M.R.O. 1—77,006—8-6-37.

(1) Number of pages _____

(2) Date of repair _____

(3) Initials of the Referencer _____

MADRAS RECORD OFFICE.

Government of Madras.

Public (Misc.) DEPARTMENT.

G.O. No. 1639
196-77

Press
Misc.

Dated 18-7-1911.

Not to be folded or roughly handled

No. 196. Read the following letter from the Government Pleader, Madras, to the Secretary to Government, Public Works Department, dated Madras, 29th June 1871, No. 109:—

With reference to the Proceedings of Government noted in the margin, I have the honour to submit the following opinion. I regret the great delay which has occurred in my answering this reference, which has been caused partly by my late absence in Tinnevelly, and partly by my having to obtain from the Superintending Engineer a copy of the Moonsiff's Judgment to which the reference relates.

G. O., No. 228, 26th January 1871.

2. The question referred to me is as to the soundness of the decision of the District Moonsiff of Trivalore in a suit brought by one Vythelinga Pillay, a contractor, against the Range Officer, Mr. Donaghue, in allowing against the contractor only half of the sum stipulated in the contract as liquidated damages for breach of the contract. On looking at the Moonsiff's Judgment, I observe that its effect is not quite accurately represented by the Superintending Engineer in his report to Government embodied in the above Proceedings. The judgment is not very clear, but, as I understand it, the fact that no special damage from the breach of contract is proved, is only one of the circumstances that induced him to disallow the whole liquidated damages. It appears that, as Mr. Donaghue says by mistake, a notice was given to the contractor, mentioning as the time within which the work must be completed a month later than that fixed by the terms of the contract, and the Moonsiff thinks that this makes it inequitable to charge the contractor with the whole damages fixed by the contract for non-completion within contract time. In this view I think he was right; indeed, I should have been inclined to go further and hold that, in consequence of the extension of the time, whether by mistake or not, would make no difference unless the plaintiff knew of the mistake, no damages for non-completion within the time could be recovered at all, for he might have completed the work within the time as extended if he had been allowed to do so.

3. If the Moonsiff had decided, as the Superintending Engineer seems to think he did, that in all cases where a sum is fixed by the parties to a contract as liquidated damages for breach of the contract, that sum cannot be recovered without showing actual damage resulting from the breach, he would clearly have been wrong. The law on this subject has undergone considerable modification by the decisions of the Courts of late years. Formerly the tendency was to regard all such stipulations in contracts as penalties which could not be enforced, but the inclination of the English Courts in modern times, in which respect the Courts out here have followed them, has been to keep parties to the terms which they have chosen to fix for themselves. The question in each case is what was the intention of the parties at the date of the contract as evidenced by the words used. If these clearly show an intention to fix beforehand a certain sum as damages for breach of contract, that amount of damages will be decreed by the Courts on breach, whether actual damage to that extent has been caused or not, (see Dimeeh *vs.* Corbett, 12, Moore's Privy Council cases, page 229; also a case reported at page 451 of the 2nd volume of the High Court Reports.)

4. I have no copy of the contract in this case before me, and, therefore, cannot judge whether the intention of the parties to assess the damages themselves is sufficiently clearly evidenced by its terms. It must always be remembered that the mere use of the words liquidated damages will not be sufficient to prove this intention, if it is negatived by other incidents of the contract: as, for example, where there are numerous acts of different importance to be performed under the contract, and the same sum is stipulated as liquidated damages for failure to perform any one of such acts. In such a case it is very improbable that the parties should have intended to estimate the value of each act and the damages for its non-performance at the same sum, when it is manifest that they vary considerably, and, therefore, unless there is something else to show that such was the intention, the contrary will be inferred from the terms of the contract. So where the payment of a smaller sum is secured by an agreement to pay a larger on failure, and so in other cases. Whether, therefore, a sum is to be considered as a penalty or liquidated damages is a question depending on the terms of the contract in each case.

5. I enclose the copy of the Moonsiff's Judgment forwarded to me by the Superintending Engineer.

No. 197. ORDER THEREON, 13th July 1871, No. 1,839.

ESTABLISHMENT, No. 28.

