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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.08.2021	PRONOUNCED ON: 15.09.2021
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CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.No.1142 of 2009

S.Jesu

..Appellant/Appellant/Plaintiff

Vs.

1. The Superintending Engineer,
TWAD BOARD.

2. The Executive Engineer,
TWAD BOARD,
both having office at
World Bank Project, Circle 8,
Bharathi Park Road,
Coimbatore-43.

..Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the Order dated 31.01.2006 passed in A.S.No.216 of 2003 by the I Additional District Court, Coimbatore, confirming the judgement and decree dated 04.09.2003 passed in O.S.No.1264 of 1996 by the III Additional District Munsif Court, Coimbatore.

For Appellant : Mr.C.Ravichandran

For Respondents : No appearance.

J U D G M E N T
(Heard through video conferencing)

This Second Appeal has been directed against the judgement and order of the I Additional District Court, Coimbatore, dated 31.01.2006 passed in A.S.No. 216 of 2003.

2.The appellant herein is the plaintiff and the respondents herein are the defendants in suit. For the sake of convenience the appellant is referred as the plaintiff and the respondents



are referred as the defendants 1 & 2 during the course of this discussion.

3. The avernments of the parties in brief:

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The plaintiff was a contractor registered with TWAD Board under unemployed Engineers Scheme. In response to the tender dated 11.11.1987 called by the defendants Department for the erection of certain structures for supplying drinking water within the Coimbatore Corporation, the plaintiff submitted his quotation and the same was accepted by the defendants. An agreement to this effect was executed between the plaintiff and the defendants on 25.03.1988. However the plaintiff was given with the work order on 21.01.1988.

3.1. Subsequent to the issuance of the work order, taking sand from Madhampatti Quarry for carrying out the work was not feasible. So the plaintiff requested the 1st defendant to change the quarry and also make necessary arrangement for availability of water to test the pipes laid down for the project. Despite the request sent by the plaintiff on 08.03.1988, the 1st defendant could change the quarry only on 10.05.1988 and he approved another quarry was situated beyond 65 kilometers.

3.2. Due to the delay and other inconvenience as stated above, the plaintiff could not carry out the work immediately. Considering the allocation of the quarry at faraway place, the 2nd defendant has asked the plaintiff to submit the revised rate and thereafter asked him to attend the meeting on 03.06.1988 for revision of rates. All of a sudden, the 2nd defendant sent a letter dated 31.05.1988, by stating that if the work is not completed the contract will be terminated.

3.3. The plaintiff sent a reply on 02.06.1988 and explained about his inability to complete the work due to the change of circumstances. Even before the discussion was over, the defendants had unilaterally revised the rate at their whims. Since the plaintiff could not accept the revised rate forced on him, he did not carry out the work. Thereafter the defendants sent a letter by cancelling the contract vide letter dated 11.07.1988. The said cancellation was illegal and against the principles of natural justice. The deposit amount was also not refunded to the plaintiff after cancelling the contract.

3.4. Again on 11.01.1994 the 2nd defendant sent an another letter in LR.No.6852F 102/JD03/DB stating that the Board suffered a huge loss by making the work done through an another agency and hence the plaintiff should pay a sum of Rs.5,63,322.86 as damages. The amount so claimed by the defendants as damages is illegal and arbitrary, beside it is



barred by limitation. Hence the plaintiff has filed a suit for declaring the letter demanding compensation dated 11.01.1994 as null and void and consequently, for permanent injunction restraining the defendants from any manner implementing the said order by resorting to any recovery proceedings under Revenue Recovery Act.

4. The written statement of the defendant in brief is as under:

The terms and conditions enlisted in the agreement would bind the plaintiff since he has signed the contract only after fully understanding the same. The work was not carried out and completed owing to his lethargy. Only after holding the discussion with the plaintiff, the 2nd defendant fixed the rate at Rs.82.49 /M3. Even if the plaintiff had suffered any inconvenience and compelled to execute the contract, he could have settled the same by invoking the arbitration clause after completing the contract work. Despite knowing that the scheme is a time bound one, the plaintiff failed to execute the work at the earliest. The plaintiff has caused the loss due to his failure to execute his part of contract. The cause of action mentioned by the plaintiff is false. The plaintiff has filed the suit without following the mandates of Section 80 CPC Notice. Hence the suit is liable to be dismissed.

