IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 30/2012

[2014] SCSC

GEMMINA SOPHOLA

Plaintiff

versus

IXORA CONSTRUCTION AND CIVIL ENGINEERING LTD

Defendant

Heard: 2 October 2013, 13 January 2014, 20 January 2014

Counsel: Mr. Nicol Gabriel for plaintiff

Mr. Basil Hoareau for defendant

Delivered: 16th July 2014

JUDGMENT

Karunakaran J

[1] The plaintiff has brought this action against the defendant claiming loss and damages in the sum of Rs 1,379,600/- resulting from an alleged breach of contract by the defendant, a construction-company incorporated in Seychelles. The defendant, in its statement of defence has denied the plaintiff's claim and sought dismissal of the plaint. Besides, in its defence, the defendant has also included a counterclaim against the plaintiff. In the counterclaim, it has sought an order to rescind the building-contract between the parties and for damages in the sum of Rs 439,787.51. The defendant claims that plaintiff owes

the said sum to the former towards balance of the contract price for the construction work, which the former had carried out for the latter upon her request, in addition to the works already agreed upon in the contract.

[2] The plaintiff, a young woman was at all material times, a self-employed person with an entrepreneurial ambition to start her own small guest-house business availing loan from the bank. The Defendant-company at all material times was and is a building contractor operating in Seychelles. By virtue of an Agreement dated 25th August 2010- in exhibit P1 -the Defendant undertook to build a four unit self-catering apartments at the Sailfish Estate, Anse a la Mouche, Mahé for the consideration of Rs1,691,221.88 and to complete the work within twenty five weeks from the date of the agreement. It was a further term of the Agreement -vide exhibit P1 - that the funds shall be disbursed as follows:

25% upon signature of the Agreement on the 30th August 2010, which sum amounts to Rs422, 805.47

20% upon completion of the foundation works which sum amounts to Rs338, 244.40

20% upon completion of the first floor concrete floorings which sum amounts to Rs338, 244.40

20% upon completion of the first floor block work up to lintel level which sum amounts to Rs338, 244.40

10% upon completion of roofing and plastering which sum amounts to Rs169, 122.20; and

5% for the finishing of the internal and exterior works inclusive of gutters and fixing of all windows and doors which sum amounts to Rs84, 561.10.

[3] According to the plaintiff, although she had made an advance payment in the total sum around 1.4 million Rupees to the Defendant, he did not complete the work in breach of the terms of the agreement. In July 2011, after completing only 60% of the work, the workers of the Defendant abandoned the incomplete building and left the site. Since then

despite several requests and demands the defendant failed to complete the remaining 40% of the work.

[4] It is also the case of the Plaintiff that the Defendant was claiming another amount to complete the remaining works that was never agreed upon. The sum outstanding on the existing bank loan would also not be enough to cover any extra charge. Further, the Plaintiff has been advised by the Planning Authority to dismantle a portion of the building, which the defendant built,since no planning permission was sought by the Defendant before he engaged in the construction works, deviating from the approved plan and that too, without the knowledge and consent of the plaintiff.

[5] The Plaintiff testified in essence that the Defendant was in breach of the agreement signed with her and as a result she had suffered loss and damages in the total sum of Rs1, 379,600. She also adduced expert-evidence to establish the loss and damages as follows:

[6] According to the plaintiff 40% of the works on the chalets remained incomplete, when the defendant abandoned and left the site, the estimate of which amounts to Rs679, 600-00.However, according to the expert, the quantity Surveyor Mr. Nigel Roucou (PW2), in November 2011 when he visited the site 72% of the work had been completed and the total value of the completed work was Rs1, 217,700.00. Therefore, the value of the remaining 28% of the incomplete works would amount to Rs473, 521.88 vide exhibit P14. In support of her version as to the incomplete work, the plaintiff also produced a number of photographs in exhibit P10 and 15 showing the incomplete structure of the building in question. Further the plaintiff testified that although pre-contract discussions on many incidental matters and minute details of work such as breaking the rocks, putting up the concrete and the boundary walls were agreed upon between the parties, they were not written down and not shown on the agreement. However, the defendant prior to signing the agreement agreed to complete the construction of the apartment so that she can use the building upon completion for the intended purpose. There was no agreement for any extra-work apart from the ones mentioned in the agreement. Incidentally, it is pertinent to note that paragraph 2(ii) in the agreement (exhibit P1) clearly reads thus: *the scope of work for the purpose of the project includes external works inclusive of concrete*

road access 25mtrs X 3mtrs X 100 mm and boundary walling of 1.8 mtrs. Be that as it may.

