

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.08.2020
PRONOUNCED ON : 01.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1150 of 2009
(Heard through video conferencing)

M/s.Indian Oxygen Limited
(Now known as BOC India Ltd.,)
Oxygen House,
P43 Taratara Road,
Calcutta - 700 088.

...Appellant/
Appellant/ Defendant

Vs

M/s.A.N.S Oxygen (P) Ltd.,
represented by its Managing Director,
No.91 Poes Garden Road,
Chennai - 600 086.

...Respondent/
Respondent/Plaintiff

Prayer:- This Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment passed in A.S.No.81/2008 dated 04.12.2008 passed by the IV Additional Judge, City Civil Court, Chennai confirming the judgment dated 28.04.2003 made in O.S.No.4737/1996 III Assistant Judge, City Civil Court, Chennai.

For Appellant :Mr.Krishna Srinivasan, for
M/s.S.Ramasubramanian Associates

For Respondent :Ms.Preethi S.Sharma, for
M/s.A.K.Mylsamy Associates

JUDGMENT

The appellant before this Court is a public limited company engaged in the business of manufacture and sale of plant and machineries for manufacturing Oxygen and other industrial gases.

2.The respondent herein an intending purchaser of oxygen manufacturing plant, after negotiation with the appellant agreed

to pay (a) Rs.28,25,000/- for the plant and machinery; (b) Rs 1,75,000/- for erection and commission and (c)Rs.25,000/- for the Package and Forwarding. Totally, Rs.30,25,000/- Through this letter of intent dated 02/08/1984, the respondent also agreed to pay 10% of the value of the plant and machinery at the time of placement of firm order and paid Rs.1,00,000/- towards part advance along with its letter of intent.

3.The respondent was not able to mobilize the required money within the time expected. Hence, requested the appellant for extension of time. The appellant acceded to the request on condition that the balance amount of advance has to reach them by 31/01/1985 otherwise, they will not be able to retain the Japanese compressor for them. In alternate, they will supply the plant with Khosla compressor for the price prevailing at the time of receipt of the order. In response to this communication, the respondent on 28/01/1985 wrote back to the appellant that their financial arrangements are at advance stage and they are sure to get the sanction before the end of February at any cost. Soon they get the loan, they will start the payment during the course of February itself.

4.Again on 22/02/1985, the respondent wrote to the appellant expressing their difficulty in getting financial sanction from the State Financial Institution and sought further time till March end. In reply, the appellant has informed the respondent that, as a special case, they will hold back the Japanese Compressor on the clear understanding that the respondent place firm order along with balance amount (Rs.2,85,000/- - Rs.1,00,000/-) towards initial advances reaches them by 29/03/1985. However, by the end of March 1985, the respondent could raise only Rs.25,000/- from their own sources. So, in their letter dated 28/02/1985, they enclosed demand draft for Rs.25,000/- and promised to make further payment as soon as they receive the financial sanction from the institution.

5.The appellant through their letter dated 03/04/1985 with regret informed the respondent that they did not receive the total advance amount by 29/03/1985 so it is not possible for them to hold the Japanese compressor any more. They will supply the plant with Khosla compressor at the prices prevailing at the time of payment of total advance amount. It was also informed to the respondent that the current price of the plant with Khosla compressor will be Rs.32,00,000/- so they will keep the draft for Rs.25,000/-, till 12th April 1985 and shall credit it if the balance amount of Rs.1,60,000/- paid to make advance equivalent of 10% of the value of the order for the plant and equipment.

6.The respondent paid the balance amount of Rs.1,60,000/- on 30/04/1985. After this, the respondent started insisting on the

old price agreed in the month of August 1984 and for supply of Japanese compressor. Correspondence between the parties was going on till 27/06/1987. Meanwhile, the respondent shifted its proposed plant site from Manamadurai to Chennai. At last, the respondent through letter and telegram, informed the appellant that they have dropped the proposal due to financial difficulties and requested to return Rs.2,85,000/- paid as advance. The appellant refused to return the advance money. They claimed that, they are not liable to refund the initial down payment money. Also they are entitled to recover all the costs and expenses actually incurred in respect of the above order. However, as special case, they are not insisting on the additional expenses incurred.

