

Beelut H.A. v Hossenbocus A.R.

2021 IND 11

Cause Number 1815/09

IN THE INTERMEDIATE COURT OF MAURITIUS

In the matter of:

Mr. Hossen Ally Beelut

Plaintiff

v.

Mr. Amad Reza Hossenbocus

Defendant

Judgment

In this Plaintiff, it is common ground that –

1. In virtue of a deed drawn up by Mr. Yogendr Keshav Nuckcheddy, Notary Public, dated 26 June 1996, registered and transcribed in Volume 3405 No.3, Plaintiff, during the legal community of goods and property existing between himself and his wife, Mrs. Nazima Soobedan, acquired a portion of land of the extent of 403 square metres at Camp Fouquereaux described in deed registered and transcribed in Volume 3405 No.3.

2. With a view to putting up a storeyed commercial/residential building on the said portion of land, Plaintiff caused the necessary plans to be drawn up and same were approved by the Municipal Council of Vacoas/Phoenix and a Building and Land use permit was issued on 11 February 1997.

3. Plaintiff had already started with the construction of the ground floor of the said building. The ship footings were placed, columns base & concrete column cast and the works reached to the level of the waistband(ceinture).
4. In virtue of a Building Agreement dated 2 June 2008, Defendant agreed to continue the construction of the ground floor of the said building in concrete under slab of about 2000 square feet according to the duly approved plans & specifications by the Municipal Council of Vacoas/Phoenix on the abovementioned portion of land for and in consideration of the price of Rs. 180,000.
5. Amongst others, Defendant undertook to do the following works which are reproduced verbatim as per the averments of the plaint at paragraph 5 viz.:

"(A) (i) La construction d'un batiment en beton sous dale environ 2000 pied carres d'apres les plans;

(ii) Le coulage des colonnes et 'beams' et l'installation de fer pour la dalle;

(iii) L'installation des portes et des fenetres;

(iv) Le crepissage en general et la construction de l'escalier;

(v) La fondation et construction du sceptic tank (puits d'absorption).

(B) L'Entrepreneur s'engage aussi a completer et a placer a 100% tous les ouvertures pour les portes, fenetres et autres. A completer les crepissage interieurs et a l'exterieur a 100%.

(C) L'Entrepreneur s'engage a terminer les travaux dans un delai de quatre mois a compter du 02/06/08, sauf pour des raisons majeurs."

Plaintiff has averred that all the works were to be carried out according to the duly approved specifications and plans and to be rendered to the satisfaction of the Plaintiff.

Between the 2 June 2008 to 28 August 2008, Defendant had allegedly claimed and cashed from him the sum of Rs. 200,000/- made up as follows:

- (i) Rs. 20,000 on 2.6.2008

- (ii) Rs. 40,000 on 13.6.2008
- (iii) Rs. 15,000 on 2.7.2008
- (iv) Rs. 25,000 on 10.7.2008
- (v) Rs. 20,000 on 5.8.2008
- (vi) Rs.10,000 on 14.8.2008
- (vii) Rs.10,000 on 15.8.2008
- (viii) Rs. 20,000 on 22.8.2008
- (ix) Rs.20,000 on 28.8.2008
- (x) Rs.10,000 (additional sum) on 5.8.2008.

Plaintiff has further averred that Defendant has abandoned the site of work as at 28 August 2008 without rendering the construction to the satisfaction of the Plaintiff.

The works have not been done according to the duly approved specifications and plans and to the required standard as alleged.

Plaintiff has averred that the septic tank has been built in such a manner that foul water from the toilet at the ground level is never to be flushed.

Although allegedly Defendant was often amicably requested to carry out the necessary remedial works to render the building to the required standard, Defendant has so far failed, neglected and even refused to do so. In fact, Defendant has made it clear that he would not undertake any remedial works as further alleged.

Defendant has allegedly committed a breach of the building contract and as a result, he is suffering great hardship, considerable prejudice and damage in the sum of Rs. 100,000 and for which Defendant is liable.

