.e., the tender notice, tender offered by the contractor, general conditions to the contract, special conditions to the contract, negotiation, correspondence, written communication on acceptance of tender etc., shall constitute a valid contract and will be the foundation of the rights of both the parties of the contract.

11. Thus, it is found that the once the second defendant sends a written communication of acceptance of tender, the same shall be considered as a valid contract between the parties concerned for the execution of work in question without any further requirement of a written agreement separately. In so far this case is concerned, it is found that the plaintiff quoting his rate, had submitted the tender form along with the DD for the requisite amount. It is found that thereafter, the plaintiff had been directed to attend the office of the second defendant for further negotiations. These facts are not in dispute. It is further seen that the plaintiff had maintained that the quoted rate is final and did not relent to lower the quoted rate. After the same, it is found that on 02.07.1998, the second defendant had written the letter to the plaintiff approving his tender and the said document has come to be marked as Ex.A8. On a perusal of Ex.A8, it is found that the plaintiff and two others had been approved for the supply of cement as per the tender called for and accordingly, it is seen that they had been directed to supply the cement as quoted and further they were directed to execute the agreement immediately with reference to the same. The receipt of Ex.A8 letter has not been controverted by the plaintiff. Even in the plaint, the

plaintiff has admitted that the first defendant has approved the offer of the plaintiff and two other companies for the supply of cement on 02.07.1998. Thus it is noted that a written communication has been sent by the second defendant to the plaintiff approving his tender on 02.07.1998 and as per clause 3.3 of the tender notice, it is found that on such a written communication of acceptance of the plaintiff's tender, as per the terms of the tender notice, a valid contract had emerged between the plaintiff and the defendants for the work in question and in such view of the matter, as per the terms of the tender notice, it is found that there is no need for the execution of any separate written agreement to fortify the same. In such view of the matter, merely because under Ex.A8 the defendants had directed the plaintiff to execute an agreement immediately, that would not entitle the plaintiff to disown or disclaim the acceptance of the tender by the second defendant and in such view of the matter, the plaintiff cannot be allowed to urge that inasmuch following Ex.A8, the plaintiff had not sent any written agreement as such, there is no concluded contract between the parties. As above adverted to, the plaintiff has not disputed the receipt of Ex.A8 written acceptance of the second defendant of his tender. Even in the letter sent by the plaintiff from backing out of the commitment vide letter dated 09.07.1998 marked as Ex.A11, there is a clear reference about the letter of acceptance sent by the second defendant and thus it is found that on the issuance of Ex.A8 letter of acceptance, a valid contract having emerged between the plaintiff and the defendants, as regards the supply of cement, in the light of clause 3.3 of the tender notice as above noted, it is found that thereafter, if the plaintiff opts to back out from the tender, he is liable to lose the participation fee remitted by him and accordingly, it is found that the second defendant by way of notice dated 17.09.1998 called upon the plaintiff to offer his explanation for his entitlement to get the refund of the participation fee, failing which, the same would be forfeited and thereafter, it is found that the plaintiff had sent a letter dated 17.12.1998 reviving the offer to supply the cement.

12. Thus, it is found that on the written acceptance sent by the second defendant under Ex.A8 to the plaintiff accepting the tender, it is found that there emerged a valid contract between the parties concerned. Despite the same, if the plaintiff has chosen to back out from the tender, as per clause 3.3, he stands to loose the EMD amount deposited by him and accordingly, it is found that the plaintiff cannot be allowed to contend that inasmuch as Ex.A8 acceptance is not followed by any written agreement as specified therein, there is no concluded contract between the parties, hence he is entitled to get back the refund of EMD. However, as per clause 3.3 of the tender

