

(1999) 01 MAD CK 0059
In the Madras High Court
Case No : S.A. No. 1402 of 1986

K.N. Keerthi Rao

APPELLANT

Vs

The General Manager, Southern Railways, Madras-3 and
Another

RESPONDENT

Date of Decision : 30-01-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 2, 73

Citation : (2002) 3 LW 271

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : M.V. Venkataseshan, for the Appellant; P.B. Krishnamurthy, for the Respondent

Final Decision : Allowed

Judgement

1. The plaintiff in O.S.No.2962 of 1982 on the file of the XIV Asst. City Civil Judge is the appellant. He filed the suit for a declaration that the letter dated 16.3.1982 marked as Ex.A13 in the suit sent by the respondents was illegal, null and void and against the principles of natural justice and therefore not sustainable in law and for a permanent injunction restraining them and their men from taking any action in pursuance of the said letter on the following averments:

2. The appellant was a registered contractor with Southern Railways for doing certain repair works to leaky roofs in Perambur Railway Quarters. He submitted his tender on 17.3.1981 in the prescribed form to the respondents and on 27.4.1981 under Ex.A4 the Divisional Railway Manager wrote to the appellant that his tender had been accepted. The appellant was directed to furnish security within 7 days therefrom in a sum of Rs.22,069 and he was further requested to commence the work within 7 days and to attend the office of the respondents to sign the agreement within 14 days as per the conditions of the tender document. Under the original of Ex.A5 letter, the appellant acknowledged the receipt of the

communication Ex.A4 and also requested the railway administration to take the security deposit amount from the running bills. He further requested the administration to prepare an agreement for the work and intimate as early as possible. On 27.8.1981 under the original of Ex.A6 the appellant wrote to the railway administration stating that though he performed his part of the contract the railway administration did not prepare the agreement and keep the same ready for execution and without the said agreement he could not proceed with the work and that he was withdrawing his tender as the railway administration did not act as per the terms of the tender document. Thereafter the railway administration sent a reply under Ex.A7 on 4/5.9.1981 stating that the administration prepared the agreement and kept the same ready for execution by the appellant long ago and in fact information was sent to the appellant in that regard through his agent one Gopal but the appellant did not come and sign the agreement, that there was no breach committed by the railway administration of the terms of the tender document. It was further stated that the contract between the parties had been validly concluded on 27.4.1981 itself under Ex.A4 and the execution of agreement was only a formality. It was further stated in the communication that the appellant commenced the work but did not proceed further. He was directed to resume the work immediately. Under the original of Ex.A8 dated 1.10.1981 the appellant reiterated that the railway administration did not perform its duty in preparing the agreement and keeping the same ready for execution by him. The appellant did not go to the railway office and execute the agreement nor did he restart the work. By Ex.A13 dated 16.3.1982 the railway administration rescinded the contract and forfeited the security deposit amount of Rs.22,069. The appellant objected to this letter and to the forfeiture of the security deposit and after issue of notice under the Original Ex.A5 filed the suit for the reliefs already mentioned.

3. The substance of the respondents' defence was that the execution of the agreement was only a formality to be observed by the parties and the contract had already been concluded between the parties on 27.4.1981 itself under Ex.A4. As the appellant committed breach of agreement the letter dated 16.3.1982 was sent to the appellant rescinding the contract and forfeiting the security deposit. The letter was perfectly valid and it could not be questioned on any acceptable principle of law. No relief could be granted to the appellant. The suit was liable to be dismissed.

4. The appellant filed a rejoinder denying the various averments in the written statement of the respondents and reiterating the plaint averments and contending that there was no concluded contract between the parties because no agreement was executed between them.

5. On the above pleadings the trial court framed the necessary issues and on the oral and documentary evidence held in favour of the appellant and by judgment and decree dated 16.8.1985 decreed the suit as prayed for.

6. However, on appeal by the respondents in A.S.No.68 of 1986 the learned VI

Additional City Civil Judge reversed the decision of the trial court, allowed the appeal and dismissed the suit by judgment and decree dated 16.7.1986. Aggrieved, the present second appeal has been filed.

7. At the time of admission the following substantial questions of law were framed for decision in the second appeal:

"(1) Whether the lower appellate court is right in holding that there was a concluded contract between the parties on the facts and circumstances of the case.

