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MADRAS RECORD OFFICE.

Government of Madras.

Public Works DEPARTMENT.

G.O. No. 3197	Press
608-610	~~Mis~~
Dated 24-10-	1868

Not to be folded or roughly handled

Proceedings of the Madras Government, Public Works Department.
24th October 1865.

Read the following papers :—

No. 608. From the Superintending Engineer, 7th Division, to the Secretary to Government, Department Public Works, dated Coimbatore, 16th October 1865, No. 151.

With reference to G. O. No. 2,990 of 9th October, I have the honor to forward translation of the *Plaint* filed by Mr. Bake, also a fuller statement of the grounds whereon I still recommend prosecution of the *Suit*; supported by enclosures numbered 1 to 13. It appears that the trial has been postponed from the 16th to the 30th October, on the Plaintiff's application; there is time therefore for receipt of Mr. Dale's instructions, and return of my original papers if he takes up the subject promptly.

1. Referred to the Government Pleader, with reference to his letter No. 143, dated 5th October 1865.

2. As the *Suit* is to come on for hearing on the 30th instant, Mr. Dale is requested to submit his opinion at his earliest convenience.

FORT SAINT GEORGE, (Signed) CHARLES A. ORR, Colonel, R. E.,
19th October 1865. Secretary to Government, P. W. D.

To the Government Pleader, with 25 Enclosures, and G. O. No. 2,990, of 1865. Papers to be returned.

No. 609 From the Government Pleader, to the Secretary to Government, Public Works Department, dated Madras, 21st October 1865, No. 151.

1. I have the honor to acknowledge the receipt of the Proceedings of Government under the date and number noted in the margin, and to state, for the information of His Excellency the Governor in Council, that I have perused, and given consideration to the papers which accompanied.

2. I regret to have to observe that these papers are very unsatisfactory. I am still uninformed of the facts of the case, and without being in full possession of the facts a professional man who is asked to advise is placed in a position of embarrassment, his labor is much increased, and the result is necessarily unsatisfactory; the papers now laid before me do not disclose a state of facts materially different from what was shown by the papers formerly laid before me.

3. The subject divides itself into three heads :—

1st.—The breach of the Contract for the supply of firewood;

2nd.—The breaches of the Contracts for the supply of Vengay and Teak timber; and

3rdly.—The claim made by Mr. Bake for a balance due to him for some of the timber supplied.

4. As to the breach of the Contract for the supply of firewood, I observe that in his letter of the 18th of August 1864, Mr. Bake states that one of the specified terms was "that all the firewood should be measured and paid for *on delivery*," and complains that in that respect (with the exception of one occasion) "the Contract was distinctly broken on the part of the Engineer himself." The statement of Mr. Bake is not in strict accordance with the terms of the specification, which I now have before me, inasmuch as in the specification it is agreed that the firewood should be measured "*after delivery*," &c.; in the papers laid before me it is not shown when the several deliveries were made, and on what dates such deliveries were measured and paid for. Under the Contract the Government would be entitled to a reasonable time for making the measurements, &c., but if Mr. Bake is correct in his

*Proceedings of the Madras Government, Public Works Department,
24th October 1865.*

assertion that the Executive Officer delayed making the measurement, and (as Mr. Bake infers) for an unreasonable time, and in fact made use of the firewood without measuring, such delay, &c., could not be justified by Government, and would preclude the Government from enforcing the penalty against Mr. Bake so far as relates to the firewood; from the information afforded to me, I am led to the conclusion that the discrepancy to which I have alluded would not have affected the case, even if the Government had not condoned the forfeiture by acceptance of firewood subsequent to the prescribed time, as advised in paragraph 4 of my letter of the 5th of October instant.

