M.R.O. 1—77,006—8-6-37.

(1) Number of pages 15

(2) Date of repair 12-10-38

(3) Initials of the Referencer

MADRAS RECORD OFFICE.

Government of Madras.

Public Works DEPARTMENT.

Cons. 20.12.59

G.O. No. 2924 Press Mis.

Dated 15 12 1859.

Not to be folded or roughly handled

No. 97. Read the following letter from CLEMENT DALE, Esq., Government Pleader, Sádr Adálat; to J. D. BOURDILLON, Esq., Secretary to Government, dated Madras, 8th December 1859, No. 148.

Order 17th November 1859, No. 2687, Public Works Department.

Paragraph 1. I do myself the honor of acknowledging the receipt of the order of Government of date and number noted in the margin, and to state for the information of the Honorable the Governor in Council, that in my opinion the Act No. 13 of 1859, is not retrospective, so as to affect transactions which had taken place previously to the passing of the Act; nor do the contractors referred to (in my opinion) come within the purview of the Act.

2. The contracts entered into by Major Marshall with these contractors, are unartistically prepared, and in consequence considerable difficulty arises.

3. The suits referred to have been instituted in the Subordinate Court of Madura, and numbered 18 and 19 of 1859.

4. The two suits have been commenced in the name of Captain Ryves. This is clearly wrong, they should have been instituted in the name of the Secretary of State for India in Council, or of Lieutenant Scott; from the manner in which the contracts are prepared, some question might have been raised by the defendants, if the suits had been commenced by either of those parties, and they (the defendants) had been advised by a professional man possessed of ordinary knowledge; but there can be no question that Captain Ryves could not have maintained the actions, if the objection had been taken in the pleadings.

5. By the plaints Captain Ryves seeks to recover, a re-payment the of balances of advances made to these contractors; as also payment of the penalties, which by the contracts are stipulated to be paid, in default of the contractors completing the works within stipulated periods.

6. In the replication filed in O. S. No. 19 of 1859, it is averred that "the contract having "been broken by the defendant, he has no claim whatever for value of work done, and the amount "of all advances might by Law be recovered." In the replication filed in O. S. No. 18, a similar position is set up; and I observe Captain Ryves in his letter of the 29th October 1859, enunciates the same doctrine. Under the circumstances of these cases, it is clear no such position could have been supported even if the Plaintiff had not waived any such supposed right, by giving credit in his plaint for the value of the work done.

7. As regards the recovery of the penalties, I am of opinion that the plaintiff should fail in both suits.

8. The defendants in No 18 aver, that the terms of the agreement had not been fulfilled on behalf of the Engineer. That the advances were not made according to the agreements, only Rupees 1,500 having been advanced instead of Rupees 2,500. They admit the receipt altogether of Rupees 7,000, but aver work has been done to the value of Rupees 6,151-2-0. That having collected materials, they applied for plans, &c. but were stopped. That subsequently orders were given to commence at a different point from that provided in the agreement. That during the rains they were stopped by order; as also on Sundays. That the work was not measured as it proceeded; and that Major Marshall had enlarged the time. In the replication filed by the Government Vakeel, it is admitted that only Rupees 1,500 were paid on the 16th June, but it is averred that Rupees 2,000 were advanced on the 10th July. The value of the work done is traversed; while the application for the plans, and consequent delay, is not denied, but merely traversed, with an offer to deduct any time, which the defendants might succeed in proving to have been thereby lost to them. The variance from the agreement, as to the point of commencement, is not denied. It is then averred that the stoppage during rains, and on Sundays, is the rule of the office, which was known to the contractors, and the notification of Government, dated the 12th of January 1847, (Gazette page 83) is relied upon; and it is also averred, that Major Marshall had no authority to enlarge the time.

9. In the O. S. No. 19 the defendant avers in his answer, that the plan and estimate were not given to him till five months after the commencement of the contract; also that a further period of two months expired before the work was pointed out; also that he had been prohibited from working on Sundays; and that while Major Marshall was on circuit, he was further delayed; and that Major Marshall relaxed the contract as to time. These averments (except the prohibition of work on Sundays and the allowance of further time by Major Marshall) are not traversed or denied.

10. Agreeably to the rules by which Courts are (or ought to be) governed, the truth of averments made by one party and not denied or traversed by the other, are admitted, the prohibition to work on Sundays is indeed admitted by both replications, but the notification by Government of the 12th of January 1847 is relied upon, I consider this insufficient; in all contracts prepared by the Company's Solicitor an express provision was made; and unless that is done, I am of opinion that such notification cannot be effectually set up so as to defect the defence.