Plaintiff further avers that he would need another sum of Rs. 194,000/- in terms of materials and labour to carry out remedial works and to render the building to the required standard.

It is also common ground that by a notice "*mise en demeure*" dated 29 September 2008, Plaintiff summoned Defendant: -

- (i) to refund forthwith to Plaintiff the sum of Rs. 20,000/- being excess money paid to Defendant over and above the contract value;
- (ii) to pay to Plaintiff the sum of Rs. 194,000/- being costs of materials and labour to carry out remedial works to render the building to the required standard;

- (iii) to pay to Plaintiff the said sum of Rs. 100,000/- as damages for the reasons set forth above.

Defendant has up to now failed and neglected to comply with the requirements and exigencies of the said notice "*mise en demeure*" as alleged.

Plaintiff is, therefore, claiming from the Defendant – (i) the refund forthwith to him in the sum of Rs. 20,000/- being the alleged excess money paid to Defendant over and above the contract value; (ii) the sum of Rs. 194,000/- being the alleged costs of materials and labour to carry out remedial works to render the building to the required standard; (iii) the said sum of Rs. 100,000/- as alleged damages.

Defendant in his plea has denied liability and has averred the following. There was no such Article inserted in the "*contrat de construction*" that all the works were to be carried out according to the duly approved specifications and plans and to be rendered to the satisfaction of the Plaintiff. Payment has been made in several stages on various dates corresponding to different stages of completion or nearing completion. Payment in stages have impliedly been to the satisfaction of Plaintiff failing which Plaintiff could have withheld payment by applying Article 6 of the contract of construction. Indeed, the payments made to the Defendant as averred by Plaintiff do not give a total of Rs. 200,000. The work was completed by 28 August 2008. The septic tank was done satisfactorily and that no plumbing has been done to connect the toilet with the septic tank. Plaintiff is not in a position to say whether full water can be flushed or not. The proper functioning of the septic tank is the work of the plumber. Plaintiff owes him Rs. 50,000/- for work done. The construction pertains to 2600 square feet as opposed to 2000 square feet which Plaintiff has averred. There has been no breach of contract as work has been done diligently and professionally and to the satisfaction of Plaintiff since the latter made payment in stages thereby acknowledging work to be of satisfactory quality, either expressly, by conduct or implied. The said report dated 27 July 2009 warranting another sum of Rs. 194,000/- in terms of materials and labour to carry out remedial works and to render the building to the required standard has not been expertised by a qualified structural engineer and no defects in whatever manner could be seen from that report. The latter comes from another competitor which will find all means to have the sum swollen in order to shoot his advantage. The said report comes from a sub-contractor but not a contractor and it does not carry any weight and it had been grossly exaggerated. The works had been completed thoroughly and diligently which were to the entire satisfaction of Plaintiff who made respective payments. It was the duty of the Plaintiff to hire a professional

and a qualified structural engineer and a project manager to supervise the Defendant's work and further Defendant's architect should perform regular visits on site to give directions as per his plan. Defendant was only a contractor. He has moved that the plaint be dismissed with costs.

The case for the Plaintiff rested on the testimonies of Plaintiff himself, Mr. Ahmad Hansrod who is a structural engineer and Mr. Jean Claude Morin who is a Contractor.

Plaintiff gave evidence in Court. He was the owner of a portion of land of the extent of 403 square metres at Camp Fouquereaux described in deed registered and transcribed in Volume 3405 No.3 as per his title deed as per Doc. G. He was having a building to be constructed on that land which was meant to be both commercial and residential. He had plans drafted viz. collectively marked as Doc. B and had a building permit from the Municipal Council of Vacoas/ Phoenix according to those plans viz. Doc. A. The construction of the said building had already started by another contractor up to the level of the waistband and then Plaintiff retained the services of Defendant who was a contractor to complete the building. They signed a contract to that effect on 2 June 2008 as per Doc. C. As per the contract, the building had to be completed in concrete which was about 2000 square feet with a good quality according to the specifications in the plans for the sum of Rs. 180,000. There was some other work enumerated in paragraph 2 of the contract and in paragraph 3, there were the conditions for the completion of the work. The openings meaning the windows, doors and rendering had to be completed at 100%. As per Article 4 of the contract, he undertook to complete the work within a delay of 4 months and the mode of payment was as per Article 5.

