BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on: 11.02.2021
Pronounced on: 25.02.2021
THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
S.A(MD)Nos.193 and 194 of 2015

In both appeals:

Mohamed Mohideen ...Appellant/Respondent/Plaintiff in SA.(MD).No.193 of 2015
... Appellant/ Appellant/Defendant In S.A.(MD).No.194 of 2015

- Vs -

M/s.Bharath Heavy Electrical Limited,
Tiruchirappalli,
Represented by its
Deputy General Manager/mm/FB/CCC/Disposal Stores
... Respondent/Appellant/Defendant in SA.(MD).No.193 of 2015
... Respondent/ Respondent/ Plaintiff In S.A.(MD).No.194 of 2015

PRAYER in both appeals: Second Appeals are filed under Section 100 of Civil Procedure Code against the judgment and decree of the learned Principal District Judge, Trichy made in A.S.Nos.56 and 119 of 2011 dated 30.04.2012 in reversing the judgment and decree of the learned 2nd Additional Subordinate Judge, Trichy made in O.S.Nos.135 of 2006 and 486 of 2007 dated 29.01.2010.

In both appeals:

For Appellant : Mr.K.K.Senthil

For Respondent : Mr.K.Prabhakar

C O M M O N J U D G M E N T

These two Second Appeals arise out of cross suits.

2. O.S.No.135 of 2006 was filed by the appellant herein seeking recovery of a sum of Rs.1,08,500/- being the earnest money deposited by him pursuant to the contract entered into between him and the defendant/respondent herein for removal of coal ash from the respondent's unit as per the tender conditions dated 13.04.2005. The plaintiff would claim that he had entered into a contract for removal of coal ash at Rs.427.60 paise per metric ton. The contract was awarded to him as he had offered highest price for the coal ash. The respondent company demanded excise duty for the price of the coal ash. Claiming that coal ash is not a exigible commodity as per the judgments of the Hon'ble Supreme Court, the plaintiff/appellant herein objected to levy of excise duty and sent a protest letter. He also cleared the coal ash for the first four months based on work

orders issued by the respondent company and paid the excise duty under protest. Since the respondent company did not accede to the demand made by the appellant and required him to get clarification from the Excise Department regarding the levy of excise duty on coal ash, the appellant had sought for such clarification. After some delay, the Excise Department clarified on 19.09.2005 that the coal ash is not a exigible commodity and therefore, the demand of excise duty made by the respondent company is unjust. In the interregnum, the appellant failed to clear the coal ash for more than 10 days. The respondent company terminated the contract and forfeited the earnest money of Rs.1 lakh deposited by the appellant. Contending that termination and the consequent forfeiture are illegal, the appellant had filed the suit in O.S.No.135 of 2006 for the relief stated supra.

3. The suit was resisted by the respondent contending that there was a genuine doubt about the exigibility of the product namely, coal ash and the plaintiff/appellant was required to get it clarified from the Excise Department. The performance of the contract, according to the respondent, does not depend on clarification that was sought from the Excise Department. Therefore, according to the respondent, the appellant was bound to carry out the terms of the contract as it was specifically agreed that removal of coal ash from the premises of the respondent must be a continuous process and it should not be stopped. It was also contended that stoppage of work by the appellant for 10 days amounted to breach of contract which enabled the respondent to terminate the contract and forfeit the earnest money. The respondent also relied upon the relevant clauses of contract which enables it to cancel the contract and to terminate the investment.

4. The respondent came up with another suit in O.S.No.486 of 2007 seeking recovery of a sum of Rs.1,22,090/- being the loss incurred by it due to the stoppage of work by the appellant. This suit was resisted by the appellant contending that termination itself is illegal and the stoppage of work was due to the attitude of the respondent company in not co-operating with the appellant regarding the payment of excise duty for the goods involved in the contract namely, coal ash.

5. Both suits were tried together. Evidence was let-in in O.S.No.135 of 2006. The plaintiff in the said suit was examined as P.W.1 and Exts.A1 to A13 were marked. The Deputy Manager of the defendant was examined as D.W.1 and Exts.B1 to B.72 were marked.

