

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.07.2018

PRONOUNCED ON : 18.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.2202 of 2004

Tamil Nadu Medical Service
Corporation Ltd.,
No.13, Whites Road,
Mamtha Complex, 3rd Floor,
Royapettah, Chennai - 600 014.Appellant (Defendant)

Vs.

M/s.Southern Union Pharmaceuticals
rep.by its Managing Partner
Mr.Ponnappan
XXVI/1, Museum Road,
Post Box No.504
Thrissur - 680 020, Kerala. Respondent (Plaintiff)
(Cause title accepted vide order
of court dated 05.11.2004 made
in CMP.No.17926/2004)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 18.09.2003 passed in A.S.No.110 of 2002 on the file of the Additional District Judge, II Fast Track Court, Chennai, reversing the Judgment and Decree dated 30.08.2001 passed in O.S.No.4734 of 1997 on the file of VIII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.V.Suresh
for M/s.Shivakumar and Suresh

For Respondent : Mrs.Thenmozhi Shivaperumal

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 18.09.2003 passed in A.S.No.110 of 2002 on the file of the Additional District Judge, II Fast Track Court, Chennai, reversing the Judgment and Decree dated 30.08.2001 passed in O.S.No.4734 of 1997 on the file of VIII Assistant Judge, City Civil Court, Chennai.

2. The second appeal has been admitted on the following substantial questions of law :

" 1. Whether there is any legal obligation on the part of the defendant to prove the actual damage and whether liquidated damage has been fixed by the parties in the event of breach of contract as the measure of reasonable compensation?

2. Whether on the pleading and material brought on record by the plaintiff, the first appellate Court was right in holding that the plaintiff was entitled for the relief claimed in the suit?

3. Whether the lower appellate court is right in allowing the suit prayers without considering the terms of the contract?

4. Whether the lower appellate court is right in holding that the defendant is not entitled for compensation for the breach of the contract on the part of the plaintiff against the specific provisions of sections 73 & 74 of the Indian Contract Act?

5. Whether the lower appellate Court is right in allowing the suit prayer, especially when the plaintiff admits the breach of contract and also existence of forfeiture clause in the tender document?

6. Whether the lower appellate court is right in allowing the suit prayer contrary to the law laid down by the Hon'ble Supreme Court of India in ONGC Limited Vs. Saw Pipes Limited reported in (2003) 5 SCC pg.705?

7. Whether there is an obligation on the part of the defendant to claim damages by a separate demand without exercising the right of forfeiture in the tender document, when there is an admitted breach of contract on the part of the defendant?

8. Whether the lower appellate court is right in allowing the appeal reversing the judgment and decree of the lower court?"

3. Considering the scope of the issues involved in the second appeal lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the respondent/plaintiff accepted the tender conditions of the appellant in the supply of the medicines. Accordingly, it is seen that with reference to the same, the parties had entered into an agreement dated 23.01.1995 marked as Ex.A2 and it is found that as per the tender conditions, the respondent had paid a sum of Rs.2,00,000/- to the appellant towards the EMD/Security deposit and according to the respondent, as the appellant had suddenly deducted the abovesaid EMD/Security deposit sum of Rs.2,00,000/- without providing opportunity to present its case and as the appellant had not sustained any damages as such for any entitlement to deduct the said amount and as the appellant had refused to pay the same, despite being called upon by the respondent, even after exchange of notices, it is found that the respondent had chosen to prefer the suit for the recovery of the suit amount with interest against the appellant.

5. The appellant has taken the plea that the sum of Rs.2,00,000/- had been deposited /paid by the respondent as per the tender conditions with reference to the supply of the medicines and accordingly, inasmuch as the respondent had failed to supply the medicines as stipulated under the tender conditions and as per the agreement entered into between the parties, the appellant is entitled to deduct the said amount and the appellant need not issue any show cause notice to the respondent before deducting the said amount and further, according to the appellant, de hors whether the appellant had sustained any damage or not, when as per the terms and conditions of the contract entered into between the parties, the appellant is entitled to deduct the abovesaid sum, it is stated that the plaintiff's suit would not lie and is liable to be dismissed.

6. The trial Court agreed with the case of the defendant/appellant and thereby, dismissed the plaintiff/respondent's suit. However, the first appellate Court reversed the judgment and decree of the trial Court. Challenging the same, the present second appeal has come to be laid.

7. It is not in dispute that as per the terms and conditions of the tender for the supply of the drugs and medicines, clause - 29 directed that the supply should be started within 21 days and should be completed within 45 days from the date of the order and if no supply is received even after 21 days, the purchase order will automatically stand cancelled without any further notice and penalties will be levied on the tenderer as per clauses 37 & 38 of the terms and conditions and the tenderer shall also suffer forfeiture of the EMD and security deposit. Thus, it is found that the mandatory condition between the parties is that the supply of medicines should be commenced in time and also completed within a particular period and if the same is not adhered to, the purchase order is liable to be cancelled and in that event, the tenderer would suffer the forfeiture of the EMD and security deposit.

8. Materials placed on record go to show clearly that the respondent had not supplied the medicines in time as per the abovesaid stipulation and it is found that the respondent had supplied the medicines very belatedly and thus, it is found that the mandatory condition of the supply of the medicines within a particular time factor has not been adhered to by the respondent. In this second appeal also, there is no material placed by the respondent to hold that the medicines had been supplied as per the terms and conditions of the contract.

