
(1903) 08 MAD CK 0011
In the Madras High Court

Narayanaswami Reddiyar

APPELLANT

Vs

The Madras Railway Company (Limited)

RESPONDENT

Date of Decision : 04-08-1903

Acts Referred:

Contract Act, 1872 — Section 73

Citation : (1903) 13 MLJ 488

Judgement

1. This is an appeal against the decree of Boddam, J., dismissing the suit brought by the appellant as the assignee (Exhibit W) of all "the moneys

and outstandings" due, from the respondent, to one Mr. O'Shaughnessy under a contract (Exhibit B) between him and the respondent, in regard to

the construction of the Kolar Gold Fields Re-alignment Line. The suit was for the recovery of Rs. 8,361-13-11, being the balance (with interest)

alleged to be due under the said contract, after giving credit to the sum of Rs. 6,498-3-11 (Exhibit KK) paid by the Company to the appellant as

the assignee of Mr. O'Shaughnessy, The amount sued for consists of two items i.e., a sum of Rs. 3,000, being the amount deposited by Mr.

O'Shaughnessy as security for the performance of the contract and another sum of Rs. 4,767-12-7, representing the 10 per cent deductions

withheld by the Company, (under the provisions of the contract) as further security, from payments made, from time to time, to Mr.

O'Shaughnessy (and subsequent to the assignment, to the appellant) for works actually done by Mr. O'Shaughnessy before the 21st June 1900,

on which date the Railway Company, under the provisions of the contract, took over the remaining works from his hands, after giving him due

notice (Exhibit 26) and entrusted the same to the appellant, under a fresh and independent contract (Exhibit S) entered into with him.

2. The respondent resists the appellant's claim principally on two grounds, viz., (1) that Mr. O'Shaughnessy having failed to complete the works

within the stipulated time, to the satisfaction of the District Engineer, has forfeited the two items claimed in the suit ; and (2) that by reason of his

breach of contract the Company has sustained loss and damage to the extent of Rs. 10,300-11-8 (paragraph 7 of the written statement) and the

Government of His Highness the Maharajah of Mysore,--for whose benefit the contract was entered into by the respondent--has also "" lost profits

and incurred liabilities for exceeding the amount claimed"" (paragraph 9 of the written statement).

3. In support of the appeal it is urged that there was really no breach of contract by Mr, O'Shaughnessy as he was unable to complete the works

within the stipulated time partly because of the laches and negligence of the respondent (in furnishing him with the plan of one of the bridges to be

built) and partly in consequence of the fact that the quantity of work which had to be actually done turned out to be much in excess of the

estimated quantity and that the respondent therefore acted unlawfully in taking over the unfinished works from Mr. O'Shaughnessy. It is further

contended that even if Mr. O'Shaughnessy had committed a breach of contract, the respondent has sustained no loss or damage thereby,

inasmuch as the unfinished works were entrusted to the appellant at the same rates as under Mr. O'Shaughnessy's contract and that the item of

Rs. 7,400 representing the cost of the special establishment continued to be maintained by the Company in connection with the unfinished contract

work, from the 3rd June to February 1901, and the items of loss of profits to and liabilities incurred by the Government of Mysore (in

consequence of the working of the realignment line having been delayed) cannot be claimed as damages flowing from the alleged breach of

contract by Mr. O'Shaughnessy.

4. If either of these contentions prevails, the appellant will be entitled to the whole amount sued for (subject to any deduction that may have to be made in the matter of interest).

5. We find it impossible to uphold the first contention. The learned Vakil for the appellant relying upon *Holme v. Guppy* 3 M. & W. 387 and *Dodd*