Defendant had signed that he received the payment in cash from Plaintiff for his work on successive occasions as per the averments of the plaint above in line with his contract namely Doc. C. Defendant had completed all the work contracted by him within the delay but not to the satisfaction of Plaintiff although the latter had paid to him the contract price namely the sum of Rs. 180,000 and also an additional amount of Rs. 20,000. Thereafter, Plaintiff retained the services of a structural engineer, Mr. Ahmad Hansrod, who visited the building and told him that it contained defects as per his report dated 19 March 2009 viz. Doc. E. For instance, his septic tank was higher than his water closet and when he flushed the latter, it could not be flushed to be drained away. On several occasions he amicably requested Defendant to correct the defects and he did not do so. The building was not done according to the plans namely Doc. B. The

Defendant had asked him for the sum of Rs. 50,000 to rectify the defects which he did not accept.

On 28 August 2008, Defendant had abandoned the work and left and following which he served him with a *mise en demeure* dated 29 September 2009 wherein he mentioned that all the work undertaken by him was not according to the plans, to his satisfaction and according to the specifications. In that *mise en demeure*, he stated that he had suffered prejudice in the sum of Rs. 100,000 and had asked him to complete the work within a certain delay failing which someone else would have to complete it as per Doc. D. Defendant did not turn up to correct the defects following that *mise en demeure*. The building had been completed at the time of his testimony in Court by another contractor not of a Grade A category, Mr. Jean Claude Morin, who made a report dated 27 July 2009 as per Doc. F in order to evaluate the amount of work that he had to do and which was in the sum of Rs. 194,000. Plaintiff had paid Mr. Morin the sum of Rs.194,000 in cash which was inclusive of materials although he made use of the materials left belonging to Plaintiff. The latter did not have a receipt witnessing such payment. He admitted that he was having a commercial building built and he had to look for professionals to do that. Defendant was not a contractor belonging to the Grade A category and he did not ask him for his construction permit. He did not retain the services of a quantity surveyor to evaluate the work the Defendant did prior to payment being made to him. He agreed that the sum of Rs.180,000 was meant to be only for the work of a mason with his workers to construct as the costs of materials were excluded. He referred to Defendant as mason when giving his name and address to his learned Attorney in his plaint at the very top where it is mentioned against whom the case was entered. Although Plaintiff admitted that he had a responsibility towards the building that he was getting to be constructed as he provided for the materials, he went on site once a week and continued to make payment as he wanted the work to be completed. Although he was not satisfied at different points and Defendant had failed to do the needful to correct same following his undertaking to do so, he did not exercise his power under the relevant Article of the contract enabling him to stop the contract and asking Defendant to leave. There was not any architect who came on site to supervise the construction work. Defendant continued the same principle as the previous contractor. There was no definition of quality of works in his contract but it was mentioned that the Defendant should complete the work. The building was grey with no finishing and no paint work. Because Plaintiff has suffered prejudice in the sum of Rs. 100,000, he is claiming that sum from

Defendant and is also claiming the sum of Rs. 20,000 which was an additional amount paid to Defendant and the excess that it cost in the sum of Rs. 194,000.

The structural engineer, Mr. Ahmad Hansrod, gave evidence in Court. He admitted that when he stated and deduced that there were defects in the construction works carried out by Defendant including the septic tank as per his report dated 19 March 2009 viz. Doc. E, he did not consult the plans and their specifications viz. Doc. B.

Mr. Jean Claude Morin, the last contractor, deposed in Court to say that he performed the remedial works which included the septic tank in line with his quotation in the sum of Rs. 194,000 inclusive of materials and which was paid to him by Plaintiff and for which he did not have a receipt. He did the work as per his report namely Doc. F. but at no time he said that the remedial works were in line with the plans namely Doc. B and its specifications.

The case for the Defendant rested solely on the testimony of Defendant.