5. As to the breaches of the Contracts for the supply of Vengay and Teak timber, the papers numbered 7 and 8, now furnished by Colonel Walker, show a large deficiency in the supply of timber under both of the specifications 1 and 2. I do not observe that Mr. Bake alleges that any delay took place in the measuring by Government officials of the timber delivered by him under the specification numbered 1, but he does charge a delay of upwards of three months with regard to the timber delivered by him under the specification numbered 2. Neither of the Contracts for the supply of the timber specify the time within which the timber was to be measured and paid for, the Law therefore infers an engagement that it should be done within a reasonable time; and, in my opinion, a delay of three months could not be justified as being reasonable time; as regards therefore the penalty of Rupees 200 under the specification No. 2, I am of opinion the Government could not enforce it, and in the absence of denial or explanation from Colonel Walker that similar delays have not occurred in the measurement of the timber supplied under the specification No. 1, I feel I should not be justified in advising Government to attempt the enforcement of the penalties.

6. Mr. Chitty in his work on Contracts says: "where the parties to a Contract mutually agree that the one shall pay to the other a specified sum of money in the event of a breach of its provisions, it not unfrequently becomes a question of some difficulty, whether such sum is to be considered in the nature of a penalty, merely to cover the damages which may be actually incurred by a violation of the Agreement, or the full sum really to be paid in that event, as liquidated or settled damages, without reference to the extent of the injury sustained." I may add that Courts of Law, as well as Equity, have shown an inclination to view, if possible, a sum so reserved as in the nature of a penalty rather than as stipulated damages: and after perusing the papers now laid before me, I am of opinion that the sums specified in these Contracts should be considered in the nature of a penalty to cover the damages which the Government may have actually incurred by the violation of his agreement by Mr. Bake; what amount of damage has been sustained by Government is not shown in the papers before me.

7. With regard to the claim made by Mr. Bake for a balance due to him for some of the timber supplied, I am unable to advise for want of sufficient and precise information. In his proposed defence Colonel Walker says that he has not been made aware by Mr. Bake of Mr. McDonough's Memorandum. Colonel Walker does not accuse Mr. McDonough of any improper conduct or laxness, and if he has done his duty properly he should have furnished to his superior Officer statements and particulars of all timber delivered, and from those Colonel Walker could have obtained information. The Memorandum is, however, referred to in the Complaint, I therefore infer that it must have been filed in Court, and if filed and Colonel Walker could not from his own records obtain the information, the Judge would probably have allowed Colonel Walker to have inspected it, or if not filed, that on Colonel Walker's application the Judge would have ordered Mr. Bake to set out full particulars of his claim. I imagine that by one or other of such means Colonel Walker would have been in a situation to have forwarded to Government full particulars of the claim, and to have shown which of the items charged he disputes, and on what grounds. Moreover, it would have been satisfactory if Colonel Walker had had a statement prepared, showing the quantities of timber delivered by Mr. Bake under each Contract; with dates of delivery and the value according to Contract rates of each quantity delivered, as also the amounts, with

*Proceedings of the Madras Government, Public Works Department,
24th October 1865.*

dates, which had been paid to Mr. Bake under each Contract. With such information His Excellency in Council would have been in a position to judge of the propriety of defending the Suit in respect of the Rupees 530-4-0 claimed by Mr. Bake, as also of the propriety of paying into Court the Rupees 413-15-6 which Colonel Walker admits to be due.

8. If I could have seen any grounds for Government defending the Suit, I should have most decidedly advised His Excellency in Council not to have allowed the defence as now prepared by Colonel Walker to be put on the file. Colonel Walker refers in his defence to Mr. Smith's letter of the 21st June 1864, as showing the particulars of the Rupees 413-15-6. That letter, however, does not disclose any particulars from which the Court could arrive at any satisfactory conclusion as to what was fairly due from the Government.

