

# **IN THE SUPREME COURT OF SEYCHELLES**

**PADY BUILDING CONTRACTOR**

**A PARTNERSHIP** herein rep by Michael Padayachy

**PLAINTIFF**

**VERSUS**

**SEYCHELLES HOUSING DEVELOPMENT**

**CORPORATION** herein rep by Mr. Charles Bastienne  
Its Ag. Managing Director

**DEFENDANT**

Civil Side No 278 of 2004

Mr. F.Ally Counsel for the Plaintiff

Mr. W.Lucas Counsel for the Defendant

## **JUDGMENT**

**Perera CJ**

The plaintiff and the defendant entered into a contract in June 1999 (P1) whereby, the plaintiff agreed to perform works on the Port Launay Housing project, namely to construct 26 housing units for an agreed sum of Rs.5,710,302. The plaintiff avers that during the term of the agreement, the defendant agreed to pay the plaintiff the value of the extra works performed. It is also averred that following determination of the agreement, the defendant agreed to pay the plaintiff 86.66% of the contract price and the value of materials on the construction site. The plaintiff claims Rs. 906,306.76 on the following basis.

1. 86.66% of the contract price - Rs. 4,948,547.71

|                               |              |           |                     |
|-------------------------------|--------------|-----------|---------------------|
| 2. Value of extra works       | -            | Rs.       | 322,347.10          |
| 3. Value of materials on site | -            | Rs.       | <u>44,072.50</u>    |
|                               | <b>Total</b> | <b>Rs</b> | <b>5,314,967.31</b> |
| <b><u>Less</u></b>            |              |           |                     |
| 1. Amount already paid        | -            | Rs.       | 3,846,101.60        |
| 2. Further payment            | -            | Rs.       | <u>562,558.87</u>   |
|                               | Balance      | Rs.       | 906,306.76          |

The plaintiff avers that the defendant claims that the payment of Rs562,558.87 discharged all its payment obligations.

The defendant in its statement of defence avers that the agreement was terminated on 17<sup>th</sup> October 2001, and that the plaintiff was informed to cease all his activities and to remove all his materials and machinery. He was also informed that he would be paid for work done up to 17<sup>th</sup> October 2001 subject to a valuation, and that if he continued to carry out further work, no claim for extra work thereafter would be entertained.

Michael Padayachy (PW1) a partner of the plaintiff company testified that, by agreement, extra work was done. The value of such work was Rs.322,347.10, but with an advance payment for purchase of materials, he was paid Rs.591, 229.54 under certificate no. 11. (P2). With that payment, the total amount paid was Rs.3,846,101,60.

The defendant formally terminated the contract by letter dated 14<sup>th</sup> November 2001 (P3). Mr Padayachy further testified that at a meeting held on 10<sup>th</sup> December 2001 with Mr Rene Michaud, SHDC Project Manager, Mr. Ojo, a Civil Engineer of MLUH and Director of Housing Projects, an agreement was reached to evaluate the works done at 86.66 %, and also that the materials on site be valued at Rs44,072.50. (P4). He clarified that 86.66%

was to be calculated against the full contract amount at Rs.5,710,302 which was Rs4,948,547.71. That agreement was signed by Mr. Michaud, and endorsed by Mr. Ojo with the seal of the MLUH. He agreed with that percentage although he had done about 89.5% of work. Consequently he was paid Rs3,846,101.68, and a further payment of Rs.562,588.87, leaving a balance sum of Rs906,306.76, which he now claims.

Mr. Rene Michaud (PW2) testified that he was partially involved with the particular project. He made site visits and signed certificates for payment. After the contract was terminated, he was asked to do an evaluation on site. He stated that the evaluation was done, and an agreement reached as regards the percentage of work done, which was 86.66% excluding the retention amount. He was authorized to do the valuation and agree on a percentage by Mr. Gopal the then Managing Director of the SHDC. The agreement was endorsed by Mr. Ojo of M.L.U.H.

Mr. Nigel Michel (PW3) Director General for Administration and Finance of the MLUH testified that the percentage of 86.66% was provided by Mr. Michaud. Hence he, as an accountant, had only to calculate 86.66% of the contract amount of Rs.5,710,302.