7.The refusal to refund the money advanced to the appellant has brought the respondent to the Court. Suit filed for recovery of Rs.2,89,275 /- with interest at the rate of 18% per annum from the date of suit till the date of payment. The trial court decreed the suit as prayed. On appeal by the defendant, the Appellate Court confirmed the decree with modification. The interest of 18% per annum was altered to 12% per annum from the date of suit till the date of trial court decree and 6% thereafter.

8.The instant Second Appeal by the defendant against the concurrent finding is on the ground that, the Courts below erred in holding that the contract never got concluded and therefore, the appellant is not entitled to forfeit the advance amount. The Courts below erred in erroneous consideration and interpretation of the facts of the case. The Courts below ought to have seen that the money paid by the plaintiff was by way of part consideration towards fulfillment of the contract and therefore, it is not open to the plaintiff to cancel the contract and claim the contract is not a concluded contract.

9.Before advertng to the merit of the appeal, it is imperative to record that, in the instant case, on behalf of the plaintiff, one Natarajan, Managing Director of the plaintiff company has been examined. Proof affidavit filed in lieu of chief examination mentioning 33 exhibits. The court has received those documents and marked as Exs.P-1 to P-33. Strangely, in the trial Court judgement, list of witnesses and list of documents not annexed. Hence, the original records were compared and verified. To the shock of this Court, though 33 exhibits marked through proof affidavit and assigned exhibit numbers by the trial judge, the trial judge not only failed to list the exhibits, but also in his judgment contrary to records, at paragraph 10 after listing the issues framed, he has mentioned that on the side of the plaintiff one witness examined and 11 exhibits were marked. Defendant chose not to examine any

witness. Still more shocking, the appellate court judge has recorded that 12 exhibits were marked on the side of the plaintiff and one Anoopguptha the Operation Manager of the defendant company was examined as DW-1. The deposition of DW-1 is not available in the records forwarded to the High Court from the court below.

10. The notes sheet maintained by the trial court indicates that this suit which was filed on the original side of the High Court Madras as C.S.No.502/1988, transferred to City Civil Court, Chennai and renumbered as O.S.No.4737/ of 1996 on increase of pecuniary jurisdiction of the High Court original side. Before the III Assistant City Civil Court Judge, the case listed for trial on 09/07/2002. On that day, PW-1 has mounted the witness box and examined in chief (partly) Ex A-1 to Ex A-3 marked. On the next date of hearing i.e., on 16/07/2002 in the course of further chief examination, Exs.A-4 to A-19 were marked and case adjourned for continuation of chief examination. Since by that time Code of Civil Procedure Amendment Act 22 of 2002 came into force from 01/07/2002, the court has allowed PW-1 to file proof affidavit under Or XVIII Rule (4) of the amended CPC in lieu of chief examination. On 08/08/2002 Exs.A-20 to A-33 were marked and case posted for cross examination of PW-1. After few adjournments, PW-1 was cross examined and the plaintiff has closed its side. After few more adjournments, on the side of defendant on 10/12/2002 proof affidavit filed by DW-1 and adjourned for his cross examination by the plaintiff. On 25/09/2002 it appears DW-1 was cross examined. On 13/03/2003, the defendant has closed its side without further witnesses. The trial court has delivered its judgment on 28/04/2003 after hearing the arguments.