[7] The plaintiff further testified that since the defendant did not complete the work within the period agreed upon in the agreement, the plaintiff could not commence and operate the business as planned. Consequently, she could not start the loan repayments as scheduled to the Development Bank of Seychelles, which had granted the loan to the plaintiff for the project. The plaintiff could not repay the said loan until to date and the interest thereon has also been accumulating over and above the installment payments towards the principal amount, which all now remain and due and payable to the bank by the plaintiff. In the circumstances, she claims loss of rental revenue in the total sum of Rs150,000-00 in respect of the intended four units of self-catering apartments for a reasonable period, which sum in her estimate amounts to Rs150, 000-00. Nearly seven months after the due date for the completion of the project, the plaintiff by a letter dated 12th July 2011 (in Exhibit P8), issued a notice to the defendant, which reads *in verbatim* thus:

"Dear Sir,

I wish to refer to your agreement dated 25th August 2010, for the construction of a commercial building – 4 apartments – at Sailfish Estate, to be handed over, fully completed within a maximum period of 25 weeks.

As it is apparent that the work is not going to be completed by the 31st July 2011, I wish to give you notice that I will be applying liquidated ascertained damages of Rs 4,650.00 per week, until such time that the work is fully completed. The said liquidated ascertained damages will be deducted and limited to 30% of the contract sum.

Sd: GeminaSophola"

[8] According to the plaintiff, the defendant did not do the work as per the plan and the roof was defective and the planning authority after their visit to the site asked the plaintiff to stop the work and rectify the defects. Hence, she claimed Rs 450,000.00 for dismantling and rectifying the defects.

[9] The Plaintiff thus claims loss and damages for incomplete works, loss of rental revenue and loss for the dismantled parts of the buildings. She is also claiming moral damages in the sum of Rs 100,000 for the mental trauma she underwent due to breach of contract by the defendant and the resultant default in the repayment of her bank loan and the accumulation of interests on the principal amount.

[10] In view of all the above, the plaintiff urged the Court to dismiss the defendant's counterclaim and enter judgment for the plaintiff and against the Defendant in the sum of Rs1,379,600 with interests at the current bank rate and with costs.

[11] On the other side, the defendant testified in essence that he suspended the work at the site since the Plaintiff refused to pay him the price for the works he had completed, which sums were due and payable to him as per the agreement. He stated that the initial contract was revised from Rs 1,691,221.88 to Rs 2,056,955.41 He further claimed that the Plaintiff owed him Rs 439,787.51 because of the extra work he did for the plaintiff in putting up a concrete road and boundary wall. He also stated that the Plaintiff had by June 2011 paid only Rs 1,514,320.12. When crossed examined on this discrepancy he stated that that was a mistake and he revised his figure later. The Defendant also stated that he was asked by the Plaintiff to build a concrete road and two external walls due to the nature of the site. He said he had a close relationship with the Plaintiff in the early days when they were both working for the ruling party SPPF. He admitted that he was the one who drafted the contract, fixed the contract sum and all the details pertaining to the building. However he admitted that there was no written alteration to the initial contract and no written request for extra payments for the extra works carried out by him. The Defendant did admit in cross examination that he did not make any claim whatsoever for extra work either by letter or an additional clause in the agreement. He only stated that he did not see the necessity to sign any contract as his relationship with the plaintiff was based on trust.

[12] The Defendant called a witness Mr. Neil Mederick, a quantity surveyor, who produced a report in Exhibit D1, of a visit that he carried out at the work site. According to Mr. Neil Mederick, some modifications had to be done by the defendant during construction to complete the project satisfactorily, and additional funds should have been allocated by

the plaintiff. According to Mr. Mederick, at the time when he visited the site in September 2011, approximately 78% of the work had been completed. The value of the work that had been completed was Rs1, 728,467.00. Therefore, it is logical to infer that the total cost of the project would be Rs2, 215,983.33 and the value of the remaining 22% of the incomplete works would amount to Rs 487, 516.33. However, this report was commissioned by the defendant without the knowledge or consent of the Plaintiff, the owner of the work site. Further this report was dated the 11th of October 2011 following a visit that was carried out in September 2011. By then the site had been abandoned by the Defendant. Admittedly, the plaintiff was never given a copy of this report. Further it is the case of the defendant that although the parties had agreed to increase the contract sum, they did not reduce it into writing as their relationship was based on trust. Furthermore, it is the case of the defendant that after signing the contract and even during the course of the construction of the units, certain changes and alteration were made to the construction, and the Plaintiff consented to all those changes. Accordingly, the contract price was changed from Rs1, 691,221.88 to Rs2, 056,955.41. However, the defendant testified that the Plaintiff never effected the payments on time as per the term of the amended agreement. It is the case of the Defendant that as and when he completed the roofing and plastering, the Plaintiff ought to have paid a total sum of Rs439, 787.51 to the Defendant, in accordance with the term of payment based on the new contract price at Rs. 2,056,955.41; but, she did not pay. This, according to the defendant necessitated him to stop the work and leave the site.

