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MADRAS RECORD OFFICE.

Government of Madras.

Public Works DEPARTMENT.

G.O. No. 2990	Press Mis.
196-192	
Dated 9-10-1868	

Not to be folded or roughly handled

69/

*Proceedings of the Madras Government, Public Works Department,
9th October 1865.*

Read the following papers :—

No. 190. From Lieutenant-Colonel G. W. WALKER, R. E., Superintending Engineer, 7th Division, to Colonel C. A. ORR, R. E., Secretary to Government, Department Public Works, dated Coimbatore, 9th September 1865, No. 121.

SIR,

1. Mr. Bake, the Timber Contractor alluded to in G. O. No. 3,060 of 24th October 1864, having at last taken legal proceedings against myself and the Range Officer at Coimbatore, who are both summoned to appear before the Civil Court on the 16th October, I have the honor to request permission to defend the Suit. *And I cannot better show cause why such action should be permitted than by submission of draft of my proposed defence, as I intend laying it before the Court.*

2. I have also the honor to submit copy of the Bond whereon the sum of Rupees 1,100 deposit money, confiscated by me, was lodged by Mr. Bake. From which it will plainly appear that even if the Plaintiff succeeded in proving timely delivery of his firewood (which he will attempt), the admission which he must make of non-delivery of the Vengay timber contracted for at the same time, will vitiate his claim to recovery of any portion of the security money, the whole of which is declared liable to forfeiture on failure to carry out entirely the conditions of the specification, which included delivery of timber (never fully supplied) as well as firewood (fully supplied, but not within the time).

1. Referred to the Government Pleader, who will be good enough to state whether there are satisfactory grounds for believing that the defence will be successful.

* 2nd September 1864, No. 2,548.
24th October " " 3,060.

2. Copies of the orders* marginally noted are forwarded herewith. The original papers referred to in Colonel

Walker's letter of 25th August 1864, No. 94, have been returned to that Officer, but will be called for, if necessary.

3. It will be observed that the Superintending Engineer and the Range Officer are summoned to appear on the 16th October 1865.

(Signed) J. H. M. SHAW STEWART, Major, R. E.,

Under Secretary to Government, P.W.D.

FORT SAINT GEORGE,
16th September 1865.

No. 191. From C. DALE, Esq., Government Pleader, Madras, to Major J. H. M. SHAW STEWART, R. E., Under Secretary to Government, Public Works Department, dated Madras, 5th October 1865, No. 143.

SIR,

Order 16th September 1865, No. 3,494, on letter from Superintending Engineer, 7th Division, 9th September 1865, No. 121.

1. I do myself the honor of acknowledging the receipt of the Order of Government of the date, &c., noted in the margin.

2. A copy of the Plaintiff filed by Mr. Bake did not accompany the Order. In all cases in which the opinion of the Law Officers is required on a Suit pending, a copy or, if in a vernacular, a translation of the plaint should always be laid before us, as in many cases our opinion may be greatly influenced by the way in which a Plaintiff frames his case in his plaint. In the case now under consideration probably sufficient is disclosed to enable me to advise.

3. I observe that the Suit is brought against Colonel Walker, and as I gather Lieutenant Smith as 2nd Defendant; and having the plaint before me, I am

*Proceedings of the Madras Government, Public Works Department,
9th October 1865.*

unable to judge whether they are properly made Defendants. The contract was made by Lieutenant Trail, and as a general rule the party entering into the contract is the only person who should be made the Defendant, as far however as I can judge of the case no difficulty to the defence of the Suit on its merits presents itself by Colonel Walker and Mr. Smith being made Defendants instead of Lieutenant Trail, and therefore I do not consider it would be becoming to endeavour to get rid of the Suit on such merely technical grounds.