11. Of the two defences the case of the defendant in No. 19, as it now rests on the pleadings, is unquestionably the strongest; and in that case the claim for the penalty must fail. In the other, from the manner in which the replication has been framed, the issue as regards the penalty will depend on the evidence adduced, but my impression is that if the averments of the defendants could have been denied, it would have been done in the replication.

12. Under all the circumstances, I should advise that a fresh arrangement should be entered into with both contractors, if it can be effected.

13. If the contractors will not come into any reasonable terms, then I advise that Captain Ryves be permitted, if the thinks fit. to pursue these suits; and I recommend in such case that they be pursued with vigor. As the pleadings now stand, the objection I have alluded to cannot properly be taken. It does not, however, follow that the Courts may not allow the objection to prevail, although not raised on the pleadings. Should such a result take place, the failure will be caused by Captain Ryves having instituted these suits in their present form, and without sanction previously obtained, and it will be for the consideration of His Excellency in Council, whether he should defray the expenses incurred. If the suits be now dropped, it is clear that Captain Ryves will be liable to defray all expenses hitherto incurred, and it is with the view of saving him from this result, that I advise he may be permitted to carry on the suits, (should the contractors refuse to come to terms) under the hope he may ultimately succeed in obtaining judgments and consequently the costs incurred.

14. It is needless to enlarge on the difficulties which must beset Government, if contracts of a description similar to these are made by Government officials; nor upon the hopelessness of a contract system answering, if the terms of contracts are so needlessly departed from, as is averred in the proceedings now under consideration.

15. I return the papers which accompanied the proceedings noted above.

No. 98. ORDER THEREON, 15th December 1859, No. 2924.

1. This letter will be communicated to the Chief Engineer with reference to his letter of November 11th, No. 7128. The Government authorize the course suggested by Mr. Dale in paragraphs 12 and 13; that in the former paragraph agrees with the Chief Engineer's recommendation in paragraph 5 of his letter above referred to. The Government will decide after the result of the suits shall be known, whether the costs of the suits irregularly and informally filed by Captain Ryves shall be borne by that officer or by Government.

2. The Government resolve to call the particular attention of the Chief Engineer to the remarks in the 14th paragraph of Mr. Dale's letter, in which they fully concur. It is evident that if the system of executing work by contract is to succeed, scrupulous good faith must be

observed towards contractors. Government have repeatedly enforced this truth, but there appear to be still officers in the Public Works Department who disregard it. This requires the constant attention of the Chief Engineer.

3. The Government authorize the Chief Engineer to allow more liberal terms of adjustment to the contractors, in consideration of the want of regard to their rights exhibited by the late executive officer in his treatment of them.

(Signed) J. D. BOURDILLON,

Secretary to Government.

one way (the defendants) had been advised by a professional

No 148

From Clement Dale Esquire Government Pleader Sudr Udalut
To J D Bourdillon Esquire Secretary to Government

Madras 8th December 1859.

Sir,

Para 1 I do myself the honor of acknowledging the receipt of the Order of Government of Date and Number noted in the Margin, and to state for the information of the Honorable the Governor in Council, that in my opinion the Act No 13 of 1859 is not retrospective, so as to affect transactions which had taken place previously to the passing of the Act. Nor do the Contractors referred to (in my opinion) come within the purview of the Act.

Order 14th November 1859 No 2687
Publick Works Department

2. The Contracts entered into by Major Marshall with these Contractors, are unartistically prepared, and in consequence Considerable difficulty arises

3. The Suits referred to have been instituted in the Subordinate Court of Madura, and Numbered 18 and 19 of 1859

4 The 2 Suits have been Commenced in the name of Captain Pynes. This is clearly wrong, they should have been instituted in the Name of the Secretary of State for India in Council, or of Lieutenant Scott; from the manner in which the Contracts are prepared, some question might have been raised by the Defendants, if the Suits had been Commenced by either of those Parties, and they (the Defendants) had been advised by a professional

al man posessed of Ordinary Knowledge; but there can be no question that Captain Rynes could not have maintained the Actions, if the objection had been taken in the pleadings.