notice, the plaintiff has been put on notice about the conclusion of the contract on the issuance of the letter of acceptance by the second defendant and also put on notice that no written agreement is required to be executed thereafter and the plaintiff on knowing the same, having chosen to participate in the tender, cannot be allowed to extricate from the tender conditions by asserting that there is no concluded contract inasmuch as the written agreement had not been executed following the written acceptance, as demanded by the second defendant. However, when the tender notice does not make such a written agreement necessary for the completion of the concluded contract and on the other hand, the tender notice stipulates the emergence of a valid contract on the acceptance of the tender by the second defendant and as and when it is seen that the plaintiff's tender had been accepted by the second defendant by way of Ex.A8 which fact has not been confronted it is found that the plaintiff cannot be allowed to wriggle out of the tender by contending that he is entitled to get back the refund of amount on the footing that the collection of the participation fee by the defendants is illegal, void and unenforceable in law. When the plaintiff with open eyes, had chosen to participate in the tender knowing the conditions set out in the tender notice, he cannot be allowed to rescind the same thereafter by challenging that the conditions stipulated therein are illegal and unenforceable. The conduct of the plaintiff itself would go to show that the abovesaid challenge placed by the plaintiff to the tender conditions is made only for the purpose in this case, as it is seen that following the demand made by the second defendant calling for the explanation as to why the participation fee of the plaintiff not be forfeited, it is found that the plaintiff understanding its unenviable position, had chosen to renew its offer by willing to supply the cement as per the contract arrived at between the parties and this would only go to show that the plaintiff has been blowing hot and cold and taking inconsistent stand to avoid the tender one way or the other and also attempted to get back the EMD amount without showing sufficient cause to the entitlement of the same, particularly having accepted the tender conditions that it would forfeit the said amount on the backing out of the tender after the acceptance of the same by the second defendant.

13. In the light of the above discussions, it is found that on failure of the plaintiff to supply the cement as agreed to, it is found that as put forth by the defendants' counsel, the work involved in the matter has been stalled and the defendants had been put to loss. In such view of the matter, the contention of the plaintiff that the defendants are not liable to retain the EMD amount as they had not sustained any loss as such cannot be accepted and even assuming that the defendants had not

sustained any loss, as such the plaintiff having accepted the tender conditions without any demur and participated in the tender and had chosen to back out from the tender conditions without assigning any proper reason and thereafter again coming forward to renew the supply, it is seen that it is only the plaintiff, who had been adopting dilatory tactics one way or the other in the completion of work in question and Courts below without properly understanding the import of the tender conditions particularly, clause 3.3 as above noted and also failing to hold that the acceptance of the tender by the second defendant amounts to a valid contract between the parties and even the direction of the second defendant to the plaintiff to attend the office with reference to the tender work also would amount to the acceptance of the tender offered by the plaintiff by the second defendant, considering the clause 3.3 in entirety and despite the position being above, the Courts below had erred in holding that plaintiff's tender has not been accepted by the second defendant as per the tender conditions. When the plaintiff himself has accepted that his tender had been accepted by the second defendant on 02.07.1998, merely because the said acceptance had not been followed by a written agreement, which need not be followed in view of the clause 3.3 of the tender notice, as rightly contended by the counsel appearing for the defendants, a valid contract had been arrived at between the parties following the issuance of Ex.A8 acceptance by the second defendant and in such view of the matter on the plaintiff backing out from the tender without assigning any reason after the acceptance of the same by the second defendant, it is found that the plaintiff stands to lose the EMD amount paid by him as per the tender conditions.

14. In view of the above discussions, the judgments and decrees of the Courts below upholding the plaintiff's case is found to be not on the proper and correct appreciation of the materials placed on record and on the other hand, they are found to be based on irrelevant considerations without any materials in support of the same and in such view of the matter, the findings and conclusions of the Courts below for upholding the plaintiff's case are found to be perverse and illogical and cannot be allowed to stay further.