4. A paper purporting to be a copy of an Agreement, dated the 19th of October 1863, between Mr. Trail and Mr. Bake, accompanied the Order noted above. It refers to "a tender dated the 29th September 1863, attached to a specification of materials and conditions attached to the delivery of the same." It is utterly impossible to arrive at a correct appreciation of the facts without seeing the specification and conditions. From the papers before me, it appears that three separate contracts were entered into with Mr. Bake, and that upon one, viz., for the delivery of firewood, Government securities for Rupees 800 were deposited, while in the two contracts for delivery of timber securities for Rupees 300 were deposited. The copy sent to me speaks generally of "materials," and Mr. Bake is stated to bind himself in the sum of Rupees 1,100 for their due delivery under the conditions set out in the specification annexed to the original Agreement; what those conditions are I have no means of precisely ascertaining from the papers forwarded by Colonel Walker. Mr. Bake, however, states that one of the conditions of the firewood contract was that "all the firewood should be measured and paid for on delivery;" and from his letter I gather that a similar condition formed part of the contracts for the supply of the timber; moreover, Mr. Bake asserts that those conditions *were broken by the Officers of Government*. It is likewise asserted by him that the whole of the firewood which he, Mr. Bake, contracted to supply was supplied by him, and accepted on behalf of Government. Mr. Bake further asserts that between the 1st and 15th November 1863 he delivered some of the timber, but consequent upon a breach of the contract by the Executive Officer, he determined to discontinue a further supply; which determination, however, he was induced to re-consider on representations made to him by the Supervisor in charge of the works, and that he subsequently supplied all the timber he had contracted to supply, and which timber was accepted by an Officer of Government, and a receipt granted. If these statements be true I fail to see what possible defence the Government can have. That they are true, appears to be admitted, for the letter of Mr. Bake has been submitted to Colonel Walker, who has not only not denied them, but says the contract had been invalidated by Mr. Bake, "as well as the others;" from this expression I infer "the others" mean the Officers of Government. It would appear from Colonel Walker's correspondence, &c., that he considers Government and Government officials may break conditions entered in contracts, and still hold the Contractors liable to forfeitures for breach of some of those conditions. Happily Courts of Law do not take a similar view, but except when one party claims from the other a penalty, that the party claiming should have faithfully and honestly performed his part of the Contract. Again, if Government intended to claim the forfeiture, their Officers on a breach having been committed by Mr. Bake should have given notice to him that they cancelled the agreement (to do which a power is reserved), and that they claimed the penalty. Has such a course been pursued in the case under consideration? It would appear it has not, but on the contrary that the wood has been received on behalf of Government, and most of it made use of, and then and not till then the penalty is claimed for non-delivery within the prescribed time. A Court of Law will treat such subsequent acceptance as a condition of the forfeiture.

5. I observe that Government were by Colonel Walker in his letter of the September 1864, referred the matter to Walker's letter of the 8th October 1864, therefore unable to judge whether any satisfactorily explained by Colonel W

t satisfied with the explanation afforded August 1864, No. 94, and on the 2nd him for further information; Colonel 131, has not been sent to me. I am objections I have noticed have been

*Proceedings of the Madras Government, Public Works Department,
9th October 1865.*

6. Colonel Walker in his letter of the 9th September 1865, No. 121, requests permission to defend the Suit instituted by Mr. Bake, and adds that he "cannot better show cause why such action should be permitted than by submission of draft of his proposed defence, as he intends laying it before the Court;" I have perused and given that paper consideration, and I regret to say that, in my opinion, it does not show any ground of defence, the facts are not stated, and it is on facts as proved and on them alone, that a Court can decide a question submitted to it. To me it appears this draft is prepared in such a manner as to confuse the case to such an extent that (unless the Plaintiff utterly fails to prove his case) a Decree must inevitably be pronounced against Government.

7. Unless, therefore, the facts are very different from those disclosed by the papers before me, I am of opinion there are not any satisfactory grounds for believing that a defence of the Suit will be successful; and I strongly advise His Excellency the Governor in Council not to sanction the defence of the Suit. If, however, the facts be different, I shall be happy to consider any papers which may be laid before me.

8. I return the papers noted at foot:—

1863, October 19th.—Copy Agreement.

1865, September 9th.—Colonel Walker's letter with Order of Government.

Do. do. Draft of proposed answer.

No. 192. ORDER THEREON, 9th October 1865, No. 2,990.

