BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.08.2023

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.19909 of 2014

M/s.M.R.Livestock
M.Ragunathan,
Proprietor,
No.345/1, Chinna Andankoil Road,
Karur. ... Petitioner

Vs.

1.The State of Tamil Nadu,
Rep. by its Secretary,
Animal Husbandry Dairying and Fisheries Department,
Secretariat,
Chennai-09.

2.The Managing Director,
Tamil Nadu Coop Milk Producers Federation Limited,
Aavinillam,
Madhavaram Milk Colony,
Madhavaram,
Chennai-51. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records in pursuant to the ROC No.1390/MP.1/2009, dated 19.11.2014 and quash the same and consequently, directing the second respondent to refund the Earnest Money Deposit of Rs.22,87,000/- which was paid by the petitioner.

For Petitioner : Mr.K.Baalasundharam
Senior Counsel
for Mr.A.Saravanan

For Respondents : Mr.S.RA.Ramachandran
Additional Government Pleader for R1

: Mr.J.Devasenan for R2

ORDER

Heard the learned Senior Counsel appearing for the petitioner and the learned Additional Government Pleader appearing for the first respondent and the learned standing counsel for the second respondent.

2. The petitioner participated in the tender floated by Aavin for the purpose of supply of milch animals under Perarignar Anna Centenary Integrated Dairy Scheme. The petitioner's tender was accepted and he was directed to pay the security deposit of Rs.22,87,000/-. EMD amount of Rs.7,00,000/- earlier paid was adjusted and the balance amount of Rs.15,87,000/- was paid by the petitioner in three installments. This was in the year 2009.

3. The case of the petitioner is that the contract envisaged supply of as many as 3,400 milch animals. According to Aavin, the petitioner supplied only 525 animals and even though at the instance of the petitioner, two extensions were given till 31.03.2011, the petitioner was unable to fulfil the contractual obligation. It is stated that the petitioner had supplied only 1,548 animals in all. The categorical stand of the second respondent is that the petitioner had breached his contractual obligation. In the meanwhile, the scheme was also given up. The petitioner called upon the second respondent to refund his security deposit of Rs.22,87,000/-. Since the second respondent did not make refund, the petitioner filed W.P.(MD)No. 15890 of 2014. Vide order dated 23.09.2014, this Court directed Aavin to consider the petitioner's representation dated 06.05.2014 on merits and pass a reasoned order within a period of four weeks. Pursuant to the said direction, the impugned communication dated 19.11.2014 came to be issued. The stand of the respondents is that several malpractices were committed in purchase of milch animals and that vigilance enquiry had been ordered. The second respondent informed the petitioner that his request for refund could not be

considered till the enquiry was completed. Challenging the said communication, the present writ petition came to be filed.

4. The learned senior counsel appearing for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition and called upon this Court to set aside the impugned communication and grant relief as prayed for.

5. The second respondent has filed the counter affidavit and the learned standing counsel took me through its contents. He submitted that the agreement between the parties clearly provides for forfeiture of the security deposit on termination of contract. According to him, the impugned communication is in consonance with the contractual terms and conditions and therefore, no interference is warranted. He pressed for dismissal of the writ petition.

6. I carefully considered the rival contentions and went through the materials on record.

7. It is true that the agreement dated 10.12.2009 entered into between the parties envisages supply of 3400 milch cows. It is again not in dispute that the petitioner had supplied only 1,548 cows. The learned standing counsel would state that the cows that were supplied by the petitioner did not conform to the specification set out in the contract. I endorse the contention of the learned standing counsel for the second respondent that there has been a clear breach of the contractual obligation by the petitioner. It is equally true that the agreement between the parties provides for forfeiture of the security deposit in the event of termination of contract. Even though an agreement may provide for forfeiture, it is not open to the affected party to enforce the same literally. In other words, the clauses that are characterized as “in terrorem” cannot be applied as such. Sections 73 & 74 of the Indian Contract Act, 1872, read as follows:-

