VISIONPHONE CONTRACTORS LTD v TELECOMMUNICATIONS CONSULTANTS INDIA LTD

2017 SCJ 281

Record No. 1249

THE SUPREME COURT OF MAURITIUS

[Court of Civil Appeal]

In the matter of:

Visionphone Contractors Ltd

Appellant

v

Telecommunications Consultants India Ltd

Respondent

JUDGMENT

This is an appeal against a judgment of the learned Judge sitting at first instance in the Commercial Division of the Supreme Court. It is common ground that the respondent (Telecommunications Consultants India Ltd, hereinafter referred to as TCIL) had a contract with the Mauritius Telecom Limited ("Mauritius Telecom") to carry out, amongst others, cable construction and pole planting works in respect of several projects and had subcontracted with the appellant (Visionphone Contractors Ltd, hereinafter referred to as VCL) in respect of projects MT 439, MT 460, MT 465 and MT 480. VCL had, *qua* plaintiff, sued TCIL, *qua* defendant, claiming Rs 1,448,859 for works done under the subcontract. And TCIL had counterclaimed an amount of Rs 2,747,060 in respect of surplus materials alleged not to have been returned by VCL following works on projects MT 439, MT 460 and MT 465 as per clause 3 of the subcontract agreements pertaining to those three projects. Upon the admission of TCIL that it did owe to VCL the amount of Rs 1,448,859 claimed by the latter, the learned Judge, in his judgment, gave judgment for VCL against TCIL in that amount. In the same judgment, the learned Judge having found that TCIL had proved its counterclaim in the amount of Rs 2,747,060 on a balance of probabilities, gave judgment for TCIL against VCL in that amount.

There were initially five grounds of appeal but, following remarks from the Court at the hearing, Counsel for VCL dropped grounds 1, 4 and 5. The two outstanding grounds of appeal read as follows:

> *" 2. Because in a claim for prejudice suffered due to a breach of contract, the learned Judge was wrong to have allowed the Respondent's counterclaim for Rs 2,747,060, as prejudice suffered, without any evidence to support the said claim, and in the teeth of clear evidence that the respondent did not suffer any prejudice whatsoever.*
>
> *3. Because the learned Judge failed to address his mind to the fact that the Respondent was fully paid for works it caused appellant to perform but it failed to pay Appellant on the ground that it (the Respondent) would be accountable for unreturned surplus materials with the owner of the said materials."*

Are there erroneous assumptions in the two grounds?

In relation to ground 2 above, the question has arisen whether the assumption therein that the counterclaim of TCIL was for "prejudice suffered" due to a breach of contract is an incorrect one. It is the contention of Counsel for VCL, in that respect, that the counterclaim was for the value of unreturned surplus materials and not for prejudice suffered. In our view, that submission is not warranted. Whilst it is true that the amount claimed in TCIL's counterclaim was in fact the value of the surplus materials which it was alleged VCL had failed to return, it was clearly averred in that counterclaim that VCL had "acted in breach of contract" by failing to return the surplus materials and that "as a result of such breach" TCIL had suffered "loss and damages amounting to Rs 2,747,060." Accordingly, there was in effect a claim that, as a result of the alleged breach of contract, TCIL had suffered prejudice consisting in "loss and damages" to the tune of Rs 2,747,060. Article 1142 of our Civil Code provides:

> *"Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur*"

The reference, in ground 2 above, to the learned Judge having allowed TCIL's counterclaim for Rs 2,747,060 "as prejudice suffered" must be read as a reference to the learned Judge having allowed the counterclaim for damages resulting from a breach of contract.

In relation to ground 3 above, the question has arisen as to whether the assumption therein that TCIL was fully paid for works it caused VCL to perform is an incorrect one, as submitted by Counsel for TCIL. After looking at the record, we find that submission to be well-founded. Indeed, the representative of TCIL stated in evidence that TCIL had not been fully paid for the works in question.

Grounds 2 and 3 dealt with together

In the light of our conclusion as to the erroneous assumption in ground 3 above, the only contention left in that ground is to the effect that there was never any issue of unreturned surplus materials with the owner of the said materials.

That contention is in fact related to the contention, contained in ground 2, to the effect that TCIL did not suffer any prejudice whatsoever. In the contention of Counsel for VCL, the evidence of the representative of Mauritius Telecom which was to the effect that there was "no issue" as between Mauritius Telecom and TCIL in respect of surplus materials clearly showed that no prejudice had been caused to TCIL. As indicated earlier, having regard to the wording of Article 1142 of our Civil Code, the reference to "prejudice" said to have been suffered by TCIL should be read as a reference to *dommages* as a result of the alleged failure of VCL to return the surplus materials.

Ground 2 and what is left of ground 3 can therefore be dealt with together.

Consideration of the questions raised under grounds 2 and 3

(i) Can the submission that there was no duty to return surplus materials be entertained?