Mr Ezekial Ojo (DW1) Director of Housing Projects of the MLUH testified that for housing project purposes, SHDC was an independent institution, and that MLUH acted in a supervisory capacity. In the present matter, as the progress of work was slow, the project was referred to MLUH for professional advice. As regards document P7 wherein 86.66% was agreed and endorsed, Mr Ojo stated that he found certain works had not been done, and hence he scaled done the percentage to 86.66%, which was agreed by all parties.

Mr. Ojo however stated that the agreement of 86.66% was reached on the material presented to him in figures, but before final accounts were prepared, a professional quantity Surveyor had to go on site and make a valuation. He stated that before payment he would have got Mr. Gerard Renaud to go on site and prepare the final certificate. Since that

stage had not reached, he stated that the valuation made was interim, and that the agreement to pay 86.66% was also interim, subject to a Quantity Surveyor making an assessment before issuing the final certificate.

Mr. Gerard Renaud (DW2), Quantity Surveyor of MLUH testified that he only re-assessed an initial valuation done by SHDC Valuers. He noted that valuation of different types and sizes of houses had been consolidated and valued on an average basis in all the payment certificates. He stated that each building carried its own rating and that hence individual valuation was necessary. The error in the earlier valuations was in averaging and weighting. He therefore stated that at the time of the agreement, the amount due to the plaintiff could not be Rs1,468,865.63, but much less. He further stated that the MLUH system of calculation was different to that of the SHDC. The MLUH calculation was 86.66% of the contract price, less the amount of materials on site. He therefore stated that the exhibit P4 was only a summary and not a certificate. Hence for purposes of payment there should be a valuation and a proper certification of the work actually done.

Mr. Nigel Michel who was recalled, further testified that although the project was funded by the MLUH, the contract was between SHDC and Pady Building Constructor. Interim payments were made on the basis of an on going project. So the payment certificates did not reflect the actual work done. But when the contract was terminated, Mr. Michaud had agreed with the plaintiff that the final payment should be based on 86.66% of the contract price on the basis of earlier valuations. The MLUH did not agree with that, and appointed the Quantity Survey to re value the work done. He further stated that subsequently, a meeting was held to resolve the matter, and that eventually the Ministry decided that the final payment due to the plaintiff was Rs562,558.87, which was paid. As regards the agreement to pay 86.66% at the meeting of 10<sup>th</sup> December 2001, which was signed by Mr. Michaud for SHDC, Mr. Ojo for MLUH, and the plaintiff, Mr. Michel stated that such agreement was on a percentage basis, but was not the final payment, which had to be

properly evaluated by a Quantity Surveyor and approved by the Principal Secretary of MLUH. Hence that was not a binding agreement for purposes of final payment.

Before the evidence is considered, it is necessary to identify the parties to the agreement for contractual purposes. The plaintiff has, in paragraph 2 of the plaint averred that the agreement was with the SHDC. This has been admitted in the defence. However, in the June 1999 agreement (P1), the employer is the Ministry of Land Use And Habitat, while the plaintiff contractor is the party of the other part. Thereafter, the following paragraph appears therein.

“Whereas the employer (MLUH) wishes the following work construction of 26 housing units at Port Launay (SHDC) (hereinafter called “*the works*” *to be carried on under the direction of Seychelles Housing Development Corporation (hereinafter called the Consultant), and .....*”

Hence the defendant SHDC was the Consultant to the project. The agreement was signed by the Principal Secretary MLUH and the plaintiff Contractor.

Paragraph 2 of the said agreement provides that –

“The employer (MLUH) will pay to the Contractor the sum of five million seven hundred and ten thousand three hundred and two only (Sr.5,710,302.00) hereinafter referred to as the “contract sum”, *or such other sum as shall become payable hereunder at the times and manner specified in the said conditions*”.

However under the conditions of the contract, condition 2(ii) permits the SHDC to order additional work and value such work “*on a fair and reasonable basis*”.