11. When the second appeal was listed for final hearing on 29/08/ 2016, the Hon'ble Judge of this Court found the omission in the trial court judgment the list of exhibits filed and witnesses examined mandated under Rule 84 of the Civil Rules of Practice and the discrepancies in the number of documents exhibited. Hence directed the registry to call for report from the III Assistant Judge, City Civil Court, Chennai. Pursuant to this order, report was called for from the court concerned through the High Court Registry letter dated 01/09/2016. The present incumbent, due to efflux of time could not ascertain why the omission and discrepancies. Hence, replied to that effect on 30/07/2020. On verification with the registry, it is ascertained that the trial court judge who delivered the judgment on 28/04/2002 retired soon after. The appellate judge also is no more in service.

12. In the above said background, the case initially instituted in High Court on the Original Side in the year 1988.

To complete the circle has come back to High Court as Second Appeal. The error and omissions pointed earlier are not materially impediment for the Court to proceed with the second appeal since, the case is based on the correspondence between the parties and all the correspondence are in sequence of reply and response between the parties and same admitted by both parties.

13. On perusal of the records, this Court formulated the following questions of law:-

"1. Whether the courts below failed to consider the facts admitted by the plaintiff which are relevant to construe the construction of the letter of intent marked as Ex A-3 ?

2. Whether the court applied the principle of unjust enrichment properly in the given facts of the case ?

14. The learned counsel for the appellant relying on the judgements of the supreme court in ONGC Ltd -vs- Saw Pipes Ltd reported in 2003 (5) SCC 705 and Dresser Rand S.A. -vs- Bindal Agro Chem Ltd reported in 2006 (1) SCC 751 submitted that, though the letter of the plaintiff/respondent dated 09/08/1984 (Ex.A-3) termed as letter of intent, it amounts to acceptance of the offer resulting in a concluded contracts between the parties. The terms of the letter and subsequent communications between the parties clearly show the parties have acted on the document for a long period and had spent considerable amount of money and time on this deal. Therefore, the appellant/defendant is entitled to forfeit the 10% advance for the breach of contract by the plaintiff. The defendant need not prove actual loss or damages suffered. Under Section 73 of the Indian Contract Act, the party which suffers the breach is entitled for a reasonable compensation. It is ordinarily accepted trade practice and usage, in an executor contracts like supply of plant, machinery and its erection. fixing 10% advance for confirmation and forfeiture of that amount in case of breach

15. Per contra, the learned counsel for the respondent/plaintiff reading through few correspondence between the parties marked as exhibits contented that the courts below have rightly held that the contract was not concluded. The plaintiff did not issue firm order as per the letter of intent to conclude the contract. The first appellate Court while confirming the trial Court judgment referring Exhibits A-3 and A-11 had rightly held that the proposal made by the plaintiff is

not accepted by the defendant. Therefore, there is no concluded contract between the parties with regard to the installation of the Oxygen plant. Since no valid contract between the parties, forfeiture of the money for damages is not sustainable in law.

16.The principles of law for consideration in this case are:-

a) When a contract gets concluded;

b) In the absence of specific terms in the agreement, whether party in breach estopped from claiming refund of the money advanced;

c) In the absence of contract in contrary, is it an unjust enrichment to forfeit the advance money citing trade practice and usage.

17.Contract in simple term defined as an agreement between competent parties to do or to abstain from doing some act, for a consideration. Section 2 of the Indian Contract Act, which deals with interpretation clause indicates that an agreement can be reached by the process of offer and acceptance. Every transaction, to be recognized as a contract, must in its ultimate analysis, resolve itself into a proposal and its absolute and unqualified acceptance (as per the case law in Badri Prasad -vs- State of MP: AIR 1979 SC 706). Whether there is an absolute and unqualified agreement between the parties, the entire negotiation and correspondence should be considered. Binding promise can be inferred from the circumstances of a case (ref: Anson's Law of Contract, 29th Edition, 2010, page 30).

18.In H.G. Krishna Reddy And Co. vs M.M. Thimmaiah And Anr. AIR 1983 Mad 169 a Division Bench of this Court, had referred the below judgments which are apt for the point regarding concluded contract.