6. On a consideration of the evidence on record, the learned trial Judge came to the conclusion that though the appellant was not justified in stopping the work for a period of 9 days and the termination of the contract was valid. The trial Judge however held that the forfeiture of the earnest money was unjust. According to the trial Court, the dispute relating to payment of excise duty on

coal ash should have been resolved by the parties in a much better manner. The trial court also concluded that the respondent company adopted an unco-operative and dogmatic approach on the question of exigibility of the product namely, coal ash. The trial court concluded that the respondent had suffered certain loss because of the stoppage of work made by the appellant, fixed the loss at Rs.22091.40 and decreed the suit filed by the respondent in O.S.No.486 of 2007 partly granting a decree for Rs.22091.40. As regards the suit filed by the appellant in O.S.No.135 of 2006, the learned trial Judge decreed the suit in its entirety directing the respondent company to repay the earnest money of Rs.1 lakh with appropriate interest.

7. Aggrieved by the decree in both the suits, the respondent company filed two appeals in A.S.Nos.56 and 57 of 2011 and the appellant herein filed two appeals in A.S.Nos.118 and 119 of 2011. The learned Principal District Judge, Trichirappalli who heard the appeals together concurred with the findings of the trial court on the damages suffered by the respondent as a result of the non-performance or stoppage of work by the appellant. Therefore, the learned Principal District Judge confirmed the decree in O.S.No.486 of 2007 and both the appeals against the said decree were dismissed.

8. On the question of forfeiture of the earnest money, learned appellate Judge disagreed with the conclusion of the trial court and held that once the sum of Rs.1 lakh is found to be the earnest money deposited for ensuring proper operation or proper performance of the contract and the contract provides for forfeiture on breach, the respondent was well within its rights to have exercised the power under the agreement. Therefore, the decree granted by the trial court for repayment of earnest money cannot be sustained.

9. On the above conclusion, the learned Appellate Judge allowed the appeal filed by the respondent in A.S.No.56 of 2011 and dismissed the suit in O.S.No.135 of 2006. As a consequence,A.S.No.118 of 2011 filed by the appellant against the decree in O.S.No.135 of 2006 was dismissed. The appeals filed challenging the decree in O.S.No.486 of 2007 namely, A.S.Nos.56 and 119 of 2011 were dismissed without costs. Aggrieved, the plaintiff in O.S.No.135 of 2006 who is the defendant O.S.No.486 of 2007, has come up with these Second Appeals.

10.The following questions of law were framed at the time of admission by this Court:

i)Whether the judgment and decree of the courts below are vitiated having failed to consider the entire evidence on record and to apply the correct principles of law?

ii)When the contract for payment of excise duty is a void one as per Section 20 of the Indian Contract Act, whether the 1 st appellate court is right in non-suiting the appellant?

iii) Is not the respondent liable to compensate the appellant as per Section 65 of the Indian Contract Act, for having benefited out of a void contract?

iv) When the performance of the contract was affected due to the invalidity of the same, whether the party rescinding the same has to compensate the other party to the contract?

11.I have heard Mr.K.K.Senthil, learned counsel appearing for the appellant and Mr.K.Prabhakar, learned counsel appearing for the respondent.

12. Mr.K.K.Senthil, learned counsel appearing for the appellant while elaborating on the question of law would vehemently contend that termination of the contract is illegal, more so, when the Excise Department had clarified that the product namely, coal ash is not exigible. He would also point out that the respondent which is a Government of India undertaking and Navarathna Company is bound to act fairly and cannot justify its demand for excise duty over a particular product, which has been held to be non-exigible by the Hon'ble Supreme Court. Mr.K.K.Senthil, would further argue that even assuming that the appellant could be held guilty of breach of contract, penalty namely forfeiture of the earnest money of Rs.1 lakh is highly unreasonable and the court, under Section 74 of the Contract Act is empowered to reduce it to the actual damages caused. As regards the decree granted in favour of the respondent in O.S.No.486 of 2007, Mr.K.K.Senthil would submit that once it is found that failure to perform was due to the fault on the part of the respondent, termination itself would become questionable and therefore, the appellant cannot be made liable for the illegal termination of the contract.

13. Contending contra, Mr.K.Prabhakar, learned counsel appearing for the respondent would submit that the demand for excise duty was made based on the circular issued by the Excise Department in 1988 and there was considerable doubt as to whether the product namely coal ash would be exempt from payment excise duty and whether it would come within the meaning of the term 'cinder' dealt with by the Hon'ble Supreme Court in the judgment of the year 2003. Mr.K.Prabhakar, would submit that all that was done by the respondent was to require the appellant to produce clarification from the Excise Department regarding exigibility of the commodity. The appellant stopped work and refused to remove the coal ash on his own without any justification.