9. Accordingly, it is found that when there is a huge delay in the supply of the medicines by the respondent and the same is violative of the conditions agreed to, it is thus found that as per the terms and conditions of the contract, the appellant is entitled to retain the EMD/ security deposit paid by the respondent and the appellant need not establish that it had sustained any specific damages before deducting the said amount and when it is found that the parties had agreed for pre-estimated liquidated damages in a sum of Rs.2,00,000/- as regards the supply of the medicines in time and when the said conditions as regards the supply of the medicines in time had not been complied with by the respondent, as rightly put forth by the appellant's counsel, the appellant would be entitled to forfeit the EMD/ security deposit paid by the respondent whether it has actually sustained the damages or not. When the breach of contract has been amply established and when there is no material placed to determine otherwise even assuming for the sake of arguments that the time enlargement sought for by the respondent in the supply of the medicines had been accepted by the appellant, that would not in any manner disentitle the appellant to forfeit the EMD/security deposit paid by the respondent as per the terms and conditions of the contract and

in such view of matter, it is found that the first appellate Court had erred in holding that the appellant is not entitled to forfeit of the EMD/security deposit.

10. In this connection, the counsel for the appellant relied upon the decision of the apex Court reported in (2003) 5 SCC 705 (Oil and Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd), wherein, the scope of Sections 73 & 74 of the Contract Act, 1872, had been discussed in detail and the apex Court had held that the appellant is not obliged to prove that it has suffered any loss before forfeiting the EMD/security deposit and the position of law has been duly held by the apex Court in the following manner:

" G.Contract Act, 1872 - Ss.73 and 74 - Compensation/Damages - Principles and considerations for assessment of, in case of breach of contract - When plaintiff not obliged to prove that it suffered a loss

In terms of Sections 73 & 74 of the Contract Act, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

11. In the light of the abovesaid determination of the apex Court, it is found that when the parties had agreed to fix the liquidated damages in advance and when the said fixation is not shown to be unreasonable and accordingly, when admittedly the respondent has not supplied the medicines in time as per the terms and conditions of the contract and when there is a clear breach of contract, it is found that the appellant would be entitled as per law to forfeit the EMD/security deposit paid by the respondent without showing any loss as such had occasioned to it on account of the breach committed by the respondent. The substantial questions of law formulated in the second appeal are accordingly, answered in favour of the appellant and against the respondent.

In fine, the Judgement and Decree dated 18.09.2003 passed in A.S.No.110 of 2002 on the file of the Additional District Judge, II Fast Track Court, Chennai are set aside and the Judgment and Decree dated 30.08.2001 passed in O.S.No.4734 of 1997 on the file of VIII Assistant Judge, City Civil Court, Chennai are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge,
II Fast Track Court,
Chennai.

2. The VIII Assistant Judge,
City Civil Court, Chennai.

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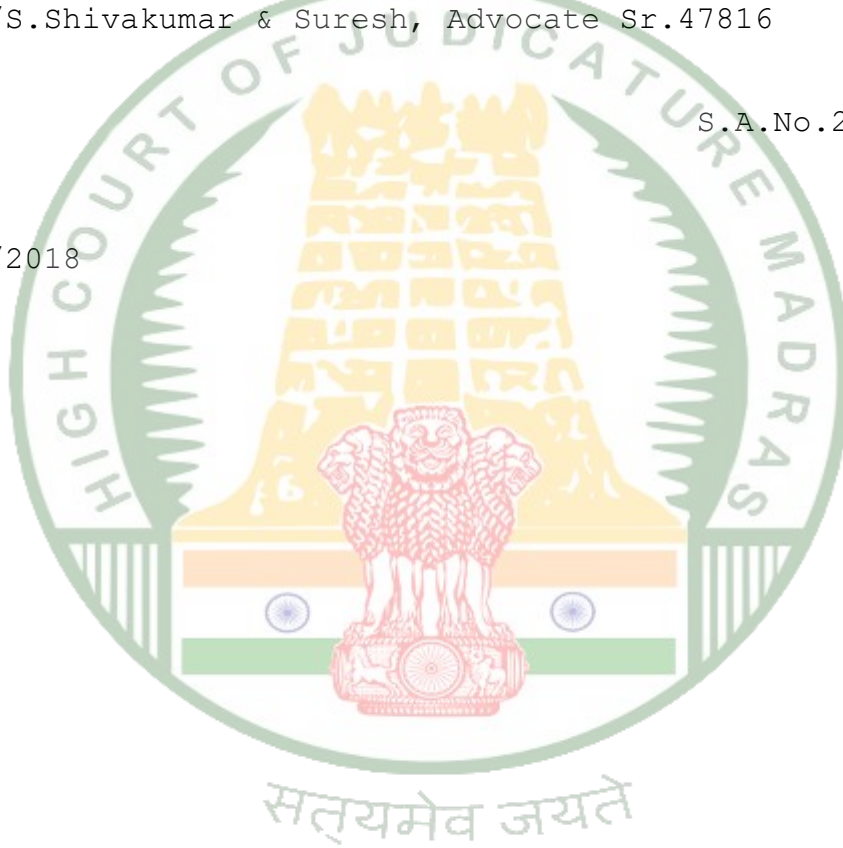
The Section Officer,
V.R.Section, High Court, Madras.

+1cc to M/S.Thenmozhi Shivaperumal, Advocate Sr.47399

+1cc to M/S.Shivakumar & Suresh, Advocate Sr.47816

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