(2011) 08 MAD CK 0331

Madras High Court

Case No: S.A. No. 840 of 2011 and M.P. No''s. 1 and 2 of 2011

Sri Sakthi Enterprises	APPELLANT
Vs	
The Tamil Nadu Electricity Board	RESPONDENT

Date of Decision: Aug. 9, 2011

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: Pushpa Sathyanarayana, for the Appellant; G. Vasudevan, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.

The Plaintiff is the Appellant herein. The Appellant/Plaintiff filed the suit for the relief of declaration that the letter dated 1.9.2007, issued by the third Respondent, cancelling the permission granted to the Appellant/Plaintiff in removing the fly ash from the third row of unit-1 at the third Defendant''s Thermal Power Station is void and also for the relief of injunction.

2. The case of the Appellant/Plaintiff was that the third Respondent permitted the Appellant/Plaintiff to install a Pressurized Dense Fly Ash Collection System (in short ''PDFACS'') at their cost in the third and forth rows of unit 1 at North Chennai Thermal Power Station, as per the memorandum of understanding signed between the parties and the validity of the memorandum of understanding was for a period of 9 years. The Appellant/Plaintiff paid a sum of Rs. 90,000/-as security deposit and installed the said system and was collecting the fly ash in the third row of unit 1 at the third Respondent''s Thermal Station from the year 2002 onwards. The Appellant/Plaintiff had spent a sum of Rs. 10,00,000/-for installation of the said system in the third row of unit 1 and was removing the fly ash without any interruption and without giving any room for any complaint and the Appellant/Plaintiff was procuring fly ash at the average of 1200 tons to 1500 tons per month.

3. While so, at the instance of the third parties, the first Defendant wanted to deny the permission granted to the Appellant/Plaintiff from removing the fly ash from the third row of unit-1 and requested the Appellant/Plaintiff to surrender the memorandum of understanding in favour of the first Respondent. The Appellant/Plaintiff was also warned that if the contract was awarded to the new Contractor, the Appellant/Plaintiff will be permitted to do the same under a new Contractor. As the Appellant/Plaintiff refused to oblige, the third Respondent, by an impugned letter dated 1.9.2007, cancelled the permission granted to the Appellant/Plaintiff, without any valid reason, and the said cancellation is against the terms of the memorandum of understanding and the Appellant/Plaintiff has got 9 years'' period which expires only in the year 2011 and therefore, the suit was filed for declaration and injunction.

4. The Respondents contested the suit stating that as per the memorandum of understanding, the Appellant/Plaintiff ought to have installed the PDFAC system at their cost during the month of July, 2002, but they were collecting the fly ash manually and they have not installed the said system in the fourth row of unit-1, even after giving sufficient opportunity to the Appellant/Plaintiff and the Appellant/Plaintiff was also informed about their poor performance, and as per Clause 5 of the terms and conditions of the memorandum of understanding, the Respondent was constrained to cancel the permission granted to them. The Respondents also denied various statistics provided by the Appellant/Plaintiff, regarding the removal of the fly ash and justified the cancellation stating that the terms of the memorandum of understanding were violated by the Appellant/Plaintiff, causing environmental hazards, which affects the general public, by poor collection of the fly ash and by non-installation of the said system.

5. It was further stated that due to poor collection of the fly ash by the Appellant/Plaintiff, the Respondent-Board incurred additional expense of Rs. 220 per ton, in removing the fly ash and therefore, only with an intention of giving permission to other competent person, the permission granted to the Appellant/Plaintiff was cancelled.

6. The Trial Court decreed the suit holding that the Contract is for a period of nine years and as per the letter-Ex.A2, the Appellant/Plaintiff was permitted to remove the fly ash by installing a manual collection system in the third row of unit -1 and having granted the license for the period of nine years, in the absence of any clause to terminate the said agreement, the cancellation is illegal.

7. The Lower Appellate Court set aside the findings of the Trial Court and allowed the appeal, holding that the Appellant/Plaintiff was removing the fly ash, less than the prescribed quantity, as per the memorandum of understanding. Even after the issuance of notice-Ex.A5, the Appellant/Plaintiff has not taken any steps to remove the fly ash as per the memorandum of understanding and even after obtaining the stay order, they have not proved that they were removing the fly ash as per the

quantities specified in the emorandum of understanding. Therefore, the cancellation of the permission granted to the Appellant/Plaintiff is fully justified. Hence, this Second Appeal.

8. Mr. Pushpa Sathyanarayana, the Learned Counsel for the Appellant/Plaintiff submitted that the Appellant/Plaintiff was granted permission to remove the fly ash by installing the PDFAC System in the third and fourth rows of unit -1 at North Chennai Thermal Power Station, as per the memorandum of understanding entered into between the parties, and the validity of the said agreement is for about 9 years and there is No. specific clause in the memorandum of understanding for cancellation of the permission, even if there is any default committed by the Appellant/Plaintiff.