v. Churton [1897] 1 Q.B. 562 argues that as Mr, O'Shaughnessy was required to

do a larger quantity of work than that provided for in the contract, he was not bound by the term fixed therein for the completion of the contract--i, e., the period of 6 months (from the 4th November 1899, when the lands were put in his possession) ending with the 3rd May 1900. The principle laid down in those two cases,--which relate to building contracts--is that "if the building owner has ordered extra work beyond that specified by the original contract, which has necessarily increased the time requisite for finishing the work, he is thereby prevented from claiming the penalties for non-completion provided for by the contract. If the extra work be one which the contractor was not bound to undertake, but which he nevertheless undertakes and if such extra work cannot be regarded as a separate and independent work, but is one connected with the work originally stipulated for, the offer and the acceptance of such additional work will, by necessary implication, operate as a variation of the original contract, as to the time therein fixed for the completion of the work. In *Westwood v. The Secretary of State for India* 7. L.T. 736 it was decided that the same rule would apply even if, under the terms of the original contract the builder had agreed to do any extra work which the building owner or his architect might order," The principle of this decision would seem to be that the term fixed in a contract for its completion must be taken to be with reference to the works specified in the contract and not with reference also to unspecified extra works which might be ordered under the contract. In *Jones v. St John's College* L.R. 6 Q. B. 1153 it was held that the ruling in *Westwood v. The Secretary of State for India* 7. L.T. 736 was inapplicable to a case in which the builder had, in the contract, agreed that "if any extra work was ordered, whatever that work might be, he would undertake, nevertheless, to complete the works within the time originally specified by the contract." In the present case it has not been shown whether the extra work consisted in the alteration or enlargement of the work specified in the contract or also of independent works. All that the appellant's Vakil was able to point out was that certain works, and, in particular rock-cutting work, which it was found had to be done, was much in excess of the quantity specified in the contract, apparently by estimate. If the excess was such as would necessarily increase the time specified in the contract, *Westwood v. The*

Secretary of State for India 7. L.T. 736 would be authority for holding that there is no breach of contract if the whole work is not completed within

the specified time, and *Holme v. Guppy* M. & W. 387 would be authority in favour for the same position, even if the contractor was not bound to

take up the extra work. In the present case, however, a reference to Exhibits 20 to 25 (ranging from the 4th May to the 18th June 1900) clearly

shows that by reason of the work to be done being in excess of the estimated quantities, the contractor sought an extension of time and that the

Railway authorities resolved upon granting an extension of one month's time (ending with the 3rd June 1900) and communicated the same to Mr

O'Shaughnessy. The latter acquiesced in it and raised no objection as to the insufficiency of the extensions We cannot accede to the appellant's

contention that the extension was only a unilateral act on the part of the respondent and that Mr. O'Shaughnessy could not be regarded as having

consented to it, If he did not consent, it was clearly his duty so to inform the Company and his silence under the circumstances amounts to consent

on his part. This being so it must be held that Mr. O'Shaughnessy committed a breach of contract in failing to complete the works on or before the

3rd June 1900, unless he can lawfully plead in justification that subsequent to the 4th May 1900 (on Which date a month's extension was granted

to him) the Railway Company committed default, in furnishing him with the plan of bridge No. 10 so late as the 18th May 1900 it being admitted

that the construction of the bridge could not have been finished in less than six weeks after the plan was furnished. This plea would no doubt be

valid if the contract embodied in Exhibit B were an indivisible one in respect of all the works therein referred to. But in our opinion the contract is

not an indivisible one, but a severable one each of the works therein referred to being itself an entire contract upon the completion of which the

contract or would be entitled to receive the price thereof, according to the schedule rates, *Government of Newfoundland v. Newfoundland*

Railway Company Hudson on Building Contracts (2nd Ed.,). Vol. I. p, 186 and payments have accordingly been made from time to time on

separate bills, to Mr. O'Shaughnessy. Whatever doubt might exist as to the separate entirety of certain kinds of works, there can be no doubt that

the construction of bridge No. 10 is an entire and separate work in itself. The provision made in the contract as to the withholding of 10 per cent, of

the amount of each bill as further security for the completion of all the works to the satisfaction of the District Engineer is by no means inconsistent with the contract being severable. The original deposit (by way of security) of Rs. 3,000, and the 10 per cent deductions, only formed an indivisible consolidated security for the due performance of each and all of the several works. It is not urged that the Company's delay in furnishing the plan for the bridge (No. 10) could in any way account for the non-completion of the other works within the extended period, The Company was therefore in our opinion justified, under the terms of the contract, in taking over the other unfinished works from Mr. O'Shaughnessy, though it may be that it was not entitled to do so in respect of Bridge No. 10. We may here observe that if Mr. O'Shaughnessy had considered that he was not guilty of breach of contract in not completing the works before the 3rd June 1900, it is incredible that he would not have protested against the action of the Company either on the receipt of the notice (Exhibit 26) or within a reasonable time thereafter.