14. Referring to the fact that the appellant had removed the coal ash after paying the excise duty under protest on earlier occasions, Mr.K.Prabhakar would contend that he could have continued to do so till he got clarification from the Department and the parties would not have to face the present unenviable situation if

only that the appellant had continued to perform the contract under protest. Mr.K.Prabhakar, would also concede that the respondent could have done well to have obtained clarification by itself but the same cannot be made as a ground to commute the act of non-performance on the part of the appellant. Once the contract provides for forfeiture of earnest money and earnest money is deposited at the time of contract as a pledge for due performance, the other party is empowered to forfeit the earnest money in case of non-performance. The same would not depend on quantum of damages. Claiming that the situation in the present case would not be covered by Section 74 of the Contract Act, Mr.K.Prabhakar would submit that law relating to forfeiture of earnest money has been settled by the Hon'ble Supreme Court and therefore, the appellate court was justified in upholding the forfeiture.

15. I have considered the rival submissions.

16. The parties are governed by the contract namely, tender conditions as evidenced by Ex.A.13. The relevant Clauses of Ex.A.13 are as follows:

> 4.The rate quoted by the tenderer(s) shall be exclusive of Excise Duty and Sale Tax and any other statutory Levies of the Government which will change from time to time. All these taxes/levies shall be paid by the tenderer.
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> 5. EARNEST MONEY DEPOSIT: An Earnest Money Deposit of Rs.1,00,000/-(Rupees one lakh only) by means of Demand Draft/Bankers Cheque favouring BHEL/HPBP/ TIRUCHY-14 drawn on any Nationalised Bank payable at Tiruchirapalli - 620 014 should accompany the quotation. Payment by cheque or other modes will not be accepted. The above EMD shall carry no interest and is refundable to unsuccessful tenderers after finalisation of the contract.
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> 6.The Earnest Money Deposit of the successful tenderer(s) shall be retained as Security Deposit by BHEL. **This security deposit will be retained by BHEL till the successful completion of the contract and shall be liable for forfeiture in the event of breach of contract condition of the sale.** The Security Deposit shall be refunded only on successful completion of the contract and on production of 'NO DEMAND CERTIFICATE' by the respective successful contractor.
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> All offers are to be kept open for acceptance for a period of 90(Ninety) calendar days from the date of opening and in case of the offer is withdrawn within

the validity period, the EMD stand forfeited.

9. Clearance: Coal Ash should be cleared from the Ash pit of the Producer Gas Plant on a day-to-day basis. For carrying out this, the contractor(s) has/have to place sufficient vehicles (minimum two vehicles in the morning within 9.00 AM) along with loadmen/women at Producer Gas Plant every day. A minimum quantity of 500 MTs have to be cleared every month as directed by BHEL officials. For any failure in lifting the allotted quantity within the due date, the contractor(s) shall remit Ground Rent at 3% per month or part thereof on the sale value of the uncleared quantity. In the event of allotted quantity of Coal ash not being lifted on daily basis by the contractor (s), BHEL reserves the right to make alternate arrangements to clear the quantity involved at the risk and cost of the default contractor(s) and also to take further legal action against the contractor(s) for their default including cancellation of the contract and forfeiture of the Security Deposit.

17. A combined reading of the above terms of the agreement between the parties shows that a sum of Rs. 1,00,000/- (Rupees one lakh only) was deposited at the time of entering into the contract as a pledge for its due performance by the appellant. It is also seen that the respondent was empowered to forfeit the earnest money in the event of breach of the contract conditions as per Clause-6. Clause-9 also provides for certain contingencies under which the respondent can terminate the contract and sue for recovery of damages. Recovery of damages is made independent of the forfeiture of the earnest money under the contract. The question that is to be addressed is as to whether the demand for excise duty made by the respondent would be a justification for the appellant to have refused performance of the contract or could it be said that breach of contract was induced by the action of the respondent in charging excise duty? As seen from Clause - 4 of the contract extracted supra, it is the liability of the appellant to pay excise duty or other leviable taxes on the goods dealt with under the contract. The question as to whether particular commodity is exigible or not has to be decided by the Department. The respondent company has not asserted that the particular product is exigible. It had only said since there was a doubt, the appellant was required to get clarification from the Excise Department about the exigibility of the product. Ofcourse the appellant cannot be held solely responsible for the delay in the issuance of the clarification by the Excise Department. But at the same time, terms of the contract between the parties cannot also be totally ignored.