9. Colonel Walker speaks of the Contracts having been cancelled, and refers to Mr. Smith's letter of the 2nd June 1864, as the instrument by which it was effected. I do not consider that letter sufficient for the purpose; it does not state specifically that it was the intention to cancel or put a stop to the Contracts, on the contrary, in that letter Mr. Smith requests Mr. Bake to meet him to inspect some timber delivered by Mr. Bake in order that such scantlings as do not agree with those mentioned in his Contracts might be set aside for removal by Mr. Bake. Moreover Mr. Smith adds, "I am not permitted to give the Contract rate for any timber which does not agree with the specification." This language is inconsistent with the proposition that by such letter the Contracts had been cancelled.

10. Colonel Walker in his proposed defence proposes to dispute the authority of Mr. McDonough to give to Mr. Bake an acknowledgment of timber delivered. Colonel Walker does not state the grounds on which he puts forward such a line of defence, and from the papers before me I am of opinion that it could not be successfully sustained if put forward. I have shown that, in my opinion, the Contracts have not been cancelled.

11. The offer referred to by Colonel Walker as having been made to Mr. Bake does not amount to a tender, and I do not see how its introduction into the defence can be turned to any account except to meet Mr. Bake's demand for interest.

12. I observe two misprints in my letter of the 5th instant, in the "tenth line from the bottom of the 4th paragraph the word printed "except" should have been "expect;" and in the last line of that paragraph the word printed "condition" should have been "condonation."

13. I return the papers which accompanied the Proceedings of Government.

No. 610. ORDER THEREON, 24th October 1865, No. 3,197.

CIVIL WORKS, No. 88.

1. The foregoing letter from the Government Pleader will be communicated to the Superintending Engineer of the 7th Division.

2. Under the opinion expressed in paragraph 8 of Mr. Dale's letter, the Government do not think it would be judicious for the Superintending Engineer to defend the Suit in the manner he proposes.

(True Extract.)

(Signed) CHARLES A. ORR, Colonel, R. E.,

Secretary to Government.

To the Superintending Engineer, 7th Division, with twenty-five Enclosures.

Exd. S. T. Augustin.

Supp. Engineer's Office, 7th St.
Cincinnati 18th October 1865

The Superintending Engineer
7th Division

The Secretary to Government
Department Public Works

Charles

With reference to G. O. No. 2990 of 9th October I have the honor to forward translation of the plaint filed by Mr. Pake. Also a fuller statement of the grounds whereon I still recommend prosecution of the suit, supported by inclosures numbered 1 to 13. It appears that the trial has been postponed from the 16th to the 30th October, on the plaintiff's application; there is time therefore for receipt of Mr. Pake's instructions, and return of my original papers if he takes up the subject promptly.

I have the honor to be,

Yours most Obedt Servant.

Wm. H. T. R. R.
Sup. Eng. 7th Division

Madras 21st October 1865.

Para 1. I have the honor to acknowledge the receipt
of the proceedings of Government under the date
and Number noted in the Margin, and to state
for the information of His Excellency the Governor in
Council that I have perused, and given Considerations to,
the papers which accompanied.

3 The Subject divides itself into three heads.
1st The breach of the Contract for the supply of firewood.
2^d The breaches of the Contracts for the supply of Vengay
and

Refereed to the Govt.
must declare, with reference to his
letter, 8th 143, dated 5th October, 1868.

No the suit is to come
on for hearing on the 30th instant
The date is requested to put
into this pamphlet
they call it convenient.

*In Reply
Saml. J. Curtis,
1914 Dec 10*

To the Govt. Pleader
with 25 Incls.: & C. H. 2990 of 1915.
Return to the returned.

Amelia M. Wm.
C. M. S.

and teak Limber; and

3^d The claim made by Mr. Baker for a balance due to him for some of the Limber supplied.