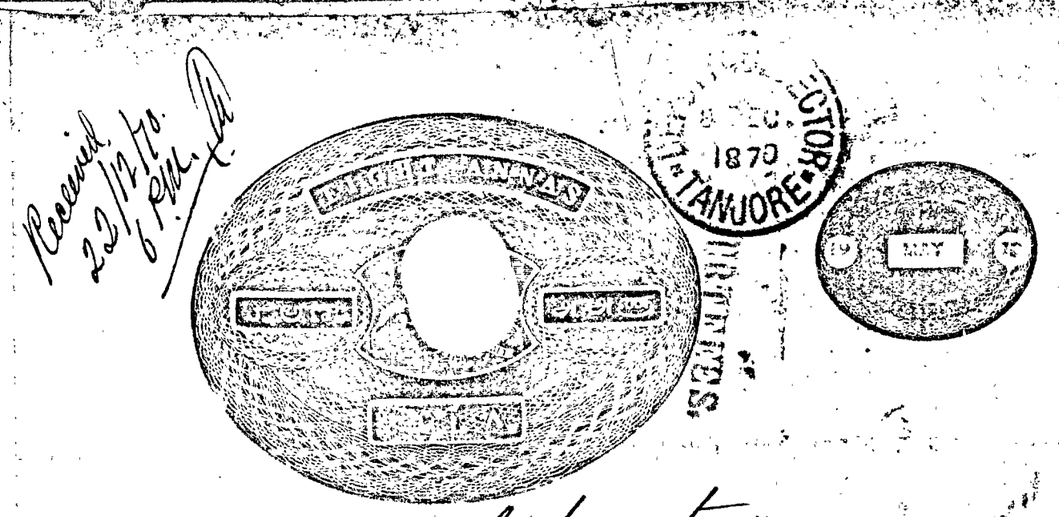
COMMUNICATED to the Superintending Engineer of the 6th Division in continuation of G. O., No. 228, dated 26th January 1871.

(True Extract.)

Colonel, R.E.,
Secretary to Government.

To the Superintending Engineer, 6th Division.
To all other Superintending Engineers.
To Major R. B. Kennedy.
To the Acting Chief Engineer for Irrigation.

Exd. S. T. Augustin.



Received 22/12/70. 6 P.M. Jh

371

Judgment

In the Court of the District Munsiff of Trivalore

Present P. Samy Syer District Munsiff

Suit No. 185 of 1870.

Plaintiff	Defendant
Vithilingapillai	Mr. Donaghue
Vakeel	Vakeel
Mahadanier	Pounusamypillai

1. It is stated in the Plaint that the Plaintiff on the 19th March 1870 entered into a contract with the Defendant for performing an excavation of mud work worth Rupees 2100— and wood cutting worth Rupees 55; that the time limited in the agreement was 30th May 1870; that the Plaintiff applied to the Defendant to extend the said time to the 30th June 1870 and that in compliance with the said request, Defendant sent him an order marked A; that contrary to the terms of the said A, Defendant on the 28th May 1870, prevented Plaintiff from performing the work by his order marked B; that Plaintiff performed work in all amounting to Rupees 756-12- and claimed to recover the same.—

2.— The Defendant in his written statement pleaded that the said order marked A was a mistake of fact or a clerical error on

1st sheet.—

his part, that the Plaintiff never made any such request to him; that the work performed by the Plaintiff was worth Rupees 444 only; that the non joinder of the superintending Engineer was a Defect ~~law~~ in the suit; that the contract agreement not having been registered before a registrar of assurances was invalid. He admits the truth of his order marked B and claims Rupees 300 as penalty as per the said contract agreement.

3 — — — Issues are: —

First whether the suit shall be defective by the non joinder of the superintending Engineer..

Second whether the Mutchelicca in question shall be invalid unless registered before a registrar of assurances.