The extension of the agreed period of completion was to be done by MLUH. Although under condition 7, it was the employer who could determine the contract for neglecting or failing to proceed with the works, it was the SHDC, by letter dated 14<sup>th</sup> November 2001 (P3) that did so. Be that as it may, condition 7 provides that upon determination by MLUH, if in complete work has to be completed by another contractor, such costs would be deducted from the former Contractor by the employer (MLUH). Hence the final determination as regards payments under the contract remained with MLUH.

As regards payment of interim payments, condition 11 provides that if the period for completion of works exceeds 2 months, which is what happened in this case, *the SHDC could certify* monthly thereafter up to the agreed date for completion, interim payments *“in respect of the value of the works executed, including any materials and goods on site for the purposes of the works and any amounts either ascertained or agreed under Clause 2, and the employer shall pay to the Contractor the amount so certified less 5% retention within 14 days of the date of the certificate”*.

In the present case, the agreed date of commencement of works was 1<sup>st</sup> August 1999. The Date for completion was 15 months therefrom, namely, 1<sup>st</sup> November 2000. According to letter dated 14<sup>th</sup> November 2001 (P3) the plaintiff had sought extensions on the ground of lack of materials. After being given time, a further letter was sent on 31<sup>st</sup> August 2001 informing that the works had still not been completed, and giving a final date. The contract was terminated on 14<sup>th</sup> November 2001.

The meeting of 10<sup>th</sup> December 2001 was after the contract was terminated for non performance of the agreed works within the extended time. Hence there ought to have been a professional assessment of the work actually done for purposes of final payment.

As Mr. Renaud testified, he was directed by the Principal Secretary MLUH to make a re-assessment of the valuation upon which an agreement had been recorded to pay 86.66%. The minutes of the meeting of 23<sup>rd</sup> January 2002 (attached to exhibit D1) state that Mr. Renaud did so “on the basis of facts in file, as well as on site, whilst at the same time maintaining the modality used on 11 previous payment by SHDC for valuing works carried out on the project”. Consequently, certificate no. 12 of 17<sup>th</sup> December 2001 for Rs.562,558.87 was authorised by Mr. Michaud of SHDC on 28<sup>th</sup> December 2001 and approved by MLUH on 31<sup>st</sup> December 2001, as the final payment. That amount was received by the petitioner, who now states that he received it as an interim payment.

The summary, as assessed by Mr. Renaud is as follows-

|                                 |                  |                       |
|---------------------------------|------------------|-----------------------|
| “Contract price                 | -                | Rs 5,710,302.00       |
| Work done to date               |                  |                       |
|                                 | - Building works | Rs                    |
|                                 | 3,291,006.11     |                       |
|                                 | - External works | Rs                    |
|                                 | 751,234.76       |                       |
| Variations and additional works |                  | Rs 322,347.10         |
| Material on site                |                  | Rs <u>44,072.50</u>   |
| Gross value                     |                  | Rs4,408,660.47        |
| Retention releases              |                  | <u>0.00</u>           |
| Not value                       |                  | Rs4,408,660.47        |
| Less previous payments          |                  | <u>Rs3,846,101.60</u> |
|                                 |                  | Rs 562,558.87         |

At the said meeting the plaintiff was informed that the agreed percentage was incorrect at the time it was done, and that the correct time for adjustments was before final payment

after all work had ceased. Hence the agreement of Mr. Michaud of the SHDC and Mr Ojo of MLUH was not binding on the two institutions they represented for two reasons.

1. They had no authority to agree on a payment which had not been finally determined.
2. The percentage had been calculated on previous miscalculations by the SHDC, and hence, the proper stage for rectification was when calculating the final payment, as in this case, admittedly, the plaintiff had not completed the works.

The contract was between the plaintiff and Ministry of Land Use And Habitat. Hence, pursuant to condition No. 7 of the agreement, MLUH was the final authority to decide on payments.

Accordingly, the Court holds that with the payment of Rs.562,558.87 on certificate no. 12, all payments due and payable to the plaintiff were fully and finally settled. Consequently, plaintiff's action is dismissed with costs.

.....  
A.R. PERERA  
**CHIEF JUSTICE**  
(Pursuant to Article 132(3) of the Constitution)

Dated this ..... day of June 2009