Defendant gave evidence in Court. He was a mason with 22 years of experience. He confirmed that he entered into a contract with Plaintiff to complete the construction work as detailed in the contract namely Doc. C. He has denied liability and his testimony was compatible to a major extent with his plea. He stressed that the Plaintiff told him that the construction already started by a previous contractor according to plans approved by the Municipal Council of Vacoas/ Phoenix had to be completed by him but he was never given the plans namely Doc. B. It was only when he reached the slab level when it was difficult to use 12 millimeters metal beams he asked Plaintiff for the plans and he gave him a photocopy. He told Plaintiff that bigger metal beams were better and he used the 16 millimeters ones instead of the 12 millimeters ones as per the plans. No engineer turned up in the course of his duty with the Plaintiff. He did the construction work as told by Defendant and which was completed correctly by him.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Counsel. Plaintiff admitted that Defendant was not a contractor of Grade A and that he did not ask him for his construction permit. He paid him for his work only as the materials were being provided by him and Defendant continued with the same principle as the previous contractor. It is not contested that Defendant completed the work within delay and he was paid the total price of Rs.

180,000 as per their contract namely Doc. C. and that sum composed of small part payments. At no time, he expressed his dissatisfaction that there were defects to the extent that he had to resort to the provisions of Article 6 of the contract by asking the Defendant to stop all the work and to leave but on the contrary Plaintiff was more interested that the work be completed. Article 6 of the contract viz. Doc. C is reproduced verbatim below:

“ARTICLE 6.

En cas de non respect de ces contrats de construction du batiment par L'entrepreneur, le Maitre de L'Ouvrage a tout le droit de suspendre tous les travaux et de retirer L'Entrepreneur du chantier, sauf au cas de certains changements faites par le Maitre de L'Ouvrage.

Il demeure expressément convenu entre parties qu'en cas de modifications des sus dites constructions de Maitre de L'Ouvrage, cela entraînera conséquemment et proportionnellement une modification du cout de la dite construction.”

In fact, Defendant stated that bigger iron beams would have been better at slab level meaning the 16 millimeters ones and not the 12 millimeters ones as per the specifications in the plans viz. Doc. B and that he used the 16 millimeters ones. It is worthy of note that all the materials were provided by Plaintiff so that the outcome of the construction would also reflect the quality of the materials used.

Now at no point in time, Mr. A. Hansrod, the structural engineer, came on site while the construction was in progress by Defendant or was nearing its completion so that the defects could have been identified before the part payments were being made to him or at least the last one. On the contrary, Plaintiff conceded that he did not retain the services of any professional whatsoever when the construction was in progress by Defendant be it a quantity surveyor or an architect. He only retained the services of Mr. A. Hansrod after the work had already been completed and his conclusion as regards the defects as contained in his report dated 9 March 2009 viz. Doc. E. as illustrated by photographs therein, he admitted that he did not consult the plans namely Doc. B and its specifications. Therefore, it is clear enough that his conclusion that the construction work carried out by Defendant contained defects cannot be relied upon.

Furthermore, I find it hard to believe that Plaintiff would refuse to pay to Defendant the sum of Rs.50,000 to do the remedial works as regards the defects as claimed by him, when he stated that he had paid Defendant Rs.20,000 in addition to

the contract price namely Rs. 180,000, but would have paid another contractor not of Grade A to do that by using his remaining materials and to buy more out of his own costs if need be and would have paid him the sum of Rs. 194,000 let alone that there is no receipt produced to that effect neither by Plaintiff nor by Mr. J.C.Morin, the last contractor. This state of affairs lends support to the version of Defendant that in fact Plaintiff owed money to the Defendant. It is significant to note that the Mr. J.C.Morin at no time stated in Court that his remedial works were done according to the specifications in the plans namely Doc. B.

Now as regards the damages claimed by Plaintiff in the sum of Rs. 100,000 for prejudice suffered, I deem it appropriate to point out that *ex facie* the pleadings, no written notice or "*mise en demeure*" was served upon Defendant by Plaintiff for the execution of the remedial works meaning according to the duly approved specifications in the plans in order to be to the required standard which will apply also to the septic tank, but only amicable requests were made in that connection.