Counsel for VCL has submitted, as one of the reasons why the learned Judge was allegedly wrong to allow the counterclaim, that there was no evidence of a duty on the part of VCL to return surplus materials. He has referred, in this connection, to the subcontract agreements between VCL and TCIL in respect of projects MT 439, MT 460 and MT 465. In each of these agreements (Documents P1, P4 and P6) it is stipulated in clause 3 that VCL "would be required to submit the stock balance of all material issued" to it along with the invoice of the works done by it. Counsel for VCL has submitted, in that connection, that this should be interpreted as a requirement merely to submit the balance and not the actual materials contrary to the assertions of Mr Soopramanien Barathi, the representative of TCIL, in his testimony at the trial.

In our view, this submission at appeal stage cannot be entertained inasmuch as it is based on a specific contention which was neither raised by VCL in its plea to TCIL's

counterclaim nor in the submissions of Counsel for VCL to the trial Judge. The counterclaim averred that VCL had failed to return the surplus materials as per clause 3 of the subcontract agreements pertaining to projects MT 439, MT 460 and MT 465. VCL's plea simply contained a denial of that averment. At no moment in the course of trial or in his submissions to the learned trial Judge did Counsel raise the issue which he has now raised before us at appeal stage. In fact, the stand of VCL had been to the effect that it had returned most of the unused materials as rightly noted in the following passage from the judgment of the learned Judge: "*The plaintiff's representative Mr Gunesh has maintained his stand that the plaintiff has returned unused materials except for some poles which have always been at the disposal of the defendant for the latter to come and collect*". Also, as noted by the learned Judge, the stand of VCL had also included an attempt to invoke the possibility of the problem of materials still with VCL having to be cleared out by Mr Mootooveren, the previous owner and director of VCL, who had gone to Australia, apparently for good. We shall therefore discard the submission made by Counsel for the first time at appeal stage in a bid to introduce a defence which was never raised before the trial Judge.

(ii) Has the learned Judge wrongly "allowed the respondent's counterclaim for Rs 2,747,060 as prejudice suffered"?

The contention of Counsel for VCL on this question is twofold:

(a) the learned Judge was wrong to find, on the evidence, that there were unused materials which VCL had not returned;
(b) there was never any issue of unreturned surplus materials "with the owner of the said materials" such that the evidence clearly showed that TCIL did not suffer any prejudice whatsoever.

In relation to contention (a) above, Counsel for VCL reiterated the submission he made before the learned Judge to the effect that Mr Gunesh, the representative of VCL, had explained in what circumstances he had signed the reconciliation documents indicating that both parties were agreed on the description, in terms of nature and quantity, of the surplus materials to be returned to TCIL by Visionphone Contractors under the relevant projects. The learned Judge rejected his submission upon holding that the acknowledgements voluntarily signed by Mr Gunesh could not be lightly disregarded. We are unable to find fault with the conclusion of the learned Judge in that respect.

In relation to (b) above, the evidence did reveal that there was no issue of unreturned surplus materials with the owner of the said materials, namely Mauritius Telecom, in the sense that no claim had been made, or was contemplated by the latter against TCIL. However, as pointed out by Counsel for TCIL, the reason why there was no such issue with Mauritius Telecom was that the unreturned surplus materials had been passed on from one project to another and had ultimately been passed on to project MT 501 which concerned TCIL and Mauritius Telecom but not VCL. In the contention of Counsel for TCIL, the latter would still be accountable to Mauritius Telecom, eventually, for the surplus material not returned by VCL.

It is to be noted that the learned trial Judge indeed viewed the damage resulting from the breach in the same manner.

The question which arises, in this connection, is whether under such a scenario of surplus material being "passed over", or "rolled over" to the next project of TCIL with Mauritius Telecom, TCIL could claim for damages resulting from non return of unused materials by VCL although the time to account to Mauritius Telecom for those surplus materials was yet to come. After anxious consideration, we have come to the conclusion that, in such a scenario, the amount of unreturned surplus materials was claimable by TCIL as loss suffered. In our view, upon VCL failing to return surplus materials remaining after its last work on a project as a subcontractor of TCIL, TCIL would suffer as a loss the value of those unreturned surplus materials which it would have to account for at the end of other relevant projects with Mauritius Telecom. We are also of the view that those were damages "qu'on a pu prévoir lors du contrat" within the meaning of Article 1150 of our Civil Code. Contention (b) above is, accordingly, also untenable.

In the light of our above conclusions, the appeal is dismissed. With Costs

E. Balancy
Senior Puisne Judge

A. F. Chui Yew Cheong
Judge

27th July 2017

Judgment delivered by Hon. E. Balancy, Senior Puisne Judge

For Appellant :	**Mr. H. Gunesh, Attorney-at-Law** **Mr. G. Bhanji-Soni, of Counsel**
For Respondent :	**Mrs D. Ghose-Radhakeesoon** **Mrs U. Boolell, Senior Counsel** **Miss A. Pittea, of Council**