19.In Hatzfeldt Wildenburg v. Alexander, (1912) 1 Ch 284, Parker, J. observed thus-

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a

question of construction whether the execution of the further contract is a condition of term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

In *Harichand -vs- Govind*, AIR 1923 PC 47, the Privy Council has observed thus :-

"Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton*, (1857) 6 HLC 238, the fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement."

"Where all the terms of contract are agreed upon, but the parties desire that the contract shall go through the form of a formal document, then the mere fact that there is no agreement upon the shape that the formal document should take will not render the agreement in-conclusive. Where, however, parties expressly declare that the agreement is subject to a formal contract it has been held that these words indicate not merely the desire of the parties that the terms already agreed upon shall be put down in the shape of a formal document, but that they indicate something more namely, that the parties will have further to make up their minds in regard to the minor terms of the contract and that the contract will not

be deemed to be concluded till then. This is the effect of decided cases with regard to the implications of the special formula subject to a formal contract."

20. With the above broad understanding of the term contract, this court proceeds further to analyze the material evidence on records. The transaction between the parties had commenced from the letter of PW-1 S.Natarajan dated 28/04/1984. In this letter which is marked as Ex A-1, PW-1 has made a trade enquiry seeking budgetary quotation for 65 m³/Hr Oxygen and 40 M³/ Hrs. Acetylene plants. To this trade enquiry, the appellant vide its letter dated 04/05/1984 forwarded its proposal Nos. P-716 and P-716 A quoting Rs.29,10,000/- ex price calcutta. Thereafter, one Mr. M.K.Chhabra representative of the appellant has visited Chennai for finalization of placement of order. The respondent have agreed for the price and letter of intent with an advance of Rs.1,00,000/- issued subject to certain conditions. This document called as letter of intent dated 02/08/1984 is the document which has to be tested 'whether the spirit of the parties was to conclude the contract or only a counter proposal'.

21. The respondent in its letter of intent Ex A-3 has agreed for the rate and had also advanced Rs.1,00,000/- subject to following conditions:-

"The regular purchase order will be placed as soon as they get financial sanction from the financial institution. The price fixed at Rs.30,25,000/- (a) plant and machinery Rs 28,25,000/-, b) Rs 1,75,000/- for erection and commission and c) Package and Forwarding Rs 25,000/- totally Rs 30,25,000/-) shall be firm and no escalation charges on plant and machinery etc, are applicable upto the time of delivery i.e., 9 months from the placement of firm order."

22. This condition found in Ex A-3 has been relied by the respondent and the Courts below in isolation to hold that there was no concluded contract, since, the respondent did not get financial assistance till 27/06/1987. Hence, the respondent had no opportunity to issue firm order. The Courts below have omitted to look at Ex A-4 dated 27/08/1984 which was written to the respondent by the appellant immediately on receipt of the letter of intent Ex A-3. In this letter, the appellant has reminded the respondent about the assurance given by the respondent during discussion held at Madras, that they will get the necessary financial approval from the finance institution by the end of August, 1984.

23.The respondent never replied to the appellant letter Ex A-4, it kept silent for about five months even after the appellant sent two reminders letters dated 03/01/1985 and 18/01/1985 marked as Ex A-5 and Ex A-6 respectively. In these two letters the appellant had reiterated that the letter of intent was accepted on the clear understanding that the respondent will remit the balance amount towards advance soon therein. In the second letter Ex A-6, after accepting the request for third extension, the appellant had in unambiguous term had informed the respondent as follows:-

"it is imperative that the order with balance amount of advance reaches us by 31/01/1985 to enable us to supply you the plant with Japanese compressor. Otherwise it shall not be possible for us to hold the Japanese compressor anymore for you and we will be compelled to divert the Japanese compressor to another customer. Thereafter we shall supply you plant with Khosla compressor at the price prevailing at the time of receipt of your order."