CIVIL WORKS, No. 32.

1. The foregoing letter from the Government Pleader will be communicated to the Superintending Engineer of

the 7th Division, with reference to his letter No. 121, dated 9th September 1865.

2. Unless Lieutenant-Colonel Walker can show stronger grounds for defending the Suit instituted by Mr. Bake, the Government must withhold their sanction to his doing so at the public expense.

3. The particular attention of all Superintending Engineers will be drawn to paragraph 2 of Mr. Dale's letter.

(True Extract.)

Colonel, R. E.,

Secretary to Government.

To the Superintending Engineer, 7th Division, with two Enclosures.
To all other Superintending Engineers.

Exd. S. T. Augustin.

*Proceedings of the Madras Government, Public Works Department,
9th October 1865.*

Read the following papers :—

No. 190. From the Superintending Engineer, 7th Division.
(Here enter 9th September 1865, No. 121.)

No. 191. From C. DALE, Esq., Government Pleader, Madras, to Major J.
H. M. SHAW STEWART, R. E., Under Secretary to Government, Public
Works Department, dated Madras, 5th October 1865, No. 143.

2. A copy of the Complaint filed by * * did not accompany the Order. In
all cases in which the opinion of the Law Officers is required on a Suit pending, a
copy or, if in a vernacular, a translation of the complaint should always be laid before
us, as in many cases our opinion may be greatly influenced by the way in which a
Plaintiff frames his case in his complaint. In the case now under consideration pro-
bably sufficient is disclosed to enable me to advise.

No. 192. ORDER THEREON, 9th October 1865, No. 2,990.

CIVIL WORKS, No. 32.

3. The particular attention of all Super-
intending Engineers will be drawn to para-
graph 2 of Mr. Dale's letter.

(True Extract.)

(Signed) CHARLES A. ORR, Colonel, R. E.,
Secretary to Government.

To the Superintending Engineers of Divisions, (except the 7th Division.)

Ed. S. T. Augustin.

Nº 121.

Superintending Engineer's Office
1st Division

Coimbatore 9th September 1865.

From Lieut Col G. W. Walker R.E.
Superintending Eng^r 1st Div.

To Colonel G. A. Orr R.E.
Secretary to Government O.P.W.

Sir, Mr. Balle, the Timber Contractor, alluded to in G. O. Nº 3060 of 24th Dec^r 64, having at last taken legal proceedings against myself and the Range Officer at Coimbatore, who are both summoned to appear before the Civil Court on the 16th October. I have the honor to request permission to defend the suit. And I cannot better show cause why such action should be permitted than by submission of draft of my proposed defence, as I intend laying it before the Court.

2 I have also the honor to submit copy of the Bond wherein the sum of Rs 1100 Deposit Money, confiscated by me, was lodged by Mr. Balle. From which it will plainly appear that even if the Plaintiff succeeded in proving timely delivery of his Firewood, (which he will attempt) ^{the} administration which he must make of non-delivery of the Tengay Timber contracted for at the same time, will vitiate his claim to recovery of any portion of the Security Money, the whole of which is declared liable to forfeiture in failure to carry out entirely the conditions of the Specification, which included delivery of Timber (never fully supplied) as well as Firewood.

(fully supplied but not within the time).

I have the honor to be
 Sir,
 Your most obedt. servant
 Samuel Hunt Esq. R.C.
 Superintending Engineer of the City.

Wm. George
 16 September 1865
 1857-1858/65

...ment. Plaster will be good -
 enough to state whether there are
 factory grounds for believing that the
 defense will be successful.
 Copies of the orders regarding
 matter are forwarded herewith. The
 original papers referred to in Grand
 Jury's letter of 25th August 1864, which
 have been returned to that officer, but will
 be called for, if necessary.
 It will be observed that the
 Superintending Engineer and the Charge Officer
 are summoned to appear on the 16th October 1865.