4 As to the breach of the Contract for the supply of firewood, I observe that in his Letter of the 18 of August 1884 Mr. Baker states that one of the specified terms was "that all the firewood should be measured and paid for on delivery" and complains that in that respect (with the exception of one occasion) "the Contract was distinctly broken on the part of the Engineer himself." The statement of Mr. Baker is not in strict accordance with the terms of the specification, which I now have before me, inasmuch as in the specification it is agreed that the firewood should be measured "after delivery" &c. in the papers laid before me it is not shown when the several deliveries were made, and on what dates such deliveries were measured & paid for; Under the Contract the Government would be entitled to a reasonable time for making the measurements &c. but if Mr. Baker is correct in his assertion that the Executive Officer delayed making the measurement, and (as Mr. Baker infers) for an unreasonable time, and in fact made use of the firewood without measuring, such delay &c.

could not be justified by Government, and would preclude the Government from enforcing the penalty against Mr. Baker so far as relates to the firewood; From the information afforded to me I am led to the conclusion that the discrepancy to which I have alluded would not have affected the case; Even if the Government had not condoned the forfeiture by acceptance of firewood subsequent to the prescribed time, as advised in para. of my letter of the 5th of October instant.

5 As to the breaches of the Contracts for the supply of Bengay and Teak Limber, The papers Nos 7 and 8, now furnished by Colonel Walker, show a large deficiency in the supply of Limber under both of the specifications 1 and 2, I do not observe that Mr. Baker alleges that any delay took place in the measuring by Government Officials of the Limber delivered by him under the specification No 1, but he does charge a delay of upwards of 3 months with regard to the Limber delivered by him under the specification No 2; Neither of the Contracts for the supply of the Limber specify the time within which Limber was to be measured and paid for, the Law therefore infers an engagement, that it should be done within a reasonable time; and in my opinion a delay of 3 months could not be justified as being a reasonable time; as regards therefore the penalty of Rupees 200 under the specification No 2 I am

opinion the Government could not enforce it, and in the absence of denial or explanation from Colonel Walker that similar delays have not occurred in the measurement of the Limber supplied under the Specification No. 1, I feel I should not be justified in advising Government to attempt the enforcement of the penalties.

6 Mr. Chitty in his Work on Contracts says "Where the parties to a contract mutually agree that 'the one shall pay to the other a specified sum of money, in the event of a breach of its provisions, it not unfrequently becomes a question of some difficulty, whether such sum is to be considered in the nature of a penalty, merely 'to cover the damages which may be actually incurred by a violation of the Agreement, or the full sum really to be paid in that event, as liquidated or settled damages, without reference to the extent of the injury sustained.' I may add that Courts of Law, as well as equity, have shown an inclination to view, if possible, a sum so reserved as in the nature of a penalty, rather than as stipulated damages: and after perusing the papers now laid before me, I am of opinion that the sums specified in these Contracts should be considered in the nature of a penalty.

5 115
penalty, to cover the damages which the Government may have actually incurred by the violation of his Agreement by Mr. Baker; what amount of damage has been sustained by Government is not shown in the papers before me.

7 With regard to the claim made by Mr. Baker for a balance due to him for some of the Limber supplied, I am unable to advise for want of sufficient and precise information. In his proposed defence Colonel Walker says that he has not been made aware by Mr. Baker of Mr. & Donough's Memo. Colonel Walker does not accuse Mr. & Donough of any improper conduct or larciness; and if he has done his duty properly, he should have furnished to his superior Officer statements and particulars of all Limber delivered, and from those Colonel Walker could have obtained information. The Memo is however referred to in the plaint, I therefore infer that it must have been filed in Court and if filed and Colonel Walker could not from his own records obtain the information, the ~~land~~ Judge would probably have allowed Colonel Walker to have inspected it; or if not filed that on Colonel Walker's application the Judge would have ordered Mr. Baker to set out full particulars of his claim; I imagine that by one or other of such means Colonel Walker would have been in a situation to have forwarded to Government full

particulars of the Claim and to have shown which of the items charged he disputes, and on what grounds; Moreover it would have been satisfactory if Colonel Walker had had a statement prepared, shewing the quantities of Lumber delivered by Mr. Baker under each Contract; with dates of delivery and the value according to Contract rates of each quantity delivered as also the amounts, with dates, which had been paid to Mr. Baker under each Contract; with such information His Excellency in Council would have been in a position to judge of the propriety of defending the Suit in respect of the Rupees 530-4-0 claimed by Mr. Baker, as also of the propriety of paying into Court the Rupees 413:15:6 which Colonel Walker admits to be due.