24.Really if the letter of intent was only a counter proposal as found by the Courts below and contented by the learned counsel for the respondent, the respondent should have rescinded the contract, if not on receipt of the letter Ex.A-4 reminding the respondent about their assurance of getting loan by end of August, at least on receipt of the letter Ex A-6. Contrarily, on receipt of Ex A-6, the respondent had again requested further extension of time to pay quoting their difficulty in getting finance. In the letter Ex A-7 dated 28/01/1985 the respondent has stated as follows:-

"Our financial arrangements are in advanced stage and we are sure to get sanction before the end of February at any cost. Kindly bear with us till then. We shall start the payment at any moment as soon as we get the sanction orders during the course of February itself and request you to allow us time till then. "

25.The next letter from the respondent on 22/02/1985 (Ex A-8) was again a repeat of earlier letters expressing inability to get finance and extension of time till March end.

26. These letter seals the issue and answer the query whether the contract was concluded, in affirmative. In this case, on perusing the communications between the parties, it is clear that the contract concluded, Part payment made and accepted by the appellant. On the basis of the concluded contract the respondent had kept apart a Japanese compressor for more than 7 months for the supply under the contract expecting the respondent will honor their promise within the time as made during the negotiation. The 'firm order' referred by them was only a formal declaration of the concluded contract. The respondent at no point of time rescinded the contract or claimed that the letter of intent Ex A-3 has lost its validity. It was the erroneous finding of the first appellate court due to non examination of the trail of correspondence between the parties.

27. On looking at the conduct of the respondent, we could see that, except seeking time for further payment of advance money, the respondent never claimed the contract was not concluded and lack privity. For the first time in the letter Ex.A-28 dated 30/07/1987 it was averred that the transaction arrived between the parties is not a concluded contract. This contention is contradictory to the promise the respondent made when they sought time for payment. Taking their promise the appellant extended the time with specific condition that they will not be able to supply the Japanese compressor if the promise is not kept and the price will be as on the date of payment. In fact, the respondent had implicitly accepted the condition and had made further payment of Rs 25,000/- on 28/03/1985 which again not the full advance money but only part amount short of Rs 1,60,000/-. The balance money was paid only on 28/04/1985 after expiry of the time granted by the appellant for payment of the entire 10%.

28. On analyzing the letter of intent Ex A-3 along with the subsequent communications which are marked as Ex A-4 to A-8 makes further clear that the agreement between the parties concluded on 02/08/1984. Payment of money as per the terms, supply of plant and erection are all performance post agreement. The respondent had not paid the advance money as orally promised during the discussion or later as committed in their letters referred above. At the request of the respondent time for payment was extended thrice. In the letter dated 22/02/1985 (Ex A-8) the respondent had sought further time till end of march 1985 stating that,

"as anticipated earlier we have not

received financial sanction till date. However we requested Mr. Chhabra to bear with us till March end as we are confident of getting our financial clearance from the financial institution by then. We hope you will appreciate our financial position and our inability to release our order earlier than March end."

29. Accepting this request, the appellant had given extension of time. The letter of the appellant dated 26/02/1985 Ex A-9, reads as below:-

"In view of the difficulties you explained to me and your request vide your letter dated 22/02/1985 handed over to me I am pleased to advise you that management has reconsidered the entire case and has agreed as a very special case to hold the Japanese compressor for you on the clear understanding that your firm order with balance amount towards initial advance reaches us by 29th March 1985. There after we shall supply you plant with Khosla compressor at the price prevailing at the time."

30. The respondent has not paid the balance amount of Rs.1,85,000/- before 29th March 1985. Made only a token payment of Rs.25,000/- on 28/03/1985. Since the extended time for payment expired, the appellant on receiving the part payment, offered to credit the demand draft after 12/04/1985. Indicating the respondent to pay the balance Rs 1,60,000/- by then for supply plant with Japanese compressor. Failing which they can supply only Khosla compressor to the plant and it costs Rs 32.00 lakhs Ex works Calcutta as on that date. After receiving this letter Ex A-10, the respondent had paid the balance Rs 1,60,000/- on 30/04/1985 much after the time granted for retaining the Japanese compressor.