Wm. George
 16 September 1865
 1857-1858/65
 Under Secretary for the City

Referred to the Council

N:112

57

On 24 Sept/64 St 45-50
 15 Sept 520-524
 24 Oct. 454-458

1865 D. 112
 Proposed by Hon. J. G. 494
 The City Engineer
 J. G.

To The Secretary to the Council

Dated 9 Sept/65
 Recd 10 "

C. 2 M 3887/65

N:121

Requests permission
 to defend Mr. Baker's
 suit -

Referred

N:120

W

57

N^o 143

From Clement Dale Esquire Government Pleader & Madras.
To Major Thomas Stewart R.E. Under Secretary to Government P.W. Department
Madras 5th October 1865

Sir
Pam. I do myself the honor of acknowledging the receipt
of the Order of Government of the date 18th noted in

Order 16 September 1865. P. 3494 on
Letter from Subordinate Engineer the Marquis
Dated 9 September 1865. P. 121.

X
2. A copy of the plaint filed by Mr. Baker did not
accompany the Order. In all cases in which the opinion
of the Law Officers is required on a such pending,
a copy or, if in a vernacular, a translation of the
plaint should always be laid before us, as in
many cases our opinion may be greatly influenced
by the way in which a Plaintiff frames his case in
his plaint. In the case now under consideration
probably sufficient is disclosed to enable me
to advise. X

3. I observe that the suit is brought against
Colonel Walker, and as I gather, Lieutenant's
Smith as 2^d Defendant, without having the
plaint before me I am unable to judge whether
they

are properly made Defendants; The Contract was made by Lieutenant Spail, and as a general rule the party entering into the Contract is the only person who should be made the Defendant, as far however as I can judge of the Case no difficulty to the difference of the Lien on its merits presents itself by Colonel Walker and c Mr Smith being made Defendants instead of Lieutenant Spail, and therefore I do not consider it would be becoming to endeavor to get rid of the Lien on such merely technical grounds.

4. A paper purporting to be a copy of an agreement dated the 19th of October 1863 between Mr Spail and Mr Baker accompanied the order noted above; It refers to "a tender dated the 29th of September 1863 attached to a specification of 'materials and Conditions attached to the delivery of the same'; It is utterly impossible to arrive at a correct appreciation of the facts without seeing the specification and Conditions; From the papers before me it appears that three separate

Contracts were entered into with Mr Baker, and that upon one viz^t for the delivery of firewood, Government securities for Rupees 800 were deposited, while in the two Contracts for delivery of Lumber securities for Rupees 300 were deposited; The copy sent to me speaks generally of "Materials" and c Mr Baker is stated to bind himself in the sum of Rupees 100 for their due delivery under the Conditions set out in the specification annexed to the Original Agreement, what those Conditions are I have no means of precisely ascertaining from the papers forwarded by Colonel Walker; c Mr Baker however states that one of the Conditions of the firewood contract was that "all the firewood should be measured and paid for on delivery;" and from his Letter I gather that a similar Condition formed part of the contract for the supply of the Lumber; c Moreover c Mr Baker asserts that those Conditions were broken by the Officers of Government; It is likewise asserted by him that the whole of the firewood which he, c Mr Baker, contracted to supply was supplied by him and accepted on behalf of Government; c Mr Baker further asserts that between the 1st and 15 November 1863

he delivered some of the Timber, but consequent upon
a breach of the Contract by the Executive Officer he
determined to discontinue a further supply; which
determination however he was induced to reconsider on
representations made to him by the Supervisor in charge
of the Works, and that he subsequently supplied all the
Timber he had contracted to supply, and which Timber
was accepted by an Officer of Government and a receipt
granted; If these statements be true I feel to see what
possible defence the Government can have. That they are
true appears to be admitted for the Letter of Mr Baker
has been submitted to Colonel Walker, who has not only
not denied them but says the Contract had been in-
validated by Mr Baker, "as well as the others" from
this expression I infer "the others" mean the Officers
of Government; it would appear from Colonel Walker's
Correspondence &c. that he considers Government
and Government Officials may break Conditions
entered in Contracts, and still hold the Contractors
liable to forfeitures for breach of some of those
Conditions; happily Courts of Law do not take
a similar view, but except when one party claims
from the other a penalty, that the party claiming