15. In the light of the above discussions, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

16. The plaintiff's counsel in support of his contentions placed reliance upon the decisions reported in
(i) LNIND 1999 MAD 65, S.A.No.1402 of 1986 [K.N.Keerthi Rao Vs. The General Manager, Southern Railways, Madras -3. and another]

(ii) LNIND 2017 MAD 523, A.S.No.572 of 2011 [P.Selvam Vs. Union of India and others]

However, on facts, it is found that the principles adumbrated in the abovesaid decisions are inapplicable to the case at hand as in the present case, following the acceptance of the tender of the plaintiff, a valid contract had emerged between the parties qua the subject matter and therefore there is no need for any subsequent written contract with reference to the same to be executed between the parties as per the terms set out in the tender notice as above discussed.

17. In conclusion, judgment and decree dated 30.04.2004 passed in A.S.No.120 of 2003 on the file of the Principal District Court, Cuddalore confirming the judgment and decree dated 31.03.2003 made in O.S.No.50 of 2001 on the file of the II Additional Sub Court, Cuddalore are set aside. Resultantly, the suit laid by the plaintiff in O.S.No.50 of 2001 is dismissed with costs. Following the same, the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Principal District Judge,
Principal District Court,
Cuddalore
2. The II Additional Subordinate Judge,
II Additional Sub Court,
Cuddalore.

WEB COPY

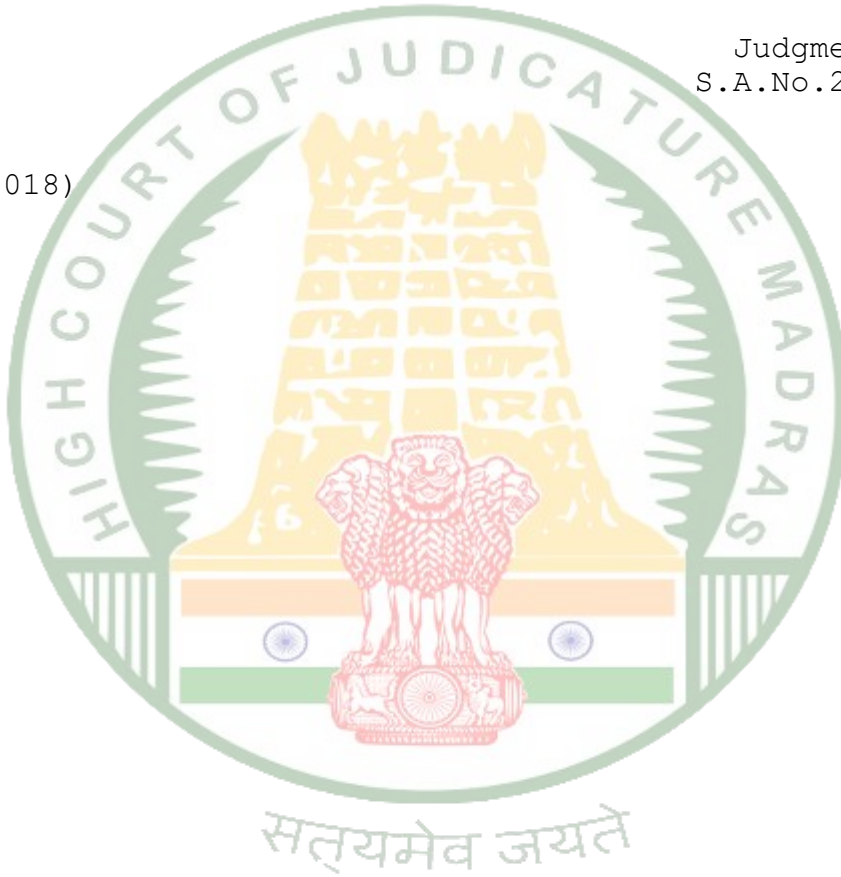
Copy to

The Section Officer,
VR Section,
High Court,
Chennai.(2 COPIES)

+2cc to Mr.T.BALAJI, Advocate, S.R.No. 44297
+1cc to the Government Pleader, S.R.No. 44464

Judgment made in
S.A.No.2063 of 2004

NM(CO)
TR(27/08/2018)



WEB COPY