31. The appellant had in its letter dated 7/05/1985, had acknowledged the receipt of the full advance money of Rs 2,85,000/- (Rs 1,00,000/- on 2/08/1984, Rs 25,000/- on 28/03/1984 and Rs 1,60,000/- on 30/04/1984) and in reiteration of the earlier communication had informed that they have diverted the Japanese compressor to another customer since the

payment was not made by 12/04/1985.

32. After all these default and delay, the respondent in its letter dated 13/05/1985(Ex A-12) started negotiating for Japanese compressor and the old price agreed under the letter of intent during the month of August 1984. The facts as seen from this letter Ex A-12, the finance institution were not ready to advance loan for any new oxygen plant in Tamilnadu due to market saturation. It is not the default of the appellant, but the inability of the respondent to get finance in time was cause for the termination of the contract. The appellant in fact through their letters dated 19/07/1985 and 20/08/1985 had expressed their readiness to install the plant with Khosla compressor within March, 1986 and awaiting for confirmation and firm order.

33. Exs.A-15 to A-18 are the telegrams and letters from the appellant to the respondent raising queries regarding the confirmation of the order, when the civil work at site to be completed, payment of balance consideration and expected date to lift the plant. The representatives of the appellant company had visited Madras and negotiating with the respondent frequently. The respondent had communicated in its letter 17/01/1986 that they are willing to take Khosla compressor instead of Japanese compressor but at the price must be as fixed under the letter of intent dated 02/08/1984. The letter of the respondent is marked as Ex A-19. The claim of the respondent could have been well appreciated, had the respondent informed this intention a year before when the appellant vide its letter dated 18/01/1985 (Ex A-6) made clear that it is difficult to retain the Japanese compressor any further and the Khosla compressor will cost more. The price will be as on the date of payment.

34. It is also pertinent to note that after the receipt of the letter Ex A-19, the appellant had sent a letter dated 24/02/1986(Ex A-20) wherein it had agreed to supply either Khosla or Kaji make Japanese compressor which ever suits the requirement of the respondent. However, on account of steep rise in prices for the various inputs they have expressed the impossibility to hold the prices as per the letter of intent Ex A-3 dated 02/08/1984 and as a very special case they are ready to supply the plant on additional costs of Rs 1,25,000/-. The appellant gave time till 7th March, 1986 for exercising the said option. The respondent had not exercised this option also. At last, vide its letter dated 18/03/1987 (Ex A-21) the respondent had intimated the appellant that, their request to change the location of the plant from Manamadurai to Madras has been

accepted by SIPCOT (financial institution) so had requested to issue fresh proforma for the plant and machinery.

35. After all these correspondence suddenly, the respondent has sent a telegram confirming the same through letter dated 27/06/1987 (Ex A-25):-

"Due to financial difficulties we are unable to proceed with our oxygen plant proposal. Hence we request you to arrange return our token advance money lying with you with interest as early as possible."

36. Again a letter dated 15/07/1987 demanding the advance money back with interest was sent to the appellant and to this letter the appellant has replied that in case of cancellation of order, the initial down payment shall not be refunded and company shall also recover all the costs and expenses actually incurred in respect of the above order.

37. From these communications, it is proved by the appellant that they were ready to perform their part of contract at all time. The respondent was not able to pay even the 10% advance in time despite extension of time thrice. The appellant had given sufficient time for the payment of this money and also made a clear statement that if the respondent fail to pay the full advance money of Rs 2,85,000/- by 12/04/1986 the last extended period, they will not be able to supply Japanese compressor at the cost agreed on 02/08/1984. The respondent had paid the last installment of advance on 30/04/1986. The parties were even thereafter negotiating and the appellant was ready to supply the Japanese compressor on payment of additional Rs 1,25,000/- being the cost escalation between 02/08/1984 to 24/02/1986. (Ex A-20). The respondent response for this was to issue fresh proforma since they have changed the plant site from Manamadurai to Madras (Ex A-21 dated 18/03/1987). Finally, the respondent cancelled the order quoting financial difficulties. It is to be recollected that even when it tendered Rs 25,000/- on 28/03/1985 the respondent has expressed its difficulty in getting finance from the institution and had raised the fund from own source to pay Rs 25,000/- (Ex A-10).