5. By the plaints Captain Rynes seeks to recover, a Repayment of the balances of advances made to these Contractors; as also payment of the penalties, which by the Contracts are Stipulated to be paid, in default of the Contractors completing the works within Stipulated periods.

6. In the Replication filed in O. S. No. 19 of 1859, it is averred that "the Contract having been broken by the Defendant, he has no claim whatever for value of work done, and the amount of all advances might by Law be recovered." In the Replication filed in O S No. 18 a Similar position is set up, And I observe Captain Rynes in his letter of the 29th October 1859, Enunciates the same Doctrine. Under the Circumstances of these Cases, it is Clear no such position could have been supported Even if the Plaintiff had not waived any such supposed Right, by giving Credit in his plaint for the value of the work done.

7. As regards the Recovery of the penalties, I am of opinion that the Plaintiff should fail in both Suits.

8. The Defendants in No. 18 aver, that the terms of the Agreement had not been fulfilled on behalf of the Engineer. That the advances were not made according to the Agreement, only Rupees 1500 having been advanced instead of Rupees 2500. They admit the Receipt altogether of Rupees 7000, but aver work has been done to the Value of Rupees 6457-2-. That having Collected Materials, they applied for plans &c, but were stopped. That subsequently orders were given to Commence at a different point, from that provided in the Agreement. That during the Rains they were stopped by Order; as also on Sundays. That the work was not measured as it proceeded; and that Major Marshall had Enlarged the time. In the Replication filed by the Government Vakeel, it is admitted that only Rupees 1500 were paid on the 16th June, but it is avered that Rs 2000 were advanced on the 10th July. The value of the work done is traversed, while the application for the plans, and consequent Delay is not denied, but merely traversed, with an offer to deduct any time, which the Defendants might succeed in proving to have been thereby lost to them. The variance from the Agreement, as to the point of Commencement, is not denied. It is then avered that the stoppage during Rains, and on Sundays, is the Rule of the Office, which was Known to the Contractors, and the Notification of Government dated the 12th of January 1847 (Gazette page 83) is Relied upon; And it is also averred, that Major Marshall had no Authority to Enlarge the time.

9. In the O S No. 19 the Defendant avers

in

in his Answer, that the Plan and Estimate were not given to him till 5 Months after the Commencement of the Contract; Also that a further period of 2 Months Expired before the work was pointed out; Also that he had been prohibited from working on Sundays; and that while Major Marshall was on Circuit, he was further delayed; and that Major Marshall relaxed the Contract as to time. These Averments (Except the prohibition of work on Sundays and the allowance of further time by Major Marshall) are not traversed or denied

10 Agreeably to the Rules by which Courts are (or ought to be) governed, the truth of Averments made by one party and not denied or traversed by the other, are admitted, the prohibition to work on Sundays is indeed admitted by both Replications, but the Notification by Government of the 12th. of January 1847 is relied upon - I consider this insufficient in all Contracts prepared by the Company's Solicitor an Express provision was made; and unless that is done I am of opinion that such Notification cannot be effectually setup so as to defeat the defence.

11. Of the 2 Defences the case of the Defendant in No. 19, as it now rests on the Pleadings, is unquestionably the strongest; and in that case the claim for the penalty must fail: In the other, from the manner in which the Replication has been framed, the issue As regards the penalty will depend on the Evidence adduced, but

my impression is that if the averments of the Defendants could have been denied, it would have been done in the Replication.

12 - Under all the Circumstances, I should advise that a fresh arrangement should be entered into with both Contractors, if it can be effected

13. - If the Contractors will not come into any reasonable terms, then I advise that Captain Ryves be permitted, if he thinks fit, to pursue these Suits; and I recommend in such Case that they be pursued with vigor - As the Pleadings now stand, the objection I have alluded to cannot properly be taken, It does not however follow that the Courts may not allow the objection to prevail, although not raised on the pleadings. Should such a Result take place the failure will be caused by Captain Ryves having instituted these Suits in their present form, and without Sanction previously obtained, and it will be for the Consideration of His Excellency in Council, whether he should defray the Expences incurred - If the Suits be now dropped, it is clear that Captain Ryves will be liable to defray all Expences hitherto incurred, and it is with the view of saving him from this result, that I advise he may be permitted to carry on the Suits, (Should the Contractors refuse to come to terms) under the hope he may ultimately Succeed in obtaining Judgments and Consequently the Costs incurred.