The applicable provisions of the law are governed by **Article 1146** of the **Civil Code** which read as follows: -

"Des dommages et intérêts ne sont dus que lorsque le débiteur est en demeure de remplir son obligation, excepté néanmoins lorsque la chose que le débiteur s'était obligé de donner ou de faire ne pouvait être donnée ou faite que dans un certain temps qu'il a laissée passer."

It is imperative to note that as per note 21 of **Encyclopédie Dalloz, Droit Civil vo Mise en Demeure**, the provisions of Article 1146 "vise uniquement le non-respect d'un délai".

The cardinal principle that a "*mise en demeure*" or notice is a prerequisite to any "*dommages et intérêts moratoires*" being claimed has been laid down in the Supreme Court case of **A.G. of Seychelles v Armitage [1958 MR 55]** as follows:

"(...) Elle sert à marquer que le créancier entend recevoir immédiatement la prestation promise ou réclamer réparation du préjudice que lui causerait l'inexécution, si elle devenait définitive, ainsi qu'à influer, si possible, sur la volonté du débiteur en vue de l'amener à s'exécuter tardivement".

It is appropriate to quote an extract from Répertoire de Droit Civil Vo. mise en demeure, note 42 referred to in the Supreme Court case of **First Grain v Banque des**

Mascareignes [2012 SCJ 263] and cited with approval in the case of **Poupart A. v Greneko Solutions Ltd [2016 SCJ 321]** as follows:

“... ... Il faut en déduire, a contrario, que lorsque l'inexécution n'est pas définitivement constituée et que l'exécution volontaire reste possible, la mise en demeure est de rigueur, même pour faire jouer la responsabilité contractuelle...”

It is significant to note that it has been highlighted in the Supreme Court case of **Gopal v Radaelli R [1990 SCJ 318 BIS]** that the mode of effecting a “*mise en demeure*” for that purpose “*peut résulter d'une simple lettre lorsqu'il ressort de ses termes une interpellation suffisante.*” (**emphasis added**)

Now, in the present case, *l'exécution volontaire* remained possible which explains the claim of the Plaintiff for the remedial works and the resulting damages in relation thereto.

Therefore, it was imperative for the Plaintiff to have put the Defendant “*en demeure*” to voluntarily execute the contract meaning to complete the remedial works. In the event that such a course was not adopted by Defendant within a given delay, Plaintiff would then have entertained a claim as per the plaint which would have included the resulting damages from the Defendant in the sum of Rs.100,000 given the hassles of having someone else to come and complete the remedial works entailing costs.

In the present matter, there has been no written notification namely by way of a letter or notice satisfying the requirement of “*une interpellation suffisante*” (see **Gopal(supra)**) for the purpose of a “*mise en demeure*” namely Doc. D for the Defendant to voluntarily execute the contract viz. to complete the remedial works within a given delay failing which payment would ensue inclusive of damages.

On the contrary, in the present plaint, the purpose of the “*mise en demeure*” served on the Defendant which is not disputed was to summon the Defendant to make payment only meaning - (a) to refund forthwith to Plaintiff the sum of Rs. 20,000/- being excess money paid to Defendant over and above the contract value; (b) to pay to Plaintiff the sum of Rs. 194,000/- being costs of materials and labour to carry out remedial works to render the building to the required standard; (c) to pay to the Plaintiff the said sum of Rs. 100,000/- as damages for the reasons set forth above.

Such a “*mise en demeure*” namely Doc. D has been couched in such a manner so that the Defendant is completely deprived of the possibility of voluntarily executing the contract which is the completion of the remedial works within a given delay and which obviously cannot be condoned by the Court.

For all the reasons given above, I have no difficulty in finding that the case for the Plaintiff has not been proved on a balance of probabilities. The case for the Plaintiff not having been proved on a balance of probabilities, the plaint is accordingly dismissed with costs.

S.D. Bonomally (Mrs.) (Vice President of Industrial Court)

30.12.21