38. The evidence available establishes that the offer of the appellant was accepted by the respondent which has resulted in the letter of intent Ex A-3. The time for payment of 10% advance

of the contract amount was orally fixed by end of August 1984. However on the request of the respondent the time was extended thrice. The last date extension of time was on 12/04/1985. The respondent implicitly accepted the condition for revised price and Khosla compressor by tendering Rs 1,60,000/- towards down payment advance. After negotiating for a year, the respondent wanted the plant to be supplied at the old price with Japanese compressor. When the appellant was ready to supply the Japanese compression with additional cost of Rs 1,25,000/- due to cost escalation in 18 months, the respondent had asked for fresh proforma in view of it shifting the plant site. From the conduct of the respondent it is obviously seen that it had no financial potential on its own to perform its part of contract. Citing the difficulty in getting loan it has sought for extension of time for nearly 7 months. Thereafter also the respondent was not ready to perform its part of contract since the finance was not forthcoming. At last it dropped the project due to financial difficulties and cancelled the order. Thereafter the defendant had started demanding the advance money with interest.

39. In *Tan Ah Boon -vs- State of Johore*, 1936 AIR (PC) 236 = CDJ 1936 PC 060, the Privy Council in a suit filed for damages for breach of contract held that, "No plaintiff can maintain such an action unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract".

40. In the instant case, the plaintiff seek for return of money advanced, whereas the defendant states that it had been had forfeited for the breach of contract. In Ex A-27 letter dated 17/07/1987 the defendant/appellant had stated that the initial down payment made for the purchase of plant shall not be refunded and the company shall also recover all the costs and expenses actually incurred. As a special case, they are not insisting on the additional expenses incurred.

Though the defendant had said that they are entitle for additional expenses, the defendant has not filed any counter claim or suit for damages. In the trial they have not produced any documents specific to the costs or expenses incurred by them pursuant to the agreement. Nor material placed before the court regarding the trade practice or usage of collecting 10% of the project as advance and if breached to forfeited it. On the combined reading of section 73 and 74 of the Contract Act, the forfeiture towards damages whether liquidated or unliquidated, it must be reasonable compensation and not an unjust enrichment.

41. From the trail of communication, the facts manifested are: (a) the appellant had kept the Japanese compressor for 7 months from the date of intent without diverting it to other customer; (b) the representative of the appellant had visited Madras on several occasions to negotiate the deal and to get through the contract. Almost in all the communications the visit of the appellant representative from Culcatta to Madras is mentioned. Leading to an inference that, more than 30 times the representative of the appellant company had come down to Madras from Culcatta for negotiation with the respondent.

42 Compensation for loss or damage caused by breach of contract and forfeiture of money in an aborted contract is provided in Section 73 and 74 of the Indian Contract Act. The Constitutional Bench of the Hon'ble Apex court in Fateh Chand - vs- Balkishan Dass (CDJ 1963 SC 020= AIR 1963 SC 1405), at paragraph No.10 has held as follows:-

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases

(i) where the contract names a sum to be paid in case of breach and 'ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of tile case. jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according, to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach.

Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

43. In ONGSC Ltd -vs- Saw pipes Ltd, (cited supra), the Hon'ble Apex Court has held as follows:-

"From the aforesaid discussions, 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 consequences of the breach of a contract. "

44. This Court on considering the terms of the contract and the conduct of the contracting parties manifested from the trail of correspondence holds that (a) Ex.A-3 is the result of a concluded contract; (b) The respondent is the party who breached the contract; (c) The appellant is entitled for reasonable damages. In other words, the appellant is entitled for forfeit a reasonable amount towards damages; (d) Proof of

actual damage is not a mandatory requirement. 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 contract.