14 - It is needless to enlarge on the difficulties

which must be set Government, if Contracts of a Description similar to these are made by Government Officials; nor upon the hopelessness of a Contract System answering, if the terms of Contracts are so needlessly departed from, as is averred in the proceedings now under Consideration.—

15 I return the papers which accompanied the Proceedings noted above.

I have the honor to be
Sir
Your most obedient Servant

Genl Pleader Sudr Adalut

P. W. D. 12

№ 2924.

Proceedings of the Madras Government
Under date the 15th December 1859.

Read the following letter from the Government Reader, S.C.

(Here enter 8 Dec. 1859 № 1487)

This letter will be communicated to the Chief Engineer with reference to his letter of 4 November 11, № 7120. The Government authorize the course suggested by Mr. Dale in paras 12 and 13; that in the former para agrees with the Chief Engineer's recommendation in para 4 of his letter above referred to. The Government will decide after the result of the suits shall be known, whether the

P. W. D. 1859 Oct. 29 Despatch from Govt. to Secretary to Govt. № 3242. Dated 8th December 1859 Rec'd 10.

Con. 20 December 1859 Apl. 112.

A. 2924. 15 December 1859. № 1487.

(With 1 Enclosure) Returned 31-1-60.

1. Letter from Govt. dated 29 Oct. 1859 № 3242 Forwarding Report from Chief Engineer dated 4 Nov. 1859 № 7120 with Opinion and Recommendation that the Contractor should be required to complete the Work in question.
2. Letter from Govt. dated 8 Dec. 1859 № 3242 Directing that the Contractor be required to complete the Work in question.
3. Letter to Govt. dated 15 Dec. 1859 № 1487 Submitting a Report from Executive Engineer dated 2 Nov. 1859 with Opinion that the Contractor is not responsible for the Failure of the Work in question, and that the Contractor should be required to complete the Work.
4. Letter from Govt. dated 31 Jan. 1860 Directing that the Contractor be required to complete the Work in question.

№ 197.

Public Works Department.

Read the following letter from the Chief Engineer, dated 4th November 1859, № 7120.

Read also the following letter from the Government, dated 29th October 1859, № 3242.

Read also the following letter from the Chief Engineer, dated 15th December 1859, № 1487.

Read also the following letter from the Government, dated 8th December 1859, № 3242.

Read also the following letter from the Chief Engineer, dated 15th December 1859, № 1487.

Read also the following letter from the Government, dated 31st January 1860.

Ordered, that the Contractor be required to complete the Work in question.

Ordered, that a Copy of the Proceedings of the Chief Engineer, dated 15th December 1859, № 1487, be forwarded to the Government.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Chief Engineer.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Executive Engineer.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Contractor.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Auditor.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Accountant.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Treasurer.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Collector.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Sub-Collector.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Deputy Collector.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Tahsildar.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Munsiff.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Headman.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Accountant.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Watchman.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Barber.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Washerman.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Potter.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Blacksmith.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Carpenter.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Mason.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Tailor.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Shoemaker.

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Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Pewtersmith.

Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Brazier.

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Ordered, that a Copy of the Proceedings of the Government, dated 31st January 1860, be forwarded to the Village Limeburner.

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the costs of the suits irregularly and informally filed by Capt. Rynes shall be borne by that Officer or by Government.

2. ..... The Government receive to call the particular attention of the Chief Engineer to the remarks in the 4th paragraph of Mr. Dale's letter, in which they fully concur. It is evident that if the system of executing work by contract is to succeed, scrupulous good faith must be observed towards contractors. Government have repeatedly enforced this truth, but there appear to be still officers in the Public Works Department who disregard it. This requires the constant attention of the Chief Engineer.

3. ..... The Government authorize the Chief Engineer to allow more liberal terms of adjustment to the contractors, in consideration of the want of regard to their rights exhibited by the late executive officer in his treatment of them.

10 Copies
To the Chief Engineer &c
1 " Government Plenipo[tentiary]

Public Works 1859 Dept.
Pro: of Govt 20th Decr.

No 2924.

Pro: of the Madras Govt.
Dy 15th December 1859

From the Chr. Engr.
Dy 27th Septr 1861
C No. 2179

From Chief Engineer
Dy 30 July 1805 No. 1805

From Bo: 25th Octr 1861
C No. 2219

Respecting the suits instituted by Capt. Rymer for the recovery of the balances of advances made to the contractors for certain works in Madura.

No 97 & 98.

C 12 Dumbrell 1814