(2) Whether the lower appellate court is right in holding that the defendants are entitled to forfeit the entire sum of Rs.22,069."

8. Mr.M.V. Venkataseshan, learned counsel for the appellant submitted that there was contemplation of an agreement or contract to be signed by both the parties that signified the fact that there was a concluded contract and in the instant case, admittedly, no contract had been signed between the parties and therefore the respondents were not justified in forfeiting the Earnest Money Deposit (HMD). Even as per the terms between the parties for non-execution of the work only security deposit should be forfeited and not HMD. In the reply statement it had been specifically pleaded that the respondents could not invoke Clause-6(1) of the general conditions of the contract, that the allegation that the appellant had done the work was not at all correct and the respondents were trying to take advantage of the appellant's letter Ex.A6 dated 27.8.81, that the stand that there was a valid concluded contract and the appellant had suddenly withdrawn from work and abandoned the contract was not at all correct and this contention raised by the appellant had not been disputed by the respondents at any point of time. In the submission of the learned counsel mere acceptance of the tender would not amount to conclusion of contract. The learned counsel further submitted that there was no provision in the agreement with regard to the forfeiture of HMD. Even otherwise there was absolutely no proof of any loss having been caused to the railway administration on account of the non-performance of the work by the appellant. In support of his several contentions the learned counsel relied on the following decisions.

1. Viswesardas Gokuldas Vs. B. K. Narayan Singh and Another, ; 2. Badri Prasad Vs. The State of Madhya Pradesh and Another, ; 3. Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, ; 4. Haridwar Singh Vs. Bagun Sumbrui and Others, ; 5. Union of India (UOI) Vs. Raman Iron Foundry, ; 6. H.G. Krishna Reddy and Co. Vs. M.M. Thimmaiah and Another, ; 7. H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, ; 8. Raymond Synthetics Ltd. and others Vs. Union of India and others, .

9. Per contra Mr.P.B. Krishnamurthy, learned counsel for the respondents submitted that the execution of an agreement was a mere formality that once the tender had been accepted there was a concluded contract. On the railway administration's acceptance of the tender, the contract between the parties

became concluded and a binding agreement came into existence between them and the contractor could not try to wriggle out of the same. The learned counsel also pointed out that by relying on Ex.A6 dated 27.8.1981, where the appellant had clearly stated that pursuant to the acceptance of the tender by the railway administration he had commenced the work within 7 days from the date of receipt of that letter. The appellant could not go back on the agreement and the railway administration was well within its rights to forfeit the E.M.D. with them. The learned counsel also pointed out that non-execution of the agreement would amount to a breach of contract and would invite penal consequences. The learned counsel also relied on the judgment of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, .

10. The appellate court in reversing the decision of the Trial Court based its conclusion that there was a completed agreement between the parties under Ex.A4 dated 27.4.1981 followed by the appellant's letter Ex.A5 dated 4.5.1981. In the first letter Ex.A4 dated 27.4.1981 the railway administration had stated that the appellant's tender had been accepted by the Additional Divisional Railway Manager, that the appellant should furnish within 7 days from the date of the receipt of that letter a sum of Rs.22,069 towards security deposit and that the appellant should commence the work within 7 days from the date of receipt of that letter and also come forward to sign the agreement within 14 days as per conditions of tender documents. This provoked a reply under Ex.A5 dated 4.5.1981 from the appellant stating that he was thankful that the work had been awarded to him and requesting the administration to take the security deposit amount for the work from the running bills. The learned appellate Judge referred to Ex.A6 dated 27.8.1981 sent by the appellant to the railway administration stating that he had commenced the work within 7 days from the date of receipt of the earlier letter. According to the learned appellate Judge, when once the appellant had notified that he had commenced the work pursuant to the acceptance of the tender having been intimated to him by the railway administration, there was a concluded contract and nothing further remained to be done between the parties and the appellant could not go back on the same. Thus, out of 3 requirements mentioned in Ex.A4 the appellant had complied with 2 and regarding the 3rd requirement there was some dispute. The question now for consideration is whether there was any work commenced by the appellant pursuant to the acceptance of the tender by the railway administration and pursuant to the appellant's own letter under Ex.A5. The lower appellate court clearly overlooked the other portion of the letter Ex.A6 dated 27.8.1981. The appellant had clearly stated that. "The tender relating to the work was submitted by him on 17.3.1981. I received the letter accepting my tender and immediately wrote to you to send the intimation for signing the agreement, so that I could start the work. But I did not get any intimation from you. As a matter of fact you wanted me to give you a copy of the letter dated 4.5.1981. In the letter dated 4.5.1981, I requested you to prepare an agreement for the work and intimate to me at an early date to arrange to start the work. The original letter dated