Third whether the order marked A is the result of a mistake on the part of the Defendant and whether that mistake can justify him in opposing Plaintiff from

2nd sheet.

performing the work after the 30th of may 1870.—

Fourth whether the penalty claimed by the Defendant is a liquidated damage or otherwise whether the said penalty or any portion of the same can be awarded to him.—

Fifth whether the Plaintiff's calculation of the work performed by him is correct or not.—

4 — Plaintiff filed two Documents— Dated respectively and examined witnesses.— namely

1st witness — Chedumbara pillai. Tamil

2nd — do — Cavary Nadan

3rd — do — Veerpparuma pillai

4th — do — Subrapaty pillai

5th — do — Valeache pillai

Defendant filed 7 Documents - I. II. III. IV. V. VI. VII. respectively. - and examined 2 - witnesses. -

1st witness — Nagoparow

2nd - do - — Moonesamy Mordly.

Court's witness - Seagaraja pillai

3rd sheet.—

Plaintiff's Witness

Judgment

5 —— The Defendant was the only person bound to account to the Plaintiff, and although the name of the superintending Engineer has been inserted in the agreement marked I, yet it is merely formal and the non joinder of the said Engineer is no defect to the Plaintiff's suit.—

6 —— The said agreement I refers not to any immoveable property exceeding Rupees 100, wherefore its non registration is not to invalidate the same.

7 —— As to the third issue. The Plaintiff's father in his deposition says that he about the 20th April 1870 personally applied to the Defendant to extend the time to the 30th June 1870 and that the latter agreed to send an order to that effect and that he did so send one which is marked A, If this man's evidence was trustworthy,

4th Sheet.—

I will conclusively presume that the Defendant agreed to extend the time to the 30th June 1870. But this man says that he saw the Defendant in the Bungalow at Coradacherry about the 20th April 1870. But he says that there is no hedge round that Bungalow, where as the Defendant swears that there is one. The statement of the Defendant in this respect is supported by the evidence of the Court's witness Segarajapillai. Moreover the evidence of this witness Segarajapillai further falsified the statement of the Plaintiff's father that the said travellers Bungalow at Coradacherry is situated on the south side of the railway line. Hence it may be presumed that the Plaintiff's father never went to Coradacherry to apply to the Defendant to extend the time to the 30th June 1870, wherefore the Plaintiff's statement that A was given in compliance with the Plaintiff's request for an extension of the time to the 30th June 1870

5th sheet.

Dist. Court 43

has fallen to the ground. Hence it may be
quite clearly believed that the order marked
A is a mere warning to the Plaintiff to
Carry on the work soon, not an agreement
to extend the time according to the Defendants'
statement. Moreover the said A does not
recite any request of the Plaintiff for an
extension, which would be the case if
any such request were made at all. Besides
this, the main part of the said order runs
thus:- "If you (Plaintiff) fail to finish the
work within the 30th June 1870 as per the
terms of your contract Mutchelica,
you will be liable to forfeit the fine",
But the date fixed in the said Mut-
-chelica (I) is only 30th May not 30th
June 1870, wherefore the Defendants' state-
-ment that the insertion in A of the words
"30th June" is a clerical error seems reliable.
As however mistake are remedied only in
Equity and because the rule is that he
who seeks Equity must have to one
Equity and since the Plaintiff was for

6th Sheet.

one reason or other once *Primafacie* informed that the time given him was 30th June instead of 30th May 1870, it would be very hard upon him to deprive him of the benefits thereof. And because no man shall be allowed to take advantage of his own wrong or fraud the Defendant does not seem justified to have prevented the Plaintiff from carrying out the contract up to 30th June 1870 as per the terms of A. Because as the Defendant says that the transmission of the said contract Mutchelicca I to the superintending Engineer was the cause of the clerical error in question, so in equal justice to the Plaintiff. I suppose that he might perhaps have believed that his time was the 30th June 1870 for the very reason or absence of the said Mutchelicca from the Plaintiff's land.