[13] Besides, it is the submission of the defence on a point of law that the Plaint should be dismissed in view of Article 1184 of the Civil Code of Seychelles. According to the defendant, the plaintiff's demand only for damages is not maintainable in law since the plaintiff did not apply for rescission coupled with damages.

[14] In the circumstances, the defendant urged the Court to dismiss the plaintiff's claim and enter judgment for the defendant on the counterclaim in the sum of Rs439, 787.51 with interest and costs.

[15] I meticulously perused the evidence on record, including the documents adduced by both parties. I diligently examined the submissions made by counsel on both sides. Obviously, the following questions arise for determination:

[16] Was the defendant in breach the agreement - Exhibit P1-in that he refused or failed or neglected to complete the construction work despite, payments made by the plaintiff in accordance with the Fund Disbursement scheme agreed upon by the parties?

[17] (a) Was the plaintiff at fault or contributed in any manner to the breach by the defendant?

[18] (b) Was there any agreement between the parties for the extra work allegedly done by the defendant namely, the construction of the concrete access road and boundary wall on the plaintiff's property?

[19] (c) Has the plaintiff established her claim in the sum of Rs439,787.51against the defendant on a balance of probabilities in respect of the alleged defective works carried out by the defendant?

[20] (d) Has the defendant established the counterclaim for sum of Rs 439,787.51against the plaintiff on a balance of probabilities?

[21] (e) What is the quantum of loss and damages if any, the plaintiff suffered as a result of the breach of contract by the defendant? and

[22] (f) Is the plaintiff liable to pay any sum to the defendant under the counterclaim made by the defendant?

[23] Before finding answerers to the above factual questions, I wish to determine the legal issue raised by the defendant in his submission that the present action is not maintainable in law in view of Article 1184 of the Civil Code, since the defendant did not ask for recession of the contract but only damages for the breach. This Article reads thus:

[24] *1. A condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking. It may also be implied in some unilateral contracts, such as a loan or a pledge. In that case, the contract shall not be rescinded by operation of law. The party towards whom the undertaking is not fulfilled may elect*

either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.

[25] Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances. Rescission shall only be effected by operation of law, if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform.

[26] 2. The Court may, in relation to an action for rescission, make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heirs.

[27] 3. If, before the performance is due, a party to a contract by an act or omission absolutely refuses to perform such contract or renders the fulfilment thereof impossible, the other party shall be entitled to treat the contract as discharged.

[28] Admittedly, the defendant in this matter by omission absolutely refused to perform the contract and complete the building alleging non-payment by the plaintiff. In such a case, the other party, namely the plaintiff is perfectly entitled to treat the contract as discharged in terms of paragraph 3 above. Therefore, in my considered view, the plaintiff in this matter, need not apply for recessions before making claim for damages. This option is open in law in favour of the innocent party in terms of Article 1184(3) of the Civil Code. This is what the plaintiff has opted for and has exactly done in this case. Therefore, the defence challenge as to maintainability of the instant action on this ground, does not appeal to me in the least. Hence, I find the instant action is maintainable in law. Hence, the defendant's plea in this respect is dismissed accordingly.

[29] I will now turn the first question supra. It is not in dispute that the defendant received the sums totaling Rs1, 383,996.58 from the plaintiff and through her banker Development Bank of Seychelles, which fact is also corroborated by documentary evidence in Exhibits P2, P3, P4, P5 and P6. Admittedly, the defendant has abandoned the site on his own,

without completing the work and that too, without notifying the plaintiff. This in itself is a clear breach of the agreement that the defendant had signed with the Plaintiff. According to the Quantity Surveyor's report the works carried out was only seventy two percent by the time the Defendant abandoned the site. The Defendant had also been over paid in the sum of about Rs 203,996 by the time he left the site. I accept the evidence of the plaintiff that nearly 40% of the works on the chalets remained incomplete, when the defendant left the site, the cost of which amounts to Rs 679, 600-00. This version is also substantially corroborated by the testimony of the quantity Surveyor Mr. Nigel Roucou (PW2). His evidence to the effect that in November 2011 when he visited the site 72% of the work had been completed and the total value of the completed work was Rs1, 217,700.00. Obviously, the plaintiff had paid the defendant more money than what was due to him as per the scheme of installment- payments agreed upon by the parties on the piecemeal basis in the agreement. It is pertinent to note, Article 1134 and Article 1135 of the Civil Code of Seychelles provides as follows:

[30] • *Agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorizes. They shall be performed in good faith.*

[31] • *Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.*

[32] Therefore, while plaintiff was performing her part of the contractual obligation as to payment, the defendant stopped work and left the site for no reason valid in the eye of law. His claim alleging underpayment by the plaintiff based on an alleged verbal agreement is not maintainable in law or on facts. Hence, I find it was only the defendant, who was in breach of contract - Exhibit P1- in that he refused or failed or neglected to complete the construction work despite, payments made by the plaintiff in accordance with the Fund Disbursement scheme. Obviously, the plaintiff can no way be faulted for the breach of contract by the defendant. This answers the first and the second questions.

[33] Regarding the third question, admittedly, there was no agreement in writing between the parties for the extra work allegedly carried out by the defendant for putting up the

concrete access road and boundary wall on the plaintiff's property. I totally believe and accept the testimony of the plaintiff, who appeared to be a credible witness. She categorically testified that there was no oral agreement between the parties on the said extra work. Having said that I should mention here that no oral evidence is admissible on any matter the value of which exceeds 5000 by virtue of Article 1341, which reads thus:

[34] *"Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees"*

[35] In any event, according to the agreement in exhibit P1, it is very evident that the works in relation to the said concrete access road and the boundary wall were included in the list and scope of work in terms of clause 2 (ii) which reads thus:

[36] "The builder hereby undertakes with the land owner as follows:

[37] As per the agreed construction schedule, the scope of works for the purpose of this project, includes the following specific tasks, responsibilities, and or liabilities on the part of the contractor (IXORA) :- Foundation excavation etc. and ……..

[38] External work is inclusive of concrete road access 25mtrs X 3mtrs X 100 mm and boundary walling of 1.8 mtrs"

[39] Hence, the defendant's claim to the effect that the said works were extra and he carried out them on the basis of the oral agreement does not hold water. In the circumstances, I find and conclude that the works the defendant carried out for the concrete access road and boundary wall were not extra; they were already found place in the written agreement in exhibit P1 and the defendant was liable to carry out those works under the written agreement. Indeed, there was no need for the parties to enter into any oral agreement in this respect. This answers the third question.

[40] Coming back to the fourth question as to the alleged defective work, I find that apart from the vague reference by the plaintiff in her testimony to it, there is no other

independent evidence on record to show that the work the defendant had carried out was defective or was not in accordance with the approved plan. Hence, I find that the plaintiff has failed to prove her claim on a balance of probabilities in the sum of Rs 439,787.51for dismantling parts of the buildings and the alleged loss in this respect.

[41] Regarding the fifth question as to counterclaim made by the defendant against the plaintiff, it is evident - as discussed supra - there is no admissible evidence on record to establish the said counterclaim in this matter. Hence, I find that the defendant has failed to establish the counterclaim in the sum of Rs 439,787.51against the plaintiff and it is liable to be dismissed and so I do accordingly.

[42] I will now turn to the sixth question (supra). It relates to the quantum of loss and damage, the plaintiff suffered because of the entire episode following the breach of contract by the defendant. The evidence on record clearly shows that the defendant has been in breach of contract, which has resulted in frustration of the contract and the entrepreneurial project has been derailed to the detriment of the plaintiff. In my considered view, the amounts claimed by the plaintiff for loss and damages appear to be reasonable and appropriate having regard to all the circumstances of the case. After taking all relevant factors into account, I accept the evidence of the quantity surveyor Nigel Roucou in its entirety and I award the following sums to the plaintiff:

For the remaining incomplete works …. Rs 473, 521.88

Amount paid in excess (overpayment)

by the plaintiff to the defendant …… Rs 203,996.00

Loss of rental revenue……. Rs 150,000.00

Moral damages…… Rs 100,000.00

Total **Rs 927,517.88**

[43] In the final analysis, for the reasons stated hereinbefore, I dismiss the defendant's counterclaim and enter judgment for the plaintiff and against the defendant in the sum of Rs 927,517.88 with interest on the said sum at 4% per annum (the legal rate) as from the date of the plaint and with costs of this action.

Signed, dated and delivered at Ile du Port on 16th July 2014.

D Karunakaran
Judge of the Supreme Court