6. It is however impossible to accede to the respondent's contention that under the terms of the contract, the amount lodged as security and the 10 per cent deductions made as further security have been forfeited to the Company as the works were not completed to the satisfaction of the Engineer and within the stipulated time. This contention proceeds on a total misapprehension of the terms of the contract. The contract does not treat the said amount as a penalty or even as liquidated damages. It is money belonging to the contractor, which, under the express terms of the contract, is held by the Company merely as security "" to be applied in or towards satisfaction of any loss or damage which the Company may sustain or incur"" by reason of the contractor's breach of contract. He may be guilty of a breach, either because he has not completed the work within the stipulated time or because such work, though completed in time, is not to the satisfaction of the Engineer. In either case, the onus is on the Company to prove the actual damage sustained by reason of the non-completion of the works within the stipulated time or by reason of defects in the quality of the work ; and if the amount of damages thus proved does not exceed the amount of the security, the contractor will be entitled to recover the balance. We are unable to agree with the contention of the respondent's counsel and the finding of the learned Judge that Exhibit KK

amounts to an admission on the part of the appellant that the Railway Company had the right to retain the 10 per cent, deduction "" for ever "".

Exhibit KK is merely an acquittance in favour of the Company in respect of the amount of the bills for Rs. 6,907-6-6, therein referred to, and not in

respect of the 10 percent deductions therefrom, which must be treated as a deposit made by the appellant (as Mr. O'Shaughnessy's assignee) as

further security, out of the amount of the bills.

7. The real question therefore in the case, is whether the Railway Company has sustained any and, if so, what amount of damage.

8. The first item of damage claimed is the cost of the special establishment maintained by the Company in connection with the carrying out of the

works included in Mr. O'Shaughnessy's contract. This establishment was necessary to point out the works to be done by the contractor and for

measuring and supervising the works while being executed. The cost of the establishment, no doubt, is borne entirely by the Railway Company.

But if the works had been completed within the specified time, the special establishment would not have had to be continued beyond that period.

From the very nature of the purpose for which the establishment was maintained, Mr. O'Shaughnessy (when he made the contract) must have

known that one result of his failure to complete the works in time would be the loss which the Company would incur by having to continue the

establishment till the works should be completed. This item therefore is not any remote or indirect loss sustained by the Company. As a matter of

fact the special establishment appears to have been continued at full strength till December 1900 and for two months longer on a reduced scale, at

a cost of about Rs. 7,400 (from the 3rd June, when the month's extension given to Mr. O'Shaughnessy expired). The question to be considered is

whether the Company is justified in claiming in this suit the costs of this establishment for the whole of this period. No further extension was granted

to Mr. O'Shaughnessy, but the Company on the 21st June 1900 exercised its right under the provisions of the contract and taking over the

unfinished works from him entrusted the carrying out of the same to the appellant under a fresh contract (Exhibit S). This fresh contract was

actually signed only on the 24th July 1900, and the time fixed therein for the completion of the unfinished works was two months from that date

(expiring with the 24th September 1900.) But, as a matter of fact, the appellant, who appears to have been originally Mr. O'Shaughnessy's sub-

contractor continued the works from the 21st June, in anticipation of the execution of Exhibit S He however failed to complete the works within the

specified time and delayed the completion till November or December. Mr. Scott, the Assistant Engineer, deposes that the two months' period

fixed in Exhibit S was sufficient for the completion of the unfinished works and there is nothing in the evidence to justify the delay on the part of the

appellant, the new contractor, according to the principles laid down in *Dodd v. Churton* [1897] 1 Q. B. 562 already referred to. It must therefore

be taken that the retention of the special establishment beyond the 24th September 1900 was the result only of the appellant's breach of contract.