5. The Trial Court has framed the following issues:

"Issues framed on 16-12-96:

i) Whether the plaintiff is entitled to declaration and consequential permanent injunction as prayed for?

ii) To what relief, if any?

Additional issues framed on 04.09.2003

வாதிக்கு எதிரான பிரதிவாதியின் கோரிக்கை காலதோஷத்தால் பாதிக்கப்பட்டுள்ளதா?

6. Before the trial Court, on the side of the plaintiff one witness has been examined as P.W.1 and 12 documents have been marked as Ex.A.1 to A.12. On the side of the defendants two witnesses have been examined as D.W.1 and D.W.2 and Ex.B1 to B21 have been marked.

7. After the conclusion of trial, the suit filed by the plaintiff has been dismissed by the Trial Court on 04.03.2003. The First Appeal preferred by the plaintiff before the I Additional District Court, Coimbatore in A.S.No.216/2003 was also dismissed by concurring with the judgment and decree of the trial Court. The plaintiff having got aggrieved over the said judgment of dismissal has preferred this Second Appeal. The Second Appeal has been admitted on the following three substantial questions of law:



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"1.Whether the Courts below have committed an error in dismissing the suit for want of notice under Section 62 of the Tamil Nadu Water Supply and Drainage Board Act, when no such plea was raised and no issue in this regard was framed ?

2.Whether the Courts below have committed an error in holding that the claim made by the respondents was not barred by limitation?

3.Whether the courts below committed an error in dismissing the suit on the ground of existence of an arbitration clause in the agreement between the parties, when the arbitration clause was not invoked by the defendants before filing their written statement?"

8.The following judgments have been relied on by the Appellant.

S.No	Case Name	Citation
1	Tamil Nadu Civil Supplies Corporation Limited. Vs.M/S. Food Fats Fertilizers Limited (D.B)	2005 (2) LW Page 436
2	Rajagopala Naidu vs Aiyyaswamy Chettiar And Ors	1965 (2) MLJ Page 135
3	The Idol of Sri Selvamuthu Mariamman Vs. Union of India	2009 (4) CTC 249
4	Food Corporation of India Vs. M/s.Thakur Shipping Co and others.	(1975) 4 SCC Page 815

9.Before venturing to answer the substantial Questions of Law, some facts involved in this case have to be highlighted, as they can not be isolated while dealing with the substantial questions of law.

10.The plaintiff in whose favour the contract was allotted, had entered into an agreement with the first defendant vide Ex.B1 on 25.03.1988. However, the work order has been issued on 21.01.1988. But the allocation of the work place was demarcated only on 22.02.1988. After executing the contract and



before commencing the work, there was some local problem in taking sand from the Madampatti quarry. Due to that the plaintiff was not able to get due permission to take sand from the said quarry for the purpose of commencing the work as agreed by him. So he addressed the second defendant department on 08.03.1988 (Ex.A2) and sought permission to change the quarry to somewhere else. He had also pointed out that there was no water within 1 kilometer radius for testing the pipes, as required in the contract.

11.The defendants accorded permission to take sand from Amaravathy river at Velappan Palayam near Tharapuram in the month of May 1988. The said fact was not denied by the defendants. Since the quarry was at a distance of 65 Kilometers it escalated the cost. Hence the plaintiff submitted the revised rate and invited the defendants for negotiations and that has been accepted by the defendants also. All of a sudden the defendant officials fixed the rate unilaterally and called upon the plaintiff to accept the same and execute the work. This had compelled the plaintiff to express his grievance and his inability to execute the work. While the said issue was pending, the second defendant sent Ex.A.7 warning notice.

12.The revision of rate due to change of circumstances had impacted the consideration for executing the contract. Once the defendant officials felt the justification to fix a new rate due to change of circumstances, it is open to the other party also to bargain his rate to the best of his advantage. If no consensus could be arrived between the parties the contract has to be cancelled and for which no one can be made liable. The Board officers cannot act in an arbitrary manner by compelling the plaintiff that he should accept the revised terms or he is liable to pay the compensation, in case the contract is re-allotted to any 3rd party.