4.5.1981 was, according to you, misplaced But you did not send the agreement execution intimation and without the agreement, I could not proceed. Thus, you have not acted as per the terms of the tender documents and you had not sent any intimation regarding the execution of the agreement. In view of the above, I am constrained to withdraw my tender and I am hereby withdrawing the same with immediate effect."

11. The case of the railway administration is that they sent intimation to the appellant through the appellant's assistant one Gopal, that the agreement was ready and the appellant could visit the office and sign the same. Gopal, examined as PW2, categorically denied that any official of the railway administration ever told him that the agreement was ready and he should pass on the information to the appellant to enable him to come and sign the same. Thus it would be clear that the railway administration had not got the agreement ready to be signed by the appellant and that the appellant did not sign any agreement for doing the work in respect of which he had submitted his tender. It is also in evidence that no work was at all commenced, by the appellant though he had stated in one of the letters that he had commenced the work within 7 days. In my view, this was more to comply with the requirements of the terms of the tender papers and actually no work was commenced by the appellant. It is also admitted by the witness on the side of the respondent/railway administration that no work was commenced by the appellant. It is also to be noticed as rightly pointed out by the counsel for the appellant that no work could have been commenced by the appellant without the railway administration providing the appellant with the necessary raw materials for commencing the work and for supply of raw materials, unless the agreement between the parties had been signed the administration would not part with those raw materials. Factually no work was commenced and this is not disputed on behalf of the respondent/railway administration.

12. The question therefore is whether without an agreement having been signed between the parties, it could be said in the present case that there was a concluded contract. Though in the letter Ex.A6 dated 27.8.1981 the appellant stated that he had commenced the work within 7 days, the portions of the said letter as also the oral evidence of PW1 and DW1 make it abundantly clear that no such work was actually commenced. The claim made by the railway administration that the appellant removed the plaster has not been substantiated. Admittedly, the appellant never indented for cement or other raw materials on the railway administration. Apart from the above there are several vital admissions made by DW1 which in my opinion had been erroneously overlooked by the lower appellate court.

13. The lower appellate court had assumed that when once the tender had been accepted and the tenderer notified there was a concluded contract, without an actual contract being signed losing sight of the fact that each case depended on the facts and circumstances of that case.

14. In H.G. Krishna Reddy and Co. Vs. M.M. Thimmaiah and Another, it has been held by a bench of this Court that -

"It is now settled that if a document which is entered into between two parties and which is relied on as constituting a contract contemplates the execution of a further regular agreement between the parties. It is a matter of construction whether the execution of a further contract is a condition of the terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the original agreement should be performed. In the former case, there cannot be any enforceable contract unless the condition is fulfilled or on the ground that law does not recognise a contract to enter into a contract. In *Ridway v. Wharton*, 1857 (6) H L C 238, Lord Cranworth observed that the fact of a subsequent agreement being prepared may be evidence that the previous negotiations 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."

15. In that case a receipt was accepted by the proposed vendor in favour of the proposed vendee for certain amount towards the agreed price of sale of suit property and that under that receipt a regular agreement of sale on a stamp paper had to be executed within 15 days from the date of the receipt, the said recital being a condition of the bargain between the parties under the receipt, the said receipt was not intended to be a concluded contract.

16. In *Viswesardas Gokuldas Vs. B. K. Narayan Singh and Another*, the question arose as follows:

"The defendant agreed to sell to the plaintiff certain quantity of float iron lying in the mining area and gave them the right to win and remove the iron ore. A few days thereafter, the defendant wrote a letter to the plaintiff agreeing to assign the said lease area in favour of the plaintiff on his paying a stipulated sum, at his option, to be decided within three months. After about two months the defendant wrote a letter revoking the offer. There was no acceptance of the offer by the plaintiff orally or by a letter before the letter revoking the offer reached him. The plaintiff filed a suit on the original contract claiming a declaration that he was entitled to remain in possession of the mining area before the letter of revocation reached him. It was held by the Supreme Court that there was no concluded contract between the parties."