8 — As to the fourth issue. The original Mutchelicca I was signed on the 19th March 1870 and the Plaintiff was

7th Sheet. —

Issue decided

bound to perform the work worth Rs. 2100 within the 30th May next i.e. within 71 days but he says in his plaint that he performed about one third of the said work only within that period. If during the one months extension in question also the Plaintiff would be allowed to carry on the work he could be presumed to perform about half of another one third work only which altogether might amount to one half of the whole work even then leaving his contract in completed; wherefore Plaintiff might be liable to the fine in question, but as it would be possible for him perhaps to complete the whole work within the extended time as the failure has been attributed by the Plaintiff to the Defendants' prevention by means of his order marked B I suppose; the proper course for the Defendant would have been to rectify his mistake with consent of the Plaintiff and not to aggra-

8th Sheet.-

Issues framed & vide ord(illegible).

aggravate the same mistaken & openly
preventing Plaintiff from completing
the work against this consent. Moreover
no special damage or any damage —
whatever has been alleged or proved by
the Plaintiffs break of contract. These
circumstances I suppose should go in
reduction of the amount of fine claimed
by the Defendant. —

9 — As to the fifth issue. The Plaintiffs
witnesses prove that he has excavated
about 900 Cubics which nearly correspond
with the account put in by the Plaintiff
and which [illegible] nearly corresponds
with the account furnished by the Com-
missioner. But the Commissioner says
he merely measured the excavations shown
to him by the Plaintiff but that he does
not know whether these excavations were
made by the Plaintiff, wherefore his
account is not useful to the Plaintiff.
Moreover as the Plaintiff uttered a false-
-hood on a material point i-e. that
he requested Defendant to extend
his time to 30th June from 30th May 1870
9th Sheet.

James Durand
Esq

and obtained A in complain with
that request. I am not inclined to believe
Plaintiff's witnesses also. Then the Defendant's
witnesses whom I see no reason to distrust,
prove that the Plaintiff has performed
so much excavation work as would entitle
him to Rupees 509-10-0. But the Defendant
swears that of the excavation works per-
-formed by the Plaintiff some were com-
-plete and others incomplete, which alto-
-gether entitled Plaintiff to Rupees 444 only
Of course every evidence is due to the Defts
statement. But it is to be here remarked
tho' he has not denied the Plaintiff's claim
to Rupees 55 on account of cutting wood &c.
Then also adding these Rupees 55 to the
said Rupees 444 the Plaintiff seems en-
-titled nearly to the same amount i.e.
Rupees 509-10- or Rupees 500. and I suppose
it just to declare Plaintiff entitled to
Rupees 500, of which of course should be
deducted the Penalty which I think
ought not exceed one half or Rupees 150,
which is proportionate to the work not
10th Sheet.

performed or not likely to have been performed by the Plaintiff within the extended time. —

— For these grounds it is decreed that the Defendant do pay Plaintiff the sum of Rupees 350 with proportionate cost: that the Plaintiff do pay Defendant his costs on the remaining sum of his claim which is hereby disallowed him. —

7 — 12 - 1876 —

(Signed) P. Samy Iyer
District Munsiff

(True Copy)

6 Stamps Rs 2-4-0

Original Decree
Delivered

11 Last Sheet

No. 109

Madras
29th June 1871

From

J. W. Handley Esqr.
Government Pleader
Madras.

To

Colonel. C. Carpendale R.E.
Secretary to Government
Public Work Department.

Sir

With reference to the Proceedings of Government noted in the margin, I have the honor to submit the following opinion

26th January 1871
G. O. No. 228

I regret the great delay which has occured in my answering this reference, which has been caused partly by my late absences in Timinelly and partly by my having to obtain from the Supt. Engineer a copy of the Moonsiffs Judgment to which the reference relates.

2 The question referred to me is as to the soundness of the decision of the District Moonsiff of Trivalore in a suit brought by one Vythilinga Pillay a Contractor against

C. No 1

Copy of Judgment

Encls: No 2 in letter
No 863-Q dated 7 Jan 1871
from the Supt Engineer - 6 Dr
To the Secretary to Govt P.W.D.
3 Dr