13.The plaintiff once again reiterated his stand with regard to the rate after receiving the notice. If the higher rate quoted by the plaintiff due to change of quarry is not acceptable to the Board, it is open to the Board to cancel the contract and give it to someone else. But without resorting to such a course, the second defendant sent a letter dated 17.06.1988 Ex.B5 by finding fault with the appellant for not restoring the work and imposed a fine of Rs.1,000/-. And he also terminated the contract by sending a letter dated 11.07.1988 (Ex.A9).

14.There was exchange of communication between the parties until 11.07.1988 on which date, the contract was terminated. It is crucial to note the following averments in Ex.A9 letter which terminated the contract.



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"(3) Further in this office letter 7th cited, it was informed that the items 2,7,6 and 9 of the said agreement involving sand will be carried out through other agencies at your risk and cost, if you are not agreeable for the revised rates communicated in this office letter 5th cites. This matter was also discussed by the undersigned with you in person at this office on 3.6.88. Further in your letter dated 15.06.88 you have reiterated for the acceptance of the rates offered by you in your letter dated 16.05.88. for the items 2,7,8 and 9 of the said agreement. As per conditions under note under schedule 'C' lead statement of the said agreement it is stated that if the quarry itself is ordered to be changed by the TWAD Board, then payment will be made only as per TWAD Board rules and regulations with references to the actual lead to the quarry. As such your rates are not acceptable and you are bound to accept the revised board rates communicated to you as per conditions of agreement.

(3) Further the site for the above work was handed over to you on 22.2.88 and as per the rate of progress defined in the agreement for this work 70% of the work should have been completed by you, but you have not kept up the above progress you have merely executed earthwork excavation partly and your total out turn is about less than 1%.

Further you have totally suspended the work from 9.4.88 onwards. Despite notice from AEE.III/III, Singanallur and from this office to speed up the progress, you have not resumed the work. As such a fine of Rs.1000/- has been imposed on you vide this office letter 9th cited for the very slow progress of work."

15.The defendants omitted to notice that a substantial portion of the time had got already lapsed in getting clarity about the new quarry and revised rates due to the change of circumstances etc., The delay on the part of the defendant officials in responding to the urgent and unforeseen situations is also conspicuous from these communications.

16.Having cancelled the contract as early as on 11.07.1988, the defendants kept quiet for 6 years and only thereafter Ex.A.10 demand was sent for claiming a sum of Rs.5,63,322.86 towards compensation for getting the contract executed by some



other agency.

17. Admittedly the plaintiff did not challenge the termination of contract. It is understandable that he did not intend to burn his fingers by pressing his right to undertake a work which he considered a loss for him. Under such circumstances nothing would have prevented the defendants from getting the work done by some other agency, immediately after the termination was effected on 11.07.1988. Despite the time limit for the work in question was 6 months, the defendants kept quiet for nearly 5 years and thereafter had chosen to give the work to some other agency and got it completed. It cannot be comprehended under what authority or rule, the plaintiff is liable to pay the escalation of price that had happened due to the supine indifference on the part of the defendants themselves in reallocating the work to a new agency.

18. The sensitivity of the public interest in executing the contract within a time frame equally lies on the defendants as how it obligates the contracting agencies. In fact the object of constituting the Board itself is to see these projects executed in a phased and cost effective manner. Having failed to re-allot the contract to any other new agency immediately after the contract was terminated on 11.07.1988, the defendants cannot demand that the loss was caused due to the failure on the part of the plaintiff and send a notice to this effect on 11.01.1994. The unfairness and the arbitrary exercise of power by the defendants did not catch the attention of the Court, despite the claim itself is barred by limitation.

19. Neither the trial Court nor the First Appellate Court has chosen to frame an issue as to whether the demand for compensation is within the period of limitation. The Courts below have misunderstood themselves that the demand of compensation should be treated as demands for revenue arrears to the Government and it has to be recovered under the Tamil Nadu Recovery Act and hence it is saved under Section 65 of TWAD Board Act. Sec. 65 of TWAD Board Act reads as under:

"65. Mode of recovery of dues.- If any amount due to the Board in accordance with the terms of a contract or otherwise or any sum payable in connection therewith, has not been paid, the Board may, without prejudice to any other remedy provided by law, recover such amount or sum as arrears of land revenue."