17. In *Badri Prasad v. The State of Madhya Pradesh and Anr.*, AIR 1970 S.C 706 the question arose as follows:

"On February I, 1955 the Divisional Forest Officer wrote to the plaintiff as follows:-

"Kindly inform whether you are ready to pay further Rs.17,000 for the contract of big trees of Sunderpani Village of Makrai Circle which (contract) is under dispute at present. This contract can be given to you on this compromise only. If

you do not wish to pay this amount you may, in future, take any action you deem fit. You may express your desire within seven days of the receipt of this letter. If you fail to do this it will be presumed that you are not inclined to make a mutual compromise. On receipt of your reply the State Government will be informed."

On 5.2.1955 the plaintiff wrote in return -

"I am ready to pay Rs.17,000 provided my claim to have the refund of Rs.17,000 already paid, from the owner of the village or any other relief consequential to the judgment of that case remains unaffected. I reserve my right to claim the said or like amount. Subject to those conditions I shall pay Rs.17,000 as required in your referred letter".

It was held by the Supreme Court that no contract was concluded between the Government and the plaintiff. It was extremely doubtful whether the letter dated February 1, 1955 was an offer. It seemed to be an invitation to the plaintiff to make an offer. Even if it was treated as an offer there was no unconditional acceptance by the letter dated February 5, 1955. The alleged acceptance of the offer made on February 1, 1955 was conditional and qualified.

18. The next case is the one reported in Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, . The Supreme Court held as follows:

"Under Clause 21 of Rule 5.34 of the Delhi Liquor License Rules the person to whom the shop has been sold is required to deposit one-sixth of total annual fee within seven days. But that sale is deemed to have been made in favour of the highest bidder only on the completion of the formalities before the conclusion of the sale and where one of the conditions of auction provides that final bid would be made subject to the confirmation of the Chief Commissioner then the contract of sale is not complete till the bid is so confirmed. Till such confirmation the person whose bid has been provisionally accepted is entitled to withdraw his bid and when the bid is so withdrawn before the confirmation of the Chief Commissioner the bidder will not be liable for damages on account of any breach of contract or for shortfall on the resale. So where the highest bidder in an auction sale of a liquor shop did not deposit one-sixth of the purchase price within seven days of the auction whereupon the resale was ordered without the bid having been confirmed by the Chief Commissioner then the essential prerequisites of a completed sale being missing no liability could be imposed on the auction purchaser for payment of the deficiency in the price on the resale."

19. In Haridwar Singh Vs. Bagun Sumbrui and Others, at an auction for settlement of a coup the highest bid of H was accepted by the Divisional Forest Officer subject to confirmation by Government. The D.F.O. reported about the auction sale to the Conservator of Forests who forwarded the papers to the State Government for confirmation of the acceptance. During the pendency of the matter before the Government the highest bidder communicated his willingness to take the settlement at the reserve price which was higher than the bid. Thereafter he applied for the settlement of the coup on the basis of the highest

bid. The Government by a telegram to the Conservator of Forests confirmed the auction sale with H at the reserve price. As no intimation was received by the D.F.O. he did not communicate it to H. Later on the Government cancelled the settlement of the coup with H and settled the same with another person for an amount higher than the reserved price. It was held by the Supreme Court that there was no concluded contract between the Government and the highest bidder H. There was no confirmation of the acceptance of the bid to take the coup in settlement for the highest amount of bid. What the Government did was not to confirm the acceptance made by the Divisional Forest Officer, but to accept the offer made by H in his communication that he would take the coup for the reserve price. The telegram sent to the Conservator of Forests could not be considered as a communication of the acceptance of that offer to H. The acceptance of the offer was not even put in the course of transmission to H and so even assuming that an acceptance need not come to the knowledge of the offeror, H could not contend that there was a concluded contract on the basis of his offer contained in his communication to take the settlement at reserve price as the acceptance of that offer was not put in the course of transmission. Quite apart from that, H himself revoked that offer later on by applying for the settlement of the coup at the highest bid made by him in the auction.