Rec'd 13th July 1871

1853
1870
Judgment

Rs - 246
Stamp - 1-4-6
Copy - 5-2
Rs - 1-9-8

against the Range Officer Mr. Donaghue, in allowing against the Contractor only half of the sum stipulated in the Contract as liquidated damages for breach of the Contract. On looking at the Moonsiff's judgment I observe that its effect is not quite accurately repre= =sented by the Sup.d Engineer in his report to Government embodied in the above proceedings. The judgment is not very clear, but as I understand it, the fact that no special damage from the breach of Contract is proved is only one of the circumstances that induced him to disallow the whole liquidated damages. It appears that, as Mr. Donaghue says by mistake, a notice was given to the Contractor mention= =ing as the time within which the work must be Completed a month later than that fixed by the terms of the Contract, and the Moonsiff thinks that this makes it inequitable to

to charge the Contractor with the whole damages fixed by the Contract for non Completion within Contract time. In this view I think he was right, indeed I should have been inclined to go further and hold that in Consequence of the extension of the time, whether by mistake or not would make no difference unless the Plaintiff knew of the mistake, no damages for non-Completion within the time could be recovered at all, for he might have completed the work within the time as extended if he had been allowed to do so.

If the Moonsiff had decided as the Sup.d Engineer seems to think he did, that in all cases where a sum is fixed by the parties to a Contract as liqui= =dated damages for breach of the Contract, that sum Cannot be recovered without shewing actual damage resulting from the breach, he would Clearly have been wrong. The Law on this subject has undergone Considerable modification by the decisions of the Courts of late years. Formerly the tendency

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uses to regard all such stipulations in Contracts as penalties which could not be enforced, but the inclination of the English Courts in modern times, in which respect the Courts out here have followed them, has been to keep parties to the terms which they have chosen to fix for themselves. The question in each case is what was the intention of the parties at the date of the Contract as evidenced by the words used. If these clearly show an intention to fix beforehand a certain sum as damages from breach of Contract, that amount of damages will be decreed by the Courts on breach, whether actual damage to that extent has been caused or not (See Dimech v Corlett 12 Moore's Privy Council Cases page 229, also a Case reported at page 451 of the 2nd Volume of the High Court reports)

4th I have no Copy of the Contract in this Case before me & therefore cannot judge whether the intention of the parties to assess the damages themselves is sufficiently clearly evidenced by its terms. It must always be remembered that the mere use of the words liquidated damages will not be sufficient to ~~negatived~~ prove this intention, if it is ~~neglected~~ by other incidents of the Contract, as for example where there are numerous acts of different importance to be performed under the Contract, and the same sum is stipulated as liquidated damages for failure to perform any one of such acts. In such a case it is very ~~improbable~~ ~~improbable~~ that the parties should have intended a estimate the value of each act and the damages for its non-performance at the same sum, when it is manifest that they vary considerably, and therefore unless there is something else to show that such was the intention, the contrary will be inferred from the terms of the Contract. So where the payment of a smaller sum is secured by an agreement to pay a larger on failure and so in other cases. Whether therefore a sum is to be considered as a penalty or liquidated damages is a question depending

depending on the terms of the Contract in each Case.

5th. I enclose the copy of the Moonsiff's judgment forwarded to me by the Supg. Engineer.

I have the honor to be
Sir
Your most obedient servant
J W Handley
Govt. Pleader

Public Works 1871 Department
No. 109.
From No. 3065
the Govt. Pleader
Madras
To
The Secy. to Govt.
Public Works Department
Dated 27th June 1871
Recd. 30th [illegible]
Question arising out of decision of District Moonsiff Trivalure in suit brought by one Vythilinga Pillay a Contractor against the Range officer Mr. Donaghue as to liquidated damages
advises on
No. 1839 - 13th July/71.
With an order

Recd 26 January/71 No 461-462

No. 1839.
Communicated to the Supg. Engr.
In continuation of G. O. No. 228 of 26 Jany/71.

150 Fols. Spngs [illegible] 13 July/71
No. 86 [illegible]
[illegible]

[illegible] 14/7/71

Co. Jnl. 14/7/71 [illegible]

3565.

Govt. of {1871} Madras.

PUBLIC WORKS.

To The Superintending Engr
S. Division

Dated.

Recd. Encd. 11

G. O. 13th July 1871, No. 1539.

Nos. 196 & 197

Subject. Letter from the
Govt. Pleader submitting
his opinion with regard to
the decision of the District
Munsiff of Trivalore in
the matter of the suit filed
against him by Superintending
Engr. Construction & Conl. to the
Govt. & others.