20. It is to be noted that the demand made through Ex.A.10 is not towards any arrears or dues payable to the defendant TWAD board. It is a demand for compensation made after the expiry of



a period of limitation. Or in other words it is a claim for money made after 3 years from the date of termination of the contract. And the entitlement of the said claim had not yet been adjudicated by any competent Court or Forum in order to become a recoverable revenue to the Government. And the claim as it appears from the date of demand makes it clear that it has been made beyond a period of three years from the date of termination of contract and hence it is barred by limitation.

21.The Hon'ble Division Bench of this Court has held in the decision reported in 2005(2) LW Page 436 [Tamil Nadu Civil Supplies Corporation Limited. Vs. M/S. Food Fats Fertilizers Limited] that the Tamil Nadu Civil Supplies Corporation ought to have filed the suit for compensation on the basis of breach of contract within 3 years from the date of breach. In the said judgment it is held as under:

"12. Now the question to be decided is whether the period of limitation starts from the date of cancellation of the agreement or from the date of issuance of fresh tender. To decide the same, it is necessary to see the [Article 55](#) of the [Limitation Act, 1963](#), which is relevant to the case on hand.

13. [Article 55](#) of the [Limitation Act](#), reads as follows:

Description of Suit	Period of Limitation	Time From Which Period Begins to Run
55.For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.

16.A bare reading of the above article reveals that for compensation due to the breach of any contract, the period of limitation is three years, which runs from the date of contract is broken or in the event of breach is a continuing one, when it ceases

17.In the case on hand, it is not disputed that the contract between the plaintiff and the defendant was



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broken on 17.4.1984 and therefore, the plaintiff should have filed a suit for compensation within three years from 17.4.1984 as per the Article 55 of the Act. However, the plaintiff has filed the above suit only on 29.6.1987, i.e. after the expiry of three years and therefore, the contention of the learned counsel appearing for the defendant has to be accepted that the suit filed by the plaintiff is barred by limitation.

18. It is seen that the learned Judge of this Court has discussed the entire transaction effected by the parties, and thereafter, he has come to the conclusion that the suit filed by the plaintiff Corporation is barred by limitation. In such circumstances, the learned Judge, rightly dismissed the suit."

[Emphasis supplied]

22. As per Art. 55 of the Limitation Act, to claim compensation for breach of contract, the time for limitation will start running from the date when the contract is breached or if the breach is a continuing one from the date when it ceased to continue. As it has already stated that after the defendants had cancelled the contract on 11.07.1988, the limitation started to run from the said date. So the limitation would have ended by 10.07.1991 itself. Hence it is a clear case, where the claim itself is barred by limitation and the substantial question of law No.2 is answered in favour of the Appellant.

23. It is further submitted by the defendants that the suit itself is not maintainable for want of mandatory pre-litigation notice under Sec.62 of TWAD Board Act. The two months notice contemplated under Sec.62 of the TWAD Board Act is similar to the notice contemplated under Sec.80 CPC. Though the TWAD Board Act does not have any provision to dispense with the notice, Sec.80 (2) CPC has got a provision to dispense with the notice. Since Civil Procedure Code is a Major Act, the procedure prescribed therein is applicable for those areas about which the minor act is silent.

24. The learned First Appellate Court has observed that the plaintiff has filed a petition to dispense with the notice under Sec.80 (2) CPC notice while filing the suit and obtained the leave of the Court. While so, it cannot be claimed that the suit is barred for want of notice. Further, the object of mandating the issuance of pre-litigation notice to the Government Agencies is to make the Government sensitive about the claims made against it and to see those matters are settled in a fair manner even before a suit is brought before the Court.