> “***73.Compensation for loss or damage caused by breach of contract.***—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they

made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

74. Compensation for breach of contract where penalty stipulated for.—1 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The second respondent ought to have quantified the actual loss that has been caused to them on account of the breach committed by the writ petitioner. The learned senior counsel for the petitioner draws my attention to the decision reported in ***(1973) 1 SCC 649(Union of India Vs. Rampur Distillery & Chemical Co.,)***. The Hon'ble Apex Court had held as follows:-

"3. Only one contention was urged on behalf, of the appellants before us: that the security deposit was taken from the respondents in order to ensure the due performance the contract and respondents having defaulted, the entire amount was liable to be forfeited. A similar contention was advanced before this Court but was rejected in Maula Bux v. Union of India . The appellant therein had entered into a contract with the Government of India for the supply of certain goods and had deposited a certain amount of security for the due performance of the contract. As in the instant case, it was stipulated in the contract there that the amount of security deposit was to stand forfeited in case the appellant neglected to perform his part of the contract. On the appellant committing default in the supply, the Government rescinded the contract and forfeited the security deposit. It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within Section 70 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, "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 was already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty." It was further held that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money.

4. It is important that the breach of contract caused no loss to the appellants. The stipulated quantity of sum was subsequently supplied to the appellants by the respondents themselves at the same rate. The appellants, in fact, made no attempt to establish that they

had suffered any loss or damage on account of the breach committed by the respondents.

5. Following the decision in Maula Bux's case, we hold that the High Court was right in rejecting the appellants claim that they are entitled to forfeit the security deposit civil appeal 1346 of 1967 is accordingly dismissed with costs."

He relied on yet another decision reported in ***2021 (6) CTC 257 (Shanmugavelu Vs. Authorised Officer)***. Paragraph No.15 of the said decision reads as follows:-

"15. For any quantum to be awarded on account of the damages, there is a twin exercise which has to be undertaken: the first limb of the exercise is to ascertain the factum; it is only upon the factum being established that the quantum may be assessed. In other words, if the factum of loss and damage is not established, there is no need to proceed of the second part to try and assess the quantum."

8. In the case on hand, the writ petition was filed way back in the year 2014. The contract dates back to the year 2009-2011. Counter affidavit was filed by the second respondent in the year 2016. I carefully went through the averments set out in the counter affidavit. No where, there is any pleading or placing of material indicating the loss or damage suffered by the second respondent. The

second respondent appears to have acted on the premise that the forfeiture clause can operate as sufficient defence and that can be taken as genuine pre-estimate. I do not think so. In any event, the second respondent has retained the security deposit of Rs.22,87,000/- for the last 14 years ie., right from December 2009 onwards. On instructions from the petitioner, the learned counsel on record makes statement before this Court that the petitioner will not insist on any interest if the security deposit is refunded within six weeks from the date of receipt of a copy of this order. The accrued interest in my view will more than offset the damage that might have been suffered by the second respondent. The impugned order is also rather tentative in character. As already pointed out, the relationship between the parties had virtually snapped in the year 2011 itself. The petitioner had already filed a writ petition before this Court in the year 2014. Even in the impugned communication issued in November 2014, there is no mentioning of any loss caused to Aavin. What has been highlighted is that they suspect that malpractice had been conducted in the matter of purchase of cows and that is why, vigilance enquiry was ordered. The learned senior counsel on instructions states that till date, the petitioner has not been prosecuted and that he has not been named as an accused. Considering the sheer lapse of time, it is too late in the day to remand the matter to the file of the second respondent to undertake the exercise of quantifying the damage. When the second respondent themselves have not pleaded in their counter affidavit that they suffered loss or damage and there is no reference about damage in the impugned communication also, the question of quantifying the same does not arise.

9. Respectfully applying the ratio laid down in the aforesaid decisions and in the light of Sections 73 & 74 of the Indian Contract Act, the communication issued in the writ petition is set aside. The second respondent is directed to refund the sum of Rs.22,87,000/- to the petitioner within six weeks. In the event of the second respondent failing to do so, it will carry interest at the rate of 6% per annum from the date of filing of the writ petition.

10. The Writ Petition is allowed. No costs.

03.08.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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To

The Secretary,
Animal Husbandry Dairying and Fisheries Department,
Secretariat,
Chennai-09.

G.R.SWAMINATHAN, J.

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