18. On the question of forfeiture, law is fairly well settled. The privy council in **Kunwar Chiranjit Singh Vs. Har Swarup (1925 LW**

172) while dealing with the concept of earnest money had observed as follows:

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee".

However, subsequently, in **AIR 1963 SC 1405 (Fateh Chand Vs.Balkishan Dass)** the Hon'ble Supreme Court had while dealing with the scope of Section 74 of the Contract Act held as follows:

> 15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstances of the party in default of the court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. Use of the expression to receive from the party who has broken the contract' does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

19. This was further explained in **Maula Bux Vs.Union of India (1969 (2) SCC 544),** wherein the Hon'ble Supreme Court has explained the law relating to forfeiture as follows:

> 5. Forfeiture of earnest money under a contract for sale of property --- Movable or immovable --- If the amount is reasonable, does nto fall within Section 74. That has been decided in several cases: Kunwar Chiranjil Singh Vs. Har Swarup ; Roshan Lal Vs. The Delhi Cloth and General Mills Company Ltd. Delhi ; Muhammad Habibullah V. Muhammal Shaji ; Bishan Chand V. Rathakishan Dar. Theses cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amunt to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has

undertaken to pay a sum of money or to forfeit a sum of money which he h as already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

20. However, there was a slight change in the law relating to forfeiture thereafter and the march of law was noticed by the Hon'ble Supreme Court in **Satish Batra Vs. Sudhir Rawal (2013(1) SCC 345)** wherein after a review of the entire case law starting from **AIR 1963 SC 1405 (Fateh Chand Vs.Balkishan Dass)** till **Videocon Properties Limited Vs. Bhalchandra Laboratories (2004(3) SCC 711,** the Hon'ble Supreme Court had referred to the judgment in **Shree Hanuman Cotton Mills Vs. Tata Air Crafts Ltd** which laid down the principles regarding the earnest money as follows:

> 21. From a review of the decisions cited above, the following principles emerge regarding 'earnest':
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> (1) It must be given at the moment at which the contract is concluded.
>
> (2)It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contractor
>
> (3)It is part of the purchase price when that transaction is carried out.
>
> (4)It is forfeited when the transaction falls through by reason of the default or failure of the purchaser
>
> (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.''

21. The Hon'ble Supreme Court also took note of the subsequent judgments in **Delhi Development Authority Vs. Grihshapana Co-operative Group Housing Society Ltd. (1995 Supp (1) SCC 751), V.Lakshmanan Vs.B.R.Mangalagiri (1995 Supp(2) 33), Huda Vs. Kewal Krishan Goel (1996(4) SCC 249).** After referring those judgments, the Hon'ble Supreme Court concluded as follows:

> 15.The law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended

as earnest money then the forfeiture clause will not apply.

Therefore, it is clear that the forfeiture can be justified if the terms of the contract are clear and explicit. If it is found that the earnest money was paid as a pledge for due performance of the contract by the depositor, the same can be forfeited in case of non-performance by him or her.

22. Now looking at the terms of the contract in the case on hand, the relevant portion extracted above would implicitly demonstrate that if there is a failure on the part of the purchaser to perform his part of contract, for whatever reason the seller namely the respondent is entitled to forfeit the earnest money.

23. The answer to the question as to whether the forfeiture would be rendered illegal because it is subsequently found that the goods involved are not exigible as doubted by the respondent has to be clearly in negative. It was open to the appellant to continue to perform the contract and pay the excise duty under protest and could have even adjusted it in the subsequent payment after the clarification is received from the Department. But the appellant did not choose to do so for reason best known to him the appellant withdrew from the contract taking strong objections to the attitude of the respondent.