45. Back to the facts, the money in dispute Rs.2,85,000/- is with the appellant since 1986. The modified decree of the first appellate court is to return the same with 12% interest from the date of suit (25.04.1988) till the date of decree (28.04.2003) and thereafter, at 6% interest till realization without costs. This Court therefore holds that having enjoyed the principal of Rs.2,85,000/- for the past 35 years and litigating over it, the reasonable compensation for the breach shall be the interest accrued on the principal, which on rough estimation if calculated at 12% Simple Interest per annum, it will be about 4 times than the principal amount. Hence in the opinion of this court, the interest enjoyed by the appellant for all these years shall be the reasonable compensation in the absence of proof for actual loss and enjoyment.

46. Accordingly, the first question of law is answered in affirmative. The 2nd question of law is answered in negative.

47. In the result, the Second Appeal is partly allowed. The modified decree of the lower appellate court regarding the interest portion is set aside. Decree is restricted to the principal amount of Rs.2,85,000/- without interest and costs. However, from the date of this judgement till the date of realization the plaintiff shall be entitled for interest at 12% pa. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jbm

To

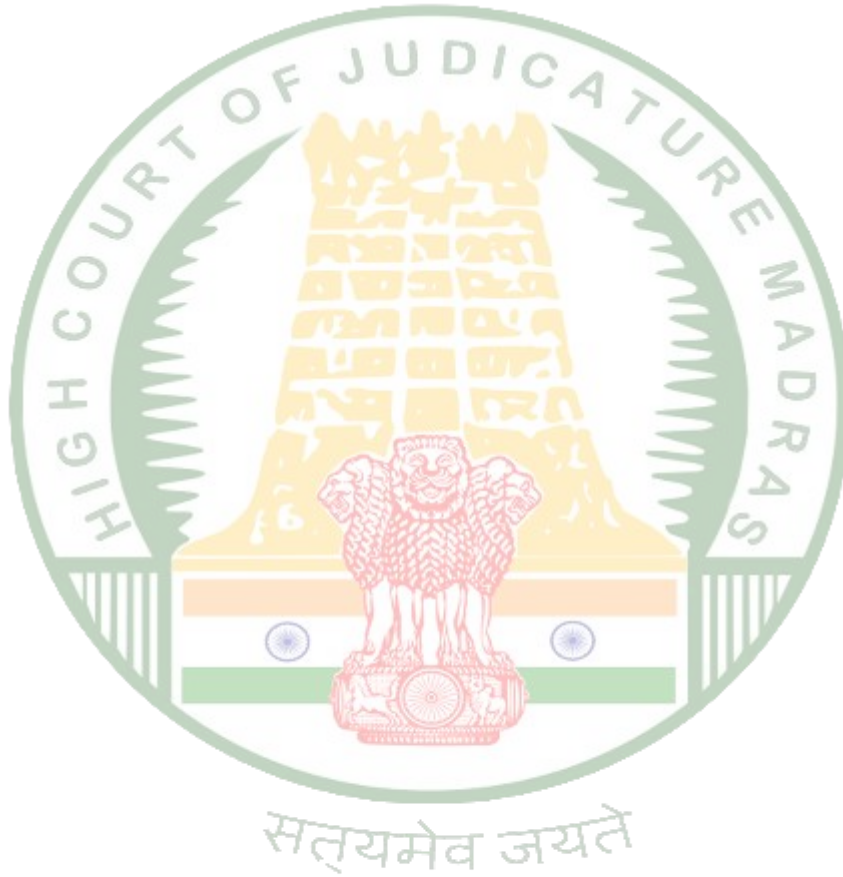
1. The IV Additional Judge,
City Civil Court, Chennai.

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

Copy to:
The Section Officer,
V.R. Section, Madras-104.

S.A.No.1150 of 2009

RSK (CO)
RMP (10/12/2020)



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