9. If I could have seen any grounds for Government defending the Suit, I should have most decidedly advised His Excellency in Council not to have allowed the defence as now prepared by Colonel Walker to be put on the file: Colonel Walker refers in his defence to Mr. Smith's Letter of the 21st June 1884 as shewing the particulars of the Rupees 413:15:6 that Letter however does not disclose any particulars from which the Court could arrive at any satisfactory conclusion as to what was fairly due from the Government.

10. Colonel Walker speaks of the Contracts having been cancelled, and refers to Mr. Smith's Letter of the 2^d June 1884 as the instrument by which it was effected; I do not consider that Letter sufficient for the purpose; it does not state specifically that it was the intention to cancel or put a stop to the Contracts, on the contrary in that Letter Mr. Smith requests Mr. Baker to meet him to inspect some timber delivered by Mr. Baker in order that such scantling as do not agree with that mentioned in his contracts might be set aside for removal by Mr. Baker; Moreover Mr. Smith adds, "I am not permitted to give the Contract rate for any timber which does not agree with the specification;" This language is inconsistent with the proposition that by such Letter the Contracts had been cancelled.

10. Colonel Walker in his proposed defence proposes to dispute the authority of Mr. Baker to give to Mr. Baker an acknowledgment of Lumber delivered; Colonel Walker does not state the grounds on which he puts forward such a line of defence, and from the papers before me I am of opinion that it could not be successfully sustained if put forward; I have shown that in my opinion the Contracts have not been cancelled.

11. The Offer, referred to by Colonel Walker
as having been made to Mr. Baker does not amount
to a tender, and I do not see how its introduction into
the defence can be turned to any account except
to meet Mr. Baker's demand for interest.

12. I observe two misprints in my Letter
of the 5th Instant, in the 10th line from the bottom of the
4th para the word printed "except" should have been
"except" and in the last line of that para the
word printed "Condonation" should have been "
"Condonation."

13. I return the papers which accompanied
the proceedings of Government.

I have the honor to be

Sir

Your Obedt. Servant

Wm. L. L.

Government Pleader.

38609

193197-24th Oct/65

Government Pleader is
of opinion that there
are no de jure promoters
in view of the nature of the
suit would be necessary

19/10/51
for the reasons
set out above

19/10/51
Dated 19th October 1951
Pleader's Office

19/10/51
Dated 19th October 1951
Pleader's Office
for the reasons
set out above

Criminal

Proceedings of the

No. 3197 (P.W.K.D. No. 16)
Madras Government
Under date the 24th Oct/65.

Read the following

From the Supg Engr. 7th Div.

Towards translation of the
plea filed by Mr. B. S. S. S.
also a statement of the grounds
whereon he recommends proce-
dure of the suit

J. S. 16th Oct/65 No. 151

From Govt. Pleader
Madras.

J. S. 21st Oct/65 No. 151

The foregoing letter
from the Govt. Pleader
will be commd. to the
Supg Engr. of the 7th Div.

Under the opinion
expressed in para 8
of Mr. Deale's letter, the
Govt. do not think
it would be judicious
for the Supg Engr. to defend the suit
in the manner he

W.D.

To Supg Engr 7th Div
with 25 Enclosures proposes -

Dec 24th 1951
P.O. 1st November

Signature

My Dear Sir

1003147
 200 of the 1st pair
 2/24 Oct 1/80

Which I will surely make.
 Let's from the first hear on
 the subject. I communicate
 to the high society of Quakers
 the latter better informed than
 first to our friends in words
 the judicious for him is depend
 the with in the summer 1820

Ms. A. 9. 2. 609