9. The Learned Counsel for the Appellant/Plaintiff further submitted that in respect of the installation of the system in the third row of unit -1, there was No. failure on the part on the Appellant/Plaintiff in installing the said system and even according to the letter-Ex.A3, dated 23.11.2005, the Respondents'' complaint is that, No. action was taken for installation of the said system in the fourth row, for collecting the fly ash. Therefore, the cancellation of the contract for the third and fourth rows of unit -1 by an dated 1.9.2011, is illegal in respect of the third row concerned, and hence, the Appellant/Plaintiff is entitled to the decree prayed for.

10. Per contra, Mr. G. Vasudevan, the Learned Counsel appearing for the Respondents submitted that eventhough the permission granted to the Appellant/Plaintiff was cancelled in the year 2007 by issuing a notice Ex.A.10, by virtue of an injunction obtained by the Appellant/Plaintiff, the Appellant/Plaintiff was permitted to collect the fly ash from both the units and as per the memorandum of understanding, the period is only for 9 years i.e., from July, 2002 to July, 2011 and validity period had already expirred. Therefore, the Appellant/Plaintiff has not suffered any loss by the cancellation. Hence, the Learned Counsel submitted that there is No. merit in the Second Appeal.

11. The Learned Counsel for the Respondents further submitted that the permission granted to the Appellant/Plaintiff was a composite one to collect the fly ash from the third and fourth rows of unit-1 and admittedly, the Appellant/Plaintiff did not install the said system in the fourth row and being a composite contract, the Respondents are justified in cancelling the said memorandum of understanding. Therefore, the judgment of the Lower Appellate Court need not be interfered with.

12. Heard both sides.

13. The main contention of the Learned Counsel for the Appellant was that the cancellation of the permission granted as per the memorandum of understanding is illegal in respect of the third row is concerned and therefore, the Appellant/Plaintiff is entitled to the decree prayed for. As a matter of fact, the Learned Counsel submitted that the following substantial question of law arises for consideration in

the Second Appeal:

i) Whether the cancellation of the memorandum of understanding by the Respondents is valid in the absence of any clause in the terms of the memorandum of understanding for cancellation of an agreement, when the validity of the memorandum of understanding is for a period of nine years?

14. According to me, nothing survives in the Second Appeal. Though the permission granted to the Appellant/Plaintiff was cancelled by a letter dated 1.9.2007, Ex.A10, the Appellant obtained stay order and was collecting the fly ash, evenafter the termination of the agreement and the period of memorandum of understanding has also come to an end by the end of July,2011. Therefore, nothing survives in the Second Appeal for further adjudication.

15. It was submitted by the Learned Counsel for the Appellant that the Appellant/Plaintiff prayed for renewal of the memorandum of understanding and the cancellation of the understanding by the Respondents would be put against the Appellant/Plaintiff and therefore, the Court has to give an finding about the legality of the action on the part of the Respondents in cancelling the permission.

16. According to me, the Court cannot give such a finding to enable the Appellant/Plaintiff to get renewal of the contract in his favour. Further, a personal contract cannot be enforced and if at all the Appellant/Plaintiff is aggrieved by the cancellation, the only remedy that is available to the Appellant/Plaintiff is to file a suit for damages and they cannot ask for the relief of declaration and injunction. Further, even if the relief of declaration as prayed for by the Appellant/Plaintiff is granted, having regard to the efflux of time, No. useful purpose will be served by granting such reliefs

17. Therefore, in my opinion, nothing survives in this Second Appeal for rendering any findings. Eventhough, the Appellant/Plaintiff did not commit any default in installing the PDFAC system in respect of the third row and admittedly, despite several reminders and opportunity granted to the Appellant/Plaintiff, the Appellant/Plaintiff did not install the system in respect of the fourth row in unit-1 and considering the fact that the memorandum of understanding was a composite one, the Respondents cancelled the same for the default committed by the Appellant/Plaintiff in not installing the system in respect of the fourth row. Therefore, in my opinion, the Lower Appellate Court has rightly allowed the appeal, holding that the Respondents have got right to cancel the memorandum of understanding and that cannot be questioned by the Appellant/Plaintiff.

18. Further, eventhough, there is No. clause in the memorandum of under standing for cancellation of the said under standing, it is always open to the parties, to cancel the agreement for breach of the terMs. Even though, penalty was prescribed under the said memorandum of understanding, as per clauses 5 and 7, the Appellant-Company''s performance in collecting 100% fly ash will be reviewed for a

period of one year and the Appellant/Plaintiff ought to give 21 days advance notice if it finds difficult to lift the fly ash and admittedly, No. notice was issued by the Appellant/Plaintiff to the Respondents, when they failed to lift as per the memorandum of understanding, to enable the Respondents to allot it to others.

19. Therefore, according to me, eventough, there is No. provision for cancellation of the memorandum of understanding, when a party has committed breach in complying with the terms of understanding, the right of the other party to cancel the understanding is inherent in the terms of the contract and therefore, the Appellant/Plaintiff cannot question the same. Further, as stated above, being a personal contract, the only efficacious remedy that is available to the Appellant/Plaintiff is to file a suit for damages and he cannot ask for declaration. Therefore, the substantial question of law is answered against the Appellant.

20. In the result, the Second Appeal is dismissed. In the circumstances, there shall be No. order as to costs. Consequently, connected Miscellaneous Petitions are closed.