should have faithfully and honestly performed his part
of the Contract. Again if Government intended to claim
the forfeiture, their Officers on a breach having been
committed by Mr Baker should have given notice to him
that they cancelled the agreement (to do which a power
is reserved) and that they claimed the penalty; has
such a course been pursued in the case under consideration.
It would appear it has not, but on the contrary that the
wood has been received on behalf of Government, and much
of it made use of, and then and not till then the penalty
is claimed for non delivery within the prescribed time.
A Court of Law will treat such subsequent acceptance
as a condition of the forfeiture.

5. I observe that Government were not satisfied
with the explanation afforded by Colonel Walker
in his Letter of the 24th August 1854 No 94 and on
the 2^d September 1854 referred the matter back to
him for further information; Colonel Walker's letter
of the 8th October 1854 No 131 has not been sent to me,
I am therefore unable to judge whether any of the
objections I have noticed have been satisfactorily
explained by Colonel Walker.

6. Colonel Walker in his Letter of the 9th September 1865 No 121 requests permission to defend the suit instituted by Mr. Baker, and adds that he "cannot better shew Cause why such action should be permitted than by Submission of draft of his proposed defence, as he intends laying it before the Court." I have perused and given that paper consideration, and I regret to say that in my opinion it does not shew any ground of defence the facts are not stated and it is on facts as proved and on them alone, that a Court can decide a question submitted to it. To me it appears this draft is prepared in such a manner as to confuse the case to such an extent that (unless the Plaintiff utterly fails to prove his case) a Decree must inevitably be pronounced against Government.

7. Unless therefore the facts are very different from those disclosed by the papers before me I am of opinion there are not any facts found for believing that a defence of the suit will be successful; and I strongly advise His Excellency the Governor in Council not to sanction the defence of the suit. If however the facts be different, I shall be happy to consider any papers which may be laid before me.

8. I return the papers noted at foot.

I have the honor to be
Sir

Your Most Obedient Servant

Wm. B. B. B.

Government Pleader

1863 October 19. Copy Agreement.
1865 September 9. Col. Walker's Letter with order of Government.
Draft of proposed answer.

Civil Works

Public Works Department

No 2990-2990 9/10

Proceedings of the Madras Government
under date the 9th October 1865
Read the following

From the Superintending Engineer
of the 7th Division (Here enter 9th September 1865 No 121)

From the Government Pleader
Madras (Here enter 5th October 1865 No 143)

The foregoing letter
from the Government Pleader
will be communicated to
the Superintending Engineer
of the 7th Division, with
reference to his letter No 121
dated 9th September 1865.

Unless Lieutenant
Walker can show
stronger grounds for defending
the

JP
WOM

1865-2-20
No 1388-2-20
From Government Pleader
to Under Secretary to Govt
P. W. Department

Dated 5th October 1865
No 143

With the enclosed
Government Pleader is of
opinion that there are no
further facts or grounds
for denying that a portion
of the land would be conveyed
to the Government by the
Council not to be taken from the
possession of the land.

1865-1-19

1865-1-19
1865-1-19
1865-1-19

substituted by Mr.
Baker, the Government
must withhold their po-
sition to his doing so at
the public expense.

3 The particular at-
tention of all Superintending
Engineers will be drawn
to para 2 of Mr. Dale's
letter signed by

A. J. Cunningham
[Signature]

The Engineer 17th 1870
"All other"
[Signature]
Resps 11th Oct 1870
The Engineer

[Faint handwritten notes]

[Faint handwritten notes]

[Faint handwritten notes]

707
To Mr. Duff
Pres. of Govt for Oct

Pres. of the Court
2/9 October/68

Such instituted by Mr.
Baker against the Sup^g Court
the Princes Office at Court of
Letter from the Govt. Pleader
regarding - communicated to the
Sup^g Court, 7th Dec, and that Officer
informed that unless he can show
stronger grounds for defending
the Govt. will withhold their
sanction to his doing so at the
public expense.

N: 190 @ 192

72 54 7