25. In an earlier decision of this Court reported in 2009(4) CTC 249 [The Idol Of Sri Selvamuthu Vs Union Of India on 27 April, 2009], it is held that once the parties are allowed to contest the suit on merits, the Court can not later dismiss the suit for want of mandatory pre-suit notice. In the said judgment it is held:

"8. In this appeal, the appellant contended that the trial Court having held that it has no jurisdiction and the suit is not maintainable for want of Section 80 C.P.C. notice should not have given finding on other issues and ought to be dismissed the suit on those two issues. While answering Issue No.5 regarding Section 80 C.P.C. notice, it was contended by the learned counsel appearing for the respondent that there was no urgency for filing the suit and according to the plaintiff, the possession of Kalyanamandapam was taken from them in the year 1982 and the suit was filed only on 11.07.1984 viz., more than two years after taking over the properties of the respondent/defendant and hence, there was no urgency as pleaded by the appellant for filing the suit without Section 80 C.P.C. notice and though the notice under Section 80 C.P.C. notice was dispensed with by the Court, it was without notice to the respondent/defendant and therefore, they are not bound by the above order and the suit was not maintainable as statutory notice under Section 80 C.P.C was not given to them. The learned Sub Judge also agreed with the contention of the learned counsel appearing for the respondent and gave a finding against the plaintiff on that issue. In my opinion, having allowed the parties to contest the suit by adducing oral and documentary evidence, it would be travesty of justice if the suit is dismissed on that ground for want of Section 80 C.P.C notice. Therefore, in my opinion, though the statutory notice was not given, having regard to the subsequent events by allowing parties to contest the suit on merits, the Court should not have dismissed the suit on the ground of want of notice."

26. So, the above technical aspect of not issuing the notice cannot be brooded after allowing the parties to contest the suit on merit. At the risk of the repetition, it is clarified that in this case leave to dispense with the mandatory notice has already been obtained by the plaintiff. Even if the leave to dispense with the notice is not obtained, such an issue ought to have been dealt as a preliminary issue even before other issues



are tried. Neither the Court on its own nor the defendants by way of filing a petition has raised a preliminary issue as to the maintainability of the suit for want of mandatory notice. Though it is not wrong to raise an issue of maintainability and file a petition under Order VII Rule 11 CPC to reject the plaint after the issuance of the summons by the Court, if such an option is not exercised by the defendant and he had subjected himself to trial, he cannot once again come and claim that the suit is not maintainable. In this case the Courts below have not framed any issue as to the maintainability of the suit for want of mandatory notice. Under such circumstances the case of the plaintiff which had been tried at length ought not to have been dismissed for this reason. Without a valid issue on this point, the plaintiff will not have any opportunity to defend his suit on this point. The irony is that the learned first Appellate Court has observed in the judgment itself that the plaintiff had obtained the leave to dispense with the notice. Having allowed the plaintiff to file the suit by getting the leave of the court to dispense with the mandatory pre-suit notice and having allowed the parties to contest the suit on merits, the courts below ought not to have dismissed the suit on the ground that the plaintiff has not complied the issuance of mandatory pre-suit notice. Thus the substantial question of law No.1 is answered in favour of the Appellant.

27.It was also observed by the courts below that in the agreement itself, there is an arbitration clause and the aggrieved parties should have invoked the said clause and settle their claim before an arbitrator and it has got no right to file a civil suit. Once the contract is terminated the plaintiff is a 3rd person and the terms of contract will not bind him anymore. Even if it is claimed by the defendants that they are still governed by the contract and that the jurisdiction of the Civil Court ought not to have been exercised, then the defendants ought to have filed an application under Sec.8 (1) of the Arbitration Act before filing written statement and requested the Civil Court to refer the matter for Arbitration. The defendants omitted to file any application under Sec. 8 (1) of the Arbitration Act. Instead they had subjected themselves to the jurisdiction of Civil Court and contested the suit. Hence the defendants are not entitled to claim that the Civil Court has no jurisdiction and thus the substantial question of law No.3 is also answered in favour of the Appellant.

In the result, this Second Appeal is allowed and the judgment dated 31.01.2006 passed in A.S.No.216 of 2003 by the learned I Additional District Judge, Coimbatore, in confirming the judgement and decree dated 04.09.2003 passed in O.S.No.1264 of 1996 by the learned III Additional District Munsif, Coimbatore, are set aside and the suit is decreed as prayed for.



No costs. Consequently, connected Miscellaneous Petition if any are also closed.

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Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jrs

To

1. The I Additional District Court,
Coimbatore.
2. The III Additional District Munsif Court,
Coimbatore.

Copy To

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

+1cc to Dr.C.Ravichandran, Advocate, S.R.No.46762

S.A.No.1142 of 2009

GJ(CO)
RGA(31/01/2022)