The learned council for the respondent contends that even in that view Mr. O'Shaughnessy is also liable for the loss arising from the appellants'

breach of contract and such loss must be regarded as the natural result of the breach of the original contract by Mr. O' Shaughnessy. Under the

provisions of the contract (Exhibit B) the Company was, no doubt, at liberty to have the unfinished works carried out either by the employment of

day labour or by entrusting them to a new contractor. But it is impossible to accede to the contention that the loss arising from a breach of contract

by the new contractor is a natural or likely result of the breach of contract by Mr O' Shaugnessy. The fact that the appellant, the new contractor is

the assignee of Mr O' Shaughnessy's benefits under the original contract does not in the least affect the question ; and the case of the "" Arbitration

between the Yeadon Water Works Company and Binns 72 L.T. 538 "" and the explanation to Section 73 of the Indian Contract Act both of which

are strongly relied upon by the respondent's counsel have no bearing whatever upon the question. The Company does not in this suit claim to set

off any loss it sustained by reason of the appellant's breach of contract, against any balance (that may be due to him as Mr, O' Shaughnessy's

assignee out of Mr. O' Shaughnessy's security amounts ; in fact it is admitted that the accounts between the appellant and the company in respect

of his own contract have been fully adjusted. We therefore hold that the respondent can as against Mr O' Shaughnessy's claim as damages the

cost of the special establishment from the 3rd June only up to the 24 September 1900. Such cost according to the Company's accounts amounts

only to Rs. 5,564-3-4 which portion alone can be deducted from the security held by the Company.

9. Mr. Scott. Mr. Pawley and Mr. Stoney (Engineers of the Company have all deposed that the special establishment was continued for the

purpose of the completion of the works left unfinished by Mr O" Shaughnessy. The appellant's pleader contends that some deductions ought to be

made from the costs of the establishment. But as the statement of the Engineers was left unchallenged and nothing has been elicited (in cross-

examination) which would warrant any deduction (on account of the bridge No. 10 or other works unconnected with the contract in question), it is

not possible to allow any deduction from the cost of the establishment.

10. The other item of damages alleged in para. 9 of the written statement is very indefinite and our attention has not been drawn to any evidence

showing the nature of the damage or that the same was in the contemplation of the parties, (when the contract was made) as the propable result of

delay in the completion of the Re-alignment Line. It is explained to us that the expenses in working the line would, to the sole benefit of the Mysore

Durbar, be reduced by about 10 per cent, by the Realignment Line and that the delay in the completion of this line resulted in a loss to the Mysore

Durbar so long as the working of the old line had to be continued during such delay. This no doubt might have been in the contemplation of the

Company ; but there is no evidence to show that this was known or communicated to Mr. O" Shaughnessy and we agree with the learned Judge

who tried the case that the damages claimed on account of the loss of the profits anticipated by the Company under this head are too remote and

cannot be allowed.

11. The appellant will be entitled to charge interest at 6 per cent upon the Rs. 3,000 Government security (together with the interest accrued

thereon up to the 24th September 1900) and on the sum of Rs. 3,988-3-5 (the amount of the 10 per cent deductions from bills) only from the 24th

September 1900 (when the works ought to have been finished under the new contract), Credit must be given to the respondent in the sum of

Rupees 3, 564-3-4 being the cost of the special establishment from the 3rd June to the 24th September 1900,

12. We, therefore, allow the appeal and give the plaintiff a decree for the balance

of Rs. 3,586,-0-0 due to him with interest thereon at 6 per cent from the 24th September 1900 till date of payment.

13. Though in the notice (dated the 19th June 1900) Exhibit 26, the Company took the right view and merely stated that the security and deposit would be appropriated against any loss which the Company might incur by the breach of the contract, yet notice (Exhibit NN) was subsequently

given to the plaintiff claiming the whole amount of the security and the deposits as having been forfeited to the Company by reason of Mr.

O'Shaughnessy's breach of contract. The appellant was therefore driven to the necessity] of bringing this s-.it; and the respondent must bear his

own costs and pay the appellant's costs throughout, pleader's fee however being allowed only on the amount decreed in favour of the appellant,

viz,, Rs. 3,586.