20. In Union of India (UOI) Vs. Raman Iron Foundry, a two Judges Bench of the Supreme Court held that the claim for damages for breach of contractor is not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause-18, to recover the amount of such claim by appropriating other sums due to the contractor. No doubt, this decision of the Supreme court was overruled by a subsequent three Judges Bench of the Supreme Court in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . But the overruling was in respect of some other portion of the earlier judgment but not with regard to the principle which has already been referred to. In fact the decision of the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, has been approved in a subsequent Supreme Court decision in Raymond Synthetics Ltd. and others Vs. Union of India and others, . After referring to the following passage -

"Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due." In Union of India (UOI) Vs. Raman Iron Foundry, the Supreme Court in the latter decision observed as follows:

"The passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in presenti, it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in presenti, or in other words, which is presently payable. Recovery of such sums is the subject-matter of Clause 18 according to the heading. That is the dominant idea running through the entire

Clause-18."

21. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, the five Judges Bench of the Supreme Court on the question whether a contract was concluded observed as follows:

"The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. Those who contract with open eyes must accept the burdens of the contract along with its benefits."

It was held by the Supreme Court that the appellants who offered their bids in the auction bid was with full knowledge of the terms and conditions attached to the auction and they could not be permitted to wriggle out of contractual obligations arising out of the acceptance of their bids. Having regard to the facts of that case the Supreme Court held that once the bids by the appellants were accepted by the authorities there was a concluded contract.

22. I am afraid this case will not be of much assistance to the railway administration. But one thing as already pointed out in the Division Bench Judgment of this Court in *H.G. Krishna Reddy and Co. Vs. M.M. Thimmaiah and Another*, each case will have to depend on the facts and circumstances of that case. Having regard to the facts and circumstances of the present case it cannot be held that there was a concluded contract. Finding contra given by the lower appellate court cannot stand. As already pointed out the lower appellate court has proceeded on an erroneous assumption that the work had commenced, that there was an admission by the appellant that he had commenced the work. The lower appellate court has failed to advert to the other contents of the said letter that was sent by the appellant to the respondent railway administration. He had categorically stated that he had not received any intimation from the railway administration for signing the agreement contemplated and it could not be put against him that he had stated in the said letter that he commenced the work within 7 days from the date of receipt of the earlier letter Ex.A4 dated 27.4.1981. The appellant had explained in detail the circumstances under which he had visited the site and how he did not commence the work. The oral evidence let in on behalf of the railway administration has already been averted to, the railway administration had not been able to establish that any work was commenced by the appellant to warrant that he could not get out of the alleged contract.

23. Even conceding that there was a concluded contract it has not been shown

by the railway administration that any work was commenced by the appellant, that because of the non-performance by the appellant the railway administration was put to any loss. Absolutely no evidence either documentary or oral had been let in on behalf of the railway administration in this regard. It is elementary that unless the respondents had been put to any loss because of the appellant not carrying out the work alleged to have been undertaken by him, they cannot make any claim.

24. The third submission that whether the amount of the appellant with the railway administration in the shape of EMD could be forfeited. The witnesses on the side of the railway administration had admitted that there was an ocean of difference between the EMD and Security Deposit. It is a matter of record that the appellant did not furnish any Security Deposit and the request by the appellant that the amount he had to deposit with the administration as Security Deposit could be adjusted from the payments that in case he was given any work and the same was carried out. Admittedly there was no Security Deposit available with the railway administration as the appellant had not commenced any work for which he was entitled to any payment from the railway administration. There is also no provision in the agreement entered into between the parties that for any default or non-performance of the alleged contract between the parties the EMD could be forfeited.

25. In view of the above discussion, I hold as follows:

(1) In the instant case mere acceptance of tender without signing of the agreement there was no concluded contract for which damages could be claimed by the railway administration from the appellant;

(2) The railway administration not having proved any loss occasioned by the alleged default on the part of the appellant, the decisions already referred to clearly show that unless there is proof of loss there could not be any claim by the railway administration against the appellant.

26. The lower appellate court has overlooked the material, factual and legal positions in the instant case and the weighty reasons given by the trial court for decreeing the suit have not been properly considered by the lower appellate court resulting in substantial injury to the appellant. The case merits interference under Sec. 100 of the Code of Civil Procedure. Consequently, the substantial questions of law raised in the second appeal are answered in favour of the appellant and the second appeal will stand allowed. There will be no order as to costs.