24. At this juncture, it should be pointed out that the attitude of the respondent was also not very positive. As pointed out by the Hon'ble Supreme Court in **2010(1) SCC 655 (Haryana Financial Corporation and another** Vs. **Rajesh Gupta)** the respondent being a public sector undertaking and a Navarathna Company should have exhibited positive attitude and should have sought for clarification by itself instead of driving the appellant to approach the Excise Department seeking clarification. Such non-challant attitude has unfortunately become a practise in public sector undertakings. May be it is due to lack of responsibility or indifferent attitude among the persons manning such public sector undertakings, but that by itself cannot justify the action of the appellant in stopping the work, which is a continuous process and would lead to a grave situation, if emergent remedy is not resorted to. If the respondent could be blamed for being dogmatic, the appellant also could be blamed for adopting arm twisting tactics by refusing to remove coal ash. As pointed out by the Hon'ble Supreme Court in the recent judgment in **Satish Batra Vs. Sudhir Rawal (2013 (1) SCC 345)** once it is shown that the terms of the contract are clear and there is a failure on the part of the party to perform the contract, forfeiture of earnest money becomes automatic and Section 74 of the Contract Act cannot be invoked by the appellant to contend that forfeiture Clause is in the nature of penalty and the court has a discretion to reduce the same to the actual damages caused.

25. Coming to the appeal against the decree in O.S.No.486 of 2007, it is seen that both the courts have only awarded the actual expenses incurred by the respondent in removing the coal ash for the period of 10 days during which the work was stopped by the appellant. Though the respondent had reserved its right to claim for future period, the respondent has not chosen to make a claim. Even if the question of law is answered in favour of the appellant, the decree in O.S.No.486 of 2007 cannot be disturbed. As the provisions of the contract gives a right to the respondent to claim the loss caused due to non-performance upon proof of the same.

26. Coming to the question of law framed in the appeals, a perusal of the judgment of the appellate court leaves no room for due that the appellate court has considered the entire evidence, particularly, the conditions of the contract marked under Ex.A.13. The appellate court came to the conclusion that a sum of Rs.1 lakh deposited pursuant to the said contract being in the nature of earnest money, forfeiture of the same is perfectly justified. Therefore, it cannot be said to be the appellate court misread the evidence or omitted to consider any evidence that was available. The learned counsel appearing for the appellant is unable to point out any relevant evidence that has been omitted to be considered by the learned appellate Judge.

27. As far as the second question of law is concerned, in my considered view, Section 28 of the Contract Act would not apply on the facts and circumstances of this case. The demand for excise duty was made based on the circular issued by the Excise Department in 1988 and the claim of the appellant that the product namely, coal ash is not exigible was on the basis of the judgment of the Hon'ble Supreme Court, which dealt with 'cinder'. Whether the product involved in the present contract would come within the definition of 'cinder' dealt with by the Hon'ble Supreme Court has to be clarified by the concerned Department namely, the Excise Department. It cannot be said that either of the parties were under any mistake regarding the essential term of the contract. The contract was for removal of coal ash from the premises of the respondent. In order to invoke Section 8 of the Contract Act, the mistake should be shown to be as to the matter of fact essential to the agreement. The question whether the product is exgibile or not cannot be termed to be the matter of fact, which is essential to the agreement in question. Therefore, the second question of law has to be answered against the appellant.

28. Once it is held that the parties are not at mistake and the contract was flouted, the obligation to repay the advance amount in fact is mandatory and applicability of Section 65 of the Contract Act cannot arise at all. It cannot be said that the agreement for removal of coal ash is violated totally. The only dispute between the parties in the case on hand is regarding the payment of excise

duty. Therefore, Section 65 of the Contract Act will not get attracted and hence, the third question of law is answered against the appellant. As a result of the answers to the questions of law 2 and 3, 4th question of law is also answered against the appellant.

29. In fine, these Second Appeals are dismissed. The judgment and decree of the learned Principal District Judge, Trichy made in A.S.Nos.56 and 119 of 2011 dated 30.04.2012 in reversing the judgment and decree of the learned 2nd Additional Subordinate Judge, Trichy made in O.S.Nos.135 of 2006 and 486 of 2007 dated 29.01.2010 is confirmed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

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Sub Assistant Registrar(CS)

To:

1. The Principal District Judge, Trichy

2. The 2nd Additional Subordinate Judge, Trichy

3. The Section Officer, V.R. Section,(2C)
Madurai Bench of Madras High Court,Madurai.

+2 CC to M/s.K.K.SENTHIL, Advocate (SR-7137[F]7136 dated 25/02/2021)
+2 CC to M/s.K.PRABHAKAR, Advocate (SR-7398[F] dated 25/02/2021)

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